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Division II
State of Washington
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF

WILLIAM HORTON, JR.,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

William Horton, Jr. was convicted of murder in Pierce County. He now brings a timely PRP attacking his judgment of conviction. Horton raises four claims, each claim presented with several variations. Broadly stated, Horton asserts:

1. His “to convict” instruction failed to include all the elements of the crime of conviction;
2. His Florida conviction, which served as a predicate for a VUFA charge, is unconstitutional because it was the product of ineffective assistance of counsel;
3. The evidence of the “gang” aggravator was insufficient because there was no evidence that the homicide was committed for gain;
4. Telling jurors that they should consider changing their opinions before deliberations began was improperly coercive.

In response, the State responds to some, but not all of Horton’s claims. This reply demonstrates that Horton’s PRP has merit and should be granted.

B. ARGUMENT

To begin, this Court should reject the State’s blanket objection that any claim cognizable on direct appeal cannot be raised in a PRP. In a PRP, a petitioner is entitled to raise new issues, including both errors of constitutional magnitude and nonconstitutional errors which constitute a fundamental defect and inherently result in a complete miscarriage of

justice. *In re Cook*, 114 Wash.2d 802, 812, 792 P.2d 506 (1990); *In re Hews*, 99 Wash.2d 80, 87, 660 P.2d 263 (1983). A petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. *In re Taylor*, 105 Wash.2d 683, 688, 717 P.2d 755 (1986). See also *Matter of Pers. Restraint of Lord*, 123 Wash. 2d 296, 303, 868 P.2d 835, *decision clarified sub nom. In re Pers. Restraint Petition of Lord*, 123 Wash. 2d 737, 870 P.2d 964 (1994).

Horton does not raise any previously decided claim of error. None of his claims is procedurally barred.

Claims:

- 1a. The “To Convict” Instruction Failed to Include All of the Elements of the Charged Crime.
- 1b. Trial Counsel was Ineffective for Failing to Object and Failing to Propose a “To Convict” Instruction Including All the Elements of the Charged Crime.
- 1c. Appellate Counsel was Ineffective for Failing to Assign Error to the Incomplete “To Convict” Instruction.

Horton contends that the “to conviction” failed to include all the elements—omitting the firearm and gang elements. The State argues that those facts are not elements for purposes of the to convict instruction, even though they comprise the substantive crime of conviction and despite its acknowledgement that a jury finding is required for each factual accusation.

The State does not explain why these factual accusations enjoy a special exemption from the requirement that a to convict instruction contain all the elements of the charged crime when, for example, premeditation does not. Instead, the State simply says that these factual accusations are different without explaining how—other than in name. Whether the statute calls them elements of the offense, sentencing factors, or “Mary Jane,” they are elements. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J. concurring).

The State is wrong and an increasing unbroken line of precedent rejects the State’s attempt to give these elements a different name in order to claim an exemption. Time and subsequent cases have washed away any justification for failing to include an “aggravator” and/or an “enhancement” in the “to convict” instruction. As the United States Supreme Court recently explained:

In *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000), this Court held that any fact that “expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict” is an “element” that must be submitted to a jury. In the years since *Apprendi*, we have applied its rule to instances involving plea bargains, *Blakely v. Washington*, 542 U.S. 296 (2004), sentencing guidelines, *United States v. Booker*, 543 U.S. 220 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. — (2012), mandatory minimums, *Alleyne*, 570 U.S., at —, 133 S.Ct., at 2166 and, in *Ring*, 536 U.S. 5846, capital punishment.

Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616, 621 (2016).

While Horton concedes that these factual accusations may not be required to be included in a charging document (although notice is required), given that they are submitted to the jury for a decision, there is no possible reason to exempt these facts from the “to convict” instruction.

To the contrary, *Alleyne* held that “facts that increase a mandatory statutory minimum [are] part of the *substantive offense*.” *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 2161, 186 L.Ed.2d 314 (2013) (emphasis added). A “to convict” instruction must contain all of the elements of the substantive offense because it serves as a yardstick “by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wash.2d 258, 263, 930 P.2d 917 (1997). Moreover, a reviewing court may not rely on other instructions to supply the element missing from the “to convict” instruction. *Id.* at 262–63.

This Court should reject the State’s attempt to avoid the holding of *Alleyne* back to *Apprendi* and apply the requirement that of a complete “to convict” instruction to all of the elements of a crime charged. Because the instruction failed to do so in this case reversal is required under all the theories advanced by Horton.

Claims:

- 2a. Mr. Horton’s Florida Conviction is Unconstitutional and Can Be Attacked Because It Served as a Predicate for an Unlawful Firearm Possession Charge.
- 2b. Trial Counsel was Ineffective for Failing to Raise this Issue.

2c. Trial Counsel was Ineffective Because If He Had Successfully Attacked the Florida Conviction, the Jury Would Not Have Heard that Horton Had Been Previously Convicted of a Violent Crime.

Horton previously claimed that a withheld adjudication on a charged crime from Florida did not constitute a conviction under Washington law. He lost that argument on direct appeal. He does not repeat it here.

Horton's argument in this PRP is different. Horton challenges the constitutionality of the Florida conviction, asserting that his plea of guilty was the result of affirmative misadvice which constituted ineffective assistance of counsel. Although apparently uncommon, Horton's challenge to the constitutionality of his predicate conviction is completely consistent with the rule and procedure outlined in *State v. Summers*, 120 Wash. 2d 801, 813, 846 P.2d 490, 496 (1993) (Summers may raise a challenge to the constitutionality of his 1976 conviction for manslaughter as a predicate conviction in his 1989 prosecution for violation of the Uniform Firearms Act).

Unlike the State, which defends the constitutionality of the predicate conviction without any evidentiary support, in support of this claim Horton submitted a sworn statement explaining that he was incorrectly told that a "withheld adjudication" would never constitute a conviction and that he would not have pleaded guilty but for this affirmative misadvice.

The issue before the Court at this juncture is whether to remand for an evidentiary hearing or to grant this claim. “The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9.” “In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence.” “If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.” *In re Rice*, 118 Wash. 2d 876, 886–87, 828 P.2d 1086, 1093 (1992).

Given the State’s failure to present competent admissible evidence, caselaw supports the conclusion that this Court should grant relief.

Claims:

- 3a. The Evidence of the Gang Element was Insufficient
- 3b. Admission of Horton’s Statements About Gang Affiliation Violated the Corpus Delicti Rule.
- 3c. Trial Counsel’s Failure to Object was Ineffective.

In these related claims, Horton claims the State failed to prove beyond a reasonable doubt that the defendant committed the crime with intent to directly or indirectly cause any “benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership.” In response, the State points to conflicted

evidence about gang membership of the participants. The State's response misses the point.

The State presented no evidence from which a jury could conclude that, even if guilty, Horton had any intent to benefit any gang. See *State v. DeLeon*, 185 Wash. 2d 478, 491, 374 P.3d 95, 101 (2016). The evidence to support the gang aggravator here falls short of establishing that the crime was committed to advance gang membership. The fact that the deceased belonged to a gang—even if known to Horton—does not establish the requisite nexus between the specific crime and actual gang-related motivations. *State v. Moreno*, 173 Wash. App. 479, 502, 294 P.3d 812, 824 (2013). The State must also establish a nexus between the charged crime and the defendant's actual gang-related motivations. *State v. Bluehorse*, 159 Wash.App. 410, 431, 248 P.3d 537 (2011). Gang membership alone and general statements from police or gang experts are not sufficient to support the aggravating factor. *State v. Clark*, 170 Wash.App. 166, 283 P.3d 1116 (2012); *Bluehorse*, 159 Wash.App. at 431. To uphold the aggravating factor on the evidence here would allow the aggravating factor to attach whenever a gang member commits a crime. See *Bluehorse*, 159 Wash.App. at 431. See also *Moreno*, 173 Wash. App. at 503.

The State argues that Horton's argument in this PRP constitutes a switch-in-time because he previously sought to establish that the deceased was a gang member. Horton sought to introduce that evidence to support

his self-defense claim. Horton's theory of the case was that Pitts threatened Horton based on gang relationships, and therefore, he should be able to prove the fact through evidence Pitts was a gang member. Horton did not contend that he killed Pitts to advance himself in a gang.

According to Horton, he did not slap box with Pitts. Horton said Pitts came into the apartment and began calling him "cuz." 11 RP at 1476, 1479. Pitts asked him about his Chicago Bears jacket, its black and orange colors, and whether he was a "Hoover." 5 11 RP at 1480. Horton stated that Pitts remarked on the colors of Horton's jacket in "his neighborhood" and asked him, "What you doing with the colors on over here, Cuz; are you from Hoover or something?" 11 RP at 1480. Pitts hit Horton, and Horton stated, "I've never been hit that hard in my life. It was one of those hits that I remember to this day. I ain't never been hit like that." 11 RP at 1484. About a week before Pitts's death, Horton saw Pitts beat up another person to the point where the other guy's "face looked like a punkin." 11 RP at 1496. Horton said, "I knew what this man was capable of and I was in fear for my life. I believe that man said he was going to kill me." 11 RP at 1497.

Horton also sought to ask witness Johnson about Pitts's chest tattoo that read "Lakewood Crip." 5 RP at 482. He argued that it demonstrated conflicting testimony existed about whether or not Pitts had his shirt off in the apartment. Johnson testified that Pitts had his shirt off in the apartment and his tattoos would be visible to Horton. Horton argued that because he

later misidentified Pitts's gang, he did not see Pitts's chest; thus, Pitts did not have his shirt off. The court ruled the evidence Horton intended to elicit from Johnson was irrelevant.

Witness Borja testified that he did not believe the incident was gang related. Horton also asked if the actions were in retaliation for being in a gang, and Borja answered, "No." 9 RP at 1114. Borja testified that he was aware of everyone's gang status and that as far as he was aware, the other people in the room also knew everyone's gang status. Horton asked what gangs they belonged to or used to belong to, the State objected, and the court overruled. Borja stated his own affiliation and Horton's but the State objected before he could provide Pitts's affiliation.

The fact that the defense's theory of the case was that Pitts threatened Horton based on gang relationships is not proof that Horton shot Pitts to advance a gang interest. The court ruled, "But, again, it's what was in the mind of Mr. Horton. I don't think it matters one bit whether or not anybody really was a member of a gang except for Mr. Horton because the State has to prove that in order to prove their aggravator, their gang aggravator, because if he's not a member of a gang, then their aggravator fails necessarily." 8RP at 982. The aggravator also fails if there is no proof of the requisite motive.

This Court's should reject the State's argument that when a gang member kills a member of another gang that establishes the requisite

motive for the aggravator. More is required and that evidence was missing here.

Claims:

4a. The Court Gave a “Dynamite” Instruction Without any Need.

4b. Trial Counsel was Ineffective by Failing to Object.

Jurors were instructed, in part:

During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions.

Horton claims that jurors should not have been given what amounts to a “dynamite” instruction before deliberations began—that such a instruction was improperly coercive. *Jenkins v. United States*, 380 U.S. 445, 446 (1965); *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Horton further supported his claim with research demonstrating that delivery of a so-called *Allen* charge can have a severe coercive effect that subverts the willingness of a holdout juror to stand firm against a majority of his or her colleagues.

The State does not contest Horton’s social-science research. Instead, the State essentially argues that the instruction is commonly given and therefore cannot be erroneous. The fact that the instruction is commonly given does not make it a proper instruction. This Court should condemn the instruction—except in cases where jurors on their own indicate a deadlock.

It is important to note that the first jury hung on the murder count. That fact together with the fact that the second jury was instructed to consider changing their opinions before even arriving at those opinions demonstrates that Horton was harmed.

D. CONCLUSION

Based on the above, this Court should either grant the PRP, remand for an evidentiary hearing, and/or order appropriate relief.

DATED this 13th day of August 2018.

Respectfully Submitted:

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