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SUPREME COURT
STATE OF WASHINGTON
2/22/2021
BY SUSAN L. CARLSON
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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

S.C. NO.

COA NO. #36570-1-III

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,
Plaintiff,

v.

CHARLES WALTER WEBER JR.
Petitioner.

PETITION FOR REVIEW

PETITION FOR REVIEW

CHARLES WALTER WEBER
Petitioner, pro se
DOC #772708/E-206-1
Monroe Corr. Complex/TRU
16774 170th St. S.E.
P.O. BOX 888
Monroe, WA, 98272-0888

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,
Plaintiff,

v.s.

CHARLES WALTER WEBER JR.
Petitioner.

S.C. NO. _____

COA. NO. 36570-1-III

PETITION FOR REVIEW

I. IDENTITY OF PETITIONER

Mr. Weber asks this court to accept review of the decision designated in Part II of this motion.

II. DECISION

Mr. Weber asks this court to accept review of the following decision or parts

of the decision filed on February 1st, 2021. The decision affirmed the dismissal of the Walla Walla superior court's denial of Weber's CR 7.8 motions filed in 2018.

III. ISSUES PRESENTED FOR REVIEW

The Court of Appeals affirming the perfunctory dismissal of Charles Walter Weber's CR 7.8(b) motion's in 2018, which deprived Weber of the opportunity to effectively argue that his life without the possibility of parole (LWOP) should be reversed due to a post-conviction sentence vacation of one of the prior strike offenses keeps a vacated conviction on his judgment and sentence in Walla Walla superior court case #04-1-00534-2 (Attempted Murder). Keeping Weber's judgment and sentence 'facially invalid.'

IV. STATEMENT OF THE CASE

(Facts and Procedural Background herein incorporated from Attachment 1 pgs. 1-11) Mr. Weber's Judgment and Sentence remains invalid on its face to date.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Judgment and Sentence out of Walla Walla Superior courthouse, case # #04-1-00534-2 remains Facially Invalid to date in violation of the Washington State Constitution, Article I, § 2 & 3, and the Fourteenth Amendment of the U.S. constitution. And there are no laws that would allow a person to serve a life without parole Sentence based on a vacated conviction serving as one of the predicate strike offenses.

Furthermore, the previous finding in

the court of Appeals #36426-7 is contrary to the sentencing laws of the state of Washington, and though the decision was affirmed by this Honourable court #96749-1 this decision should be reevaluated as it conflicts with prior opinions in this court. In re Personal Restraint of Carrier, 173 Wn.2d 791, 272 P.3d 209 (2012) Id. 816. "...[w]e can distill the following principles as to the meaning of the 'later criminal prosecution' exception: (1) a vacated conviction... may not be used as criminal history - I.E., to determine the appropriate punishments for that or any other subsequent offense..."

The Court of Appeals opinion in this matter #36570-1-III and previous opinion cited to #36426-7-III are contrary to the sentencing laws in effect at the time of Weber's conviction and subsequent sentencing hearing in 2005, and RCW 9.94A.345 require that:

"Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current

offense was committed.

ALSO See RCW 10.01.040 regarding repeal or Amendment to the laws:

"No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal."

The laws in effect at the time of Mr. Weber's conviction and sentencing in 2005 were those set forth in In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), State v. Ford, 157 Wn.2d 472 973 P.2d 452 (1999), State v. McKorkle, 88 Wn.App. 485, 500 (973 P.2d 459), and State v. Lopez, 147 Wn.2d 515. which are instructive in the matter that the state does not receive a second opportunity to prove criminal history in collateral proceed-

ings, known as the "No second chance" rule, and because Mr. Weber specifically objected at sentencing to the validity of the judgment and sentence produced by the state, and the state being granted a continuance in order to complete his irregularly late presentence investigation and report—the state must now be held to the existing record it created in 2005, and not be allowed ~~to~~ another opportunity to prove another conviction which did not exist until two years after the conviction at hand, after it was revived from a vacated state of existence in 2007. "A vacated conviction cannot be revived for the purpose of enhancing a persons sentence."

Previous rulings in this matter erroneously find that the state would not be bound by the record it created in 2005, citing RCW 9.94A.525(23) and RCW 9.94A.530(2) and State v. Jones, 182 Wn.2d 1, 11, 338 P.3d 278 (2014) ruling that the laws within RCW 9.94A.530(2) abrogated common law "no second chance" rule but these amendments had not occurred at the time of Mr. Webers sentencing hearing

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on April 15th, 2005. See Former RCW's 9.94A.500(1)(2006); and 9.94A.530(2)(2005). And pursuant to RCW 9.94A.345 and RCW 10.01.040 Weber must be sentenced under the laws in effect at the time of his conviction.

VI. CONCLUSION

Based on the foregoing facts and arguments, this Court should accept review.

Dated this 17th day of February, 2021.

C. Walter Weber Jr.
CHARLES WALTER WEBER JR.
Petitioner, pro se
Doc # 772708/E-206-1
Monroe Correctional Complex/TRU
16774 170th DR. S.E.
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WEBER

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S.E. NO.

COA. NO. 36570-1-III

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,
Plaintiff,

V.S.

CHARLES WALTER WEBER JR.
Petitioner.

STATEMENT OF ADDITIONAL GROUNDS
PETITION FOR REVIEW

CHARLES WALTER WEBER JR.
Petitioner, PRO SE
DOC # 772708/E-206-1
Monroe Correctional Complex/
Twin Rivers Unit
16774 170th DR. S.E.
P.O. Box 888
Monroe, WA, 98272-0888

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,
Plaintiff,

S.C. NO.

COA. NO. 36570-1-III

VS.

CHARLES WALTER WEBER JR.
Petitioner.

PETITION FOR

REVIEW

S.A.G.

I. IDENTITY OF PETITIONER

Mr. Weber asks this court to accept review of the decision designated in Part II of this Motion.

II. DECISION

Mr. Weber asks this court to accept review of the following decision or parts

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of the decision filed on February 1st, 2021, regarding Weber's statement of Additional Grounds addressing his actual innocence which was denied in superior court CrR 7.8 Motions in 2018 in Walla Walla Superior Courthouse case #04-1-00534-2 and affirmed by the court of Appeals #365701-III.

III. ISSUES PRESENTED FOR REVIEW

- (1) Failure to appoint counsel to represent Weber after state had him transferred to Walla Walla for proceedings.
- (2) Denial of Notice of any of the several hearings held and an opportunity to be heard, as due process violation?
- (3) Did the Trial court Abuse its Discretion by not completing a Meaningful Analysis of the Newly Discovered Evidence presented to the court?
- (4) Did the Trial court Abuse its Discretion

When it Denied Weber's access to Discovery Evidence within the court records which prove the actual and factual innocence of Weber?

(5) Did the Trial Court Abuse its Discretion when it failed to complete a Meaningful Analysis in whether a Jury Instructional Error resulted in actual Prejudice to Weber at trial?

(6) Did the Trial Court Abuse its Discretion when it failed to complete a Meaningful Analysis in whether the prosecutor was vindictive in his prosecution of Mr. Weber at trial?

(7) Did the Trial Court Abuse its Discretion By Not Waiving LFO's/Accrued Interest in the matter of Weber's case?

(8) Did the Trial Court Abuse its Discretion by Not completing A Meaningful Analysis of the Evidence presented Proving Weber's Actual Innocence?

IV. STATEMENT OF THE CASE

(Facts and Procedural Background herein incorporated from Attachment 1 pgs. 1-11) Mr. Weber's Judgment and Sentence remains Facially Invalid on its face to date.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Petitioner Charles Walter Weber Jr. is Actually and Factually Innocent of the Crime of Assault in the Second Degree, and can prove that he was vindictively and maliciously prosecuted by and through a false misrepresentation of the evidence by the state at trial, and fraudulent, perjured testimony of an alleged victim who told a different story at a separate trial and in the Furtherance of Justice Review should be granted in this matter accordingly. (S.A.G. Following pgs.)

STATEMENT OF ADDITIONAL Ground 1
Failure To Appoint Counsel

1.1 The court of Appeals finds that because there was no hearing on the merits in this matter that Mr. Weber had no right to the appointment of counsel, citing State V. Robinson, 153 Wn.2d 689, 696-97, 107 P.3d 90 (2005)

1.2 Mr. Weber was transferred out of a Long Term Minimum/medium custody facility in Monroe Washington over to the Washington State Penitentiary in Walla Walla by the State for the sake of being present at the hearings in this matter, so claiming and finding that Mr. Weber's CR 7.8 Motion was without merit, given the fact that the State was requesting resentencing in his response himself is a meritless finding itself.

1.3 After the State had Mr. Weber transferred across the State, Weber was placed in the Intensive Management

unit (IMU) on Washington State's designated "Death Row" (ISDP) tier on August 1st, 2018, and being denied access to adequate legal materials, he filed a Motion for Appointment of Counsel at the first hearing on August 6th, 2018.

1.4 The trial court had a legal duty to appoint counsel to Mr. Weber once his CrR 7.8 motion was found meritorious enough for the State to have him transferred across the state for a resentencing hearing in the matter of the standing 'facially invalid' judgment and sentence.

1.5 The trial court denied Weber appointment of counsel even after the court acknowledged that resentencing was necessary in his ruling of 9/18/18 (see Exh. 2 of initial S.A.G., letter from Judge M. Scott Wolfram).

1.6 "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and

educated laymen has small and some-
times no skill in the science of law,"
Gideon v. Wainwright, 372 U.S. 335,
344-45, 83 S.Ct 792, 9 L.Ed.2d 799
(1963) (quoting Powell v. Alabama, 287 U.S.
45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

1.7 Appointment of counsel was necessary
for Mr. Weber to have his CRB 7.8 motions
properly heard and addressed before the
Court, and because he was not provided
with counsel, it resulted in actual preju-
dice, because the court denied all mot-
ions without doing any meaningful
analysis, leaving Weber's Judgment and
sentence to remain 'facially invalid' to
date, as he was returned to the Monroe
Correctional Complex without being
resentenced as the court had ordered.

1.8 On page 3 and 4 of Weber's state-
ment of Additional Grounds he relays
the transcript of an hearing held on
August 20th, 2018 regarding Weber's
Motion for Appointment of counsel
for which Weber was not brought over
to the courthouse to participate in

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yet the trial court based its decision to not appoint counsel on assumptions that Mr. Weber was pro se in this matter:

The Court: "Frankly, I think he's representing himself." (Pg. 4 SAG)

1.9

CONCLUSION

Mr. Weber served a motion for appointment of counsel upon the court and the state in open court on 8/6/18, and in the face of this motion the court held an hearing on August, 20th, 2018 and excluded Mr. Weber from the hearing, and presumed Weber to be pro se, even in the face of his motion for appointment of counsel, which was an abuse of discretion by the court, especially in the face of Weber's transfer across the state strictly to participate in these proceedings.

STATEMENT OF ADDITIONAL GROUND 2
Denial of Notice & Opportunity To Be Heard

2.1 The Trial Court denied Mr. Weber his constitutional right to due process and abused its discretion when it failed to provide Notice and the opportunity to be heard for any of the scheduled hearings in this matter held on 7/23/18, 8/6/18, 8/20/18, 9/4/18, 10/1/18, 10/15/18, and 1/7/19, and 12/24/18 in violation of Weber's right to due process of law under Article I, Section 2 and 3 of the Washington State constitution, and the 14th Amendment of the U.S. Constitution.

2.2 Many of these hearings Weber was not even made aware of taking place, and the court further denied Weber of his Constitutional Right to even be heard at any of the hearings he was brought over to attend, and in denying Weber appointment of counsel

Mr. Weber had no reason to be transferred across the state and being placed on Death Row.

2.3 Mr. Weber was given No Notice by the state of any of the hearings held in this matter, resulting in him not being given the opportunity to be heard by the court, which has further resulted in actual prejudice to Mr. Weber, and was a violation of his constitutional right to due process of law.

2.4 The Appellate Court is ruling this 2nd ground as though Weber is claiming to have been denied an hearing where a judge has found to dismiss the motion due to there being "no grounds for relief" which is a wrong characterization of his argument. (see pg. 14 of COA opinion).

2.5 But there were hearings scheduled and held without providing Weber with Notice of any one of them

(see 2.1).

2.6 "The fundamental right to due process is notice and the opportunity to be heard." Mathews, 424 U.S. at 333; (905 P.2d 368), Soundgarden v. Eikenberry, 123 Wn.2d 750, 768, 871 P.2d 598 (1994)

2.7 The fundamental fairness of Weber's collateral proceedings in this matter were not met, and the irregularities in the way that the state vindictively hid its intentions from Weber by not giving him notice of the date, time and cause for each of the hearings left Mr. Weber unprepared to present his motions and arguments to the court at every turn, resulting in a fundamentally unfair collateral proceedings.

2.8 The courts have recognized in Tellevik I, 125 Wn.2d 371 that "Due process affords an individual the right to notice and an opportunity to be heard when the government deprives the individual of life, liberty

or property interest". See Tellevik I,
120 Wn.2d at 82-83, Mullane v. Central
Hanover Bank & Trust Co., 339 U.S.
306, 313, 94 L.Ed. 865, 70 S.Ct. 652
(1950).

2.9 Mr. Weber was sentenced to a Life Sentence With No Possibility of Parole in this matter under the Persistent Offender Accountability Act for a fist fight he was in inside of the Washington State Penitentiary, and has ^{been} able to discover an abundance of evidence proving that he was convicted under perjured testimony and a fraudulent misrepresentation of the evidence by the State, so the nature of his conviction and the severity of the deprivation of his due process rights in these proceedings is extremely prejudicial. See Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).

2.10 "Failure to comply with the procedural requirements itself establishes suffic-

ient injury to confer standing." In Dicta In Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7, 112 S.Ct 2130, 119 L.Ed.2d 351 (1992)

2.11 In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 94 L.Ed. 865, 70 S.Ct. 652 (1950), the court held, "If feasible, notice reasonably calculated to inform parties of proceedings which may directly or adversely affect their legally protected interest, must be given."

2.12 Mr. Weber's Constitutional Rights to Due Process under both State and Federal constitutions and established Washington state case law were violated when the state and court failed to provide notice of any of the hearings held in this matter which establishes actual prejudice and these motions should be remanded to the trial court accordingly.

STATEMENT OF ADDITIONAL GROUND 3
Abuse of Discretion In Not Completing
A Meaningful Analysis Whether
Trial Court Had Abused Its Discretion

3.1 The appellate court is attempting to Klump Statement of Additional Grounds 3 & 5-8 into one ineligible Ground under CRB 7.8(b) claiming these issues cannot be addressed due to them being file more than one year after the Judgment and sentence became final, but because the Judgment and Sentence in this matter are not valid on its face these time bars are not applicable to Weber's case.

3.2 Under RCW 10.73.090 and 100 "if such a motion or petition is filed more than a year after the Judgment and Sentence becomes final, it is barred as untimely unless the Judgment and Sentence is invalid on its face, the trial court lacked ~~had~~ jurisdiction, or the petition is based solely on one

or more of the exceptions set forth in RCW 10.73.100 (1)-(6), Benavidez, 160 Wn.App. at 170."

3.3 The Court of Appeals opinion at page 15 cites webers exception in its own opinion, as weber's Judgment and Sentence in this matter remains 'invalid on its face' to date.

3.4 The Trial court abused its discretion by denying weber in 2018-19 of an hearing in this matter, in whether the Trial Court had denied weber's 7.5 Motion in 2005 because weber is 'actually innocent' of the conviction and has submitted an abundance of evidence in the Trial Court to prove his actual innocence in this matter.

3.5 "A Court abuses its discretion when its exercise thereof is manifestly unreasonable or based on grounds that are unteneable; an arbitrary exercise of discretionary authority without regard to what is right and equitable under the circumstances and which is not directed toward

a just result according to the conscience of the court constitutes abuse of discretion." State v. Grant, 10 Wn.App. 468, 519 P.2d 261 (1974).

3.6 The Trial court in Weber's motion for a new trial on April 7th, 2005 abused its discretion after first informing Weber in a motion to represent himself on 12/21/04 that witnesses would be in neighboring cells and an attorney would be more fitted to interview them (Exh. 4, RP 15 at 18-25), yet denying Weber's motion for a new trial on 4/7/05 after learning in Weber's attorney did no investigation, and interview no witnesses (Exh. 5, RP 2-3 at 9-25, 1-3), and even in the face of Weber's own counsel stating: "I think Mr. ~~Weber~~ Makus provided you with assistance of counsel. (Exh. 5, RP 2-3 at 9-25).

3.7 In Weber's CR 7.8 motion filed in this case on 9/27/18 the Trial Court failed to complete a meaningful

Analysis of whether the Trial court had abused its discretion, and now the Court of Appeals denied reviewing whether either denial of the motions was an abuse of discretion, and this Honourable Court should grant review in this matter accordingly, And weber would ask that the court do so.

STATEMENT OF ADDITIONAL GROUND 4
Denial of Discovery Evidence
Proving Actual Innocence

4.1 The Court of Appeals denies Weber relief in this ground based on the false opinion that Weber identifies no legal authority entitling him to discovery in aid of his collateral attack in 2018, but Weber has not only identified legal authority in superior court, but further in the state and Federal constitutions.

4.2 The state has a continuing duty to disclose relevant discovery evidence to a defendant as it is discovered under CRB 4.7 (h)(2), and has no right to withhold what will prove a defendant to have been convicted under fraudulent circumstances and testimony which falls under CRB 7.8 (b)(3).

4.3 The state has been aware of the

fact that the alleged victim in this matter perjured himself at Mr. Weber's trial on 2/16/05 since at least 5/5/05 at the trial of Weber's co-defendant Edgar Armando Perez case #04-1-00533-4 where the alleged victim Mark Holt told a different story about the incident, which brought the state to dismiss the charges against the 3rd co-defendant Joseph Manuel Gallegos, case #04-1-00535-1 who was actually the one accused of the assault.

4.4 The state had a legal obligation to provide defendant/counsel with discovery evidence from any source which would negate defendant's guilt as to the offense charged. CRB 4.7 (a) (III) (3) (4) (c) (d) (2).

4.5 As the current Judgment and Sentence in this matter was and remains inoperable, as it is 'facially invalid' and no judgment is final until a final valid penalty is pronounced, the court should

not have impeded Mr. Weber's investigation into the validity of his own conviction. See CRB 4.7 (b)(1).

4.6 Because the current Judgment and sentence in this matter was and remains invalid on its face and there has been an abundance of Newly Discovered evidence submitted in the trial court record, the trial court abused its discretion by not ordering the testimony of the alleged victim to be produced in 2018 in order for Weber to perfect his 7.8 Motion for relief from judgment under actual innocence doctrine, in violation of Article I Section 2 and 3 of the Washington State constitution and the 14th Amendment of the constitution of the United States, as Weber has a right to equal protection of the law.

4.7 IIR. Weber possessing the testimony of the alleged victim Mark Holt from his own trial negates the entire argument of the State, as the testimony

In the Perez trial should be virtually the same, and would only have benefitted the 7,8 collateral proceedings in 2018 and proven Mr. Weber's actual and factual innocence, and the trial court abused its discretion in denying Weber that testimony and this matter should be remanded for further proceedings and an evidentiary hearing held in the furtherance of justice.

4.8 Mr. Weber has since these matters went under advisement of the court of Appeals gained the testimony of Mr. Holt (alleged victim) from the Perez trial and it is different in facts and substance, and Mr. Weber has filed this testimony from the trial of Perez, case #04-1-00533-4 and had filed under his own case #04-1-00534-2 as of 7/24/20 on the case information "Disposition of events."

4.9 Mr. Weber was convicted under a fraudulent misrepresentation of the evidence by the state, and perjured

testimony of the alleged victim Mark A. Holt, and in the furtherance of justice this case should be remanded to the trial court for further proceedings. As he is actually innocent of the offense he is currently sentenced to Life Without Parole for, in Walla Walla county where his judgment and sentence remains invalid on its face with an Attempted Murder charge serving as the second strike which was vacated March 27th, 2007.

STATEMENT OF ADDITIONAL GROUNDS 5
Failure To Propose Consent Jury
Instructional Error

5.1 The court of Appeals dismissing Weber's argument in the matter of a Jury Instructional Error based on its own announcement of the new rule in Weber III that consent could not be used as a defense by incarcerated persons makes Weber's argument for him.

5.2 In Weber's direct appeal in this matter the court of Appeals created a new rule that consent could not be used as a defense by incarcerated persons. State v. Weber, 155 P.3d 947 (2007).

5.3 But Weber's counsel at trial did not propose a consent instruction to be given by the court as an alternative defense to the assault he was charged with, which was a tenable

alternative defense at the time of Weber's trial in 2005. See Hellriegel v. Tholl, 69 Wash.2d 97, 103, 417 P.2d 362 (1966).

5.4 Because defense counsel relied only on self defense instruction, the jury never had the opportunity to find the defendant not guilty by way of consent, but rather only considered whether he had defended himself or not.

5.5 This ineffectiveness and failure of trial counsel to propose a consent instruction brought the court of Appeals to clearly err when it analyzed consent as Weber's defense, because no consent instruction had been given to the jury to deliberate over. "Defendant's constitutional right to due process was potentially implicated by the alleged erroneous jury instruction, and assuming there was an error in the jury instructions, it could have practical and identifiable consequences in the trial." Bidgley, 174 P.3d 105 (2007).

5.6 The court of Appeals at page 17 of its opinion cites to the opinion of the chief Judge and Supreme Court commissioner from 2008 "that had the consent instruction been given at the trial it would not change the result, since the jury found that weber assaulted Mr. Holt, it rejected his claim of self-defense, and consent is not an available defense," completely ignoring the fact that prior to State v. Weber, 155 P.3d 947 (2007) consent was a tenable alternative defense to assault by two incarcerated persons, which is a practical and identifiable consequence to Weber's Liberty interests as he is serving a Life Without Parole sentence in this matter under a facially invalid judgment and sentence in a case where this instruction could have been given as an alternative defense, and this matter should

be remanded for further proceedings.

5.7 The Trial Court abused its discretion in this matter by not completing a meaningful analysis of the profound affects of this failure of counsel which resulted in a new rule being announced in the appellate court, and remand should be ordered accordingly.

STATEMENT OF ADDITIONAL GROUNDS 6

Vindictive Prosecution

6.1 The Judgment and Sentence in this matter currently remains invalid on its face making the entire conviction open to collateral attack and until a facially valid judgment has been rendered the judgment is open to collateral attack and the Trial Court erred and abused its discretion in the matter of Weber's CRB 7,8 motions filed in 2018 in not conducting a meaningful analysis of the facts presented, and the Court of Appeals has clearly erred by denying Weber review in this matter and not remanding the case for an evidentiary hearing on the merits.

6.2 The State in this matter relied on there being forced used by Weber and his two cell mates to get the alleged

victim, Mark Holt to Weber's cell since the opening statements through the state's closing arguments, yet dismissed the charges against the defendant who was actually falsely accused of not only applying the alleged 'force', but was also falsely accused of launching the first attack.

6.3 The state relied on this force being used by 3 men to get the alleged victim to the defendant's cell in his opening statements (Exh. 13 of SAG, RP 69 at 8-16).

6.4 The State then turned around and dismissed the charges against the co-defendant who was actually the principle accused of applying the force by "shank", and of throwing the first blows. This alleged force was reportedly used by Joseph Manuel Gallegos (Exh. 14 of S.A.G., RP 176-93, testimony of Mark Holt). Also see court record of dismissal of charges against Gallegos, case #04-1-00535-1, Index #45.

The state continued to rely on this force being used throughout the trial against Weber and into closing Arguments (Exh. 15, closing arguments, S.A.G.) yet the state dismissed the charges against the principle defendant who was accused of both the force and the principle assault. Why?

6.5 Why would the state dismiss the charges against the defendant who allegedly applied the force, and who launched the first attack unless the victim told a different story at the Perez trial than that testified to at Weber's own trial?

6.6 Mr. Weber has fought the state tooth and nail to have the testimony of Mark Holt produced from the Perez trial since April of 2018 in order to prove his actual and factual innocence #197982-1 S.C. and finally was able to gain this testimony which proves that Mr. Weber was convicted under a fraudulent

misrepresentation of the evidence by the State and perjured testimony of the alleged victim Mark Holt.

6.7 In the Perez trial Mr. Holt admitted to being the first aggressor in this matter, and if this first aggressor testimony would have been meaningfully analyzed by the trial court in an evidentiary hearing in these CRB 7.8 Motions in 2018 and contrasted with the victim role Holt played in Weber's trial the Trial court would have been inclined to vacate Mr. Weber's conviction accordingly. (See Exh. 1, this Petition for Review, Holt's testimony from Weber's trial, RP 172-174) and contrast with (Exhibit 2, Holt's testimony from Perez trial, RP ~~16~~ 16-18, 20-21).

6.8 The Trial court erred and abused its discretion in not ordering an evidentiary hearing to be held to complete a meaningful analysis of the two contrasting testimonies to learn why the state

had dismissed the charges against the principle defendant in this matter after having used this principle's alleged force and first attack in order to convict Weber as an accomplice to the principle force and assault, knowing that the alleged victim Mark Holt had perjured himself at one or both of the trials of Weber and Perez, and the court of Appeals has clearly erred in not remanding this case back to the trial court for an evidentiary hearing.

69 The current Judgment and Sentence in this matter continues to be facially invalid opening the judgment up to collateral attack and this case should be remanded to the Trial court for further proceedings accordingly.

STATEMENT OF ADDITIONAL GROUNDS 7

The Trial Court Abused Its Discretion By Not Waiving LFO's / accrued Interest

7.1 The Trial court abused its discretion in not waiving Weber's Legal Financial obligations, when the trial court failed to complete any analysis at all in whether the legal standard for imposing these Legal Financial Obligations in the first place. On April 15, 2005.

7.2 The Trial court made no inquiry at the time of Weber's sentencing hearing in whether Weber had the ability or future ability to pay any Legal Financial obligations (see BP 254, Lines 15-24, attached as Exhibit 17 S.A.G.)

7.3 "Before a sentencing court imposes Legal Financial obligations on a defendant, the record must reflect that it considered the defendant's individual financial circumstances and made an individualized inquiry into the

defendant's current and future ability to pay." State v. Morretti, October, 31st 2017 Wash. App. Lexis 2491, Citing State v. Blazina, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). "This also requires the court to consider other factors, such as incarceration and a defendant's other debts when determining a defendant's ability to pay." Blazina, 182 Wn.2d at 839.

7.4 In Weber's case the court did not indicate anywhere that he had the ability to pay or future ability to pay, nor did the court do any analysis at all of his other debts and in the 14 years prior to Weber's motion to vacate LFO's in 2018 the state was able to collect a mere \$200.86 from Weber's meager paychecks to be paid toward the \$2,137.78 imposed, yet a whopping \$8,395.69 had accrued in interest in that time.

7.5 The Trial court in 2018 in regards to Weber's motion to vacate LFO's Abused its discretion by not vacating LFO's and this matter should be re-

remanded to the Trial court accordingly.

STATEMENT OF ADDITIONAL GROUNDS 8

The Trial court Abused Its Discretion By Not completing a Meaningful Analysis of The Evidence Proving Weber's Actual Innocence

8.1 The Trial Court Abused its Discretion in Weber's 2018 Motion for an Evidentiary Hearing to present Newly Discovered Evidence when it denied Weber's Motion because the evidence was Newly Discovered and could not have been discovered before the trial by the due diligence of the defendant.

8.2 Mr. Weber's Motion to prove his actual innocence filed 8/17/18 pursuant to CRB 7.8 (b)(2), ~~was~~ presented a great amount of evidence which was all newly discovered and could not have been discovered prior to his trial in large part because two of the witness testimony

in Weber's co defendant's trial did not exist until 2½ months after Weber's trial had been completed.

8.3 Weber further presented Affidavits and Declarations of many of the other prisoners who witnessed the events leading up to Weber's conviction for Assault, and the Trial court failed to complete a Meaningful Analysis in whether these affidavits and trial testimony in conjunction with the lack of a consent instruction in Weber's Trial which created actual prejudice to Mr. Weber's case.

8.4 The defendant is actually and factually innocent of the crime of Assault in the Second Degree, which he is now serving Life without the Possibility of Parole in prison for under the Persistent Offender Accountability Act (POAA) In re Personal Restraint of Carrier, 263 P.3d 1241 (2011) 172 Wash.2d 917, also Schlup, 513 U.S. at 314, 115 S.Ct. 851, And U.S. v. Pettiford, 612 F.3d 270, 284-85 (4th Cir. 2010).

8.5 The defendant showed by clear and convincing evidence, newly discovered and presented to the court that had it not been for his counsel's failure to complete any investigation or interview any witness's that he would have been acquitted at trial. In re Carter, 263 P.3d 1241 (2011) 172 Wash. 2d 917 at 25.

8.6 The defendant is factually and actually innocent of the crime of assault in the second degree, and the Federal and State constitutional errors involved in his case resulted in the conviction of a man who is factually innocent of the crime of Assault in the Second Degree, when analyzed in conjunction with the fact that Weber's ineffective assistance of counsel failed to propose instruction for consent to be given to the jury. Sawyer, 505 U.S. at 340, 112 S.Ct. 2514.

8.7 Mr. Weber provided an abundance of evidence in his CRB 7.8 Motion in 2018 in the Trial Court to prove his actual and factual innocence, and

established a fair probability that if the trier of facts had been presented with this evidence that they would have entertained a reasonable doubt as to the defendant's guilt. Schlup at 322.

8.8 Because this newly discovered and presented evidence will probably change the result of the trial, and has been discovered since trial, could not have been discovered before trial because the defendant's counsel was ineffective, and is material, exculpatory evidence, and is not merely cumulative or impeaching, and in conjunction with the fact that Weber's attorney did not propose a 'consent instruction' the Trial court abused its discretion by not completing a meaningful analysis of the evidence presented. In re Personal Restraint of Lord, 123 Wn.2d 296, 320, 868 P.2d 835 (1994) (quoting State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 835 (1981)). Also in the interests of justice vacation of this conviction and sentence

Should have at least been considered under a meaningful analysis of the evidence presented BAP 16.4(c)(3).

8.9 The Trial court abused its discretion by not completing a meaningful analysis of the evidence and facts presented to it by the ~~2018~~ CR 7.8 motions in 2018. And the Appellate court has clearly erred by not remanding for further proceeding for the Trial court to do so. Buiz-Sanabria, 184 Wn.2d 632, 362 P.3d 758 (2015). In re Percer, 150 Wn.2d 41, 47-48,

8.10 75 P.3d 488 (2003).

If the facts and evidence presented by Mr. Weber in his 2018 CR 7.8 motions would have been analyzed by the court and been found true at an evidentiary hearing it would have changed the result of the trial, as the jury would have found the defendant not guilty, and an evidentiary ^{hearing} was required when there are facts that if found true would have resulted in a different outcome. Bryan v. Mullen, 535 F.3d 1207 (10th Cir. ²⁰⁰³ ~~1998~~).

Miller v. Champion, 161 F.3d 1249, 1253
(10th Cir. 1998). And because the victim
in this matter has not only recanted
his entire trial testimony, and completely
exonerates the defendant an evidentiary
hearing should have been granted. And
with Weber gaining the testimony of the
alleged victim Mark Holt in this matter
on his own from his codefendant's trial
which is contrary to that given in his own
the conviction must be vacated accord-
ingly at such an hearing. (Exh. 1 & 2) ~~37A.02~~
Jones v. Woods, 114 F.3d 1002, 1010
(9th Cir. 1997).

8.11 The ends of justice may be satisfied
whenever a petitioner raises new points
of fact and law that were not or could
not have been raised in the principle
action to the prejudice of the defend-
ant. In re Pers. Restraint of Gentry,
137 Wn.2d 378, 388, 972 P.2d 1250
(1999).

8.12 Because the defendant has developed
a factual claim through many affidavits

Declarations, Recantation, and trial testimony contrary to that in his own evidentiary hearing was, and remains to be required in order to prove the actual and factual innocence of the defendant. Insy Xienmay v. Morgan, 403 F.3d 657, 670 (9th Cir. 2005); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

8.13 The petitioner is entitled to an evidentiary hearing if he presents a meritorious claim and he exercised reasonable diligence in developing the factual record in State proceedings. Williams v. Taylor, 529 U.S. 420, 434-371, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). This newly discovered and presented evidence is very relevant. The Court must assess the probative force of the newly discovered and presented evidence in connection with the evidence adduced at trial. House v. Bell, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). An evi-

dentiary hearing is needed to determine the facts. Wingo v. Wedding, 418 U.S. 477 94 S.Ct. 2842, 165 L.Ed.2d 879 (1974).

8.14 If such facts are in dispute, they should be fleshed out at an evidentiary hearing. In the Matter of Pers. Restraint of Yates, 180 Wn.2d 53, 321 P.3d 1195, 1205 fn.3 (2014).

8.15 A new trial is warranted when newly discovered and presented evidence by the defendant was erroneously kept from the defendant that he could have argued at trial or in direct appeal, and the defendant exercised due diligence and still could not have discovered the evidence before trial. State v. Hawkins, 181 Wn.2d 170, 332 P.3d 408 (2014).

8.16 The Trial court Abused its Discretion in not ~~completing a~~ ordering an evidentiary hearing and ^{not} completing a Meaningful Analysis of the evidence in this matter, and the court of

Appeals clearly erred in not remanding this matter back to the Trial court to do so, and this Honourable Court should remand this matter back to the Trial court to complete an evidentiary hearing to do so accordingly (see Exh. 19, Motion For New Trial, together with affidavits submitted ^{SAG.}) Also the contrary testimonies submitted (Exh. 1 & 2, Petition for review),

8.17

CONCLUSION

AS the current judgment and sentence in this matter remains facially invalid to date there is no final judgment in this matter, and the Trial court has Abused its discretion and court of Appeals has clearly erred, this matter should be remanded to the Trial court for further proceedings accordingly.
B.C.W 10,73.100(1)-(6).

WEBER

Petition For Review-38

FILED
FEBRUARY 1, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	
)	No. 36570-1-III
Respondent,)	
)	
v.)	
)	
CHARLES WALTER WEBER,)	UNPUBLISHED OPINION
)	
Appellant.)	

SIDDOWAY, J. — Ten years after his judgment and sentence for a prison assault became final, and after dismissal of one personal restraint petition as frivolous, Charles Weber filed a series of motions in the trial court in an effort to obtain a new trial. We affirm the trial court’s dismissal of the motions.

FACTS AND PROCEDURAL BACKGROUND

Prior criminal proceedings

In February 1999, Charles Weber entered a plea of guilty of assault in the second degree in King County Superior Court and was sentenced to a term of total confinement of 29 months.

In July 2003, he was found guilty in a jury trial of attempted murder in the second degree and assault in the first degree, among other charges, again in King County. It was agreed by the parties that convictions on both the attempted murder and assault charges

violated double jeopardy, so the trial court vacated the conviction for the assault charge. It was the State's position that since the assault charge carried the longer standard sentence range, it was the conviction that should stand. The State sought review of that issue by the Washington Supreme Court.

A little over a year after he was sentenced for his 2003 crimes, while serving his time at the Washington State Penitentiary, Mr. Weber was charged with committing a second degree assault of another inmate. Mr. Weber and the other inmate, Mark Holt, became involved in a dispute during a prison softball game. The following day, after the inmates finished eating lunch, Mr. Weber and Mr. Holt fought in Mr. Weber's cell. As later summarized by this court:

There was a dispute as to whether Mr. Holt went to Mr. Weber's cell voluntarily to fight him, or whether Mr. Holt was taken there by force. Mr. Holt insisted that the inmates cornered him in the cell and began beating him.

....

... At trial, Mr. Weber admitted to fighting with Mr. Holt. He also admitted that he struck the first blows. However, Mr. Weber stated that Mr. Holt had agreed to come to Mr. Weber's cell to fight and that the two had engaged in mutual combat.

State v. Weber, 137 Wn. App. 852, 855-56, 155 P.3d 947 (2007) (*Weber III*). Mr. Weber was found guilty following a jury trial. Because the prison assault was his third most serious offense, Mr. Weber was sentenced in April 2005 as a persistent offender, to life in prison without the possibility of parole. After his motion for a new trial was denied, he appealed.

Two months after the Walla Walla Superior Court imposed the life without parole sentence for his 2004 prison assault, Division One of this court decided the appeal of Mr. Weber's sentence for his 2003 crimes. It agreed with the State in a published decision that when double jeopardy requires vacating one of two convictions, the conviction with the shorter standard sentence is the "lesser offense" that should be vacated. *State v. Weber*, 127 Wn. App. 879, 888, 112 P.3d 1287 (2005) (*Weber I*). The Supreme Court accepted review, and affirmed. *State v. Weber*, 159 Wn.2d 252, 269, 149 P.3d 646 (2006) (*Weber II*). In March 2007, the King County Superior Court entered an amended judgment and sentence that reinstated Mr. Weber's conviction for first degree assault at the same time it vacated the conviction for attempted second degree murder.

A month later, this court decided Mr. Weber's appeal of his conviction for the prison assault. Mr. Weber had complained in part that he received ineffective assistance of counsel when his trial lawyer failed to interview two witnesses. One witness, Jermine Mercado, was a friend and cellmate of victim Holt. In an affidavit offered as support when Mr. Weber moved for a new trial, Mr. Mercado stated that Mr. Holt had been untruthful in his account of the assault and had been a willing participant in the fight.

In a published opinion, this court agreed that Mr. Weber might have received deficient representation when his trial lawyer failed to interview the witnesses without a satisfactory explanation. *Weber III*, 137 Wn. App. at 858. Turning to the actual prejudice required to demonstrate ineffective assistance of counsel, however, this court

observed that consent—while historically a defense to assault—was now disfavored as a defense, at least in some contexts. This court held as a matter of first impression that consent is not a defense to a charge of second degree assault between two incarcerated persons. *Id.* at 860. Since Mr. Weber could not demonstrate the prejudice prong of his ineffective assistance of counsel claim and presented no other error, his conviction was affirmed. Mr. Weber sought review by the Supreme Court, which was denied. This court issued its mandate in April 2008.

In a timely personal restraint petition (PRP) filed in November 2008, Mr. Weber raised a new claim of ineffective assistance of counsel. *See Order Dismissing Pers. Restraint Petition, In re Pers. Restraint of Weber*, No. 27530-2-III (Wash. Ct. App. July 2, 2009). With supporting witness affidavits, including an affidavit from Mr. Holt recanting his trial testimony and asserting that he, rather than Mr. Weber threw the first punch, Mr. Weber argued that trial counsel failed to warn him of problems presented by pursuing a trial strategy of consent. The chief judge of this court dismissed the PRP in July 2009, holding that it was not unreasonable for Mr. Weber’s trial lawyer to defend on a theory of consent and self-defense. The chief judge observed that “[a]lthough Mr. Weber admitted he threw the first punch, he claimed that the other inmate charged into his cell with the intent to fight,” and “landing the first blow might be viewed as a reasonable way to avoid injury.” *Id.* at 3. Our chief judge also observed that consent had traditionally been considered a defense to assault, and Mr. Weber’s trial lawyer

“reasonably relied on traditional consent cases and did not anticipate the ruling in *Weber* [III].” *Id.* at 4. The dismissal order observed that none of Mr. Weber’s supporting affidavits were helpful to him, because most simply supported the theory of consent rejected on appeal and Mr. Holt’s new claim that he threw the first punch “contradicts Mr. Weber’s own testimony and therefore is insufficient to show prejudice.” *Id.* at 4 n.1.

Mr. Weber sought discretionary review of dismissal of his PRP by the Supreme Court, whose commissioner denied review in October 2009. Ruling Denying Review, *In re Pers. Restraint of Weber*, No. 83398-2 (Wash. Oct. 16, 2009). The commissioner’s ruling agreed that the affidavits filed by Mr. Weber in support of his PRP were unhelpful because they merely “support the untenable theory that the victim entered the fray voluntarily and thus consented to the assault. And the victim recantation is highly dubious because it contradicts Mr. Weber’s claim that he, and not the victim, threw the first punch.” *Id.* at 2.

Current proceedings

In July 2018, Mr. Weber filed a pro se “CrR 7.8 Motion for Evidentiary Hearing” in the Walla Walla County Superior Court, arguing that when his 2003 conviction for attempted murder was vacated, it “voided” his persistent offender status and rendered his judgment and sentence facially invalid. Clerk’s Papers (CP) at 71-73.

On August 6, Mr. Weber was transported to superior court for what had been set as a hearing on his CrR 7.8 motion. At the outset of the hearing, the State explained that

it had drafted but not filed a response to the motion because it was awaiting a certified copy of the original and amended King County judgment and sentences for the 2003 convictions, which it was sure the court would want to see. It offered a response brief for filing during the hearing, in which it argued that because Mr. Weber's 2003 conviction for first degree assault was reinstated when his attempted second degree murder conviction was vacated, he had two most serious offense convictions when sentenced in Walla Walla. The State suggested that the hearing be continued so that Mr. Weber would have a chance to reply. The court, the Honorable Scott Wolfram, agreed. Mr. Weber took the opportunity at the hearing to serve and file the following additional pro se motions:

- August 6, 2018 Motion for Continuance and Transfer to Walla Walla County
- August 6, 2018 Motion for Appointment of Counsel
- August 6, 2018 Motion for Transcripts from Co-defendant's Trial be Produced by the State

He later filed the following additional motions:

- August 16, 2018 Motion for Appointment of Counsel (Amended)
- August 16, 2018 Motion for Continuance of Hearing
- August 16, 2018 Amended Motion to Produce Transcripts of Co-defendant's Trial under CrR 7.8(b)(2)
- August 22, 2018 Motion to Submit Evidence of Actual Innocence 7.8 (b)(2)

Some of these motions revived Mr. Weber's complaints that when tried for the prison assault, available evidence that Mr. Holt was a willing combatant was not presented. Mr. Weber also argued that the State's case against him was substantially premised on its contention that his cellmates, Joseph Gallegos and Edgar Perez, forced Mr. Holt into the cell where Mr. Holt was assaulted, yet Mr. Perez was tried separately for his involvement and was acquitted, and the charges against Mr. Gallegos were later dropped. He argued that newly discovered evidence demonstrated his actual innocence, entitling him to a new trial.

On August 30, the State filed a response to these new arguments. It argued that Mr. Weber had relied on affidavits challenging the evidence presented in his trial in his 2005 motion for a new trial of the prison assault charge, his appeal, and his 2008 PRP; that none of his evidence was newly discovered; and that this court had found the affidavits on which Mr. Weber relied unhelpful to his legal arguments.

On September 4, Mr. Weber was again transported to superior court for a hearing. When he explained that he had filed a reply brief that he had sent out the night before, Judge Wolfram said he would take Mr. Weber's motions under advisement and rule after reviewing Mr. Weber's reply.

On September 19, Judge Wolfram sent a letter to Mr. Weber and the deputy prosecuting attorney assigned to the matter, stating he had reviewed "the pending motions filed by Mr. Weber," the parties' briefing, and the cases cited and was going to

deny “all motions filed by Mr. Weber,” “basing its decision on the State’s briefing.” CP at 359. He directed the State to present an order.

Before entry of an order, Mr. Weber moved on September 27 for reconsideration. Between September 27 and October 3, he filed the following additional motions:

- | | |
|--------------------|--|
| September 27, 2018 | Motion to Terminate Legal Financial Obligations |
| October 3, 2018 | Motion to Stay Previous Motion for Reconsideration Pending Receipt of Official Order |
| October 3, 2018 | Motion to Produce Transcripts of Mark A. Holt from Trial of Perez |
| October 3, 2018 | Motion for a New Trial Under CrR 7.8, Additional Grounds for Relief |

On October 15, 2018, Mr. Weber was transported to superior court for presentment by the State of the order it had been directed to prepare. Judge Wolfram signed the proposed order denying motions for new trial and for evidentiary hearing and for other relief.

On October 19, Mr. Weber filed a pro se petition for writ of habeas corpus ad subjiciendum with the Walla Walla County Superior Court. See Initiation Petition, *In re Pers. Restraint of Weber*, No. 36426-7-III (Wash. Ct. App. Nov. 9, 2018). Unlike prior motions he had filed under the case number for the prison assault prosecution, he did not include a case file number on this petition. It was reviewed by the Honorable John Lohrmann, who entered an order transferring it to the Court of Appeals for consideration

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as a PRP. The matter was opened in this court as a PRP and was assigned case no. 36426-7-III.

Returning to the prison assault case, on October 24, Mr. Weber filed a motion to order response from the State and schedule motion hearing, asking that a response be ordered to his legal financial obligation (LFO) and new trial motions filed with the court on October 3. The motion also complained that he had received no State response to his motion for the production of transcripts of the testimony of Mr. Holt in the Perez trial.

The State filed a response to Mr. Weber's motion to terminate his LFOs on November 6. Also on November 6, Mr. Weber filed a motion to vacate judgment, in which he complained that the State had failed to give him advance notice of the August 6, September 4, and October 15 hearings on his motions. He also filed motions for an order of indigency, an order authorizing appeal at public expense, and appointment of counsel.

The State did not respond to many of the motions Mr. Weber filed after the motions dismissed on October 15. On December 24, when Mr. Weber's case was evidently on the court calendar (Mr. Weber was not present) the prosecutor explained to Judge Wolfram that the later motions "were the same nature, same issues" and "further responses . . . would have been acts of futility on the State's behalf." Report of Proceedings (RP) (Dec. 24, 2018) at 13. At the trial court's direction that the State file a "brief paragraph response to what you just indicated," the State filed a response to what it

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characterized as Mr. Weber's "subsequent motions" on December 31. RP (Dec. 24, 2018) at 13; CP at 425-26.

On January 4, 2019, the acting chief judge of this court entered an order in case no. 36426-7-III, the CrR 7.8 motion that had been transferred on the order of Judge Lohrmann. The order dismissed Mr. Weber's PRP as frivolous. It explained that since Mr. Weber filed his petition more than a year after his judgment and sentence became final, it was untimely unless it fell within an exception to the timeliness requirement. Order Dismissing Pers. Restraint Petition, *In re Pers. Restraint of Weber*, No. 36426-7-III (Wash. Ct. App. Jan. 4, 2019). It recognized that Mr. Weber claimed his sentence was facially invalid and the sentence imposed was in excess of the court's jurisdiction under RCW 10.73.100(5). It held, however, that since Mr. Weber's 2003 first degree assault conviction was reinstated at the same time his 2003 attempted murder conviction was vacated, he "still qualifies as a persistent offender under RCW 9.94A.030(38)" and "[t]he sentence imposed is not unlawful." Order, *Weber*, No. 36426-7-III, at 3-4.

On January 7, 2019, a hearing was conducted by Judge Wolfram at which the State and Mr. Weber were present. The prosecutor reminded the trial court that it had previously denied Mr. Weber's pro se motions and, while Mr. Weber had since filed additional motions, the prosecutor argued, "We would be asking the Court to deny the subsequent motions because they are . . . essentially the same nature and scope of his previous motions." RP (Jan. 7, 2019) at 15. Judge Wolfram commented that a decision

had also just come down from the Court of Appeals dismissing Mr. Weber's PRP[®] as frivolous. Judge Wolfram entered an order dismissing Mr. Weber's "motions for relief made in September, October and November of 2018, based on those motions being repetitive in nature and scope of his previous motions which this Court denied formally on October 15." CP at 427. Mr. Weber timely appealed. An order of indigency was entered by the trial court and this court appointed counsel.

Mr. Weber timely sought discretionary review of this court's order dismissing his second PRP.

ANALYSIS

A motion for relief from judgment under the superior court criminal rule, like a personal restraint petition, is subject to RCW 10.73.090 (one year time limit), .100 (exceptions to the time limit), and .140 (subsequent petitions). CrR 7.8(b). If such a motion or petition is filed more than a year after the judgment and sentence became final, it is barred as untimely unless the judgment and sentence is invalid on its face, the trial court lacked competent jurisdiction, or the petition is based solely on one or more of the exceptions set forth in RCW 10.73.100(1)-(6). See *In re Pers. Restraint of Benavidez*, 160 Wn. App. 165, 170, 246 P.3d 842 (2011) (addressing timeliness of a petition).

Mr. Weber's counsel on appeal makes two assignments of error: that the trial court's "perfunctory dismissal" of Mr. Weber's CrR 7.8(b) motion deprived him of the opportunity to effectively argue that his life without parole sentence should be reversed,

and that his constitutional right to due process was violated when the State failed to provide notice that at the time of sentencing, it would seek a sentence of life without parole. Br. of Appellant at 1. We address the alleged errors in the order presented.

I. MR. WEBER'S PERSISTENT OFFENDER SENTENCE IS NOT INVALID

Whether Mr. Weber's life without parole sentence as a persistent offender became unlawful when his 2003 conviction for attempted murder was vacated was squarely presented in his PRP that this court dismissed as frivolous in our case no. 36426-7-III. At the time Mr. Weber filed his opening brief in this appeal, the Supreme Court had not yet acted on his motion for discretionary review of the PRP's dismissal, but the Supreme Court commissioner entered a ruling denying review in July 2019. Largely paralleling our acting chief judge's analysis, the commissioner stated:

[R]egardless of the vacation of Mr. Weber's attempted second degree murder conviction, he still has two prior convictions for strike offenses—one for first degree assault and one for second degree assault—making him a persistent offender in relation to his current conviction. Former RCW 9.94A.030(32)(a) (2002). While technically Mr. Weber's current life sentence is invalid to the extent it rests in part on a vacated prior conviction, any facial error does not prejudice Mr. Weber because under his correct criminal history he remains a persistent offender for which a sentence of life without release is required. He therefore is not entitled to sentencing relief. See *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 506, 301 P.3d 450 (2013) (even where facial error is shown, petitioner is entitled to relief only if petitioner was actually and substantially prejudiced by constitutional error or a nonconstitutional error resulted in a complete miscarriage of justice).

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Ruling Denying Review, *In re Pers. Restraint of Weber*, No. 96749-1, at 2-3 (Wash. July 24, 2019) (footnotes omitted). A motion to modify the commissioner's ruling was denied. Order, *In re Pers. Restraint of Weber*, No. 96749-1 (Wash. Oct. 3, 2019).

Mr. Weber's counsel continues to press the argument that when Mr. Weber's attempted murder conviction was vacated, it eliminated the basis for his life without parole sentence despite our acting chief judge's order and the Supreme Court commissioner's ruling denying review. Neither he nor the prosecutor has briefed the significance (or not) of those rulings on the identical issue raised in this appeal. We assume without deciding that this panel is not bound by our acting chief judge's decision or the reasoning of the Supreme Court commissioner in denying review. We agree with and adopt the reasoning of both decisions, however. Mr. Weber may have demonstrated an error in the 2005 judgment and sentence. But in this collateral attack, he is required to do more than that; he is required to demonstrate that his sentence is unlawful. He has not demonstrated that it is.

II. WE WILL NOT REVIEW THE NEW DUE PROCESS CHALLENGE RAISED FOR THE FIRST TIME ON APPEAL

The second error assigned by appointed counsel is a new issue not raised in the trial court nor, for that matter, in any of Mr. Weber's motions in the trial court: Mr. Weber argues his sentence must be vacated because he was not given notice, when

prosecuted for his prison assault, that at the time of sentencing the State would seek a sentence of life without parole. We decline to consider the issue. *See* RAP 2.5(a).¹

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Weber raises eight. Five of the eight suffer from a common infirmity and are considered together.

SAG 1: Failure to appoint counsel. Mr. Weber contends the trial court abused its discretion by not appointing counsel to represent him in connection with his CrR 7.8 motions. A defendant does not have a right to counsel when his CrR 7.8 motion fails to establish grounds for relief and is dismissed without a hearing on the merits. *State v. Robinson*, 153 Wn.2d 689, 696-97, 107 P.3d 90 (2005). The right to counsel arises only after the court determines the motion has merit. *Id.* Because there was no hearing on the merits, Mr. Weber did not have a right to counsel.

SAG 2: Denial of hearing. Mr. Weber contends the trial court abused its discretion when it failed to provide notice and the opportunity to be heard on his CrR 7.8 motions. “If [a CrR 7.8 motion] does not establish grounds for relief, the judge may dismiss the petition or deny the motion without a hearing on the merits.” *Id.* at 696.

¹ The State invites us to reach the issue, arguing that the Washington Supreme Court rejected the same argument in *State v. Crawford*, 159 Wn.2d 86, 96, 147 P.3d 1288 (2006) (holding that the Persistent Offender Accountability Act, RCW 9.94A.570, does not require notice nor is notice constitutionally required).

SAG 4: Denial of discovery. Mr. Weber complains that he was denied discovery that he sought in aid of his collateral attack. He cites CrR 4.7, which appears in Title 4 of the Superior Court Criminal Rules, entitled “Procedures Prior to Trial.” Mr. Weber identifies no legal authority entitling him to discovery in aid of a collateral attack in 2018.

SAG 3 and 5 through 8: Matters ineligible for relief under CrR 7.8(b). “[T]ime and manner” limitations are imposed on collateral review, including review requested by a motion under CrR 7.8(b). *State v. Brand*, 120 Wn.2d 365, 369, 842 P.2d 470 (1992). As earlier observed, a motion for relief from judgment under the superior court criminal rule, like a personal restraint petition, is subject to RCW 10.73.090 and .100. If such a motion or petition is filed more than a year after the judgment and sentence became final, it is barred as untimely unless the judgment and sentence is invalid on its face, the trial court lacked competent jurisdiction, or the petition is based solely on one or more of the exceptions set forth in RCW 10.73.100(1)-(6). *Benavidez*, 160 Wn. App. at 170.

A motion for relief from judgment under the rule is also subject to RCW 10.73.140. CrR 7.8(b). That statute provides that “[i]f a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition.” RCW 10.73.140. Although the statute literally applies only to the filing of a subsequent PRP, the Supreme Court held in *Brand* that RCW 10.73.140 “appl[ies] by

analogy” to CrR 7.8(b) motions, and “[t]o hold otherwise would thwart the legislative purpose by allowing repetitious collateral attacks in the trial courts in contravention of the policy limiting collateral review.” 120 Wn.2d at 370.

A collateral attack by motion in the trial court is also subject to the general prohibition against successive attacks that are embodied in the doctrines of claim and issue preclusion. *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 497, 20 P.3d 409 (2001).

Mr. Weber’s motions in the trial court were brought many years after his judgment and sentence for the prison assault became final, and after his 2008 PRP. The remaining grounds identified in his SAG fail under the time and manner limitations on collateral review.

Mr. Weber’s challenge to the trial court’s refusal to revisit the denial of his 2005 motion for a new trial (SAG 3), a denial that was affirmed on appeal, is barred by law of the case doctrine.

He contends that his trial lawyer provided ineffective assistance of counsel by failing to request a jury instruction on his defense of consent. He argues in SAG 5 that if the jury had been instructed on the defense of consent, he would have been acquitted, avoiding this court’s announcement of the new rule in *Weber III* that the defense is unavailable to incarcerated persons. This contention fails on multiple grounds. Mr. Weber makes only a bald, conclusory argument that the defense, which failed even

though argued to the jury, would have succeeded if addressed by an instruction. He provides no “good cause” why this claim of ineffective assistance of counsel was not raised in his 2008 PRP. He does not identify effective relief that we can grant, since the unavailability of the defense is now settled and would control in the event of a new trial.

Mr. Weber challenges the denial of his motion for a new trial based on the evidence that led to the acquittal and dismissal of charges against his cellmates, characterizing it as “evidence newly-discovered.” (SAG 6 and 8). “[I]n the context of ‘newly discovered evidence,’ a collateral attack is based on ‘similar grounds’ unless the current evidence is significantly different in either quantum or quality from the evidence presented in a previous collateral attack.” *Brand*, 120 Wn.2d at 370. The State demonstrates that the evidence on which Mr. Weber relies does not meet this standard. And as the chief judge and Supreme Court commissioner observed in addressing Mr. Weber’s 2008 PRP, it also would not change the result, since the jury found that Mr. Weber assaulted Mr. Holt, it rejected his claim of self-defense, and consent is not an available defense.²

Mr. Weber contends the trial court abused its discretion when it denied his motion to vacate his LFOs (SAG 7) because there was inadequate inquiry into his current or

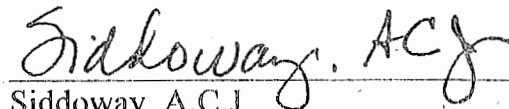
² Mr. Weber represents in the motions below that in his 2005 trial, he “took the blame for his own fight from the beginning, excluding Mr. Perez and Mr. Gallegos as being involved.” CP at 180.

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future ability to pay. But *Blazina*³ error is not exempt from the one-year time bar for collateral attacks. *In re Pers. Restraint of Flipppo*, 187 Wn.2d 106, 111, 385 P.3d 128 (2016); RCW 10.73.100(6).


Dismissal of Mr. Weber's 2018 motions is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Siddoway, A.C.J.

WE CONCUR:


Fearing, J.


Korsmo, J.P.T.⁴

³ *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

⁴ Judge Kevin M. Korsmo was a member of the Court of Appeals at the time argument was held on this matter. He is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

WASHINGTON STATE SUPREME COURT

<u>STATE OF WASHINGTON</u>)	NO. <u>36570-1-III</u>
)	
<u>Plaintiff</u> ,)	DECLARATION OF
)	MAILING
v.)	
)	
<u>CHARLES WALTER WEBER</u> ,)	
)	
<u>Petitioner</u> ,)	
)	

I, Charles Walter Weber, hereby declare:

1. I am over the age of eighteen years and I am competent to testify herein.

2. On the below date, I caused to be placed in the U.S. Mail, first class postage prepaid, 3 envelope(s) addressed to the below-listed individual(s):

Washington Supreme Court
Ronald Carpenter, clerk
Temple of Justice
P.O. Box 40929
Olympia, WA. 98505-0929

Court of Appeals Div. III
Bence S. Townsley, clerk
500 N. Cedar Street
P.O. Box 2159
Spokane, WA. 99201-2159

Walla Walla County Pres. Atty.
James L. Nagie
240 West Alder, Ste #201
Walla Walla, WA, 99362

3. I am a prisoner confined in the state of Washington Department of Corrections ("DOC"), housed at the Monroe Correctional Complex ("MCC"), P.O. Box 888, Monroe, WA 98272, where I mailed the said envelope(s) in accordance with DOC and MCC Policy 450.100 and 590.500. The said mailing was witnessed by one or more correctional staff. The envelope contained a true and correct copy of the below-listed documents:

1. Motion to Allow Expanded Petition
2. Petition For Review of Appellate Decision
3. of Withdraw Counsel's Appellate Brief
4. Separate Petition For Review of Decision
5. on Statement of Additional Grounds
6. _____

4. I invoke the "Mail Box Rule" set forth in GR-3.1—the above listed documents are considered filed on the date that I deposited

them into DOC's legal mail system.

5. I hereby declare under pain and penalty of perjury, under the laws of state of Washington, that the foregoing declaration is true and accurate to the best of my ability.

DATED this 17th day of February, 2021.

C. Walter Weber Jr.
(Print) Charles Walter Weber Jr.
Petitioner, *Pro se.*
DOC# 772708, Unit E-206-1
Monroe Correctional Complex
(Street address) 16774 170th DR. S.E.
P.O. Box 888
Monroe, WA 98272

Exhibit 1

1 MARK HOLT, called as a witness in
2 behalf of the Plaintiff,
3 being first duly sworn by
the Court, testified as
follows:

4 DIRECT EXAMINATION

5 BY MR. ACOSTA:

6 Q Sir, would you please state your name and spell your last
7 name for the record?

8 A Mark Holt, H-o-l-t.

9 Q And where are you currently residing?

10 A Washington State Penitentiary.

11 Q Okay. Were you there September 2 and 3 of last year?

12 A Yes.

13 Q What part of the prison were you housed in at that time?

14 A 6 wing.

15 Q 6 wing, which cell?

16 A E-3.

17 Q Okay. E tier, cell 3?

18 A Yeah.

19 Q Okay. At that time, did you know any inmates by the name
20 of Charles or Christopher Weber?

21 A Yes.

22 Q Okay. How long had you known them, if at all?

23 A Not long.

24 Q Okay. Any association with them by yourself personally
25 or --

1 A. No.

2 Q Other than that they reside there as well?

3 A No, no.

4 Q Okay. Do you recall where -- Prior to anything happening
5 on September 2nd, did you know where they lived?

6 A Yeah.

7 Q Okay. Were they on the same tier as you?

8 A Yes.

9 Q Okay. On September 2, would you tell the jury what you
10 were doing and kind of make it specific? Are you allowed
11 to play sports, you know, have recreation there at the
12 prison?

13 A Yes.

14 Q On the 2nd, were you engaging in some recreational activity
15 that day?

16 A Yes.

17 Q What was that?

18 A Softball.

19 Q Okay. And who was playing it; inmates, officers?

20 A Inmates.

21 Q Okay. Just strictly inmates?

22 A Yeah.

23 Q Okay. And the teams, you know, is it just first come first
24 serve, you get on teams or are they pretty structured
25 teams?

1 A You make your own teams.

2 Q Okay. That day you were playing softball in the morning,
3 afternoon?

4 A In the afternoon.

5 Q Okay. Would you tell the jury what happened in particular
6 with you involving another inmate by the name of
7 Christopher Weber?

8 A Well, he -- he ran me over while we was playing baseball.
9 I was going for a double play. He ran me over. And then I
10 talked to the umpires and they said that they -- that they
11 ain't going to do it, ain't going to call it like it was
12 supposed to be called, so I --

13 Q Let's back up. So you were playing out in the field?

14 A Yeah.

15 Q What position?

16 A Shortstop.

17 Q Okay. When you say Christopher Weber ran you over, he was
18 running the bases then?

19 A Yeah.

20 Q Okay. Okay. So you talked to the umpires, nothing
21 happened. What happened next?

22 A Well, I had said something out of line, but I apologized at
23 the end of the game. I apologized and they said that you
24 can't apologize for that.

25 Q Okay. Let's backup. Okay. You said that you said

1 something out of line. What did you say and who to?

2 A I said, "I'll just throw up an elbow if he runs me over
3 again."

4 Q Who did you say that to?

5 A I just said it out loud.

6 Q Okay. Oh, to nobody in particular?

7 A No.

8 Q Loud enough for anybody to hear there in the field?

9 A Yeah.

10 Q Okay. Any response to that at that time?

11 A Yeah.

12 Q What was the response?

13 A Chris Weber said, "Go ahead and try --

14 MR. MAKUS: Your Honor, I'm going to object as to what
15 Chris Weber said as being hearsay.

16 THE COURT: What is it being offered for?

17 MR. ACOSTA: To lay a foundation of why what happened on
18 the following day happened.

19 THE COURT: It's not being offered for the truth of the
20 matter?

21 MR. ACOSTA: No.

22 THE COURT: I'll overrule the objection. Go ahead.

23 Q Okay. What was the response?

24 A He said you -- he said, "Go ahead and try it. Go ahead and
25 try to throw up an elbow."

1 Q Okay. Anything further prior to your apology then --
2 A No.
3 Q -- on that line?
4 A No.
5 Q Okay. When and where did you attempt this apology?
6 A Right after the game on the field.
7 Q Okay. And --
8 A On the baseball field.
9 Q Okay. Did you approach him or were you two in the same
10 vicinity, how did that happen? Explain.
11 A We was all on the field together. I walked over and said,
12 "Hey, man, I apologize. I was out of line." And they
13 said --
14 Q Who is they? Is it one person saying or several people
15 saying this?
16 A It's two people.
17 Q Okay. Who were the two people?
18 A Charles Weber and Chris Weber.
19 Q Okay.
20 A They said, "You can't. You can't." They said, "You can't
21 apologize for something like that."
22 Q Okay. Was that all they said?
23 A Well, and then they started talking among themselves.
24 Q Okay. Did you do anything further at that time?
25 A No. I walked away.

1 Q Okay. The following day, I'm going to start around the
2 noon hour. Did you have lunch that day?
3 A Yes.
4 Q When is lunch for you?
5 A Well, it's rotating every day so --
6 Q Okay. When was lunch for you that day?
7 A Around 12 o'clock.
8 Q Okay. When did you finish lunch?
9 A Around 12:15.
10 Q Okay. What did you -- And when you eat lunch, are you in
11 a big cafeteria or --
12 A Yes.
13 Q With other inmates?
14 A Yes.
15 Q Okay. When you finished lunch, what did you do?
16 A When I finished lunch, I went back to the unit.
17 Q Okay. To your cell?
18 A Well, I was going to go to my cell.
19 Q Okay. Did you go by yourself or when you left the lunch
20 hall or --
21 A Yeah, I was by myself.
22 Q Okay.
23 A From my house.
24 Q Okay. What I want you to do is describe now, you know,
25 what happened when you left the lunch hall.

1 A I was walking back to the unit. When I got up on the
2 beginning of the tier where I live, Weber, Charles Weber
3 came up with his two cellies and they told me that I'm
4 going to their house no matter what.

5 Q Okay. And when you say cellies, that's a term for
6 cellmates?

7 A Yeah.

8 Q Okay. And when you say house, is that the prison term for
9 your cell?

10 A Well, yeah.

11 Q House is your cell?

12 A Yes.

13 Q Where was it that they confronted you or met you?

14 A Right at the beginning of the tier.

15 Q Okay. Where the number one cell would be?

16 A No. It's right outside number one cell on the tier, then
17 right outside you stand there and wait for them to open the
18 gate to get onto the tier.

19 Q Okay. Okay. So you are before you get to the cells then,
20 the main landing, is that another term for it or --

21 A Yeah.

22 Q Showing you what has been admitted as Exhibit Number 21, do
23 you recognize what that is supposed to be showing?

24 A Yeah. It's right -- you come in right there.

25 Q Okay.

1 A Up at the top. Right out there, there's gates to get to
2 where you get on the waiting thing for the tier, then right
3 in this area.

4 Q Hold on. Okay. With the Court's permission, I would ask
5 you to turn it the other way so the jurors can see where
6 the location is where you were when you were met by these
7 other inmates.

8 A You come up the stairs. It's three tiers high. And you
9 come in that little area. You wait right here. Then you
10 come in right there for the tier. And then they escorted
11 me all the way down here. My house is right here. They
12 escorted me down to E-16.

13 Q Okay. Now, before they escorted you, what exactly was
14 said?

15 A They said, "You are going to our house."

16 Q Okay. Did one person say that or all three of them say it?

17 A Well, one person said it.

18 Q Who was that?

19 A Perez.

20 Q Okay. And did you make any response?

21 A No.

22 Q Why not?

23 A Because I was scared.

24 Q Okay. Did any of the other two say anything in that same
25 time frame or just Perez said, "You are going to our

1 house"?

2 A Just Perez.

3 Q Anything else said?

4 A No.

5 Q Okay. So you're being escorted down the tier. Were there
6 any other inmates walking along there at that time?

7 A Yes.

8 Q Okay. Any other officers walking along there at that time?

9 A No.

10 Q Did you attempt to call out for help in any way?

11 A When I was in the house, I did. That was the only way I
12 could do it.

13 Q Why not while you were walking along?

14 A Because they was surrounded, they surrounded me.

15 Q How did they surround you?

16 A One was in front of me, one on the side of me, one was in
17 back of me.

18 Q Okay. Triangular shape around you, you are in the middle?

19 A Well, I was close to the bars for the cell. You have got
20 one -- I could explain it on the thing. You got one right
21 here. There're the bars, walking down the tier, you got
22 one right here, you got one right here. I'm right here up
23 against -- walking next to the cells.

24 Q Okay. Then the other one is between you and the outside of
25 the walkway?

1 A Yeah.

2 Q Okay. Were you walking or running or --

3 A I was walking.

4 Q Okay. So nothing else said from the time that Perez said,

5 "You are going to our house," and you get to the house, was

6 anything said in between there?

7 A No.

8 Q Okay. Any particular reason why you were afraid?

9 A Well, because there's three of them and there's one of me.

10 Q Okay. When you got to their cell, what happened?

11 A They jumped me. They knocked me out first, then they

12 started beating on me.

13 Q Okay. And let's -- as best as you can from your

14 recollection, what happened first? You say they jumped

15 you. You know, if you know who hit or did whatever to you,

16 say that as well, but what we want to know is what

17 specifically happened to you from the beginning to the end?

18 A Well, I got in the house.

19 Q Who was the first one in the house?

20 A Charles Weber.

21 Q Okay. And then who was the second one in?

22 A Me.

23 Q Okay. And then do you know who was the very next one

24 behind you or --

25 A Perez.

1 Q Perez. So then Mr. Gallegos would have been in the very
2 back then?

3 A Yes.

4 Q Okay. What happened then?

5 A Well, what happened was they -- Gallegos socked me, knocked
6 me out. And then I -- I fell out. And then they started
7 beating on me in the corner of the cell.

8 Q Okay. Did they wait until you were in the corner of the
9 cell to do that or did they start?

10 A No. When they knocked me out, I was basically trying to
11 get away, but they ended up getting me in the corner of the
12 cell.

13 Q Okay. So you moved to the corner or --

14 A Yeah, because they started beating on me. And I ended up
15 coming to and then I crawled to the corner of the cell
16 because I was trying to get refuge, so I didn't get hurt
17 too bad.

18 Q Okay. Now, you said as you went in that it was Gallegos
19 that socked you. How do you know it was him?

20 A Well, because he's the one that was behind me.

21 Q Okay. I thought you said Perez?

22 A No. When I came in the cell, Perez was behind me. He
23 ended up getting on his bunk. He came in and got on his
24 bunk and then Gallegos came in and socked me.

25 Q Okay. So it was only two of the inmates hitting you?

1 A No. All three was hitting me. Once I got in the corner,
2 they were all stomping and hitting me.

3 Q How do you know Perez was involved in that if he had gone
4 up to his bunk?

5 A Because whenever I came to, they were all hitting me --

6 Q Okay.

7 A -- in the corner.]

8 Q Now, what about the cell door? When you came in, did --
9 was the cell door open before you guys arrived there?

10 A No.

11 Q So you had to wait for it to open?

12 A Yeah. Charles Weber was there before anybody and the door
13 came open while he was waiting. He went in, then I went
14 in, then Perez went in, then Gallegos went in.

15 Q Okay. Do you know whether or not the cell door was closed
16 then after that?

17 A I don't remember it closing.

18 Q Okay. Was anything being -- While you were -- While
19 that was happening, were you saying anything?

20 A I was just screaming.

21 Q Okay.

22 A I was in pain. They was beating on me.

23 Q Okay. Were any of them yelling as well, you know,
24 screaming?

25 A Yes.

1 Q Okay. Who?

2 A All of them, all three of them.

3 Q Okay. Okay. And during this altercation, did you, you
4 know -- Let's go back, you know, prior to anything being
5 done either to you or by you. When you got into the cell,
6 did you -- did you say anything to them once you got into
7 the cell?

8 A No, no.

9 Q Did you touch any of them, push any of them?

10 A No.

11 Q Okay. While then this assault was going on, did you do
12 anything to any of the three that you can recall, you know,
13 hitting back?

14 A No. I was -- I was covering myself.

15 Q Okay. Do you know whether or not you might have grabbed
16 somebody's arm?

17 A I might have.

18 Q Okay.

19 A But I don't remember because I was getting beat up pretty
20 bad.

21 Q Okay. There was testimony that one of your fingernails was
22 ripped off. Do you recall that?

23 A Yeah.

24 Q How would that have happened?

25 A Well, because it was already coming off anyways. And then

1 I got in the corner and the wall too, my nail was long. I
2 got in the corner and the wall, they were beating me, my
3 nail came off while I was trying to protect myself, got
4 caught in the cement.

5 Q Okay. So you are not -- So you wouldn't be saying that
6 you were trying to gouge any of them or --

7 A No.

8 Q Or --

9 A No.

10 Q -- scratch at any of them?

11 A No.

12 Q How did it end?

13 A The officers came. The officers came and saw me on the
14 ground bleeding and they stopped it. They called the other
15 officers to come and get me and them.

16 Q Okay. Was there anything specifically during this
17 altercation specifically pertaining to Charles Weber --

18 A No.

19 Q -- that you recalled him saying to you?

20 A No.

21 Q Okay. Did you need medical attention?

22 A Yes.

23 Q Okay. What happened with that?

24 A My nose got broke, so I needed to go downtown, down to the
25 St. Mary Hospital for them to do an EKG or whatever that is

1 where they stick you in like -- a MRI, and they did that.
2 And then a couple of days later, they took me down to the
3 Dr. Morgan, a plastic surgeon, and he was working on my
4 nose. Then they said that I need another surgery because
5 my nose collapsed so --

6 Q Are they still working on your nose?

7 A Well, they denied my surgery so --

8 Q Okay.

9 A But if they would have -- if they would have approved it,
10 yes, I would still be waiting for surgery.

11 Q Okay. Those three inmates, Perez, Gallegos and Charles
12 Weber, do you see any of those three in here today?

13 A Yes.

14 Q And who do you see and where is he?

15 A Charles Weber.

16 Q Where is he located?

17 A Right there.

18 MR. ACOSTA: Okay. Let the record reflect that the
19 Defendant has been identified.

20 Q Did -- From the very start, kind of going back now when
21 they met -- confronted you at the head of the tier before
22 getting to the cells, was anything said about a weapon?

23 A No.

24 Q Was -- Did you see any weapon?

25 A No.

1 Q During the walk to the cells, did you see or hear anything
2 about a weapon?

3 A No, I felt a weapon.

4 Q What did you feel and how?

5 A It's like a shank. It's a homemade shank.

6 Q Okay. And for the jury, who may not have heard the term
7 shank, what is a shank?

8 A It's like a knife.

9 Q Okay. A homemade one?

10 A Yes.

11 Q Okay. And how would they make such a thing?

12 A You can use a razor with a toothbrush, basically hard
13 plastic.

14 Q Okay. They would strap a razor to the toothbrush?

15 A They could do that or just grind down the plastic into a
16 point and use that.

17 Q Okay. You never saw it, but you felt that there was one?

18 A Yes.

19 Q Okay. During -- Once you got to the cell during this
20 altercation, did you ever see it?

21 A No.

22 Q Did you ever feel it once you were in the cell?

23 A Not when I got in the cell, no.

24 Q Okay. That day -- Once officers responded and you were
25 being treated and being photographed, were you being

1 questioned by one or more officers about this incident as
2 well?

3 A Yes.

4 Q Did you ever say anything about a shank that day?

5 A Not that I recall.

6 Q Okay. Why not?

7 A Because I was -- I'm thinking about myself getting --
8 making myself feel better. I'm more focused on me because
9 I was in pain.

10 Q Okay. You mean making yourself better medically, is that
11 what you are talking to?

12 A I was in too much pain. And I wasn't thinking because I
13 was more concerned about me, more concerned about me and
14 not what happened.

15 Q Okay. When was the first time you ever said anything about
16 a shank?

17 A Whenever they came and interviewed me.

18 Q Okay. Who is they?

19 A The prosecutor and the people's -- the defendants' --

20 Q The defense attorneys?

21 A Yeah.

22 Q Okay. And let me backup. After that first day, did any
23 officers question you again about this incident or was it
24 just that first day?

25 A No. Sergeant Penrose came and talked to me while I was in

1 the hospital.

2 Q Okay.

3 A I was in the hospital for a week.

4 Q Okay. When you say the hospital, the prison hospital?

5 A Yes.

6 Q Okay. And during that time, though, you still didn't say
7 anything about a shank?

8 A I talked to Sergeant Penrose about a shank.

9 Q You did?

10 A Yes.

11 Q Okay. Did he say anything about it?

12 A No. He said that whenever they come and talk to him, he
13 will let them know.

14 Q Okay. Were you on any pain medication during that time
15 frame?

16 A Yes.

17 Q Okay. As the officers were responding and getting the
18 other prisoners there from the cell that day on September
19 3, were you paying any attention to whether or not anybody
20 was using the toilet?

21 A There was somebody using the toilet.

22 Q Who?

23 A Charles Weber.

24 Q Okay. And why would you know or remember that?

25 A Because whenever the officers came, they handcuffed Perez

1 and Gallegos and took them out on the tier and Charles
2 Weber was sitting on the toilet --

3 Q Okay.

4 A -- waiting for them to come and get him. They took me out
5 and took me over to the hospital.

6 Q Okay.

7 A After they took the first two out.

8 Q Okay. There at the prison when things like this happen
9 there's what is called a disciplinary hearing process. Are
10 you familiar with that?

11 A Yes.

12 Q Okay. Did you write a statement for such a process for
13 Defendant Charles Weber?

14 A No.

15 Q Okay. Let me -- Showing you what has been marked
16 Plaintiff's Identification Number 22, ask you to look at
17 that. Do you recognize that?

18 A Yeah. That's what I wrote for Perez.

19 Q Are you positive that was for Perez and not Weber?

20 A Yes.

21 Q Let me see it a second. Okay. Why would you have written
22 that for Inmate Perez's process?

23 A Because Perez told the officers that he's the one that did
24 it, that was fighting with me. But it was all three of
25 them. So I wrote this for Perez. And it is not positive.

1 It's -- it's just telling them that they assaulted me. I
2 didn't --

3 Q Okay. Were you asked to do this written statement?

4 A For Perez, yes.

5 Q Who asked you?

6 A The officers gave it to me from Perez. Perez put my name
7 down for someone for me to write and say that he did it.

8 Q Okay. Did any of the other inmates ask that you write a
9 statement for them?

10 A No.

11 Q Okay. So this is the only one that you wrote a statement
12 for?

13 A Yes.

14 Q Okay. Is that an accurate copy?

15 A Yes.

16 Q Okay. It's got your signature there?

17 A Yes.

18 MR. ACOSTA: The State would offer Number 22.

19 MR. MAKUS: Well, Number 22 is hearsay, your Honor. And
20 unless it is being used for impeachment purposes, actually
21 intended to use it for impeachment purposes, I guess, I
22 have no objection.

23 THE COURT: 22 will be admitted.

24 Q Have you ever gone into anybody else's cell before?

25 A No.

1 Q Okay. And why is that?

2 A Because it's against the rules of DOC.

3 Q So even if you were friends with another -- with inmates in
4 another cell like next door, it's against the rules for you
5 to go inside their cell?

6 A Yes. It is against the rules, but people do go inside
7 cells.

8 Q Okay. And Christopher Weber wasn't there at that time?

9 A No. He was at work.

10 MR. ACOSTA: Okay. I don't have any further questions at
11 this time, your Honor.

12 THE COURT: Mr. Makus?

13 CROSS-EXAMINATION

14 BY MR. MAKUS:

15 Q You're in the state penitentiary for a lengthy period of
16 time; would that be a fair statement?

17 A Yes.

18 Q And you know if you get involved in fights, it's against
19 the rules?

20 A Yes.

21 Q And you know if you get in fights, you lose good time?

22 A Yes.

23 Q And it could be sanctions?

24 A Yes.

25 Q Not only loss of good time, but being put in isolation,

1 segregation, those kinds of things?

2 A Yes.

3 Q So you know you are not supposed to get in fights?

4 A Yes.

5 Q Now, you told the jury about this shank?

6 A Uh-huh.

7 Q That you said was involved?

8 A Yes.

9 Q It was Perez with the shank?

10 A No, Gallegos.

11 Q Gallegos? But you didn't say anything about it that day?

12 A No.

13 Q But you did have a chance to talk to Officer Hartford over
14 here; did you not?

15 A Yes.

16 Q But you didn't tell him about it?

17 A No.

18 Q Because you were concentrating on yourself?

19 A Yes.

20 Q But you told him about everything else except the shank;
21 did you not?

22 A Yes.

23 Q The first time you mentioned the shank was when you said
24 you interviewed with the prosecutor and the defense
25 attorney. I was the defense attorney; right?

1 A Yes.

2 Q Is that the first time you told anybody about it?

3 A Yes.

4 Q Well, you talked to me, what, maybe three weeks ago, a
5 month ago?

6 A Yes.

7 Q You also told the jury contrary to that that before you
8 told me about it you told Penrose about it?

9 A Yes, I did tell Penrose.

10 Q So who was the first one you told, me or Penrose?

11 A Penrose.

12 Q Did you write this statement out in regards to what
13 happened?

14 A Right.

15 Q And you say Perez asked you to write this statement?

16 A Yes.

17 Q Didn't mention anything about the shank when you wrote the
18 statement out involving the incident; did you?

19 A No.

20 Q You wanted Perez punished?

21 A Yes.

22 Q You wanted them all punished?

23 A Yes.

24 Q But you just forgot at the time you wrote this statement to
25 mention the fact of the shank?

1 A That came right after I'd gotten out of the hospital.

2 Q Okay. So you forgot at that time about the shank?

3 A I was more concerned about myself.

4 Q Well, you wrote the statement to inflict punishment; isn't

5 that right?

6 A Yes.

7 Q But at that time after you were out of the hospital, you

8 wrote the statement. What, you were still concentrating on

9 yourself and forgot to mention the shank?

10 A Yeah. I'm more concerned about my -- my wellbeing than a

11 shank.]

12 Q You were asked about Exhibit Number 21. And you say you

13 were first approached on Exhibit Number 21 in this area

14 over here?

15 A No. In this area right here.

16 Q And there's an individual camera in the area?

17 A This -- There's an individual camera in the corner right

18 here.

19 Q Well, if that's the place you were approached, then it

20 would have been videoed?

21 A Yes.

22 Q And all these people gathered around you was videoed?

23 A It should have been.

24 Q Yeah. Are you sure -- One other question. You said you

25 approached this cell 16?

1 A Yes.

2 Q And you had to wait for the door to open?

3 A No. The door was open because Weber got to the cell first.

4 Q Well, you were all three together, as I understand it?

5 A Right. And Weber got to the cell.

6 Q Well, how far ahead of you was Weber?

7 A About two feet, three feet.

8 Q Okay. What's the process for getting a cell opened?

9 A You got to put a sign out.

10 Q What do you mean?

11 A The cell -- the cell's got a sign that says 16. You put
12 the sign out, then they open the door.

13 Q And the person who opens the door, is the person who would
14 be in -- the person in the west booth?

15 A Yep.

16 Q So the person who is in the west booth is sitting in there
17 looking?

18 A Right.

19 Q You put your sign out, then he presses a button to open the
20 door?

21 A Yes.

22 Q So he has to see what's going on when he pushes that
23 button?

24 A Yes.

25 Q Is there any oral communication in regards to this?

1 A No.

2 Q Okay. And this person in the booth, he would be how far
3 away from the cell?

4 A About 15, 20 feet.

5 Q More or less about the distance from you to me or closer?

6 A Farther.

7 Q Farther? How much farther?

8 A Probably about another ten feet.

9 Q Well, do you know what 15 or 20 feet is?

10 A It's pretty long.

11 Q Exhibit 6 is a photo that's been introduced. And on the
12 lower left corner would be a picture of your hands?

13 A Yes.

14 Q You agree those are your hands?

15 A Yes.

16 Q And you agree that the knuckles have abrasions on them?

17 A Yes.

18 Q Did you get those abrasions by throwing a punch?

19 A No.

20 Q How did you get the abrasions on your knuckles?

21 A I was protecting myself, and they was stomping on me and
22 kicking me.

23 Q And so what you are saying is somebody stomped on your
24 hand, that's how you got the abrasions on the knuckles of
25 your right hand?

1 A There was abrasions on both hands.

2 Q I'm asking about the right hand. They took a picture of
3 the right hand?

4 A Yes. When they was kicking me and stomping.

5 MR. MAKUS: I don't have any more questions, your Honor.

6 THE COURT: Anything further, Mr. Acosta?

7 REDIRECT EXAMINATION

8 BY MR. ACOSTA:

9 Q When you say that they were kicking and stomping on you,
10 you were -- that's how your hands would have gotten
11 injured?

12 A Yeah, because I was like this protecting myself.

13 Q Okay. For the record, because it can't -- she's writing it
14 down and it can't see what you just did, for the record you
15 had your hands over --

16 A Over my head.

17 Q -- the front top of your head?

18 A Yes.

19 Q With the palms against your head?

20 A Yep.

21 Q The knuckles exposed?

22 A Yes.

23 Q Did any amount of this altercation occur there in the
24 corner itself or did you just end up there after it had
25 happened?

1 A No. It happened in the corner from -- It happened from
2 the door to the corner.

3 Q Okay. And for the record, the corner, the walls of this
4 cell that you were in, what kind of material is it?

5 A Cement.

6 Q Okay. Were you -- Was there physical contact with your
7 skin against the walls of the corner of this cell?

8 A Yes.

9 MR. ACOSTA: Okay. I don't have any further questions.

10 THE COURT: Anything further, Mr. Makus?

11 MR. MAKUS: No.

12 THE COURT: May this witness be excused?

13 MR. ACOSTA: Yes, your Honor.

14 THE COURT: You may step down. You are excused. Thank
15 you very much.

16 THE COURT: Call your next witness.

17 MR. ACOSTA: The State rests, your Honor.

18 STATE RESTS

19 THE COURT: Are you ready to proceed, Mr. Makus?

20 MR. MAKUS: Yes, I am.

21 THE COURT: Call your first witness.

22 MR. MAKUS: I call Mr. Weber.

23 CHARLES WEBER, the Defendant, being called
24 as a witness in his own
25 behalf, being first duly
sworn by the Court, testified
as follows:

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KATHY MARTIN
WALLA WALLA COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WALLA WALLA

STATE OF WASHINGTON,

Plaintiff,

-vs-

EDGAR ARMANDO PEREZ,

Defendant.

No. 04-1-00533-4

(Excerpt of Trial -
Testimony of
Mark Holt)

The above-entitled and numbered cause came on for jury trial before the Honorable DONALD W. SCHACHT, one of the judges of the above-entitled court, sitting in Department Number 2 thereof, on the 5th day of May, 2005, in the courthouse in the City of Walla Walla, County of Walla Walla, State of Washington.

APPEARANCES:

MR. GABRIEL ACOSTA, Deputy Prosecuting Attorney, appeared in behalf of the Plaintiff.

MS. GAIL SIEMERS, Attorney at Law, appeared in behalf of the Defendant.

WHEREUPON, the following is an excerpt of the proceedings had, to-wit:

MR. MARK HOLT, called as a witness in behalf of the Plaintiff, being first duly sworn by the Court, testified as follows:

THE COURT: Go ahead, Mr. Acosta.

MR. ACOSTA: Thank you.

DIRECT EXAMINATION

BY MR. ACOSTA:

Q Sir, would you please state your name and spell it?

A Holt, H-o-l-t.

Q And your -- What is your first name?

A Mark, M-a-r-k.

Q Okay. And where do you currently live?

A Five wing, WSP.

Q Okay. Washington State Penitentiary?

A Yeah.

Q Were you housed there back in September of last year?

A Yeah.

Q Okay. And at that time where were you housed at?

A Six wing.

Q Okay.

A Six unit.

Q I'm sorry?

A Six unit, E tier.

Q Okay. And which cell?

A Three.

Q Okay. On September 2 of last year, were you -- First of all, on September 2 of last year, did you know an inmate by the name of Christopher Weber? Did you know that inmate?

A Yes.

Q Did you know a Charles Weber?

1 A Yes.

2 Q Did you know an Edgar Perez?

3 A Yes.

4 Q And Joseph Gallegos?

5 A Yes.

6 Q And did they live on your same unit?

7 A Yes.

8 Q In your same tier?

9 A Yes.

10 Q Okay. On September 2, did you have contact with Charles

11 Weber?

12 A Yes.

13 Q And where was -- Tell the jury, you know, when and where

14 that contact was.

15 A Contact came when I -- I was standing in front of the tier

16 waiting to go on the tier. Him, he came up to me and cut

17 in front of me, then two guys came behind me, put a shank

18 on me and told me I have got to go to their house.

19 Q Okay. Let's back up. I'm talking about September 2 and

20 talking about Charles Weber. You've gotten ahead of me by

21 a day.

22 Okay. Before that -- before what happened then you are

23 starting to talk about, did something happen the day

24 before?

25 A Yes. On -- Out on the baseball field.

1 Q Okay. Why don't you explain what happened there on the
2 baseball field.

3 A Well, one of the Webers plowed me while we was playing
4 softball. And I tried to get him because I was turning the
5 double play, I tired to get him to call the guy out. They
6 wouldn't call him out, so it just elevated from there.

7 Q Okay. What do you mean elevated?

8 A I said, all right. First, I said, all right. I said it
9 will get handled. That's what I said. And then they said
10 -- Because I said that, after I went over and apologized
11 to them. I went over and apologized to him for saying it.
12 They said, you can't apologize for that. And then the next
13 day came and said you can't apologize for anything you say.

14 Q Who said you can't apologize?

15 A Gallegos, Weber and a couple of the other guys that I don't
16 even know.

17 Q Okay. So nothing happened that day --

18 A That day, no.

19 Q -- at the ball field?

20 A No.

21 Q Okay. Then the following day before going to what you were
22 starting to describe, did you have lunch that day?

23 A Yes.

24 Q Okay. Where do you eat lunch?

25 A North side chow hall.

1 Q Okay. There at the institution?

2 A There's a south side and a north side where we live. We
3 was eating on the north side chow hall for six wing.

4 Q Okay. That day at the chow hall, either in line waiting
5 for the food or while eating there, do you get your food
6 there at what, a line or bar or something?

7 A Yeah. You have got to walk through the line to get your
8 food.

9 Q Do you have assigned seating there or --

10 A No.

11 Q Can you sit wherever you want?

12 A Yeah.

13 Q Are there like tables or individual seating, how is that?

14 A There are tables.

15 Q Okay. You ate there. Did you eat with anybody in
16 particular?

17 A I sat with the Moslems because I was Moslem at the time.
18 I'm not a Moslem no more.

19 Q Okay. So then after you got done eating, what did you do?

20 A I got up to go back to the unit.

21 Q Okay.

22 A When I was walking back to the unit, I got up on the start
23 of my tier and they came up on me.

24 Q Okay. First, and let's kind of take it step by step. When
25 you left the chow hall to go back to your unit --

1 MS. SIEMERS: Excuse me, your Honor. May I ask for a
2 side bar for a moment, please? I think we are going to
3 have a problem in a minute.

4 THE COURT: Okay.

5 (A side bar conference was
6 had between the Court and
counsel off the record.)

7 THE COURT: Ladies and gentlemen, I'm going to need to
8 excuse you for a minute and take up a matter. Please do
9 not discuss this case in any way.

10 (The following occurred out
11 of the presence of the jury:)

12 THE COURT: I don't know, Mr. Holt, that you intended to
13 say or mention anything about this, but I have ruled in
14 limine -- I have ruled before trial that there is to be no
15 mention in testimony by either side about any gang
16 affiliation or membership of groups or anything.

17 Your comment about you were Moslem at one time but no
18 longer is really of no consequence. That was just made in
19 passing. But you did identify the people that assaulted
20 you by name, but there should be no reference as to any
21 group they might belong to or association that they might
22 have with other inmates or anything other than friends. If
23 you know them to be friends of acquaintances of somebody or
24 a cellmate, that would be fine. But other identifying type
25 of remarks shouldn't be made.

1 THE WITNESS: All right.

2 THE COURT: Okay. Does that cover it, Mr. Acosta?

3 MR. ACOSTA: I believe so.

4 THE COURT: Ms. Siemers?

5 MS. SIEMERS: Yes, your Honor. Thank you.

6 THE COURT: Okay. Ready to proceed?

7 MS. SIEMERS: Yes.

8 THE COURT: Okay. Bring the jury back in, please.

9 (The following occurred in the
10 presence of the jury:)

11 THE COURT: You may proceed, Mr. Acosta.

12 MR. ACOSTA: Thank you.

13 Q Okay. We were kind of going in sequence. You left the
14 chow hall. Did you leave by yourself?

15 A Yes.

16 Q Okay. And so as you traveled then to your unit, is it a
17 long distance or short distance?

18 A It is not that long, but it's not that short either.

19 Q Okay. But anyway --

20 A In between.

21 Q In between there what happened, if anything?

22 A Nothing happened until I got in the unit.

23 Q Until you got to your unit or onto your tier itself or --

24 A In front of my tier, waiting to go to my tier.

25 Q Okay. Like there is a gate door between this opening and

1 your tier?

2 A Yeah.

3 Q Okay. And you are saying that's where something happened?

4 A That is where they came up on me.

5 Q Okay. And why don't you explain what you mean by that?

6 Were they already there or you were there and they came up

7 to you?

8 A I was there, they came up to me. One stood in front of me,

9 one stood on the side and one behind me shanked on me

10 telling me I have got to go to their house.

11 Q Okay. And let's see. Did you see who the three

12 individuals were?

13 A Yes.

14 Q And who were they?

15 A Edgar Perez, Charles Weber and Gallegos.

16 Q Okay.

17 A Joseph Gallegos.

18 Q You used the term shank. What is a shank?

19 A Yeah, it's like a knife. It's a homemade knife.

20 Q Okay. Are inmates allowed to have knives there at the

21 prison?

22 A No.

23 Q Okay. So how would they have a knife or a homemade knife?

24 MS. SIEMERS: Objection, calls for conjecture.

25 THE COURT: I'll overrule the objection. Go ahead.

1 A They -- You could use a toothbrush and razor blade.
2 Q Okay. Did you see it yourself?
3 A No, I felt it.
4 Q You felt it? Where did you feel it?
5 A In my back.
6 Q Go ahead and describe, you know, what happened from that
7 point on.
8 A One of them was in front of me, one of them was on the side
9 of me, one of them was behind me, escorted me down to the
10 tier to their house. They live in E16. I got in their
11 house. They jumped me. They all attacked me.
12 Q Okay. I think you said you lived in E3?
13 A Right.
14 Q So you passed your cell?
15 A Yes.
16 Q Okay. This is the third floor; right?
17 A Yes.
18 Q Any particular reason why you didn't make some noise or
19 gestures to anybody who might be on the floor in this wing
20 unit for help?
21 A I was scared. I had the shank in my back. They told me
22 any false move, they will shove me over the tier.
23 Q Okay.
24 A So I didn't say nothing.
25 Q Okay. And were you aware of there being the security or

1 control booth off to the side?

2 A No, he couldn't see me. No, he couldn't see.

3 Q That person couldn't see you?

4 A (Shook head.)

5 Q Why is that?

6 A Because Edgar Perez was standing on the side of me so they

7 couldn't see me.

8 Q Okay. So one in front, one behind, one beside you between

9 you and the --

10 A Yeah, so the booth can't see me -- them walking me down.

11 Q Okay. And, you know, you said that they said to go with

12 them or they would kill you. Did you believe that would

13 happen if you didn't go with them?

14 A Yeah, yeah.

15 Q Okay. What did you think would happen when you got to

16 their cell?

17 A Well, I still thought they was going to kill me, but -- and

18 they was trying to beat me to death.

19 Q Okay. When you got to where their cell was, was the cell

20 door open?

21 A No. They was standing there for a minute, then they opened

22 the cell, one guy went in. The guy on the side of me stood

23 where the booth can't see me. And I went in, then the

24 other two came in and they jumped me.

25 Q Okay. And you use the term jumped you. Okay. Why don't

1 you, you know --

2 A They beat me up.

3 Q Okay. Did they start as soon as you entered or what

4 happened once you entered?

5 A Once I entered, they started.

6 Q Okay.

7 A They knocked me out.

8 Q Okay.

9 A Then started giving me the boots and hitting me.

10 Q Could you see who was doing it or how could you tell?

11 A I got knocked out at first. I was knocked out at first and

12 then I kind of ended up crawling to a corner of the cell

13 and getting in the fetal position so I could protect

14 myself. That's when I realized that all three of them was

15 beating on me because I kind of woke up out of being

16 knocked out. I woke up. I crawled to the corner of the

17 cell and that's when I was in the fetal position, but I

18 could see all three of them because I was like this

19 (indicating), you know what I'm saying? Because I wanted

20 to see what they are doing to me as far as --

21 Q So you had your back to the wall looking at them or --

22 A No. I was in the corner like this (indicating).

23 Q Facing the corner or --

24 A No.

25 Q -- back to the corner?

1 A Like I say, the wall is right here. Here is the corner. I
2 was right here like this (indicating) in the corner and
3 they was kicking me and hitting me and all -- all three of
4 them was doing it because I heard them too --

5 Q Okay.

6 A -- talk.

7 Q What did you hear?

8 A We were going to kill you, this and that and then they
9 started calling me a rape-po and --

10 Q Okay. Okay. At some point in time did it stop?

11 A Well, when the cops came.

12 Q Okay.

13 A The cops -- cops, the officers.

14 Q Correctional officers?

15 A Yes.

16 Q And is that in general terms what the inmates used towards
17 the correctional officers, cops?

18 A Well, if they don't like them. I mean, my -- myself, I
19 call them officers.

20 Q Okay.

21 A I mean, cops is like a disrespect to them because they are
22 officers. They are correctional officers. They are not
23 cops. So it was a disrespect thing to call them a cop.

24 Q So anyway, at some point it stopped and officers arrived?

25 A Yeah.

1 Q What happened with you next?

2 A The cops took out Gallegos and then took put Perez and then
3 they took me out and they had to take me to the hospital.
4 They took me to the hospital there at the prison and they
5 cleaned me up and then they took me downtown and they had
6 to do an EKG on me a -- or --

7 Q CT?

8 A They got a CT scan --

9 Q Okay.

10 A -- for my body, then they took me back. I was in the
11 hospital for like a week and they put me in the PC.

12 Q Okay. Just back up a little bit. When you say put in the
13 hospital for a week, that is the prison hospital?

14 A The prison hospital.

15 Q Okay. And so you were actually being housed there for a
16 week as opposed to --

17 A Well, yeah, because they needed to -- the plastic surgeon
18 had to come up and see me and get me -- them to clear me to
19 go back downtown and get my nose worked on and he did that.
20 And they kept me in the hospital for like another 3 or 4
21 days. That was in the week I seen him, like, the third day
22 and then, like I said, in the hospital for like 4 more days
23 and they sent me to 3 wing. Now I'm waiting for surgery
24 again.

25 Q Okay. You used the term PC?

1 A Protective custody.

2 Q Okay. Now, what injuries, if any, did you sustain or get -
3 from this assault?

4 A I got my nose broke. It was actually caved in and then I
5 just had other minor injuries. My eye was split, bruising
6 all over my body.

7 Q Okay. Now, at some point in time did officers or
8 detectives come and question you about what happened?

9 A Yes.

10 Q During any of that time did you mention anything about a
11 shank?

12 A No.

13 Q Why not?

14 A Because I was scared. I was still scared.

15 Q Why would you be scared?

16 A Because, I mean, they got people that can do things.

17 MS. SIEMERS: Objection, your Honor.

18 THE COURT: On what basis?

19 MS. SIEMERS: The basis is the rules made by the Court
20 earlier today.

21 THE COURT: I will overrule the objection. Go ahead.

22 Actually, wait for a question.

23 Q Going back to when you were -- when you went into the cell
24 at any point, I suppose, before you say that they jumped
25 you and kicked you, all that kind of thing, did you do

1 anything to any of them, you know, with your hands, with
2 your body at all?

3 A No.

④ Q Okay. As they were then doing whatever it was that they
⑤ were doing to you, did you do anything in an effort to
⑥ protect yourself? Could you have scratched one of them or
⑦ done --

⑧ A Not that I can think of, no. I was protecting myself.
⑨ That's all I was doing.

10 Q Okay.

11 A And didn't do no good, really.

12 Q Okay. Have you ever gone into another person's cell that
13 you didn't live in?

14 A No.

15 Q And why not?

16 A Because it is against the rules.

17 Q Okay. Had you ever been to -- Well, so you had never been
18 inside this cell before?

19 A No.

20 Q And had there been any prior occasions when you had tried
21 to enter their cell?

22 A No.

23 MR. ACOSTA: I don't have any further questions at this
24 time, your Honor.

25 THE COURT: Ms. Siemers?

CROSS-EXAMINATION

BY MS. SIEMERS:

1
2
3 Q Good afternoon, Mr. Holt. You remember speaking to me up
4 at the prison at one time?

5 A Yes.

6 Q And do you remember at that time when we were discussing
7 what happened you had told me about the softball game. Was
8 that not the case?

9 A Yeah.

10 Q And there was an encounter between you and the younger --
11 or the brother Weber; is that correct?

12 A Yeah.

13 Q You recall at the time that we spoke what gesture you had
14 made or said to Mr. Weber if this happened again, do you
15 recall?

16 A Yeah.

17 Q Okay. What did you say?

18 A Told him it will get handled.

19 Q And how would that -- What does that mean?

20 A That's all I said. It would get handled.

21 Q Do you recall at any time telling Detective Gilbreath from
22 the Walla Walla Police Department anything about an elbow;
23 do you remember?

24 A Yeah. He threw an elbow.

25 Q Do you remember saying anything about you using your elbow?

- ① A No. I was talking to my teammates.
- ② Q And when you discussed this with Detective Gilbreath, you
- ③ were not saying anything about that, the elbow?
- ④ A Yeah.
- ⑤ Q And did you not -- Do you remember telling me that you
- ⑥ were going to use an elbow next time?
- ⑦ A Yeah.
- ⑧ Q Okay. So your testimony is that indeed you stated you
- ⑨ would use an elbow next time?
- ⑩ A Yep.
- ⑪ Q And so getting handled was from -- also from you; is that
- ⑫ correct?
- ⑬ A Yeah.
- ⑭ Q So there were threats made to Mr. Weber as well as you
- ⑮ claim there were threats made from Weber?
- ⑯ A Yeah.
- ⑰ Q So it's mutual statements?
- 18 A Yeah, but I came and apologized to Mr. Weber, you know.
- 19 Q That's not my question. Would you please listen to the
- 20 question? It was mutual discussion with you and Mr. Weber
- 21 at that time?
- 22 A Not -- It was me and practically their whole team.
- 23 Q Well, so at the time you said to Detective Gilbreath that
- 24 you were talking to Mr. Weber, then that's not accurate?
- 25 A I was talking to Weber --

1 Q And --

2 A -- but his whole team too.

3 Q So was there -- You were speaking to Mr. Weber and the

4 whole team when you admitted that you were going to elbow

5 someone?

6 A Yeah.

7 Q And that this was going to be handled was to the whole

8 team?

9 A Well, yeah.

10 Q You were making threats to a number of people?

11 A Yeah.

12 Q When you stated earlier that the three people who were in

13 the cell that you eventually ended up in, Number 17, you

14 stated they said this is going to be handled, who would

15 they be specifically?

16 A Perez, Gallegos and Charles Weber.

17 Q And they said what they said in unison, this is going to be

18 handled, or how was it said?

19 A They came up on me and they said you are going in our house

20 and it is going to get handled, the whole problem.

21 Q Do you recall when you spoke with me up at the prison that

22 you said it was Weber, Gallegos who stated that to you?

23 A I don't recall saying that.

24 Q Do you recall whether or not you made a statement to

25 Officer Gilbreath about the fact that it was Weber and

① Gallegos who had made threats to you?

2 A I don't remember.

3 Q Do you remember specifically telling me in our interview

4 that it was Gallegos who had the alleged shank?

5 A Yep.

6 Q So Gallegos is who carried the shank?

7 A Yes.

8 Q And at no time is there -- was there any other testimony

9 from you or statements you made to the detective it was

10 someone else who had a shank?

11 A No.

12 Q And your testimony today is that you, in fact, didn't see

13 any shank?

14 A Right.

15 Q That you felt a shank?

16 A Yep.

17 Q Have you been shanked before? Is there some reason why you

18 would know?

19 A Yes. I have been stabbed before.

20 Q Okay. And what did that -- this shank or how do you know

21 this shank was a shank?

22 A Because I know how the razor feels.

23 Q And so did you have clothing on at the time?

24 A Yeah.

25 Q Did you have something on like you have today?

1 A No. I just had a T-shirt and pants.
2 Q Excuse me, what was that?
3 A T-shirt and pants.
4 Q Okay. And you assumed only from what you have known
5 before?
6 A Yes.
7 Q Okay. You stated that you were scared?
8 A Yep.
9 Q Were you scared when you were talking to the whole team and
10 telling them this was going to be handled?
11 A No, I was angry.
12 Q So not scared?
13 A No, not really.
14 Q And so addressing a group of people and making threats does
15 not scare you?
16 A Well, yeah, but I was angry at the time so it just
17 didn't --
18 Q Are you angry anymore since this allegedly happened to you?
19 A No.
20 Q You are not angry?
21 A No. I haven't had no reason to be angry.
22 Q Even though you allege that other people have beat you up
23 and kicked you and caused you this great fear?
24 A There ain't no reason to be angry no more. I mean, it's --
25 They ain't around to do it no more.

① Q That's because you are in PC?

② A Yes.

③ Q You earlier said in your testimony they were calling you
④ names?

⑤ A They was while they was beating me up.

⑥ Q What did you say they were saying while they were beating
⑦ you up?

⑧ A It wasn't that, why they was beating me up, though.

⑨ Q How do you know why they were beating you up?

⑩ A Because they said over the softball game.

⑪ Q That was after your threats that you were handling it?

⑫ A Yeah.

⑬ Q And so at the time they were calling you names, it only had
⑭ to do -- it didn't have to do with the softball game?

⑮ A No.

⑯ Q Okay. If it didn't have to do with the softball game, why
⑰ do you think they were calling you names?

18 MR. ACOSTA: Your Honor, I think the State objects. I
19 think we need to take a matter up out of the presence of
20 the jury.

21 THE COURT: This is getting close to the motion in
22 limine. I'm going to sustain the objection. Go on to
23 another line of questions, please.

⑲ MS. SIEMERS: Your Honor, I would state that he opened
⑳ the door.

1 THE COURT: Well, I'm going to find it is more -- that
2 it's not probative of an issue that is before the Court at
3 this time. If it becomes probative later on, I will let
4 you reopen the matter.

5 MS. SIEMERS: Okay. Thank you.

6 Q Do you recall your interview with Detective Gilbreath?

7 A At the hospital?

8 Q It would have been.

9 A Yep.

10 Q Huh?

11 A I talked to him, but I don't remember what I said. I mean
12 --

13 Q Do you recall telling Doctor -- or Detective Gilbreath or
14 making any statements regarding that Mr. Perez -- why Mr.
15 Perez would have claimed to have done the assault?

16 A I have no idea why he did that.

17 Q Do you recall telling Detective Gilbreath that he claimed
18 he alone had assaulted Inmate Holt, the claim believed to
19 be owing to the fact he has the earliest release date, do
20 you recall saying that?

21 A No. I know -- I know Perez said that he was the only one
22 to the officers that was doing it.

23 Q And do you recall giving Detective Gilbreath the statement
24 that I just stated, that he had the earliest release date?

25 A He had the earliest release date?

1 Q Uh-huh.

2 A Early release date to what?

3 Q That according to Detective Gilbreath's report, which was
4 taken straight from you --

5 A Uh-huh.

⑥ Q -- that there was a statement that's owing to the fact that
⑦ Mr. Perez was going to be getting out soon, he was the one
⑧ who took the blame. Do you recall?

⑨ A No, I don't remember that.

⑩ Q You don't? Okay. Do you recall you said you were
⑪ unconscious? Do you know how long you were unconscious?

⑫ A For about 20, 30 seconds.

⑬ Q How would you know that?

14 A Well, because they was beating on me and woke me back up.
15 I mean, they were beating on me. I crawled to the corner
16 of the cell.

17 Q Well, have you ever been unconscious before?

18 A Yes. I have been knocked out before.

19 Q And do you know every time you have been knocked out how
20 long it took for you to get conscious again?

21 A No, because I've never been knocked out in a fight.

22 Q So other being unconscious is different from being knocked
23 out in a fight?

24 A Well, in a fight I could get knocked out and be woke right
25 back up.

1 Q That's according to your experience as a medical person or
2 how do you know that?

3 A That's through my experience but not as a medical person.
4 It's just through experiences I have been through.

5 Q And you stated that you believe you had a head injury?

6 A Yeah.

7 Q Have you had head injuries before?

8 A Yep.

9 Q And do you have any awareness of how long a head injury
10 might cause you to have difficulty remembering?

11 A No.

12 Q So you are not aware whether a fight or otherwise if you
13 were unconscious what a head injury might do to you?

14 A Well, I take medication, that's why I got a bad memory, but
15 --

16 Q So do you have a bad memory on top of the head injury and
17 unconsciousness?

18 A Yeah.

19 Q And the fact that you were angry about this softball game?

20 A (Nodded head.)

21 Q You stated -- How long did you state you believed that you
22 were in the cell without being able to get out?

23 A Probably a couple of minutes.

24 Q Couple of minutes?

25 A Close to five minutes.

1 Q And how much of that were you unconscious?
2 A Probably about 30 seconds.
3 Q And this was a loss of consciousness, a head injury and
4 other -- you said you had a broken nose and just other
5 miscellaneous injuries that weren't much?
6 A Bruises, those scratches.
7 Q Uh-huh. Okay. So bruises and little scratches and the
8 nose?
9 A Yeah. My whole body was bruised up.
10 Q Uh-huh. You said, though, at the time that you were
11 fighting back because you were protecting yourself?
12 A No. I wasn't fighting back.
13 Q How were you protecting yourself?
14 A I was in the fetal position.
15 Q Towards the wall?
16 A Yeah.
17 Q With your head down?
18 A Like this (indicating).
19 Q Your hands over your face?
20 A Like this (indicating), yeah.
21 Q So that even though you were down, head down, face down,
22 hands over your face, you could tell exactly who it was
23 that was doing what to you?
24 A Yeah, because I could see out the corner of my eye. I'm
25 like this (indicating).

1 Q You were unconscious and had a head injury also?

2 A No. I was awake when I -- they had me in the corner.

3 Q Uh-huh. And how long did you think you were in the corner?

4 A How long do I think? I was for about 3 minutes, 4 minutes.

5 Q So when you were head down in the corner with the total of
6 5 minutes, but 3 or 4 of them you couldn't see anything and
7 yet the other time you could tell exactly what was
8 happening.

9 MR. ACOSTA: Objection, badgering the witness.

10 THE COURT: Is that a question, Ms. Siemers?

11 MS. SIEMERS: Yeah. I'm asking him if he can tell what
12 was happening in the seconds.

13 THE COURT: Ask him that question. I wasn't sure.

14 Q Okay. You could tell what was happening during the 3 or 4
15 or 1 or 2 minutes that you were not able to see other than
16 because --

17 A They was beating on me the whole time.

18 Q Uh-huh.

19 A They was beating me all the way into the corner.

20 Q I believe your testimony then was that you were crawling in
21 the corner yourself, was it not? Is that different from
22 what you just said?

23 A I was crawling in the corner of the cell. They was beating
24 on me, then beating me while I got to the corner of the
25 cell.

1 Q Uh-huh. All of this was based on the softball game problem
2 with Mr. Weber?

3 A Yeah.

4 MS. SIEMERS: One moment, please. No further questions.

5 THE COURT: Anything further, Mr. Acosta?

6 MR. ACOSTA: One or two, your Honor.

7 REDIRECT EXAMINATION

8 BY MR. ACOSTA:

9 Q Going back to the ball field and you said I went to
10 apologize?

11 A Yep.

12 Q When you were directing your comments, you said the whole
13 team was there?

14 A Right.

15 Q So the whole team heard but you were directing your
16 comments to the whole team or just to Charles or
17 Christopher Weber?

18 A In general.

19 Q This apology?

20 A The apology? The apology was towards Weber.

21 Q Okay. And were you angry while you were apologizing?

22 A No. I was more calmed down because by --

23 Q So --

24 A -- the people that I'm with, they came up and talked to me
25 and calmed me down. And then I said, well, maybe I should

① go apologize. So I went and apologized. And they said you
② can't apologize for words.

3 Q Okay.

4 A So --

5 Q Okay. Okay.

6 A So I just walked away after that.

7 MR. ACOSTA: I don't have any further questions.

8 THE COURT: Anything further, Ms. Siemers?

9 MS. SIEMERS: Just one other thing.

10 RE-CROSS-EXAMINATION

11 BY MS. SIEMERS:

⑫ Q Do you remember when you were talking to Detective
⑬ Gilbreath saying you actually blacked out?

⑭ A Yep.

15 MS. SIEMERS: Okay. No further questions.

16 THE COURT: Anything further?

17 MR. ACOSTA: No, your Honor.

18 THE COURT: May Mr. Holt be excused?

19 MR. ACOSTA: I believe so.

20 THE COURT: You may step down. You are excused. Thank
21 you.

22 MS. SIEMERS: Your Honor, I would like to reserve the
23 opportunity of calling him back if that is necessary.

24 THE COURT: He will be available.

25 (Testimony of Mr. Holt concluded.)

CERTIFICATE

STATE OF WASHINGTON) No: 04-1-00533-14
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) :ss
County of Walla Walla)

I, Tina M. Driver, CCR, Official Court Reporter and Notary Public for the State of Washington, Washington CCR Number DRIVETM438CP, residing in Walla Walla, Washington, do hereby certify:

That I am a certified court reporter;

That I was duly authorized to and did report the trial in the above-entitled cause;

That the foregoing pages of this verbatim report of proceedings constitute a true and correct record of the proceedings to the best of my ability, including any changes made by the trial judge reviewing the transcript;

I further certify that I am not an attorney nor counsel of any of the parties; nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this 16th day of July, 2020.

Tina Driver

TINA M. DRIVER, CCR, Official Court Reporter, Notary Public of the State of Washington, residing in Walla Walla, Washington. My Commission expires: 9/09/22