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NO. 29513-3-III

County NO. 09-1-04057-6

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

Merle William Harvey

Appellant

VS.

STATE OF WASHINGTON,

Respondent

STATEMENT OF ADDITIONAL GROUNDS FOR DIRECT APPEAL

Merle W. Harvey
Pro Se Appellant
Produced by Jail House Lawyer

Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, Washington 98326-9723

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TABLE OF CONTENT

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

ADDITIONAL AUTHORITIES

STATUTES AND RULES.

STATE CONSTITUTION.

FEDERAL CONSTITUTION.

OTHER AUTHORITIES

QUESTIONS PRESENTED FOR REVIEW

1. Did the State prove the absence of self-defense beyond a reasonable doubt?

2. Was the Jury improperly Instructed that they had to be unanimous as to the answer "no" on the Special Verdict, and if so was the sentence imposed in excess of the Court's jurisdiction?

3. Did the Court's recognition of Bashaw and conclusion that jury instruction needed to be changed, and Counsel's agreement, effectively preserve this issue for appeal when trial Court subsequently failed to correct the erroneous instruction?

4. Was the imposition of two Unlawful Possession of Firearm Enhancements in the Sentence and Judgment, after Judge ruled that two convictions same criminal conduct, violate Double Jeopardy?

5. Did Trial Judge error by responding to Jury inquiries without notifying all parties, when Counsel previously Objected to the jury Instruction on Premeditation and intent and Jury Inquiries requested additional Instructions on Premeditated and Intent, and thereby violate Mr. Harvey's Right to be Present and Right to Public Trial?

6. Did the Jury Inquiries that asked: "According to the testimonies of L. Averill and Mr. Harvey, did Jack Lemerez have his gun on his person when Merle Harvey put together the 22 7.", involve factual matters and disputed facts? And if so did the Inquiries constitute a critical stage of the proceedings warranting notice and a hearing on the record?

7. Did Mr. Harvey have a Constitutional Right to be present during Pre-Trial Hearing, and if so was he prejudiced by the exclusion?

8. Did the Multiple Sentence Enhancements for same criminal conduct violate Double Jeopardy principles?

9. Did the Trial Court violate Mr. Harvey's Right to Public Trial when it cleared the Courtroom of all spectators to make room for Special Juror Pool of 80 Prospective jurors during voir dire?

10. Was the Charging information defective and invalid for failing to charge or set forth any elements of Second Degree Murder?

11. Is the Charging information Defective for listing Multiplicitous counts of Unlawful Possession of Firearm and Sentence Enhancements for being armed with firearm when it resulted in multiple sentences for same criminal conduct, and if so, did it prejudice the jury against Mr. Harvey by creating impression of more criminal conduct than actually occurred?

12. Was Trial Counsel ineffective for failing to review record from prior conviction when Mr. Harvey informed him that the Court in 2000 never informed him that his Right to Possess a Firearm had been lost?

13. Does Counsel's Failure to Present Expert Witness List to Prosecution prior to Omnibus Hearing constitute ineffective assistance and prejudice Mr. Harvey's right to present witnesses when two witnesses subsequently excluded?

14. Was Mr. Harvey's Right to s Speedy Trial violated after right was asserted, Judge set Trial date to avoid violating that right, and Trial date continued without reason and without Mr. Harvey being present for the continuance hearing, and Judge refused to rule on Motion to dismiss charges due to speedy trial violation?

15. Was Mr. Harvey's Right to be Present violated when Continuance Hearing was Held without him?

16. Is Mr. Harvey's Right to Appeal the Record being violated by State's and Counsel's refusal to provide him with requested trial Transcripts of Jury Voir Dire, Opening Statements and Clerk's Papers?

17. Does Mr. Harvey have the Right to Appeal the Record that is independent from that which his Counsel presents?

18. Does the filing of this Brief disprove a court access claim?

ANSWERS TO QUESTIONS PRESENTED FOR REVIEW

1. No. The State was relieved of its burden of proof, as was clearly indicated by Trial Judge after State concluded its case-in-chief.

2. Yes. The Jury was improperly instructed and the Court did impose sentence in excess of it's jurisdiction.

3. Yes. The Court's recognition of Bashaw and conclusion that jury instruction erroneous, and Counsel's agreement did constitute sufficient notice to preserve his issue for appeal, especially considering fact that it had not at the time been affirmatively established that jury instruction was unconstitutional. At the very least it constitutes a change in the law and needs to be reviewed by this Court and vacated.

4. Yes. The two convictions for same criminal conduct is violative of double jeopardy principles and vacation of one of the two conviction is warranted.

5. Yes. The Trial Judge erred by not following CrR 6.15(f)(1), especially in light of Counsel's Objection to the Instruction on Premeditated and Intent, because instruction not informative enough. Yes. Mr. Harvey had an overriding interest in being informed of the Jury Inquiries, had a right to the matter being discussed on the Record with himself and the public present.

6. Yes. The Inquiry by the Jury did involve Factual Matters and Disputed Facts that warranted notice and an opportunity to comment upon an appropriate response on the record in open court because such testimony essential to self-defense.

7. Yes. Mr. Harvey had a Constitutional Right to be present during the Pre-Trial Hearing and the exclusion was not harmless beyond a reasonable doubt because he was prejudiced by the exclusion.

8. Yes. Multiple Sentences for same criminal conduct does violated double jeopardy.

9. Yes. Closure of voir dire to the public did violate constitutional public trial right according to Presley v. Georgia.

10. Yes. The Fifth Amendment guarantees a defendant the right to be tried for only those offenses presented in an indictment or information. The imposition of crimes that were not charged in information is a violation and must be vacated in whole.

11. Yes. According to federal case law Multiplicitous counts that result in multiple sentences for same criminal conduct can and does prejudice the jury against Mr. Harvey.

12. Most certainly knowledge that one is breaking the law is essential in this situation where one is charged with unlawfully possessing a firearm, especially when law provides for such right, and counsel was defective for failing to investigate matter.

13. Yes. Counsel's failure to present expert witness list to Prosecution before Omnibus Hearing is ineffective and prejudiced Mr. Harvey's right to present witnesses because two witnesses subsequently excluded.

14. Yes. The Speedy trial right was violated and judge gave no reason or ruling on record concerning motion to dismiss.

15. Yes. The continuance hearing was a critical stage that warranted Mr. Harvey's presence.

16. Yes. The right to appeal and access to the court is being violated by State's and Counsel's refusal to provide requested verbatim transcripts.

17. Yes. Mr. Harvey has the right to the verbatim transcripts and Clerk's Papers for his appeal.

18. No. According the Acevedo v. Forcinito, 820 F.Supp. 986, 988 (D.N.J.1993), The fact that plaintiff filed a complaint does not disprove a court access claim.

1) THE STATE FAILED TO PROVE IT'S CASE-IN-CHIEF AND FAILED TO PROVE THE ABSENCE OF SELF DEFENSE BEYOND A REASONABLE DOUBT.

a. Mr. Harvey first provided sufficient evidence to support a rational finding of self-defense, and thus, shifted the burden of proof to the State to disprove self defense beyond a reasonable doubt.

The evidence produced before and during trial established that in July 2009, Jack Lamere and Merle Harvey traded vehicles. Jack convinced Merle to take his Cadillac for a test drive while Jack test drove Merle's Chevy Blazer. During the test drive, Jack drove off with the Blazer leaving Merle with the Cadillac. No titles were ever exchanged.

The license tabs on the Cadillac were expired, so without the title Merle could not get the car licensed to drive. For reasons unknown, Jack refused to give Merle the title to the Cadillac or allow anyone else to provide Merle with the title. While Merle was in possession of a vehicle he could not drive, Jack continued to possess Merle's Chevy Blazer. Merle made many phone calls and pleas asking Jack to either give him the title to the Cadillac or return the Blazer, but Jack did neither. The problem was compounded by the fact that Merle was aware of Jack's history of violence and torture. Jack was a convicted felon, known as a debt collector ("taxman") and enforcer. He often carried a firearm and usually carried a knife and/or brass knuckles, and had done federal prison time for torture and burning a mans testicles with a candle.

On the evening of September 28th, 2009, Merle Harvey and Diana Richardson were riding in a flat bed truck. They came across Jack Lamere in the parking lot of his apartment complex.

The Chevy Blazer and numerous other people were present. It was dark outside and the area was dimly lit. Merle and Jack discussed Merle taking his Blazer back and Jack refused to allow it without the Cadillac. At this time, the Cadillac was parked at Merle's house.

Diana Richardson left the area to find a phone to ask someone to drive the Cadillac to their location. She was able to borrow a cell phone from an STA security guard and called Merle's home. She spoke to Aaron Cnningham. Diana ordered Aaron to get the Cadillac to their location as fast as possible. She returned to the parking lot. Upon her return, Jack Lamere asked where the Cadillac was and Diana responded it was on its way. For whatever reason, Jack and April became anxious with Diana leaving and returning indicating the Cadillac was on its way.

At some point before Diana's return, Jack Lamere and April Fletcher went into the apartment and armed themselves. Jack came out with a pistol and April was armed with a kitchen knife. At this time Merle began to get scared but was unable to drive off because Diana had the keys to the truck. Merle had a 22 caliber rifle in the truck but it was not assembled so he sat in the truck and assembled the weapon while both Jack ~~Thomas~~ Lamere and Jacob Potter visibly armed themselves with weapons, i.e., Guns, Knives, Brass Knuckles and a pistol-grip flashlight, that looked like a gun. Both ~~Thomas~~ Lamere and Potter took aggressive postures and aggressively approached Mr. Harvey and his girlfriend Diana Richardson from opposite sides. Fearing for his life and the life of Diana Richardson Mr. Harvey stepped

out of the passenger side of his truck and revealed his weapons and fired. Witness accounts indicate Jack ~~Thomas~~ Lamere had the pistol in his waist band at times and in his right hand at times, making it visible to everyone present. Police photos show there was a mettle baseball bat and an open knife on the floor of the car Jack was working on when Mr. Harvey arrived. In a toolbox near Jack there was a loaded Jennings semi automatic pistol with eight rounds in the magazine. There was also an open knife near Jack on the bed of the truck. Both Jack and Jacob Potter had brass knuckles on their persons and Jack's had spikes on them. Furthermore, the autopsy report shows both Jack and Potter had high levels of methamphetamine in their systems that evening. Jack had 1.23 mg/l in his bloodstream, while Potter had 1.71 mg/l.

Mr. Harvey had two guns in his truck but he had not made them visible to anyone up to this point. It was not until the scene became hostile and Mr. Harvey felt Diana's and his life were being threatened that he revealed the weapons and fired.

The Court found sufficient evidence to warrant a self defense instruction and also found insufficient evidence to support the State's requested first Aggressor instruction.

Thus, Mr. Harvey provided sufficient evidence to support a rational finding of self-defense beyond a reasonable doubt. United States v. Jackson, 726 F.2d 1466, 1468-69 (9th Cir. 1984); State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983); State v. Lively, 130 Wn.2d 1, 10, 921 P.2d 1035 (1996).

b. The Court, over objections, erroneously refused to instruct the Jury that State had to prove the absence of Self-Defense

beyond a reasonable doubt, which relieved the State of its burden of proof.

Mr. Harvey affirmatively established sufficient evidence establishing self-defense and the burden thus shifted to the State to disprove self-defense. Because The Trial Court refused to instruct the jury as to the state's burden of proof, to disprove self-defense, the State was relieved of its burden of proof.

Defense Counsel requested the Court instruct on State's burden to prove absence of self-defens, Defendant was subsequently prejudiced.

Defense Counsel Objected to the Court not giving the instruction on absence of self-defense, thus, preserving this issue for appeal. See VRP Page 1152 and 1289.

Once there is some evidence tending to demonstrate self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 923 P.2d 1237 (1997); State v. Jones, 12, Wash.2d 220, 237, 850 P.2d 495, 22 A.L.R. 5th 921 (1993); State v. Acosta, 101 Wash.2d 612, 619, 683 P.2d 1069 (1984).

c. The State produced no evidence to support the crime charged and failed to disprove self-defense.

In considering Defendant's Motion to Dismiss Counts I & II the Court made the following ruling:

> THE COURT: All right. At this juncture, it's the responsibility of the Court to be the gatekeeper and not let anything go forward. In looking at the case presented so far, and considering all the facts in light most

favorable to the nonmoving party, i.e., the State, there is not evidence set forth that would support or could support the jury finding all the elements of the crime charged exist. I can't make that determination at this point. In considering the case so far in light most favorable to the State, it seems to me the Jury could find based on the case presented so far that the elements exist, There are a number of factual considerations, determinations that have to be made by the Jury. So the Motion is denied at this point, and we'll go forward.

See VRP P. 938-939

Due Process requires the State to prove every fact necessary to constitute the crime charged. in re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970).

Here, the State failed to prove all the elements of the crime charged, and failed to disprove self-defense. For this reason this Court should vacate the Conviction with prejudice to the State's ability to recharge.

2) THE ERRONEOUS JURY UNANIMITY INSTRUCTION PRESENTS A CONSTITUTIONAL ISSUE AND REQUIRES REVERSAL OF THE ENHANCEMENT FINDINGS AND VACATION OF THE SENTENCES.

In this case the court instructed the jury to use special verdict forms on the sentencing issues, and that it must be unanimous to answer the special verdict. The instruction given to the Jury goes as follows:

> Instruction NO. 40 (in part only)
> You will be given special verdict forms for the crimes charged in Counts I and II. If you find the defendant not guilty of these crimes, or a lesser included crime, do

not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no" or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

Appellant hereby contends that although unanimity is required to find the presence of a Special Finding increasing the Maximum penalty, it is not required to find the absence of such a Special Finding. The jury instruction here stated that unanimity was required for either determination. That was error. To require the jury to be unanimous about the negative-to be unanimous that state has not met its burden- is to leave the jury without a way to express a reasonable doubt on the part of some jurors. Since the court neither conducted individual juror questioning or entered facts findings and conclusions of law in regard to the special verdict forms, as required by the SRA, it cannot determine whether or not one or more of the jurors wished to answer "no" on the Special Verdict Forms but was unable to do so because not all jurors were in agreement.

Here, the sentence was imposed in excess of the Court's Jurisdiction. The Court was well aware of State v. Bashaw, 144 Wn.App. 196, 198-99, 182 P.3d 451 (2008), and the court even discussed the Bashaw case and noted that the Jury Instruction

must be changed, however, the Court failed to correct the erroneous Jury instruction.

As in Bashaw the instruction here was likewise erroneous. The State's burden is to prove to the jury beyond a reasonable doubt that its allegations are established. If the jury cannot unanimously agree that the state has done so, the state has necessarily failed in its burden. To require the jury to be unanimous as to the answer "no" on the special verdict form is to leave the jury without a way to express a reasonable doubt on the part of some jurors.

Mr. Harvey did not object to this particular instruction. Ordinarily, failure to timely object waives the claim on appeal. This is so even with respect to instructional errors. But an appellant may raise an issue for the first time on appeal if the error is both manifest and of constitutional dimension. An Error is manifest if it had practical and identifiable consequences in the trial of the case. State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000). Although the State may contend the instructional error here meets neither contention, Bashaw compels the conclusion the error is both Manifest and Constitutional.

In a thoughtful and thorough opinion this Court recently came to the conclusion that the same error was not of Constitutional magnitude and cannot be raised for the first time on appeal. However, Division I and II have reached the opposite conclusion. State v. Ryan, No. 647261-I, and State v. Gordon, No. 63815-7-I; State v. Robert R. Kennedy, No.

40657-8-II.

In the present case the Trial Court discussed Bashaw and came to its own conclusion that the Jury Instruction must be corrected, but failed in its attempt. Appellant contends that this recognition by the court constitutes an objection. Essentially the court made its own objection but failed to correct the obvious erroneous jury instruction, and effectively preserved this issue for appeal.

Since the time the trial court considered Bashaw in this case Bashaw was reversed, 169 Wn.2d 133, 234 P.3d 195 (2010), and concluded the jury had to determine whether the state had proven a fact giving rise to a sentence enhancement. The Supreme Court held the instruction erroneous for sentencing verdict and reversed. The instruction here was likewise erroneous.

The State may argue that any error was harmless. Bashaw is also determinative in this regard.

Because the trial Court's error had Constitutional dimensions and practical and identifiable consequences, the Jury's special verdict added an additional consequence raising the maximum penalty on both first degree and second degree murders, each by 120 months, totaling 240 months for both enhancements. This Court should reject any claim by the State that Mr. Harvey waived this ability to challenge the instruction on appeal. State v. Moore, No. 64742-3-I (2011).

The error here is the procedure by which unanimity was inappropriately achieved. The result of the flawed deliberative process tells little about what result the jury would have

reached had it been given a correct instruction. Therefore, this Court cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

The trial Court's instruction here was error. This error was not harmless. The remedy, as in Bashaw, is to vacate the Sentence enhancements.

3) THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE ONE OF THE TWO UNLAWFUL POSSESSION OF FIREARM CONVICTIONS IN VIOLATION OF DOUBLE JEOPARDY.

Mr. Harvey was charged with two counts of unlawful possession of firearm in Counts III and IV. After trial the Court found the two convictions encompassed the same criminal conduct, (VRP P. 1404), because Mr. Harvey possessed both guns at same time, not separate incidences or times. The trial Judge found the two convictions for UPF's encompassed the same criminal conduct and sentenced Mr. Harvey to one sentence for both convictions but did not vacate one of the two convictions. However, the second UPF conviction was counted in determining offender score for calculating sentencing range for all three of the other convictions. That added score elevated the sentencing range, even though Mr. Harvey only received one sentence for the two convictions he was punished and received an elevated sentence range for both of the UPF convictions.

The double jeopardy provision of Article 1 and 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution prohibit multiple punishments for the same offense imposed in the same proceeding. The double jeopardy doctrine protects defendant's against "prosecution oppression."

5 La Fave, Isreael & King, Criminal Procedure Sec. 25.1(b), at 630 (2d ed. 1999).

A conviction, under Washington Law, remains a conviction regardless of the trial Court's decision not to enter Judgment on it. The SRA defines "conviction" as: "An adjudication of guilt pursuant to Titles 10 or 13 RCW 9.94A.030(12). And a conviction can still be counted in a future offender score under the definition regardless of whether a court renders it to judgment or whether sentence is imposed. RCW 9.94A.525.

Here, Mr. Harvey contends that the recent decision in State v. Turner, No. 81626-3, that was handed down by the Supreme Court of Washington imposes a new obligation on the State by making it mandatory that a second conviction for the same crime must be vacated by trial court to avoid double jeopardy, which is clearly the case here. Teague v. Lane, 109 S.Ct. 1061 (1989); In re Stoudmire, 145 Wn.2d 258, 264, 36 P.3d 1005 (2001); State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007); In re Strandy, No. 82308-1 (2011).

The remedy for this violation is to vacate one of the two UPF convictions and remand for resentencing, on any remaining convictions unaffected by this appeal, using a proper offender score.

4) THE TRIAL COURT ERRED BY RESPONDING TO JURY INQUIRIES WITHOUT NOTIFYING THE ATTORNEYS OR MR. HARVEY VIOLATING HIS RIGHT TO BE PRESENT AND RIGHT TO PUBLIC TRIAL.

During deliberations the Jury sent out two written questions to the Judge. (see Exhibits 1 & 2). One of the two questions concerned factual matters concerning testimony of L. Averill and Mr. Harvey about whether Jack Lemere had his gun on his person when Mr. Harvey put together the 22 7. The court Judge did not notify Mr. Harvey or his Attorney, rather she responded to the Inquiry by writing "Please Re read your instructions and continue to deliberate.", on the form and had the court assistant return the form to the Jury.

a. The Trial Court violated CrR 6.15 (f)(1) in responding to the Jury's Inquiries.

Criminal Rule 6.15 expressly requires that all parties be notified of any Jury questions posed to the trial court during deliberations and be afforded an opportunity to comment upon appropriate response.

The Court in State v. Jasper, No. 63442-9-I, stated that:

> "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 . . . Any additional instructions upon any point of law shall be given in writing."

CrR 6.15(f)(1) "any communication between the Court and the Jury in the absence of the defendant, or defense counsel, is error. State v. Langdon, 42 Wn.App. 715, 717, 713 P.2d 120 (1986).

Here, Mr. Harvey or his Attorney would have requested additional instruction be given to the Jury concerning "Premeditation and Intent" because Attorney had previously objected to the Courts giving an instruction on Premeditation and Intent claiming that the Instruction failed to properly inform the jury on Premeditation. (see VRP P.1289). It is clear by the Jury's question that the Instruction was not sufficient to inform the jury. Had the Jury been informed that one may form an intent to kill that is not premeditated the Jury would have certainly returned with a different verdict, especially considering the States weak case. The Jury was improperly instructed concerning "more than a moment in point of time." The Jury should have been instructed that "acting with the objective or purpose to accomplish a result which constitutes a crime," Premeditation involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." And that: "It is therefore possible for one to form an intent to kill that is not premeditated" and "Premeditation cannot simply be inferred from the intent to kill." Brooks, at 876 - Commodore, 38 Wash.App. 244, 684 P.2d 1364; State v. Williams, 285 N.W.2d 248, 268 (IOWA 1997), cert denied, 446 U.S. 921 (1980).

(b).Mr. Harvey's Right to be Present was violated when court responded to Jury's inquiries without notifying him or his Counsel because question involved Factual Matters.

Pursuant to Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment, and article I, Section 22 of the Washington Constitution a criminal defendant

has right to be present at all critical stages. State v. Pruitt, 145 Wn.App. 784, 798, 187 P.3d 326 (2008); Ky v. Stincer, 482 U.S. 730, 740, 744 n.17 (1987); In re Lord, 123 Wash.2d 296, 306, 868 P.2d 835, cert denied, 130 L.Ed.2d 86, 115 S.Ct. 146 (1994).

CrR 3.4(a) provides that the Defendant shall be present at arraignment, at every stage of the trial including the impaneling of jury and the return of the verdict, and at the imposition of sentence. This rule is mandatory, and is not satisfied by the mere presence of counsel. State v. Hammond, 121 Wash.2d 787, 793, 854 P.2d 637 (1993); Bustamante, 456 F.2d at 274.

The State bears the burden of proving that a violation of the defendant's right to be present was harmless beyond a reasonable doubt. State v. Rice, 110 Wash.2d 577, 613-14, 757 P.2d 889 (1988); cert. denied, 491 U.S. 910, 105 L.Ed.2d 707, 109 S.Ct. 3200 (1989).

Here, the Court responded to the Jury's inquiries without notifying him or his Counsel or discussing the matter on the Record, when jury's inquiries constituted a critical stage of the proceedings.

(c). Mr. Harvey's public Trial Right was violated when Court failed to discuss the matter of multiple inquiries by Jury during deliberations on the record and allow Counsel or the Public an opportunity to comment upon an appropriate response.

Mr. Harvey contends that the Jury inquiries, and the Court's reply, constituted a critical stage of the proceedings because question raised issue involving disputed facts and that Counsel,

Harvey and the Public had a right to have opportunity to comment upon appropriate response. That such decision should have been conducted in open court. Failure of Trial Court to conduct such a hearing has violated Mr. Harvey's and the Public's right to open proceedings. The Trial Court, thus, should have conducted a Bone-Club analysis before excluding the public from the proceeding concerning the Jury's Inquiry and the Judge's subsequent response to matters of factual matters. U.S. Const. amend. IV; also U.S. Const. amend. V; Article I, sec. 22 of the Washington Constitution; Const. art. I, sec. 10; U.S const. amend. 1,6; Federated Publications, 94 Wn.2d at 58; Globe Newspaper, 457 U.S. at 603-05; Richmond Newspaper, 448 U.S. at 580; Bone-Club, 128 Wn.2d at 258-59.

"Whether a defendant's Constitutional right to a public trial has been violated is a question of law, subject to de novo review on direct appeal. State v. Strode, 167 Wn.2d 222, 225, 217 P.3d 310 (2009).

(d).Reversal is Required.

The remedy for a violation of the public's right of access, defendant's right to be informed, right to be present and participate in his defense, is remand for new trial. Closure of the courtroom during critical stage of trial is a structural error that cannot be considered harmless. State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006)(the denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. The trial court's error in excluding witnesses,

excluding counsel and defendant, and conducting private responses to Jury's inquiarys requires reversal of Mr. Harvey's convictions.

5) MR. HARVEY'S RIGHT TO BE PRESENT DURING CRITICAL PRE-TRIAL HEARING WAS VIOLATED BECAUSE COURT CONDUCTED PRE-TRIAL HEARING WITHOUT MR. HARVEY BEING PRESENT.

Mr. Harvey was not present during Pre-Trial Hearing, Volume 1, VRP P. 261-300. The record does not show that Mr. Harvey was present during this Hearing. In fact the court talked about having a recess so Mr. Ames could go talk with Mr. Harvey about old Chief issue. (VRP P.291) This indicates that Mr. Harvey was not present in the Court during this Hearing. There would be no need to recess and go talk with Mr. Harvey about an issue being discussed in court at time if Harvey was present. The Court would simply ask if Harvey understood the issue in open court. Attached as Exhibit 3 is an Affidavit by Mr. Harvey declaring under penalty of perjury that he was not brought to the Court from the Jail for this Hearing and that he was not present in the Court during such Hearing.

The Confrontation Clause of the Sixth amendment and Due Process Clause of the Fourteenth amendment gives a criminal defendant the constitutional right to be present during all "critical stages" of a criminal proceeding. State v. Pruitt, 145 Wn.App. 784, 798, 187 P.3d 326 (2008). A critical stage is one where the defendant's presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the Charge. In re Benn, 134 Wn.2d 869, 920, 952 P.2d 116 (1998), citing United States v. Gagnon, 470 U.S.

522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

Generally, in-chambers conferences between the court and counsel on legal issues are not critical stages except when the issues involve disputed facts. In re Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

In determining whether a defendant's absence was voluntary, the trial court must (1) make a sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary, (2) make a preliminary finding of voluntariness (when justified), and (3) afford the defendant an adequate opportunity to explain his absence when his is returned to custody and before sentence is imposed. State v. Washington, 34 Wn.App. 410, 414, 661 P.2d 605 (1983). Whether a voluntary waiver has occurred is determined by the totality of the circumstances. Id. at 413. The Court will indulge a presumption against a waiver of the right. State v. LaBelle, 18 Wn.App. 380, 389, 568 P.2d 808 (1977).

Courts have refused to find voluntary absence where the defendant provides sufficient evidence that his absence was due to circumstances beyond his control. United States v. Mackey, 915 F.2d 69, 73-74 (2d Cir. N.Y. 1990); United States v. Fontanez, 878 F.2d 33, 36 (2d Cir. N.Y. 1989).

CrR 3.4(a) provides that the defendant shall be present at arraignment, at every stage of the trial including the empaneling of a jury and the return of the verdict, and at the imposition of sentence. This rule is mandatory, and is not satisfied by the mere presence of counsel. State v. Hammond,

121 Wash.2d 787, 793, 854 P.2d 637 (1993); Bustamante, 456 F.2d at 274.

The State bears the burden of proving that a violation of the defendant's right to be present was harmless beyond a reasonable doubt. State v. Rice, 110 Wash.2d 577, 613-14, 757 P.2d 889 (1988), cert denied, 491 U.S. 910, 105 L.Ed.2d 707, 109 S.Ct. 3200 (1989).

The remedy in this situation is to vacate the convictions and remand for new trial.

6) THE TRIAL COURT ERRED WHEN IT IMPOSED SENTENCE ENHANCEMENTS ON TWO COUNTS FOR SAME CRIMINAL CONDUCT IN VIOLATION OF DOUBLE JEOPARDY.

Here the court found the two unlawful possession of firearm convictions encompassed the same criminal conduct because Mr. Harvey possessed both guns at same time, not separate incidents or times, but failed to vacate one of the two UPF convictions.

This issue is much similar to that issue. Mr. Harvey was armed with only one firearm when he acted in self defense against two aggressive and heavily armed meth-heads when he shot his firearm. This was the same conduct that took place at the same time.

The Charging information only set forth in each count charged that; "the defendant being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3)." Both shootings occurred at same time, it was one incident, he armed himself only after the two drugged out men had armed themselves and physically threatened Mr. Harvey and his

girlfriend with knives, brass knuckles and guns. Mr. Harvey was armed with the same firearm at the same time, the shooting was one incident in rapid succession against two attackers. Mr. Harvey did not aim the firearm, he only pointed it in the attackers general direction to ward off the attack and protect him and his girlfriend.

The court should have imposed only one firearm enhancement for the first degree premeditated murder only. Not the second degree murder that was not charged in the information.

Defense Counsel requested lesser included of Second Degree Murder without firearm enhancement along with two manslaughter one's and two Manslaughter two's, all without enhancements.

The charging information failed to set forth firearm enhancement for Second Degree because it never charged Second Degree Murder, and therefore was defective on its face. The Trial Court should not have imposed firearm enhancement ~~on~~ for second degree murder because that enhancement was not included in the information or in the proposed lesser included. The Court erroneously injected firearm enhancement into the second degree murder lesser included.

This Court should vacate the Second degree firearm enhancement because it was not charged in the information, requested by counsel, and because it violates double jeopardy principles. Article 1 and 9 of the Washington Constitution: RCW 9.94A.525; State v. Turner, No. 81626-3; Teague v. Lane, 109 S.Ct. 1061 (1989); In re Stoudmire, 145 Wn.2d 258, 264, 36 P.3d 1005 (2001); State v. Womac, 160 Wn.2d 643, 650-51,

160 P.3d 40 (2007); In re Strandy, No. 82309-1 (2011).

Mr. Harvey's right to be informed, that the state sought to impose firearm enhancement on defendant's proposed lesser included of Second Degree Murder, was violated.

This Court should vacate the Sentence Enhancement on Second Degree Murder and remand for resentencing.

7) MR. HARVEY'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY CLOSED JURY VOIR DIRE WITHOUT CONDUCTING THE REQUIRED INQUIRY UNDER BONE-CLUB, IN VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF A PUBLIC TRIAL.

a. The Federal and State Constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings.

Both the State and Federal constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. IV; See also U.S. Const. amend. V (guaranteeing due process of law). Article 1, Sec. 22 of the Washington Constitution guarantees "in criminal prosecutions, the accused shall have the right to...a speedy public trial." Const. art. I, Sec. 22.

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." Const. art. I, Sec. 10; see also U.S. Const.amend.1,6. The clear constitutional mandate in article I, Sec 10 entitles the public and the press to openly administered justice. Seattle Times co. v. Ishikaw, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publications Inc. v.

Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by article I, Sec. 5, which establishes the freedom of every person to speak and publish on any topic. Federated Publications, 94 Wn.2d at 58.

In the federal constitution, the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial. Globe Newspaper, 457 U.S. at 603-05; Richmond Newspapers, 448 U.S. at 580.

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complementary and interdependent functions in assuring the fairness of our judicial system." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (19950.

The right to a public trial includes the right to have public access to jury voir dire. In re Personal Restraint of Orange, 152 Wn.2d 75, 812, 100 P.3d 291 (2004); accord State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); Presley v. Georgia, 558 U.S.__, 130 S.Ct. 721, 724-25, L.Ed.2d (2010)("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trial," including the voir dire of prospective jurors). Even when only a part of jury voir dire is improperly closed to the public it can violate a defendant's constitutional public trial right. Orange, 152 Wn.2d at 812.

"A closed jury selection process harms the defendant by preventing his or her family form contributing their knowledge or insight to jury selection and by preventing the venire from

seeing the interested individuals." State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)(citing Orange, 152 Wn.2d at 812).

"Whether a defendant's constitutional right to a public trial has been violated is a question of law, subject to de novo review on direct appeal." State v. Strode, 167 Wn.2d 222, 225, 217 P.3d 310 (2009)(citing Brightman, 155 Wn.2d at 514).

b. Washington Courts must apply a five-part test before closing any part of jury voir dire from the public.

In Orange, the Court held that before a trial judge can close any part of jury voir dire from the public it is required to analyze the five factors identified in Bone-Club, supra. Orance, 152 Wn.2d at 806-807, 809; see Brightman, Id. at 515-516.

The Bone Club requirements are:

1. The proponent of closure . . . must make some showing of a compelling interest, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right. 2. anyone present when the closure motion is made must be given an opportunity to object to the closure. 3. The proposed method for curtailing open access must be the least restrictive means available for protecting threatened interest. 4. The court must weigh the competing interests of the proponent of closure and the public. 5. The order must be no broader in its application or duration than necessary to serve its prupose. Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspaper, 121 Wn.2d at 210-11. accord, Orange, Id. at 806-07.

The constitutional right to a public trial is not waived by counsel's failure to object. Easterling, 157 Wn.2d at 176 n.8("explicitly" holding "a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection."); State v. Brightman, Id. at 514-15. In additions, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. Id.

c. The trial court did not apply the five-part Bone-Club test before closing the Courtroom to the public.

The court may not conduct voir dire in private without first discussing the need to do so on the record and weighing the necessary Bone-Club factors. Easterling, at 175; Orange, at 804. Courts have repeatedly overturned convicitons when a trial court has closed only a portion of a trial. In Brightman, the trial curt sua sponte told counsel that for reasons of security "we can't have any observers while we are selecting the jury." Brightman, at 511. The court, however, failed to analyze the five Bone-Club factors. The Brightman Court held that because the record lacked "any hint that the trial court considered Brightman's public trial as required by Bone-Club, we cannot determine whether the closure was warranted." Id. at 518. The court remanded for a new trial. Id. In that case, the State argued Brightman failed to prove the trial court in fact closed the courtroom during jury selection and if it was closed, the closure was de minimis. Brightman, 155 Wn.2d at 515-517. The Court, however, rejected the State's arguments, ruling that "once the plain language of the trial court's ruling

imposing a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed." Id. at 516. The Brightman court also found that where jury selection or a part of the jury selection is closed, the closure is not de minimis. Id. at 517.

In Orange, the same issue was raised in a PRP. In 1995 Orange was tried for murder, attempted murder and assault. Orange, 152 Wn.2d at 799. During a part of the jury selection process the trial court closed the courtroom. Orange was convicted and appealed but did not raise the closed jury selection issue. Id. at 814. Orange subsequently filed a PRP in 2001, six years after his trial. Orange, 152 Wn.2d at 803. Our Supreme Court granted discretionary review and ordered a reference hearing. Id. The Orange court held the trial court's failure to analyze the five Bone-Club factors before ordering the courtroom closed violated Orange's right to a public trial. Id. at 812.

The Orange court also held the constitutional violation was presumptively prejudicial and would have resulted in a new trial had the issue been raised on Orange's direct appeal. Orange, 152 Wn.2d at 814 (citing Bone-Club, 128 Wn.2d at 261-262). It reasoned for appellate counsel's failure to raise the issue, Orange was denied his right to effective assistance of counsel on appeal and was entitled to a new trial, the same remedy he would have received had counsel raised the issue on appeal. Id. at 814.

Here, the Trial Court brought in a special juror pool that

consisted of 80 prospective jurors and closed the courtroom to the public because the courtroom was not large enough to accommodate both the public and the juror pool. The entire voir dire was subsequently closed to the public. (see Exhibit 3).

d. Reversal is required.

The remedy for a violation of the public's right of access is remanded for a new trial. Closure of the courtroom during voir dire "is a structural error that cannot be considered harmless." State v. Strode, 167 Wn.2d 222, 223, 217 P.3d 310 (2009); accord State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006), ("The denial of the constitutional right to a public trial is one of the limited classes of fundamental right not subject to harmless error analysis."). Consequently, the remedy for a violation of the right to public access is to reverse the conviction. Easterling, Id. at 179-80. The Trial Court's error in excluding witnesses and conducting private voir dire requires reversal of Mr. Harvey's Convictions.

8) THE CHARGING INFORMATION IS INVALID ON ITS FACE BECAUSE IT FAILED TO CHARGE OR SET FORTH ANY ELEMENT OF SECOND DEGREE MURDER, OR ALLEGE ANY ENHANCERS TO SECOND DEGREE MURDER.

The fifth Amendment guarantees a defendant the right to be tried for only those offenses presented in an indictment, or information, and an indictment or information may not be substantively amended. U.S. v. Tandall, 171 F.3d 195, 203 (4th Cir. 1999).

Every material element of the charge, along with all essential supporting facts, must be put forth with clarity. CrR 2.1(a)(1); State v. Kjorsvik, 117 Wn.2d 93, 97, 102, 812 P.2d 86 (1991).

The essential element rule is of Constitutional origin and is also embodied in a Court Rule. Const. art. I, Sec. 22 (amend. 10); U.S. Const. amend. IV; CR 2.1(b); State v. Grant, 104 Wn.App. 715, 720, 17 P.3d 674 (2001). Court should look only at face of indictment, not at facts government expects to prove. U.S. v. Critzer, 951 F.2d 307-08 (1992).

Here, the State and Court failed to charge Second Degree Murder, nor did it set forth any of the essential statutes of that crime in the information, nor was the information amended to include Second Degree Murder. Mr. Harvey was convicted of a Statute and crime that was not charged in the Information.

If the Document cannot be construed to give notice of, or to contain in some manner the essential elements of a crime, the most liberal reading cannot cur it. State v. Moavenzadeh, 135 Wn.2d 359 (1998).

Thus, reading the information liberally, this Court must employ the Kjorsvik two-prong test: (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he or she was actually prejudiced by the inartful language. Kjorsvik, Id. at 105-06.

If the necessary elements are not found or fairly implied, however, the court must presume prejudice and reverse without reaching the question of prejudice. City of Auburn v. Brooke, 119 Wn.2d 623, 636, 836 P.2d 212 (1992).

Mr. Harvey argues that the information is deficient because on its face it fails to allege the crime of Second Degree Murder, nor does it set forth any of the essential elements of that crime. The Amended Information only set forth Premeditated Murder in the First Degree, while Armed with a Firearm, and Unlawful Possession of a Firearm, two counts of each.

Second Degree Murder had distinct elements from those charged in the information, nor did the information cite to any Statutes of Second Degree Murder.

Failure to define every element of an offense is an error of Constitutional Magnitude. State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 195 (1983). The Constitutional sufficiency of a charging document is reviewed under a two-part test that effectively prohibits use of the conventional constitutional harmless error analysis. Under the applicable test, the reviewing court may not consider whether the defendant was actually prejudiced by the language of the charging document unless it

is able to establish first that all essential elements of the alleged crime are found in that document. State v. Macom, COA No. 34022-1-I.

A Charge omitting any particular fact which the law makes essential to the punishment is no accusation at all. Powell, 167 Wn.2d at 689-90; citing Blakely, 542 U.S. at 301-02.

The issue raised here cannot be limited to procedural due process under the Fifth Amendment; the requirement that one be charged with a crime in the information "inheres in the Sixth Amendment Jury Trial Right," and this "applies to the States" and binds this State in this case. Powell, Id. at 609; See also Siers, 158 Wn.App. 686.

Here, the State never amended the information to include the charge of Second Degree Murder, did not request such an amendment. U.S. v. Randall, 171 F.3d 195, 210 (4th Cir. 1999); Ed Parte Bain, 121 U.S. 1, 9-10 (1987).

Because Mr. Harvey's Charging Information is defective on its face for not charging Second Degree Murder, a non-included offense, and was subsequently convicted and sentenced to, this Court must vacate the Second Degree Murder conviction in whole, along with the Special Findings Enhancement that was attached.

The Supreme Court has sorted constitutional error into two categories. Structural defect and trial errors.

A structural defect is an error that inflicts the entire trial process. Brecht v. Abrahamson, 507 U.S. 619, 629-30, 113 S.Ct. 1710, 123 L.Ed2d 353 (1993). Structural errors automatically entitle the defendant to relief because they defy

analysis by harmless error standards... "Trial errors" on the other hand, do not automatically require reversal... Quoting from Wray v. Johnson, 202 F.3d 515 (2d Cir. 2000); Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S.Ct. 2078, 142 L.Ed.2d 182 (1993); also see In re Mulholland, 166 P.3d 677, 616 Wash.2d 322 (2007).

b. Reversal is required.

The remedy for a charging document that omits an essential element is reversal and dismissal of the charge without prejudice, NOT a remand to enter a conviction on a lesser-included offense. State v. Vangerpen, 125 Wn.2d 782 (1995).

So what is the remedy for a charging document that does not state a offense at all and the defendant is convicted and sentenced for a capital murder. Petitioner feels that dismissal of the conviction with prejudice is appropriate in this circumstance, considering the State's weak case.

In order to decide against Mr. Harvey, and for the State, this Court would have to ignore the consistent line of authority (stare decisis) from the State and Federal Supreme Courts on this issue, absent a hearing, on the record, that reflects the defendant clearly knew, intelligently decided, and voluntarily forfeited his Constitutional right, then automatic reversal is required due to Structural Error.

9) THE CHARGING INFORMATION IS DEFECTIVE BECAUSE IT LISTED MULTIPLICITIOUS COUNTS OF UNLAWFUL POSSESSION OF A FIREARM AND TWO SENTENCE ENHANCEMENTS FOR BEING ARMED WITH FIREARM WHICH RESULTED IN MULTIPLE SENTENCES FOR SINGLE OFFENSE AND PREJUDICED JURY AGAINST MR. HARVEY BY CREATING IMPRESSION OF MORE CRIMINAL ACTIVITY THAN IN FACT OCCURRED.

a. Indictment that listed 2 counts unlawful possession of firearm is multiplicitous because he possessed both guns simultaneously on single occasion.

U.S. v. Matthews, 240 F.3d 806, 813 (9th Cir. 2001). Multiplicitous indictment violates double jeopardy clause because it raises danger that defendant will receive more than 1 sentence for single crime. U.S. v. Brandon, 17 F.3d 409, 422 (1st Cir. 1994); U.S. v. Alerta, 96 F.3d 1230, 1239 (9th Cir. 1996).

Here, Mr. Harvey's charging information on premeditated first degree murder in Counts I and II charged as an element of that offense "being armed with a Firearm under the provisions of 9.94A.602 and 9.94A.533(3), and also charged unlawful possession of firearm in Counts III and IV. The two Counts of UPF and two sentence enhancements attached to Counts I and II are multiplicitous, and prejudiced the Jury.

Indictments charging a single offense in different counts are multiplicitous. U.S. v. Leftenant, 341 F.3d 338, 347-48 (4th Cir. 2003)(indictment charging 6 separate counts of possessing counterfeit currency multiplicitous because defendant possessed all items simultaneously on single occasion). U.S. v. mathews, 240 F.3d 806, 813 (9th Cir. 2001)(indictment listing 3 counts of being a felon-in-possession multiplicitous because defendant possessed all 3 guns simultaneously on single occassion).

Such indictments are improper because they may result in multiple sentences for single offense in violation of double jeopardy clause, or may otherwise prejudice the defendant. U.S. v.Brandon, 17 F.3d 409. 422 (1st Cir.1994).

Multiplicitous indictment might prejudice jury against defendant by creating impression of more criminal activity than in fact occurred. U.S. v. Marquardt, 786 F.2d 771, 778 (7th Cir. 1986); U.S. v. Alerta, 96 F.3d 1230, 1239 (9th Cir.1996); U.S. v. Johanson, 130 F.3d 1420, 1424 (10th Cir.1997)(multiplicitous indictment, consisting of felon-in-possession of a firearm and unlawful use of controlled substance while in possession of a firearm charges raises double jeopardy implications).

Even if a Statute appears to require proof of different facts on its face, courts will often consider additional evidence to determine whether the legislature intended to provide for multiple punishments. U.S. v. Bennafield, 287 F.3d 320, 323 (4th Cir. 2002).

Defendant may challenge multiple sentences based on multiplicitous indictment for first time on appeal. U.S v. Tucker, 345 F.3d 320, 337 (5th Cir.2003).

The Court may grant relief from waiver for good cause. Reed v. Ross, 468 U.S. 1, 16 (1984)(novelty of a constitutional claim may excuse defendant from failure to raise the claim during proper procedures.

Here, the charging information is defective on its face because it charged multiple offenses for same criminal conduct,

both in the UPF's and Enhancers which prejudiced the jury against Mr. Harvey by creating impression of more criminal activity than in fact occurred.

For this reason this Court should vacate the convictions either with or without prejudice to the State's ability to recharge.

10) TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REVIEW SUPERIOR COURT FILE ON PRIOR CONVICTION TO FIND OUT IF MR. HARVEY WAS PROPERLY NOTIFIED OF LOSING HIS RIGHT TO POSSESS A FIREARM.

Mr. Harvey had informed his counsel, Mr. Ames, that he was never informed that his right to possess a firearm was revoked as an outcome of his 2000 conviction, (see Exhibit 3), also see VRP Volume 1 Page 23-24, where Mr. Ames addressed the court concerning this matter:

> MR. AMES: Well, the felon in possession of a firearm, judge, is going to involve a pretty thorough review of that Superior Court court file to find out if he was properly notified of losing his right to possess a firearm, research on admissibility of those documents.

Counsel's failure to investigate Mr. Harvey's claim that he had not been notified of his loss of right prejudiced Mr. Harvey because knowledge of loss of that right essential to state's case on gun enhancement and unlawful possession of firearm, and defendant's Stipulation that he had been convicted of serious offense 10 years prior not admission that he was knowingly and unlawfully in possession of firearm.

Counsel's failure to investigate and present substantial mitigating evidence that Mr. Harvey had never been informed that his Second Amendment Right to keep and bear arms had been lost has denied Mr. Harvey constitutional guarantee to effective assistance of counsel. Williams v. Taylor, 529 U.S. 362, 369-99 (2000); Hart v. Gomez, 174 F.3d 1067, 1073 (9th Cir.1999).

11) COUNSEL'S EGREGIOUS FAILURE TO PRESENT EXPERT WITNESS LIST TO PROSECUTION UNTIL AFTER OMNIBUS HEARING AND JUST DAYS BEFORE TRIAL, AND TWO OF EXPERT WITNESSES SUBSEQUENTLY EXCLUDED, PREJUDICED DEFENDANT'S RIGHT TO PRESENT WITNESSES.

> CrR 4.7 (b) states that "Defendant's Obligations. (1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the Omnibus hearing; the names and addresses of persons whom the Defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

And CrR 4.5 (b) states that:

> "The time set for the Omnibus hearing shall allow sufficient time for counsel to (i) initiate and complete discovery; (ii) conduct further investigation of the case, as needed; and (iii) continue plea discussions.

Here, Trial Counsel failed to present the Prosecution with expert witness list. (VRP Volume 1 P. 236, Lines 22-24).

The Trial judge discussed what would happen if she excluded any of the witnesses on the list: (VRP P.243)

> THE COURT: So here is my choice, gentlemen. I exclude the witnesses and give Mr. Harvey, if he is convicted, a slam dunk on ineffective assistance of counsel for not disclosing the experts on time, right.
>
> MR. NAGY: Correct, your honor.

Following the Court's statement on ineffective assistance a heated discussion took place between the court and counsel concerning a continuance and the cost associated with calling in a special jury pool of 100 and other cost incurred by a delay. (VRP P.243-260).

Most notably the Judge further stated on Page 255-256 that:

> THE COURT: If I exclude your witnesses, Mr. Mason, I'm giving Mr. Harvey, if things go south on him at his trial, a slam dunk, as I said before, an ineffective assistance of counsel if I exclude your witnesses.
>
> MR. MASON: Something to that, yes. I understand that.
>
> THE COURT: And then what do we do? We do it again? What about the expense there? What about him? He thought there was going to be a trial Monday.

Subsequently the Trial Judge dismissed one of the Expert Witnesses on the very next page of transcripts, as follows:

> THE COURT: Here is what I'm going to do: We are going to exclude the tattoo expert. The tattoos to a certain extent speak for themselves. I just made the decision today as a motion in limine to admit the tattoos and it's a self defense case. The reason I admitted the tattoos is what the purportedly created in the mind of the defendant. So its not important what an expert says tattoos mean. It's important mostly what Mr. Harvey thought the tattoos meant, what they meant to him. That takes care of one of the experts. (VRP P.257-58)

Mr. Harvey contends that the expert on tattoos was essential to his self defense because of Mr. Harvey's intelligence limitations prevented him from properly expressing what the tattoos meant to him and the fear they instilled upon him, which led to his acting in self defense. While the tattoos and there meaning, may have been evident to the Judge, they may not have been evident to members of the Jury. Mr. Harvey was incapable of properly conveying the meaning of the tattoos to the jury due to his intelligence limitations and the expert on tattoos, especially of the type in question here, was essential to convey the fear the tattoos were meant to instill upon others with knowledge of that world of white supremacist and Natzi fascist sects that appear throughout certain sub cultures of modern day. The tattoos only speak for themselves to a certain extent. Most notably is the large tattoo of a Black Man hanging from a tree with KKK members looking up at him. Many other tattoos consisted of more subtle symbols and graphs that the common citizen would be hard pressed to decipher.

Most certainly it cannot be said that this witness would have been excluded if his attorney had not erred by not presenting the Expert witness list on time. It is most evident that the Judge was hard pressed to find any reason for excluding the Expert Witnesses in order not to prejudice the State, due to Counsel's in effectiveness in not providing the witness list to the State on time, and to keep the trial moving forward on time. Had counsel presented the witness list there would have been no reason for excluding any of the Experts.

The second Expert Witness was Robert Smith, an Expert on Self Defense who was excluded the very next day by the Judge after getting only a synopsis of what he would testify to. The exclusion of Robert Smith denied Mr. Harvey his right to present his theory of the case on self defense, and his right to present witnesses in his defense. These violations are due mostly to his counsel's ineffective assistance as stated above.

Mr. Harvey was prejudiced by both his own Counsel's ineffectiveness and the exclusion of two expert witnesses as a result. For the reasons stated herein this Court should find that Counsel was ineffective for failing to present expert witness list to State prior to Omnibus hearing and that Mr. Harvey was prejudiced by the exclusion of one or more of his expert witnesses and this court should vacate the convictions and Remand for New Trial.

12) MR. HARVEY'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in relevant part that "no person shall...be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment imposes this same limitation on the States. U.S. Const. amend. XIV.

The Sixth Amendment provides in relevant part that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. U.S. Const. amend. IV. The Sixth Amendment speedy trial guarantee is binding on the States through

the due process clause for the Fourteenth Amendment. Klopfer v. N.C., 386 U.S. 213, 222-23 (1967).

The Fundamental Right under the Sixth Amendment serves to: (1) prevent undue and oppressive incarceration prior to trial; (2) minimize "anxiety and concern accompanying public accusation, and (3) limit the possibility that long delay will impair the ability of an accused to defend himself.

The remedy for violations of his right is to dismiss the indictment or vacate the Sentence.

To determine whether a defendant has been deprived of his right to speedy trial, courts will consider the defendant's and the prosecution's conduct by focusing on the four Baker factors. (1) the length of the delay; (2) the reason for delay; (3) whether, when and how the defendant asserted his right to speedy trial; and (4) whether the defendant was prejudiced by the delay. Baker v. Wingo, 407 U.S. 514, 534 (1972).

Weight given in length of delay analysis depends on extent to which delay exceeds bare minimum considered presumptively prejudicial. U.S. v. Maxwell, 351 F.3d 35 (1st Cir.2003).

Delays approaching, but not exceeding, one year are also generally presumptively prejudicial. Wells v. Petsock, 941 F.2d 253, 257-58 (3d Cir.1991); United States v. Tinklenberg, No. 09-1498 (U.S. 5-26-2011).

In Baker, the Supreme Court stated that "different weights should be assigned to different reasons" for delay.

The Third factor focuses on whether and how the defendant asserted his right to a speedy trial.

The fourth and final factor is prejudice. Courts assess prejudice "in light of the interest of defendants which the speedy trial right was designed to protect. Prejudice, however, is not a necessary prequisite "to the finding of a deprivation of the right of speedy trial." See Baker, 407 U.S. at 533.

In the present case Mr. Harvey asserted his right to a speedy trial on April 16, 2010, seven months after being served with the charging information. Mr. Harvey agreed to continue for 30 days only, to May 10. (VRP P.1-18).

The trial Judge showed concern about speedy trial issue, (VRP P.7-8), and set trial for June 7, 2010, and pre-trial for may 21, 2010.

The very next hearing took place on July 1, 2010, 24 days after the date set for trial. Defense Counsel presented a Motion to Dismiss and Prosecution presented Motion to Amend. At the beginning of this Hearing the Court asked the Prosecution:

> THE COURT: And we at some point continued this trial from may 10 to September 2nd. Was that at our last Hearing?
>
> MR. NAGY: Yes, your honor. I was not the prosecutor at that time, but I believe it was at the request of the State based on unavailability of witnesses. (VRP P.12).

Later in that same Hearing the Defense Counsel addressed the Court stating:

> MR. AMES: "The last comment I had in my -- and, Judge, you know, in our brief we argued that, you know, that the Speedy Trial time had ran because he didn't waive at the last continuance, and that Michelli and 8.3(b) Justified

dismissal and that when Michelli talks about dismissal its talking about the whole ball of wax, the murders, everything.

Mr. Harvey contends that he asserted his speedy trial right on April 16, 2010, seven months after he was served with the Charging Information. The Judge set Trial for june 7, 2010, to prevent speedy trial violation. Mr. Harvey further contends that he was prejudiced because prosecution Amended the Information nearly a month after his right to a speedy trial was violated, that the Amended information Prejudiced him by charging multiplicitous Counts in violation of Double Jeopardy.

It is unknown just what Hearing for continuance the Prosecuting and Defense Counsel were talking about. Mr. Harvey never attended any Hearings between April 16, 2010 and July 1, 2010. Mr. Harvey has not been provided with any of the Clerks Papers, opening statement, jury voir dire, Clerks notes, Sentence and Judgment or any Motions filed in his case, so he is unable to adequately present this claim. Mr. Harvey hereby Requests this Court to Order his Appeal Attorney to further Brief all the claims presented herein because she has refused to provide him with sufficient record for review, even after being requested to do so on many occassions. RAP 10.10(f). The only documents she has provided are two pre-trial hearings, trial transcripts starting with testimony and ending with Sentencing. No other Documentation has been provided to Mr. Harvey by either the State or his Attorney. Mr. Harvey was, however, able to get his Trial Counsel to send him a few documents such as "Defense

Memorandum in Support of Self Defense instruction and Opposing First Aggressor Instruction," "Memorandum in Support of Allowing all of Defendant's Statement to Law Enforcement into Evidence," along with a few other assorted papers, but nothing substantial, except for two "Inquiry from the Jury and Court's Response." listed as Exhibits 1 and 2.

For the foregoing reasons this Court should Order Appeal Counsel to further brief all the issues brought forth herein pursuant to RCW 10.10(f).

13) MR. HARVEY'S RIGHT TO BE PRESENT DURING THE MAY 10, 2010 CONTINUANCE HEARING WAS VIOLATED.

On May 10, 2010 Trial Counsel attempted to get Mr. Harvey to sigh a Continuance. Mr. Harvey refused to sign the Continuance and his Attorney left. Mr. Harvey was not brought to the Court Room for any Continuance Hearing on May 10, 2010. This is a violation of his right to be present.

Pursuant to Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment, and article I Section 22 of the Washington Constitution a criminal defendant has a right to be present at all critical stages. State v. Pruitt, 145 Wn.App. 784, 798, 187 P.3d 326 (2008); Ky v. Stincer, 482 U.S. 730, 740, 744 n.17 (1987); In re Lord, 123 Wash.2d 296, 306, 868 P.2d 835, cert denied, 130 L.Ed.2d 86, 115 S.Ct. 146 (1994); CrR 3.4(a). (see Exhibit 3).

For this reason this court should vacate the convictions and remand for new trial.

14) MR. HARVEY'S DUE PROCESS RIGHT TO APPEAL HAS BEEN VIOLATED BY STATE'S AND COUNSEL'S REFUSAL TO PROVIDE HIM WITH REQUESTED TRIAL TRANSCRIPTS AND CLERKS PAPERS.

The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions, and on first appeal. Evitts v. Lucey, 469 U.S. 387, 396-99 (1985).

In reviewing an ineffective assistance claim, The court must judge the defense counsel's performance according to an objective standard of reasonableness, maintaining a presumption that defense counsel's performance was adequate. Strickland v. Washington, 466 U.S. 668, 687 (1984).

The Right to effective assistance of counsel may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial. Murray v. Carrier, 477 U.S. 478, 496 (1986).

Here, Mr. Harvey has a constitutional right to access to the courts, has a due process right to effective assistance of appeal counsel and a right to be afforded as adequate an appeal as that afforded an inmate with funds enough to adequately bring his contentions to the ocurt. The right to appeal is implicit in the concept of ordered liberty. Polko v. Connecticut, 303 U.S. 319, 325.

Mr. Harvey has been denied his Fifth and Fourteenth right to appeal by appeal counsel's ineffective assistance and deficient performance by not properly requesting trial transcripts that Mr. Harvey requested, namely Opening Arguments and Jury Voir Dire. Mr. Harvey's Appeal Counsel has refused to provide him with the transcripts of requested trial

proceedings and has refused to provide Clerks Papers, Motions Filed during trial, Reporter's Notes or any other Documents requested.

Mr. Harvey not only has a right to effective assistance of counsel but has the right to present his own issues on appeal. An indigent defendant is not required to show that an appeal has probable merit in order to be entitled to representation at public expense and verbatim transcripts. State v. Atteberry, 87 Wn.2d 556, 557, 554 P.2d 1053 (1976).

Generally, as a matter of constitutional law, where the "grounds of appeal make out a colorable need for a complete transcript," the State bears the burden of showing that "only a portion of the transcript or an alternative will suffice for an effective appeal on those grounds." Mayer v. Chicago, 404 U.S. at 195. The Defendant is not obliged to prove adequate "such alternatives as may be suggested by the State or conjured up by a court in hindsight." Britt v. North Carolina, 404 U.S. 226, 230, 30 L.Ed.2d 400, 92 S.Ct. 431 (1971).

In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds - the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions." RAP 18.4(e)(2)(a); State v. Larson, 62 Wn.2d 66 (1963); State v. Woodard, 26 Wn.App. 735, 617 P.2d 1039 (1980).

Due Process requires that a record of "sufficient completeness" be provided for appellate review of the errors raised by a criminal defendant. State v. Brow, 132 Wn.2d 529 (1979).

The Supreme Court has stated: "It is now established beyond doubt that prisoners have a constitutional right of access to the ocurts. Bounds v. Smith, 430 U.S. 817, 821, 97 S.Ct. 1491 (1977).

The fact that Plaintiff filed a complaint does not disprove a court access claim. Acevedo v. Forcinito, 820 F.Supp. 886, 888 (D.N.J.1993).

A systemic denial of inmates constitutional right of access to the Courts is such a fundamental deprovation that it is an injury in itself. Hershberger v. Scaletta, 33 F.3d 955, 956 (8th Cir. 1994).

Prejudice need not be show in "systemic" challenges to the "basic adequacy of materials and legal assistance" but must be shown where deprivations are "minor and short-lived. Chandler v. Baird, 926 F.2d 1057, 1063 (11th Cir.1991).

Substantive due process also sometimes refers to the protections of the first, fourth, Sixth and Eighth Amendments. These Amendments now apply to the States because they are considered to be "incorporated" in the Fourteenth Amendment Due Process Clause, which does apply to the States. Duncan v. Louisana, 391 U.S. 145, 147-48, 88 S.Ct. 1444 (1968).

In some Federal Habeas Corpus cases where the State failed to produce transcripts of record in State trial the Court gave

State the alternative of (1) holding the necessary hearings in the State Court for the creation of a reasonable substitute for a trial transcript, (2) granting petitioner a delayed appeal in the State Court, (3) releasing him from custody, or (4) setting aside his conviction and re-trying him. Hart v. Eyman, 458 F.2d 334 (1972).

All case law Mr. Harvey's prison litigant has found suggests that the ultimate responsibility for producing a record of sufficient completeness falls on the State to afford, regardless of fact that he is represented by Counsel because he has a right to appeal the record himself, which is distinct from that which his attorney feels is necessary. This seems to be a situation where the State points out that it is Counsel's responsibility to provide the transcripts requested, and Counsel points to the State Passing-the-Buck back and forth while Mr. Harvey is suffering prejudice at the hands of both State and Appeal Counsel.

Mr. Harvey contends that he is being denied Due Process because both State and Appeal Counsel have both refused to provide him with adequate records for appeal. Opening Statements and Jury Voir Dire are Trial Transcripts which must be provided and entered into the record on appeal because Mr. Harvey has requested them from both the State and his Counsel, along with Clerk's Papers, none of which have been provided to Mr. Harvey.

This Court should do one of the following: (1) Order State and Appeal Counsel to provide Mr. Harvey with the Transcripts requested and allow him adequate time to view them and present

his contentions on direct appeal; (2) Order Appeal Counsel to further Brief all the issues raised herein and enter into the record on appeal the clerk's papers and trial transcripts of opening statements and jury voir dire; or, (3) vacate the conviction and remand for new trial.

CONCLUSIONS

Because the State failed to prove its case-in-chief and for the reasons stated herein this Court should vacate the Conviction, with prejudice to the State's ability to recharge.

VERIVICATION

I, Merle W. Harvey, do hereby declare and affirm under penalty of perjury, under the laws of the State of Washington, pursuant to RCW 9A.72.085, and the laws of the United States, pursuant to Title 28 U.S.C. sec. 1746, that the foregoing is true and correct, to the best of my knowledge.

Executed on this 6 day of September, 2011

Merle Harvey

Merle William Harvey ç818251
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9823

EXHIBIT PACKET

WORKING COPY

FILED
SEP 30 2010
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
FOR SPOKANE COUNTY

STATE OF WASHINGTON,
Plaintiff

vs.

MERELE W. HARVEY,
Defendant.

NO. 2009-01-04057-6

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY:
More detailed definition between pre meditation and intent?

Dated: 9/29/10 Signature: _____
Presiding Juror

COURT'S RESPONSE:

Please reread your instructions and continue to deliberate

Tari S. Eitzen
SUPERIOR COURT JUDGE

Date and Time Returned to Jury: 2:26 pm

DO NOT DESTROY

(EXHIBIT # NO. 1)

WORKING COPY

FILED
SEP 30 2010
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

STATE OF WASHINGTON,
Plaintiff

vs.

MERELE W. HARVEY,
Defendant.

NO. 2009-01-04057-6

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY:

According to the testimonies of L Averill and M Harvey did Jack Lemere have his gun on his person when Merle Harvey put together the 227.

Dated: 9/29/10

Signature: _____
Presiding Juror

COURT'S RESPONSE:

Please Reread your instructions and continue to deliberate

_____
Tari S. Eitzen
SUPERIOR COURT JUDGE

Date and Time Returned to Jury: 2:26 PM

DO NOT DESTROY

(EXHIBIT ~~MXE~~ NO. 2)

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

Merle W. Harvey, Petitioner, VS. STATE OF WASHINGTON, Respondent.	)	County No. 99-1-04057-6 No. 29513-3-III DECLARATION OF MERLE WILLIAM HARVEY IN SUPPORT OF STATEMENT OF ADDITIONAL GROUNDS

PURSUANT TO 28 U.S.C. § 1746 (1976), Merle William Harvey hereby declars as follows

1. I am over the age of 18, am competent to be a witness, and have personal knowledge of the following:

2. I am the named appellant in the above entitled cause.

3. After being served with original Information in the above entitled cause I was appointed a public defender, Mr. Ames. I informed him, after hearing that the State may charge Unlawful Possession of Firearm, that I had never been informed that my right to bear arms had been lost due to prior conviction in 2000. Mr. Ames said that he would research the record from the 2000 conviction and confirm my contentions. Later one of my two attorneys, not sure which one, told me that it did not matter and that I should sign the stipulation saying that I had been convicted of prior serious offense so that the State would not be able to bring the circumstances of that conviction to the attention of the Jury, so I signed the Stipulation.

4. To the best of my knowledge I was never informed that my righ t to bear arms was lost due to the 2000 conviction.

(EXHIBIT 3)

5. On May 10, 2010 my Attorney came to the County Jail where I was being held and asked me if I would sign a Continuance. I declined to sign the form and he left. I was not brought to the Courtroom for the Continuance Hearing held on May 10, 2010, nor was I given the opportunity to attend.

6. I was not brought to the Courtroom on September 10, 2010 for the Pre-Trial hearing of "findings and conclusion to 404(b)" I knew that there was a hearing scheduled for that day and I was ready to be brought from the Jail to the Court but nobody came to get me. Later I had a heated argument with my attorney about not being at the hearing and all he said was sorry.

7. I was present in the Courtroom during Jury Voir Dire, i.e. impaneling of the Jury, and witnessed the courtroom being cleared out of all spectators because the whole courtroom was needed for the 80 member strong jury pool. Subsequently no spectators were allowed in the courtroom during the entire jury voir dire. This I witnessed with my own eyes.

9. At no point during Jury Deliberations was I informed of the Questions presented to the Judge by the Jury.

I, Merle W. Harvey, do declare and affirm pursuant to U.S.C. Title 28 § 1746, Under Penalty of Perjury, that I have read the foregoing, that it is true, correct and not meant to mislead, to the best of my knowledge.

Dated this 6 day of September 2011.

Merle Harvey

Merle W. Harvey #819251 C-E-11
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

Merle W. Harvey, Petitioner, VS. STATE OF WASHINGTON, Respondent.	)	NO. 29513-3-III County No. 09-1-04057-6 No. 29513-3-III DECLARATION OF SERVICE BY U.S. MAIL

I, Merle W. Harvey, do hereby declare that I presented to DOC Officials the following documents for mailing by U.S. Mail.

1. STATEMENT OF ADDITIONAL GROUNDS, and EXHIBITS 1,2, and 3.

The above documents were sent to the following individuals;

Court of Appeals, Division III
N. 500 CEDAR
Spokane, WA 99201

SPOKANE COUNTY PROSECUTOR
1100 West Mallon Ave.
Spokane, WA 99260

GEMBERLING & Dooris, Atty. at Law, P.O. Box 9166

The above documents were given to DOC Officials for mailing on the below noted date.

VERIFICATION

I, Merle W. Harvey, do declare and affirm pursuant to U.S.C. Title 28 § 1746, Under Penalty of Perjury, that I have read the foregoing, that it is true, correct and not meant to mislead, to the best of my knowledge.

Dated this 6 day of September, 2011.

Merle W. Harvey #911251 C-E-11
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723