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NO. 85227-8

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent/Cross-Petitioner,

v.

DOUGLAS JASPER,  
Petitioner/Cross-Respondent.

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

PETITIONER/CROSS-RESPONDENT'S SUPPLEMENTAL BRIEF

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ORIGINAL

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A. INTRODUCTION.

Douglas Jasper crashed his car and hit another car when he inadvertently crossed the center line of a road. He crawled out of his car through a window, identified himself to a person in the other car, and checked to see if they were okay. Jasper had hit his head in the accident, was confused, and walked around the area. Police arrested him for hit and run and driving with a suspended license in the third degree.

At Jasper's jury trial, the State offered a written statement from an employee of the Department of Licensing (DOL), which stated that a clerk had performed a "diligent search" of driving records and determined that Jasper's driver's license status is "suspended in the third degree." The State used this affidavit rather than calling a witness about Jasper's licensing status, even though Jasper objected that this method of taking evidence violated his right to confront witnesses.

During its deliberations, the jury sent two written questions to the judge seeking clarification of how the law applied to the case based on issues raised in closing arguments. Without notifying Jasper or holding a hearing, the court told the jury that it could not receive any additional instructions and must continue deliberating.

These errors violated Jasper's rights to confront witnesses and appear and defend in person.

B. ISSUES PRESENTED

1. A clerk's affidavit created for the purpose of proving a fact at issue in a trial is testimonial and its admission violates the Confrontation Clause unless the person who prepared the affidavit testifies. The Court of Appeals issued a thorough decision analyzing Melendez-Diaz<sup>1</sup> and its application to the clerk's affidavit introduced as evidence against Jasper. It concluded that the DOL affidavit was created to provide evidence against Jasper at trial; contained the testimonial assertion that Jasper's license was "suspended in the third degree"; and every jurisdiction to consider the question has almost uniformly found similar evidence to be testimonial. Did the Court of Appeals correctly hold that the affidavit claiming Jasper's license to drive was "suspended in the third degree" was testimonial and its admission contributed to the verdict obtained? Did the DOL affidavit also contribute to the verdict finding Jasper committed hit and run when the State argued it showed he failed to fulfill his obligations as a licensed driver?

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<sup>1</sup> Melendez-Diaz v. Massachusetts, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009).

2. When a deliberating jury asks for further instruction on how the law applies to the facts of the case, the court must allow the defendant and his attorney to participate in the decision as to how to respond. Here, the jury wrote two jury questions asking for further information about the arguments raised by the parties in the case. The court responded without informing Jasper or making any record that it notified the attorneys. The court's response did not correct the jury's misapprehension of the law. Does the state constitutional right to "appear and defend in person" require the court to notify Jasper of the questions jury's questions before responding, and alternatively, it is possible that the court's inaccurate answers contributed to the verdict?

C. STATEMENT OF THE CASE.

Douglas Jasper was charged with driving with a suspended license in the third degree on February 14, 2008, which requires that his license to drive has been suspended due to certain traffic infractions. CP 1, 43-44. The State introduced a certified document from a Department of Licensing (DOL) clerk over Jasper's objection. 3/30/09RP 57. The clerk asserted that he or she had "diligently searched" DOL records and determined that, as of February 14, 2005, Jasper's licensing status was: "Suspended in

the third degree." Ex. 16 (attached as Appendix A). The Court of Appeals held that this document was a testimonial assertion and its admission violated the Confrontation Clause. State v. Jasper, 158 Wn.App. 518, 245 P.3d 228 (2010), rev. granted, \_\_ Wn.2d \_\_, Supreme Court No. 58227-8 (2011).

Jasper was also charged with hit and run, which requires the State to prove (1) he was involved in a car accident where someone was injured and (2) he did not remain at the scene, exchange specified information with the other car's occupants, and render aid. RCW 46.52.020(4). It is a defense to hit and run that the driver is physically injured in the accident and thus unable to comply with the law's requirements. RCW 46.52.020(4)(d).

The traffic accident occurred after Jasper left a day of work as a cement mixer. 3/11/09RP 27-28. He inadvertently crossed the center line of the road, hit another car, and crashed his own car into an embankment. Id. at 28. He hit his head "pretty hard," "everything went black," and he was "really dazed" afterward. Id. He had to climb through a passenger window to get out of his car. Id. He spoke to a person who was standing outside the other car. Id. at 35. Then he wandered around the area, walking two or three blocks away from the accident scene before turning back toward

the accident. Id. at 24, 38-40. He was not trying to leave but was walking around due to the effects of the accident. Id.

In his closing argument, Jasper's attorney urged the jury to consider Jasper's confused mental and physical state and find he did not leave the accident scene; instead, he was in the process of returning but was hampered by his condition. 3/12/09RP 16-18. Jasper was injured, did not flee, and "[h]e did the best he could under the circumstances . . . he followed the spirit of the law." Id. at 13. The jury asked two separate questions:

Regarding Instruction #8 [the to-convict instruction for hit and run], Parts 4 a-d, is a person's "obligation to fulfill all of the following duties" dependent on their mental, emotional, or physical condition?

CP 49 (attached as App. B).

What is the definition of the spirit of the law?

CP 51 (attached as App. C).

The court responded to each question with the same answer, "Please re-read your instructions and continue deliberating. No further instructions will be given to this question." CP 50, 52. The Court of Appeals faulted the trial court for failing to notify Jasper of the jury's questions but found the error harmless. 158 Wn.App. at 538-41. It refused to find the Washington

Constitution as setting a stricter standard for the defendant's right to be present than the federal constitution. The facts are addressed in further detail below, as well as in Jasper's Opening and Reply Briefs and the Court of Appeals decision.

D. ARGUMENT.

1. THE RIGHT TO CONFRONT WITNESSES  
FACE-TO-FACE INCLUDES WITNESSES  
WHO TESTIFY THAT THEY DILIGENTLY  
REVIEWED RECORDS AND DETERMINED  
A PERSON HAD A SUSPENDED LICENSE  
IN THE THIRD DEGREE

a. The Confrontation Clause requires that witnesses who offer testimony against an accused person testify in court.

The Confrontation Clause dictates the procedure by which the prosecution must prove its case and it is rooted in long-standing common law tradition. Crawford v. Washington, 541 U.S. 36, 43-50, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004); U.S. Const. amend. 6;<sup>2</sup> Const. art. I, § 22.<sup>3</sup> The "principal evil" at which the Confrontation Clause is directed is the use of an *ex parte* statement, such as an affidavit or letter, made for the purpose of

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<sup>2</sup> The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

<sup>3</sup> The Washington Constitution more explicitly mandates that an accused person is guaranteed the right "to meet the witnesses against him face to face."

establishing or proving some fact. Crawford, 541 U.S. at 50-51. Affidavits or statements “that declarants would reasonably expect to be used prosecutorially” fall within the “core class” of testimonial statements that are inadmissible absent confrontation. Id.

Declarations of fact that are written, sworn, and prepared with an eye toward trial “do precisely what a witness does on direct examination.” Melendez-Diaz, 129 S.Ct. at 2532 (quoting Davis v. Washington, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224, 237 (2006)). Such “‘certificates’ are functionally identical to live, in-court testimony.” Id. When the State presents evidence of a person’s out-of-court analysis of information, it is by confronting the analyst that the witness’s “honesty, proficiency, and methodology,” may be explored by the accused. Id. at 2538.

The right to confront adverse witnesses is not circumscribed by evidentiary rules. Business and public records may be admissible absent confrontation “not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial.” Melendez-Diaz, 129 S.Ct. at 2539-40. In the context of Jasper’s case, this means that documents generated by the

Department of Licensing are testimonial when they are created to prove a fact at trial.

b. A document prepared for use at trial by a government official and introduced to establish a material fact is testimonial. In Melendez-Diaz, the prosecution used “certificates of analysis” to show that seized substances had been “examined” by an analyst at the state’s department of health and “found to contain: cocaine.” 129 S.Ct. at 2531. In resolving whether the certificate of analysis was testimonial, the Court examined: (1) the substantive assertions contained in the document; and (2) the circumstances causing the document to be made. The Court concluded that this scenario is decided by a “straightforward application of our holding in Crawford.” Id. at 2533. The document contained material assertions directed at proving an element of the charged offense and it was created for the purpose of prosecuting a criminal case. Id. at 2532. Therefore, the laboratory analysis was testimonial. Id.

The Melendez-Diaz Court further explained that evidence need not be “accusatory” to constitute testimony a defendant has the right to confront. Id. at 2533-35. It also rejected the claim that a scientific test is neutral evidence that could not be distorted. Id. at

2536-37 (in-court testimony may show an analyst's "lack of proper training or deficiency in judgment"). The Court refused the prosecution's efforts to paint evidence as presumptively reliable based on the simplicity of the test, or consider the availability of other means to challenge the forensic test results at issue. Id. It ruled, "the Constitution guarantees one way [of confronting evidence]: confrontation." Id. at 2536.

The Melendez-Diaz Court paid specific attention to reports generated for the purpose of prosecution. Police reports are inadmissible at trial because their purpose is for use in a potential prosecution. 129 S.Ct. at 2538. Documents prepared for litigation have long been inadmissible at trial. Crawford, 541 U.S. at 49-50.

Similarly, while a clerk may certify the authenticity of an existing record, the clerk has "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," without the opportunity to confront the record-keeper. Melendez-Diaz, 129 S.Ct. at 2538. Here, the clerk's certification that she conducted a diligent search, this search was accurate and thorough, and it showed Jasper's license was "suspended in the third degree," constitutes a clerk's interpretation of the record that substitutes for

in-court testimony and therefore may not be admitted absent the opportunity for confrontation. Ex. 16.

c. Accusations based on the non-existence of a record are testimonial. Based on Melendez-Diaz, a number of courts have ruled that the prosecution may not rely on a clerk's affidavit claiming that a diligent search shows that no record exists of a pertinent fact. For example, the government violates the Confrontation Clause by introducing a certificate of non-existent record (CNR), stating in part: "a diligent search was performed in these database systems, [and] no record was found to exist" of the defendant's permission to re-enter the United States following an earlier deportation. United States v. Martinez-Rios, 595 F.3d 581, 584 (5<sup>th</sup> Cir. 2010). This certificate is testimonial because it "serves as substantive evidence against the defendant whose guilt depended on the nonexistence of the record" and was "used to establish a necessary fact to convict." Id. at 586. By offering evidence of the record search without producing the witness who searched and maintained the records, the defendant was unable to confront the person who analyzed the records. Id.

Almost every other court to consider the issue has agreed. United States v. Orozco-Acosta, 607 F.3d 1156, 1161 (9<sup>th</sup> Cir.

2010), cert. denied, 131 S.Ct. 946 (2011) (certificate testimonial where it states "after a diligent search [of two agency databases,] no record was found to exist" allowing defendant to re-enter United States); People v. Sanchez, \_Cal. Rptr. 3<sup>rd</sup> \_\_, 2011 WL 1025032 (Cal.App. Mar. 23, 2011) (certification that defendant not registered owner of firearm was testimonial); Tabaka v. District of Columbia, 976 A.2d 173, 176 (D.C. Ct. App. 2009) (clerk's statement that no record of driver's license used as substantive evidence attesting to an important element of the charged offense is inadmissible without confrontation); Washington v. State, 18 So.3d 1221, 1223-24 (Fla. App. 2009) (certificate attesting to unlicensed contractor is testimonial); see also State v. Alvarez-Amador, 235 Or.App. 402, 232 P.3d 989, 991, 993-94 (2010) (affidavit stating social security number did not belong to accused was testimonial).<sup>4</sup>

Orozco-Acosta,<sup>5</sup> and Martinez-Rios,<sup>6</sup> are instructive because they overruled cases on which this Court heavily relied when

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<sup>4</sup> Maine "stands alone" as the only jurisdiction that has issued a post-Melendez-Diaz ruling holding that a DOL employee's affidavit of non-licensure is non-testimonial. Sanchez, 2011 WL 1025031, \*13 (citing State v. Murphy, 991 A.2d 35 (Me. 2010); Jasper, 158 Wn.App. at 532 n.6. "No court has followed the Maine court's decision." Sanchez, at \*12. Jasper further explains the flawed analysis in Murphy, 158 Wn.App. at 532 n.6.

<sup>5</sup> Overruling United States v. Cervantes-Flores, 421 F.3d 825 (9<sup>th</sup> Cir. 2005), because it is "irreconcilable" with Melendez-Diaz, 607 F.3d 1161 n.3.

addressing whether clerk's affidavits alleging a person's licensing status were testimonial, in State v. Kirkpatrick, 160 Wn.2d 873, 884-86, 161 P.3d 990 (2007) and State v. Kronich, 160 Wn.2d 893, 903, 161 P.3d 982 (2007). In decisions pre-dating Melendez-Diaz, this court issued two rulings on the same day finding clerk's affidavits reporting the results of database searches to be non-testimonial. The majority said it was unable to find clear direction from the United States Supreme Court and instead drew from Cervantes-Flores and Rueda-Rivera, which have since been overruled. Kirkpatrick, 160 Wn.2d at 882-886; Kronich, 160 Wn.2d at 902-03. Melendez-Diaz, is the controlling precedent that Kirkpatrick and Kronich sought but did not have available.

d. Labeling a record "public" does not render the record automatically admissible without confrontation. By creating a record to prove a fact in evidence at a trial, the DOL certification is testimonial, without regard to whether it could be categorized as a "public record." Melendez-Diaz, 129 S.Ct. at 2538-39; Sanchez, at 2011 WL 1025032 \*12 ("immaterial" whether licensing database is official record). A certification that no record exists, prepared for

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<sup>6</sup> Holding Melendez-Diaz "implicitly overruled" United States v. Rueda-Rivera, 396 F.3d 678 (5<sup>th</sup> Cir. 2005), and "calls into doubt" similar cases from

use at a trial, "furnishes evidence" against the accused. Alvarez-Amador, 232 P.3d at 993-94. It "plainly fits within the general definition of a testimonial statement provided in Crawford: '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Sanchez, at \*12 (quoting Crawford, 541 U.S. at 51).

The affidavit from DOL is testimonial because it contains statements made for the purpose of establishing the fact that Jasper was driving with a suspended license. Jasper, 158 Wn.App. at 531. It asserts that the clerk performed a "diligent search," which presupposes the clerk knew what records to search, knew how to find those records in the database, and conducted the search correctly. Id. The affidavit states Jasper's license was suspended on a particular day "in the third degree." Id. These are "factual assertions, intended to prove an element of a crime charged." Id. It further contends that no record exists that Jasper has reinstated his license, which is a testimonial assertion. Id. This affidavit did not exist independently of this prosecution. Id. It was created to provide evidence against Jasper. Id.

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other courts. 595 F.3d at 585.

Cross-examination would not be a frivolous act.

“Government agencies are not immune from human error, and DOL is certainly no exception.” Kronich, 160 Wn.2d at 909 (Sanders, J., dissenting). Given “the sheer volume of information” DOL receives, and documented instances of errors, there is a “substantial” risk of error in DOL license suspensions. Redmond v. Moore, 151 Wn.2d 664, 674, 91 Wn.2d 875 (2004) (requiring DOL to provide avenue to challenge suspension based on risk of error in DOL procedures).

In Jasper’s case, the Court of Appeals saw a particular value in cross-examining the witness who searched the DOL records. 158 Wn.App. at 534. The affidavit stated that Jasper’s license to drive was suspended on February 14, 2005, but the incident occurred on February 14, 2008. CP 1, Ex. 16. The prosecutor told the jury that the date must be a typographical error. 3/12/09RP 10. Jasper’s attorney argued that the discrepancy in the date on the document indicates that “maybe the Department of Licensing, a government bureaucracy, got it wrong.” 3/12/10RP 18. As the Court of Appeals said, “[e]ven the dullest of defense attorneys might have come up with a question or two to ask a live witness in such a situation.” 158 Wn.App. at 534.

e. The United States Supreme Court has not abandoned the testimonial underpinnings of the Confrontation Clause. The State's petition for review quotes extensively from the oral argument in Michigan v. Bryant, \_ U.S. \_\_, 131 S.Ct. 1143, 1150 (2011), as if that case might alter the analysis here. The issue in Bryant was whether a dying man gave a testimonial statement shortly after being shot by telling the police the name of the person who shot him at a time when the identity and location of the gunman were unknown. In Bryant, the court provided "further explanation" of the rule it articulated in Davis, 547 U.S. at 830, involving whether the primary purpose of interrogation was to address an on-going emergency. 131 S.Ct. at 1156.

The Bryant majority emphasized that on-the-scene police questioning "is nothing like" the use of an affidavit in place of live testimony and insisted its ruling was intended to "confirm[ ] rather than undermine[ ]" the prohibition on state actors introducing out-of-court statements obtained as evidence for trial. Bryant, 131 S.Ct. at 1155 n.4. It noted that emergency police questioning is "readily distinguishable" from testimony contained in a written document and submitted without the opportunity for cross-examination. Id. at 1165 n.17. The holding is limited to determining the testimonial

nature of police questioning in the context of an on-going emergency. Contrary to the prosecution's tea leaf reading in its petition for review, Bryant does not mark the return of a reliability-centered test for all confrontation violations or show any retreat from the core holdings of Crawford and Melendez-Diaz.

f. The error requires reversal. A violation of the right of confrontation requires reversal unless the prosecution "conclusively show[s] that the tainted evidence did not contribute to the conviction." United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5<sup>th</sup> Cir. 2008); see also Fields v. United States, 952 A.2d 859, 864 (D.C. 2008) (finding improperly admitted document of analysis not harmless when government could not prove it did not "contribute to the verdict obtained").

The Court of Appeals correctly determined that the error contributed to the verdict on the suspended license charge. 158 Wn.App. at 537. The State's other exhibits did not show that DOL had suspended Jasper's license, only that it was possible it would do so in the future. Id. Jasper admitted he did not have a license but did not explain the reason, and the charged crime required proof that his license was suspended for a specific reason. Id. The DOL affidavit explicitly asserted Jasper's license was

"suspended in the third degree," it was the only such direct evidence, and it contributed to the verdict. Id.

The error also affects the second charge of hit and run. The prosecutor used the affidavit from DOL to claim that Jasper repeatedly disregarded his responsibilities as a driver. 3/12/09RP 10-11. She said the reason Jasper left the scene was because he was driving with a suspended license. Id. at 11, 24. She argued that the jury should tell Jasper it is time to "face those consequences" and make him accountable under the driving laws, asking the jury to deduce Jasper's failure to fulfill his obligations for hit and run from evidence of his suspended license. Id. Because the DOL certificate contributed to the verdict on both charges, a new trial should be ordered.

2. JURY DELIBERATIONS ARE A CRITICAL PART OF THE TRIAL AND THE COURT SHOULD NOT ANSWER JURY QUESTIONS WITHOUT CONSULTING THE ATTORNEYS, INFORMING THE ACCUSED, AND ALLOWING FOR A CONSIDERED RESPONSE BY THE PARTIES

The deliberating jury sought clarification from the court regarding the elements of the charges and how to interpret Jasper's closing argument. The trial judge immediately responded in writing. Jasper was not informed of the questions or included in

crafting any response. Although the record is silent about whether the judge notified the attorneys before responding, after the Court of Appeals decision the trial judge sent a letter claiming she usually telephones attorneys when she receives a note from the jury. The Court of Appeals deemed this belatedly offered information unimportant and untimely. It ruled that the judge's communication with the jury was harmless error. Yet the jury's questions went to the heart of the defense, the judge conveyed substantive information to the jury without receiving input from Jasper, and Jasper should have been allowed to participate.

a. A criminal defendant is entitled to be aware of and meaningfully represented at proceedings discussing the instructions for a deliberating jury. When the jury asks the court for additional instruction, the court's consideration of the question and its response constitute a critical stage of a criminal proceeding at which a defendant has the right to be present and receive meaningful representation. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); U.S. Const. amends. 5, 6,

14;<sup>7</sup> Wash. Const. Art. I, § 22;<sup>8</sup> CrR 3.4 (a). “[T]he jury’s message should have been answered in open court and the petitioner’s counsel should have been given an opportunity to be heard before the trial judge responded.” Rogers, 422 U.S. at 39; U.S. Const. amend. 6; Const. art. I, §§ 10, 22; CrR 6.15(f).

Under the federal constitution, an accused person’s right to be present attaches when a stage in the trial process offers a defendant, if present, the opportunity to “give advice or suggestion or even to supersede his lawyers altogether.” State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011) (citing Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)). The right to “appear and defend” guaranteed by the Washington Constitution is broader than its federal constitutional counterpart. Irby, 170 Wn.2d at 883.

b. Washington has historically protected and independently interpreted an individual’s right to be present when the court communicates with the deliberating jury. The Irby Court held that the right to “appear and defend in person” under article I,

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<sup>7</sup> The Fifth and Fourteenth Amendments protect the right to “due process of law,” while the Sixth Amendment protects the right to “a speedy and public trial” with the assistance of counsel and right to confront witnesses.

section 22, is interpreted independently of the corollary federal right. 170 Wn.2d at 884. The state constitutional right is triggered whenever the accused's "*substantial rights may be affected.*" *Id.* (emphasis added by *Irby*, quoting *State v. Shutzler*, 82 Wash. 365, 367, 144 P. 284 (1914)).<sup>9</sup>

In *Shutzler*, the jury informed the judge that it was unable to reach a verdict. 82 Wash. at 366. Without notifying the defendant or his attorney, the judge told the jury to continue deliberating, carefully consider the evidence, and try to reach a verdict. *Id.*

On appeal, the court ruled that the defendant's right to be present pertains to "every stage of the trial when his substantial rights may be affected." *Id.* at 367. It held that such a stage includes the court's direction to the deliberating jury to continue deliberations, or other "special instructions during the period of their deliberations." *Id.* By responding to the jury's question in this fashion, the court violated the accused's constitutional and statutory right to be present. *Id.* "[A]ny denial of the right without

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<sup>9</sup> "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ."

the fault of the accused is conclusively presumed to be prejudicial.”  
Id. It is “a wrong” that does not require the defendant to show  
anything “was done which might not lawfully have been done had  
he been personally present.” Id.

“It is settled in this state that there should be no  
communication between the court and the jury in the absence of  
the defendant.” State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d  
466 (1983) (finding court erred by replaying tape for jury without  
notifying defendant). When the Framers drafted the state  
constitution, it was the prevailing understanding that an accused  
person had a personal right to be present when discussing  
instructions with a deliberating jury. Linbeck v. State, 1 Wash. 336,  
338-39, 25 P. 452 (1890) (repeating and orally explaining jury  
instructions to deliberating jury without defendant's presence is  
error “and we do not think this error was cured by the fact that  
defendant's attorney was present and made no objection.”); State  
v. Wroth, 15 Wash. 621, 623, 47 P. 106 (1896) (judge's  
assurances that he said nothing to jury in response to request for

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<sup>9</sup> A Gunwall analysis is unnecessary when the court has already  
determined that the state constitution warrants an inquiry on independent state  
grounds, as the Court indicated in Irby. See State v. Williams-Walker, 167 Wn.2d  
889, 896 n.2, 225 P.3d 913 (2010); State v. Gunwall, 106 Wn.2d 54, 720 P.2d

additional instruction insufficient to satisfy accused's right to be present); State v. Beaudin, 76 Wash. 306, 308, 136 P. 137 (1913) (“[t]he giving of an instruction in appellant's absence constituted prejudicial error, which was not cured” by later reinstructing the jury with defendant present, because the right to be personally present is mandatory during any instructions to jury).

Federal courts were in accord at the time Washington adopted its constitution. In 1892, the United States Supreme Court explained, “[a] leading principle that pervades the entire law of criminal procedure is that, after indictment is found, nothing shall be done in the absence of the prisoner.” Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136 (1892). The right to be present extends beyond the taking of evidence, it includes “any subsequent stage when anything may be done in the prosecution by which [the defendant] is to be affected.” Id.<sup>10</sup>

In Snyder, the United States Supreme Court drew a distinction between common law or statutory rights to be present

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808 (1996). Jasper provided a Gunwall analysis in his Opening Brief.

and the parameters of the federal constitution, explaining that the Fourteenth Amendment requires the presence of the accused any time his presence "bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend." 291 U.S. at 106. But as Irby recognized, article I, section 22's explicitly protected right to "appear and defend in person" uses a different standard: whether the accused's substantial rights may be affected. Additionally, Shutzler explains that an accused person's substantial rights may be affected when the judge communicates with the deliberating jury without first notifying him. 82 Wash. at 367.

In Caliguri, the judge improperly replayed tape recordings admitted into evidence without notifying the defendant. 99 Wn.2d at 508. The court acknowledged that historically, our state courts used a strict standard of reversal when the court communicated with the jury without notifying the accused. Id. But it decided to apply a constitutional harmless error test because federal courts and other jurisdictions no longer strictly construed such an error.

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<sup>10</sup> See also Shields v. United States, 273 U.S. 583, 47 S.Ct. 478 (1927) (defendant "entitled" "to be present from the time the jury is impaneled until its discharge after rendering the verdict"); United States v. Schor, 418 F.2d 26, 29 (2<sup>nd</sup> Cir. 1969) (correct procedure for responding to jury inquiry "was to answer the notes in open court in the presence of the defendant and his attorney, even if the meaning of the notes was obvious.").

Id. at 508-09. The Caliguri Court did not acknowledge that this Court does not interpret our constitution based on modern trends in other courts, rather, it looks at the law at the time the constitutional provision was enacted. In re Runyan, 121 Wn.2d 432, 441, 853 P.2d 424 (1993).

As articulated in Shutzler, and affirmed in Irby, a violation of the right to be present is “conclusively presumed to be prejudicial.” 82 Wash. at 367. The constitution’s explicit protection of the public trial right precludes any de minimis analysis. See State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009) (in Washington, “[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.”). A similar approach should apply to the violation of Jasper’s right to be present during a part of the proceedings where his substantial rights could be affected. The error undermines the procedure required by our constitution and is presumed prejudicial.

c. The court’s communications with the jury is prejudicial under either the state and federal constitutional tests.

The jury asked the court whether the essential elements of hit and run are dependent upon a person’s “mental, emotional, or physical condition.” CP 49. The court summarily responded, “no further

instructions will be given to this question," and directed the jury to "reread your instructions and continue deliberating." *Id.* The court delivered the identical response to the jury's other question asking the court to explain "the spirit of the law."<sup>11</sup> CP 51-52.

The court's responses were incomplete, substantive, and prejudicial. A person is statutorily exempt from criminal liability for hit and run if the accident renders the person physically incapable of complying with the requirements of remaining at the scene and providing necessary documents. RCW 46.52.020(4)(d). Yet the court's instructions had not explained that a driver is not required to "fulfill his obligations" following an accident if he is physically incapacitated. CP 37. The court's supplemental response to the jury's question did not properly direct the jury to the governing law.

Jasper testified that he was substantially incapacitated by the accident. He said he "hit my head pretty hard" and "was really dazed" by the accident. 3/11/09RP at 28. He told the police he was injured but they did not give him any medical attention. *Id.* at 39-30. He was "pretty confused" afterward and did not know what

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<sup>11</sup> In closing argument, Jasper's attorney contended that Jasper had given his name to an occupant of the other car, was returning to the scene when arrested, and fulfilled the "spirit of the law." 3/12/09RP 16-18. He was injured, and "[h]e did the best he could under the circumstances presented to him. He did

to do. Id. at 28. He checked on the people in the other car, gave his name and said he was the driver of the other car, and saw they seemed all right. Id. at 28, 35, 40. When he got into the police car, he "laid down on the seat" but the police did not give him medical attention. 3/11/09RP 31. He had trouble seeing and could not concentrate. Id. at 40-41. He did not hide or run away. Id. at 41. The jury's question was targeted at the precise circumstances of the case and if it could consider whether Jasper was mentally or physically unable to fulfill his specific obligations.

A judge may provide supplemental instructions to the jury. State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). In Becklin, the closing arguments discussed whether the defendant committed stalking by encouraging a third party to act. Id. at 524. The original instructions did not address liability for acts of another, but when the jury asked whether such liability existed, the court appropriately responded, "yes," after conferring with the parties. Id. at 524-25, 529.

Similarly, Jasper's physical and mental condition after the car accident was squarely before the jury. Rather than informing

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not flee, he followed the spirit of the law." Id. at 13.

the jury that by law, it could find Jasper physically incapable of fulfilling his obligations as the driver in a car accident, or discussing the issue with counsel and tailoring an instruction to the facts of the case, the court refused to accurately explain the law to the jury.<sup>12</sup>

A trial court "has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue." United States v. Southwell, 432 F.3d 1050, 1053 (9<sup>th</sup> Cir. 2005); see also Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed.2d 350 (1946) ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."). Although the second question pertaining to the "spirit of the law," might be harder for the judge to answer, the court should not summarily dismiss the jury's questions in a vacuum. Even a negative response to a jury's question may affect the jury. See Schor, 418 F.2d at 30 (cannot say "with fair assurance" what effect judge's answer declining to give further instruction had on jury).

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<sup>12</sup> Although the trial judge sent a letter claiming that it is her practice to direct her bailiff to speak to attorneys on the telephone before responding to a jury question, the Court of Appeals refused to consider this belatedly offered information. 158 Wn.App. at 539 n.13. In any event, the judge claims no specific recollection about this case and offers no explanation of any conversation that occurred in the case at bar. The court made no record of a conversation with the lawyers at the time of trial and the absence of any such record is construed as an event that did not take place. Id.

Additionally, the court directed the jury to "continue deliberating" in its supplemental instructions. This language echoes the improper instruction the court gave in Shutzler, and it was similarly delivered without affording Jasper an opportunity to appear and defend. 82 Wash. at 366.

Questions from the deliberating jury are necessarily important to the outcome of the case because they occur at the critical time when the jury is closely reviewing the evidence and striving to reach a verdict. Here, the jury asked how to apply the law to the facts of the case based on the arguments from counsel. Under article I, section 22, the trial judge's failure to inform the accused of questions from the jury before responding is "a wrong" that is treated as prejudicial error. Shutzler, 82 Wash. at 367.

Alternatively, the State cannot prove the error harmless beyond a reasonable doubt when the deliberating jury asked legitimate questions arising from the evidence and closing arguments. The jury wanted to know whether Jasper could be guilty if he was incapable of complying with the strict terms of the statute. Rather than explaining the requirements of the statute, the court led the jury to believe that there was no exception for Jasper's physical condition. The court did not let Jasper or his lawyers

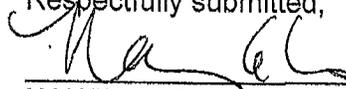
assist in crafting a response. Directing the jury to deliberate without giving it an accurate understanding of the law denied Jasper his right to a fair trial by jury and denied Jasper his right to appear and defend under the Washington Constitution.

E. CONCLUSION.

For the foregoing reasons, Douglas Jasper respectfully requests this Court reverse his convictions and remand his case for a new trial.

DATED this 11th day of April 2011.

Respectfully submitted,



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NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Petitioner/Cross-  
Respondent

## APPENDIX A

16



STATE OF WASHINGTON  
DEPARTMENT OF LICENSING  
P. O. Box 9030 Olympia, Washington 98507-9030

April 14, 2008

gt

The information in this report pertains to the driving record of:

Lic #: JASPEDS403QJ  
Name: JASPER, DOUGLAS SCOTT  
10724 SUMMIT LK RD NW  
OLYMPIA WA 98502

Birthdate: November 11, 1960  
Eyes: BLU Sex: M  
Hgt: 5 ft 11 in Wgt: 175 lbs  
License Issued: September 15, 2005  
License Expires: November 11, 2009

After a diligent search, our official record indicates that the status on February 14, 2005, was:

Personal Driver License Status:

- Suspended in the third degree

Commercial Driver License Status:

The following also applied:

PDL Attachments:

- Notice of Suspension June 28, 2007

CDL Attachments:



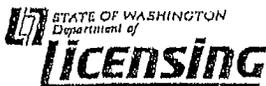
Having been appointed by the Director of the Department of Licensing as legal custodian of driving records of the State of Washington I certify under penalty of perjury that such records are official, and are maintained within the Department of Licensing.

*Judy R. Hoenes*

Custodian of Records  
Place: Olympia, Washington  
Date: April 14, 2008

The Department of Licensing has a policy of providing equal access to its services. If you need special accommodation, please call (360) 802-8900 or TTY (360) 664-0116.

JASPEDS403QJ 20070426 071315247



ABFT

PO Box 9030, Olympia, WA 98507-9030

May 14, 2007

I00082078

File Copy

JASPER, DOUGLAS SCOTT  
10724 SUMMIT LK RD NW  
OLYMPIA WA 98502

DP

License #: JASPEDS403QJ  
Birthdate: 11-11-1960

On 06-28-2007 at 12:01 a.m. your driving privilege will be suspended. The Court has notified us that you failed to respond, appear, pay, or comply with the terms of the citation listed below:

<u>Citation Number</u>	<u>Violation Date</u>	<u>Reason for Citation</u>
I00082078	04-26-2007	DRIVING W/O LIABILITY INS

What do I have to do to avoid suspension of my driving privilege?

- Contact this court to find out how to take care of this citation:  
PUYALLUP MUN CRT  
929 E MAIN AVE STE 120  
PUYALLUP, WA 98372  
(253) 841-5450
- Provide proof that you have satisfied the court's requirements. Once the requirements are met, the court will send us notice. Because this may take several days, you may take your copy of the Notice of Adjudication form from the court to any driver licensing office to speed up the process.

What will happen if my driving privilege is suspended?

Make sure that we have received notice that this matter is settled before the date shown above. If we have not, it will be illegal for you to drive and you must surrender your license to any driver licensing office. You must pay a reissue fee and any other applicable licensing fees before a new license can be issued.

May I appeal this action?

Yes. To request an administrative review return the enclosed form or submit a written request to: Department of Licensing, Hearings & Interviews, PO Box 9031, Olympia, WA 98507-9031 or fax to (360)664-8492. Requests must be postmarked within 15 days from the date of this notice. If you have questions, please call (360)902-3878.

If you have other questions after contacting the court, call Customer Service at (360) 902-3900 or visit our website, at [www.dol.wa.gov](http://www.dol.wa.gov).

The Department of Licensing has a policy of providing equal access to its services. If you need special accommodation, please call (360) 902-3900 or TTY (360)664-0116.

I certify under penalty of perjury under the laws of the state of Washington that I caused to be placed in a U.S. Postal Service mail box, a true and accurate copy of this document to the person named herein at the address shown, which is the last address of record, postage prepaid, on May 14, 2007.

Agent for the Department of Licensing

Authority: RCW 46.20.289

JASPEDS403QJ 20070115

071295318



ABFT

PO Box 9030, Olympia, WA 98507-9030

May 14, 2007

7Y0205607

File Copy

JASPER, DOUGLAS SCOTT  
10724 SUMMIT LK RD NW  
OLYMPIA WA 98502

DP

License #: JASPEDS403QJ  
Birthdate: 11-11-1980

On 06-28-2007 at 12:01 a.m. your driving privilege will be suspended. The Court has notified us that you failed to respond, appear, pay, or comply with the terms of the citation listed below:

<u>Citation Number</u>	<u>Violation Date</u>	<u>Reason for Citation</u>
7Y0205607	01-15-2007	REGISTRATION VIOL/NO TABS

What do I have to do to avoid suspension of my driving privilege?

- Contact this court to find out how to take care of this citation:  
PIERCE CO DIST CRT  
930 TACOMA AVE S RM 601  
TACOMA, WA 98402-2175  
(253) 798-7487
- Provide proof that you have satisfied the court's requirements. Once the requirements are met, the court will send us notice. Because this may take several days, you may take your copy of the Notice of Adjudication form from the court to any driver licensing office to speed up the process.

What will happen if my driving privilege is suspended?

Make sure that we have received notice that this matter is settled before the date shown above. If we have not, it will be illegal for you to drive and you must surrender your license to any driver licensing office. You must pay a reissue fee and any other applicable licensing fees before a new license can be issued.

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The Department of Licensing has a policy of providing equal access to its services. If you need special accommodation, please call (360) 902-3900 or TTY (360)664-0116.

I certify under penalty of perjury under the laws of the state of Washington that I caused to be placed in a U.S. Postal Service mail box, a true and accurate copy of this document to the person named herein at the address shown, which is the last address of record, postage prepaid, on May 14, 2007.

Agent for the Department of Licensing

Authority: RCW 46.20.289

**APPENDIX B**

**FILED**  
KING COUNTY, WASHINGTON  
MAR 12 2009  
SUPERIOR COURT CLERK  
BY KELLI C. NORTHROP  
DEPUTY

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

State of Washington

vs. Plaintiff/Petitioner

No. 08-1-04310-6 KNT

Douglas Jasper

Defendant/Respondent

INQUIRY FROM THE JURY  
AND COURT'S RESPONSE  
(JYN)

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

JURY INQUIRY:

Regarding Instruction #8, Parts 4 a-d, is a person's "obligation to fulfill all of the following duties" dependent on their mental, emotional, or physical condition?

John A. Van  
Signed by Presiding Juror/Juror # 13

12 March 2009 - 1:40pm.  
DATE AND TIME

DATE AND TIME RECEIVED: 3/12/09 1:42 pm

\*\*\*\*DO NOT DESTROY- LEAVE IN JURY ROOM\*\*\*\*

Inquiry From the Jury and Court's Response, Page 1 of 2 SC Form JO-117 (7/00)

49

93B

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

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

Deborah D. Fleck  
Judge DEBORAH D. FLECK

DATE AND TIME RETURNED TO JURY: 3/12/09 1:50 pm

\*\*\*\*DO NOT DESTROY- LEAVE IN JURY ROOM\*\*\*\*

Inquiry From the Jury and Court's Response, Page 2 of 2 SC Form JO-117 . (7/00)

**APPENDIX C**

2/28/09

**FILED**  
KING COUNTY, WASHINGTON  
MAR 12 2009  
SUPERIOR COURT CLERK  
BY KELLI C. NORTHRUP  
DEPUTY

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

State of Washington

Plaintiff/Petitioner

No. 08-1-04310-6 KNT

vs.

Douglas Jasper

INQUIRY FROM THE JURY  
AND COURT'S RESPONSE  
(JYN)

Defendant/Respondent

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

JURY INQUIRY:

*What is the definition of the spirit of the law?*

*John A. Vain*  
Signed by Presiding Juror / Juror # 13

12 March 2009 - 1:40 p.m.  
DATE AND TIME

DATE AND TIME RECEIVED: 3/12/09 1:42 pm

\*\*\*\*DO NOT DESTROY- LEAVE IN JURY ROOM\*\*\*\*

Inquiry From the Jury and Court's Response, Page 1 of 2 SC Form JO-117 (7/00)

51

93C

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

Please Re-read your instructions & continue deliberating.  
No further instructions will be given to this question

  
\_\_\_\_\_  
Judge DEBORAH D. FLECK

DATE AND TIME RETURNED TO JURY: 3/12/09 1:50 pm

\*\*\*\*DO NOT DESTROY- LEAVE IN JURY ROOM\*\*\*\*

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS JASPER,

Petitioner/Cross-Respondent.

NO. 85227-8

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, JOSEPH ALVARADO, STATE THAT ON THE 11<sup>TH</sup> DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **PETITIONER/CROSS-RESPONDENT'S SUPPLEMENTAL BRIEF** TO BE FILED IN THE SUPREME COURT OF THE STATE OF WASHINGTON AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |   |                   |                                     |
|---|-------------------|-------------------------------------|
| [X] JAMES MORRISSEY WHISMAN,<br>PETER DAVID LEWICKI,<br>JERRY LINCOLN TAYLOR, JR<br>KING COUNTY PROSECUTOR'S OFFICE<br>APPELLATE UNIT<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] KRISTEN V. MURRAY<br>CHRISTINE ANNE JACKSON<br>THE DEFENDER ASSOCIATION<br>810 3 <sup>RD</sup> AVE., STE. 800<br>SEATTLE, WA 98104-1655   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] ERIC BROMAN<br>NIELSEN BROMAN & KOCH PLLC<br>1908 E MADISON ST.<br>SEATTLE, WA 98122-2842   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] Douglas Jasper<br>10724 Summit Lake Rd. NW<br>Olympia, WA 98502   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF APRIL, 2011.

x \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
Phone (206) 587-2711  
Fax (206) 587-2710