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Supreme Court No. 87844-7

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

STATE OF WASHINGTON,
Petitioner,

vs.

Kenneth Slert

Appellant/Respondent

Lewis County Superior Court Cause No. 04-1-00043-7

The Honorable Judge James Lawler

ANSWER TO PETITION

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant/Respondent

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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RAP 2.522

I. THE PETITION SHOULD BE DENIED BECAUSE THE CASE DOES NOT MEET ANY OF THE CRITERIA SET FORTH IN RAP 13.4(B).

The Court of Appeals reversed Mr. Slert's conviction because the trial judge met with counsel in chambers and dismissed four prospective jurors for cause. Opinion, pp. 8-9. The dismissal occurred outside Mr. Slert's presence, and without analysis of the need for closing the courtroom. The jurors were excused on the basis of jury questionnaires which have since been destroyed. Opinion, pp. 3 n. 6, 4-5.

The Court of Appeals found this procedure unconstitutional. The decision was based on two alternate grounds: (1) the trial court's violation of Mr. Slert's right to be present during jury selection, and (2) the trial court's violation of the requirement that criminal trials be open and public.

A. Review should be denied because Mr. Slert's right-to-be-present claim is directly controlled by the Supreme Court's decision in *Irby*.

The Court of Appeals decision was based in part on a simple application of *State v. Irby*, 170 Wash.2d 874, 246 P.3d 796 (2011). *See* Opinion, pp. 7-8. In *Irby*, the Supreme Court reversed a conviction because the trial judge dismissed jurors without the defendant's involvement after an email exchange between the court and counsel. *Id.*

The *Irby* court found this procedure to violate both the state and federal constitutions: "Jury selection is unquestionably a 'stage of the trial' at which a defendant's 'substantial rights may be affected,' and for that

reason we do not hesitate in holding that Irby's absence from a portion of jury selection violated his right to "appear and defend in person" under article I, section 22 as well as the due process clause of the Fourteenth Amendment." *Irby*, at 885.

Mr. Slert's case presents facts nearly identical to those in *Irby*. The sole difference between the two cases is the judge's means of consulting with counsel: here the consultation with counsel occurred in chambers rather than by email. Opinion, pp. 4-5. This difference is immaterial, and should not require a different outcome.¹

Irby is directly on point, and controls Mr. Slert's case.

Petitioner attempts to distinguish *Irby* on several grounds, none of which should persuade the Supreme Court to accept review. First, Petitioner suggests that Mr. Slert "was present or on hand for consultation at all relevant times." Petition, p. 11 n. 6. This is incorrect, as the Court of Appeals outlined. Opinion, pp. 4-5, 8-9. Contrary to Petitioner's suggestion, Mr. Slert's opportunity to consult with his attorney is insufficient; to satisfy the constitution, the record must "evidence the fact that defense counsel spoke to [the accused person] before responding..."

¹ In fact, the present case is perhaps *more* egregious than that confronting the court in *Irby*. In *Irby*, the defendant could (at least theoretically) review the emails after the fact and be assured that he knew everything that transpired between the court, his lawyer, and the prosecution. Here, by contrast, Mr. Slert will never know exactly what was said in the judge's chambers.

Irby, at 884 (citing *Lewis v. United States*, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)).

Furthermore, even if the Court of Appeals misread the record, such a misreading is not a basis to grant review under RAP 13.4(b). Petitioner apparently concedes as much—it is noteworthy that Petitioner makes no mention of RAP 13.4(b) or the factors listed therein in connection with its claim that “[the court’s] holding is wrong on the record [sic].” Petition, p. 10; *see, e.g., In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009) (“By failing to argue [a certain point], the State apparently concedes [the point]”).

Petitioner’s second argument—that the dismissal of jurors for cause is simply one of the “legal issues based on agreed-upon facts” for which the defendant has no right to be present (Petition, p. 11)—is foreclosed by the Supreme Court’s decision in *Irby*. In *Irby*, the Court held that the email exchange resulting in the dismissal of prospective jurors for cause constituted a part of jury selection:

In our judgment, the e-mail exchange was a portion of the jury selection process. We say that because this novel proceeding did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in this particular case.

The fact that jurors were being evaluated individually and dismissed for cause distinguishes this proceeding from other, ostensibly similar proceedings that courts have held a defendant does not have the right to attend.

Irby, at 882.

Here, as in *Irby*, the challenged procedure “was a portion of the jury selection process” because it “did not simply address the general qualifications of [the] potential jurors, but instead tested their fitness to serve as jurors in this particular case.” *Id.* Contrary to Petitioner’s suggestion, the *Irby* court’s decision did not hinge on the novelty of the email procedure. Petition, p. 11-12 (citing *Irby*, at 881-883).

During the closed hearing in this case, “jurors were being evaluated individually and dismissed for cause.” *Irby*, at 882. This distinguishes the in chambers conference from “other, ostensibly similar proceedings that courts have held a defendant does not have the right to attend.” *Id.*²

An accused person has the right to be present during jury selection. *Id.*, at 883. The decision to dismiss a particular juror for cause is a part of jury selection. *Id.*, at 882. The *in camera* proceeding here violated Mr. Slert’s right to be present. Because the Court of Appeals correctly applied *Irby*,

² Petitioner claims that the *Irby* court “approv[ed] of... cases allowing for sidebar or in-chamber legal discussions without the defendant.” See Petition, pp. 11-12 (citing *Irby*, at 881-882). This is misleading. Petitioner is correct that the Court did not invalidate all sidebars or in-chambers discussions; this does not mean, however, that the Court sanctioned the dismissal of jurors for cause in chambers when the defendant is not present. In addition, the *in camera* dismissal of jurors cannot be likened to a sidebar. When a sidebar occurs, counsel and the accused are in the same room, allowing for easy consultation. In some cases, the defendant is invited up to the bench to participate when a sidebar occurs. Finally, the language cited by Petitioner is *dicta*: *Irby* did not involve a sidebar or *in camera* proceeding, nor did it involve a discussion of purely legal issues. Instead, as in this case, *Irby* involved jury selection itself.

there is no basis for review under RAP 13.4(b). Accordingly, the Petition should be denied.

B. Review should be denied because the lower court's alternate grounds for reversal (Mr. Slert's courtroom closure claim) is controlled by settled law.

The Court of Appeals also found that the trial court's procedure in Mr. Slert's case was in violation of the constitutional requirement that criminal justice be administered openly and publicly. Opinion, p. 5-8, 9-12. The court's decision rested in part on *Irby*'s holding that the dismissal of jurors for cause is necessarily a part of the jury selection process (when based on responses to a jury questionnaire). Opinion, pp. 6-7 (citing *Irby*).³

Petitioner does not dispute that the public trial right attaches to jury selection. Petition, pp. 5-17. Instead, Petitioner argues that *Irby* does not apply to courtroom closure cases, and contends that "the Court of Appeals erroneously assumed that *Irby* [is] an open-courts case." Petition, p. 6. Petitioner's argument is misplaced. In addressing the courtroom closure issue, the Court of Appeals limited its reliance on *Irby* to the predicate question addressed in that case—whether or not dismissal of prospective jurors for cause (based on individual jury questionnaires) constitutes jury selection. Opinion, pp. 6-9. The *Irby* court did not limit its holding on this

³ The *Irby* court did not limit its holding on this issue to cases involving the right to be present. As the Court of Appeals noted, Mr. Slert's case involved questionnaires that fell "squarely within *Irby*'s discussion of jury selection..." Opinion, p. 7 n. 10.

issue to cases involving the right to be present. Nor would it have made sense to have done so: there is no logical reason to suppose that the framers of the state and federal constitutions would have defined jury selection differently depending on the constitutional right at issue.

As the Court of Appeals noted, Mr. Slert's case involved questionnaires that fell "squarely within *Irby's* discussion of jury selection..." Opinion, p. 7 n. 10. Thus, the Court of Appeals properly relied on the applicable portion of *Irby* when deciding the courtroom closure issue. Petitioner does not suggest that the *Irby* analysis is incorrect when applied to courtroom closure issues; nor does Petitioner propose an alternative analysis for determining when a procedure constitutes "jury selection." Petition, pp. 5-7.

Contrary to Petitioner's suggestion, *Irby* did not approve of *in camera* proceedings such as that conducted here.⁴ See Petition, pp. 6-7 (citing *Irby*, at 881-882). The Court noted that an accused person does not have a right to be present for discussions—at a sidebar or in chambers—involving only legal matters. *Irby*, at 881-82⁵. Presumably, an email

⁴Petitioner's argument regarding sidebars is irrelevant. The dismissal of jurors in this case did not occur during a sidebar. See Opinion, pp. 2-5.

⁵ Citing *Matter of Pers. Restraint of Lord*, 123 Wash. 2d 296, 868 P.2d 835 decision clarified sub nom. *In re Pers. Restraint Petition of Lord*, 123 Wash. 2d 737, 870 P.2d 964 (1994); *In re Pers. Restraint of Pirtle*, 136 Wash.2d 467, 484, 965 P.2d 593 (1998); and *Matter of Pers. Restraint of Benn*, 134 Wash. 2d 868, 952 P.2d 116 (1998).

exchange involving only legal issues would not violate an accused person's right to be present.

Nor can the dismissal of prospective jurors for cause be considered "administrative," when based on answers to a questionnaire. Respondent's attempt to recharacterize the *in camera* discussion as a "mere agreement" is belied by the record. Petition, pp. 7-8. In fact, following the *in camera* meeting, the trial judge announced that he had "already...excused" certain jurors.⁶ RP (1/25/10) 5. Furthermore, a "mere agreement" after the fact to dismiss prospective jurors for cause cannot be characterized as an administrative or ministerial matter, especially when based on answers to a questionnaire. *Cf. Irby*.

Petitioner suggests—without citation to any authority—that an unlawful courtroom closure can somehow be undone by putting matters on the record following the closure, and that this procedure "satisfied the defendant's and public's open-courts right" in Mr. Slert's case. Petition, p. 9. Petitioner did not make this argument in the Court of Appeals, and that court did not address it in its ruling. Furthermore, counsels' failure to cite authority supporting Petitioner's position suggests that none was found

⁶ Similarly, Petitioner's claim that "the official act of dismissing those jurors for cause... happened in open court" ignores what actually happened, as shown by this portion of the record. Petition, pp. 8-9. *See* RP (1/25/10) 5.

after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

Petitioner also suggests that any error was cured by the public's ability to observe the parties' use of the juror questionnaires after the court's *in camera* dismissal of four prospective jurors. Petition, p. 10 (citing *State v. Smith*, 162 Wash.App. 833, 256 P.3d 449 (2011)). But Mr. Slert did not suggest reversal is required solely because all the juror questionnaires were sealed and later destroyed.⁷ Instead, the issue is the particular decision to excuse the four jurors who were dismissed in chambers. The public had no opportunity to observe anything with regard to these four jurors, except for the brief *post-hoc* statement on the record, when the dismissal was a *fait accompli*.

The state and federal constitutions require courts to conduct criminal trials openly and publicly. Here, the trial judge closed a portion of jury selection, without any basis to do so. Applying settled law, the Court of Appeals reversed Mr. Slert's conviction. The government's dissatisfaction with the result is not a basis for review; accordingly, the petition should be denied. RAP 13.4(b).

⁷ This error may, in fact, require reversal. However, it is unnecessary to address the issue in this case, because reversal is so clearly required for other reasons.

C. Review should be denied because Petitioner's harmless error argument does not implicate RAP 13.4(b).

Having concluded that the trial court erred by closing the courtroom without the required analysis, the Court of Appeals held that reversal was required under *Presley*. Opinion, p. 10 (citing *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*)). The court also analyzed the error under the Supreme Court's pre-*Presley* cases. Opinion, pp. 10-13 (citing *State v. Momah*, 167 Wash. 2d 140, 217 P.3d 321 (2009) and *State v. Strode*, 167 Wash. 2d 222, 217 P.3d 310 (2009)).

The court concluded that Mr. Slert's case was controlled by *Strode* rather than *Momah*. The court found three factors significant in making this determination. First, the record does not suggest that defense counsel proposed the *in camera* procedure. Second, the circumstances did not appear to require closure (and the court did not consider reasonable alternatives to closure). Third, the trial judge did not consider Mr. Slert's right to an open and public trial or explain that right to him prior to conducting the closed hearing and dismissing four jurors. Opinion, p. 12.

Petitioner does not dispute the court's analysis. Instead, Petitioner appears to seek review—in essence—to determine whether any part of the

Momah - Strode framework survived *Presley*.⁸ Petition, pp. 12-17. If this is so, review is inappropriate: it would be a waste of judicial resources to accept review merely to decide whether reversal is compelled by *Presley* or by *Momah* and *Strode*.⁹

Such a question meets none of the criteria set forth in RAP 13.4(b). Accordingly, the Petition should be denied. RAP 13.4(b).

II. IF REVIEW IS ACCEPTED, ADDITIONAL ISSUES MUST ALSO BE REVIEWED FOR A FAIR AND COMPLETE RESOLUTION OF THE CASE.

Although the Court of Appeals ruled in Mr. Slert's favor on two issues, it decided a number of other issues against him and declined to reach additional issues. Opinion, p. 1 n. 1. If the Supreme Court accepts review of the issues identified by Petitioner, it should also review the other issues raised by Mr. Slert in this direct appeal.

A. Statement of Issues

1. Did the admission of Mr. Slert's unwarned custodial statements to Rangers Nehring, Langley, and Kirschner violate his Fifth and Fourteenth Amendment privilege against self-incrimination?
2. Did the admission of statements extracted from Mr. Slert after he'd invoked his right to remain silent violate his Fifth and Fourteenth Amendment privilege against self-incrimination?

⁸ Alternatively, Petitioner's position may be that traditional harmless error analysis should apply to courtroom closure issues. *See* Petition, pp. 12-17. This would require reversal of a long line of Supreme Court decisions stretching back to the earliest courtroom closure cases.

⁹ In addition, Petitioner does not argue harmless error for the right-to-be-present issue. Petition, pp. 12-17. Thus, even if review were accepted to determine the applicability *Momah* and *Strode* in the post-*Presley* era, reversal would still be required under *Irby*. Petitioner does not suggest that the Court should reconsider the outcome reached in *Irby*.

3. Did the warrantless search of Mr. Slert's tent and campsite violate his Fourth Amendment right to be free from unreasonable searches and seizures and his right to privacy under Wash. Const. Article I, Section 7?
4. Did the five-hour investigatory detention at the campsite violate Mr. Slert's right to privacy under Wash. Const. Article I, Section 7?
5. Was Mr. Slert denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel by his attorney's unreasonable failure to propose instructions on the lesser included offense of manslaughter?
6. Was Mr. Slert denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel by his attorney's unreasonable failure to seek suppression of certain evidence and statements, and by counsel's failure to argue the correct grounds for suppression?
7. Was Mr. Slert denied his Sixth and Fourteenth Amendment right to effective assistance at sentencing by his attorney's unreasonable failure to suggest that Mr. Slert's mental health problems and failed self-defense claim provided a basis for a sentence below the top of the standard sentencing range?
8. Did the trial court violate Mr. Slert's Sixth and Fourteenth Amendment right to confrontation by restricting his opportunity to cross-examine a jailhouse informant regarding his credibility, and by limiting cross-examination of the sheriff regarding an illegal recording that may have been made of Mr. Slert's custodial statements?
9. Did the trial court violate Mr. Slert's state constitutional right to a jury trial by forcing him to exhaust peremptory challenges to remove a biased juror after erroneously denying a challenge for cause?

B. The Supreme Court should accept review and suppress evidence unlawfully seized from Mr. Slert's car and campsite, as well as statements obtained during an unlawful 5-hour investigatory detention. Division II's decision conflicts with a published opinion from Division I. Furthermore, Mr. Slert's suppression arguments present significant questions of constitutional law that are also of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(2), (3), and (4).

1. Division II's Opinion has greatly expanded the invited error doctrine in a manner that conflicts with Division I's application of the doctrine in *Watkins*.

Mr. Slert did not freely and voluntarily consent to a search of his car. He was not provided *Miranda* warnings, he had no prior criminal involvement with law enforcement, he'd recently consumed a significant quantity of alcohol, he was not aware of his right to refuse consent, and he was placed in handcuffs at the time he assented. In addition, Mr. Slert has mental health issues and a below-average IQ. RP (11/18/09) 21, 28, 30-31, 33-36, 121; RP (11/20/09) 8-9, 41, 57; RP 228, 826-831, 840, 855-856; CP 1, 5. Under these circumstances, consent was not freely given. *See, e.g., State v. Reichenbach*, 153 Wash.2d 126, 131-32, 101 P.3d 80 (2004).

The Court of Appeals held that the (potentially erroneous) admission of evidence seized from Mr. Slert's car was invited error. Opinion, pp. 32-33. The court reasoned that any error was invited—even though the evidence was introduced by the prosecution—because defense counsel attempted to mitigate its harmful effect by highlighting Mr. Slert's cooperation with law enforcement, both on cross-examination and during closing argument. Opinion, pp. 32-33.

Under the invited error doctrine, as traditionally understood, “a party may not *set up* error at trial and then complain about the error on appeal.” *State v. Korum*, 157 Wash. 2d 614, 646, 141 P.3d 13 (2006) (emphasis

added).¹⁰ As this language suggests, “the invited error doctrine ‘appears to require affirmative actions by the defendant ... [in which] the defendant took knowing and voluntary actions to set up the error...’” *In re Call*, 144 Wash. 2d 315, 328, 28 P.3d 709 (2001) (quoting *In re Personal Restraint of Thompson*, 141 Wash.2d 712, 724, 10 P.3d 380 (2000)).

The principle has not traditionally been applied to cases where a party takes steps to mitigate the harm produced by the action later claimed to be error. As Division I has pointed out, the purpose of the invited error doctrine

would not be served by a rule that denies review to a party who introduces evidence in an effort to mitigate prejudice resulting from an adverse ruling. In this situation, the party did not “set up” the error complained of on appeal.

State v. Watkins, 61 Wash. App. 552, 558, 811 P.2d 953 (1991).

Division II’s decision in Mr. Slert’s case runs directly counter to the court’s reasoning in *Watkins*.

The appellate court’s interpretation of the invited error doctrine in Mr. Slert’s case greatly expands the doctrine’s scope. Under the court’s decision, any attempt to address the damaging impact of evidence introduced by another party could be considered “set[ting] up the error,”

¹⁰ An error may also be invited if the defendant affirmatively assented to it; however, this is not the same as failing to object. *See, e.g., Momah*, at 155 (“Defense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning.”)

and thus bar review (even of a manifest error affecting a constitutional right). Opinion, p. 33.

The Supreme Court should accept review because the lower court's decision conflicts with Division I's decision in *Watkins*. The reach of the invited error rule is an issue of substantial public importance that should be decided by the Supreme Court. The reasoning of the Court of Appeals has the potential to affect a vast number of appeals, both civil and criminal. Review is therefore appropriate under RAP 13.4(b)(2) and (4).

2. The appellate court's decision to deny curtilage protection to a dwelling lawfully erected in a dispersed camping area merits review.

Without a warrant, officers entered and searched Mr. Slert's campsite, including the area immediately around the tent in which he'd been dwelling. Mr. Slert sought to suppress evidence found within the curtilage (including descriptions of items that were actually located within his tent). However, the Court of Appeals held that Mr. Slert's tent did not have a curtilage, and thus affirmed the trial court's refusal to determine whether or not evidence seized or viewed from within the curtilage should have been suppressed. Opinion, pp. 35-36.

The privacy protection afforded people who live in nonstandard dwellings—such as campers, tents, lean-tos, etc. — is a constitutional issue

of substantial public interest that should be decided by the Supreme Court. The Court should accept review under RAP 13.4(b)(3) and (4).

3. The five-hour investigative detention upheld by the appellate court is significantly longer than the longest investigative detention ever approved in a published opinion under Article I, Section 7.

Mr. Slert was detained in handcuffs for five hours while law enforcement investigated Benson's death. RP (11/18/09) 18-19, 33, 103-104, 125, 130, 188, 240, 244; RP (11/20/09) 2. Mr. Slert challenged the detention on appeal, arguing a manifest error affecting his rights under Article I, Section 7. *See* Appellant's Opening Brief, at pp. 40-45.

The Court of Appeals refused to grant relief. Opinion, p. 40. Although the court ostensibly declined to reach the merits of the claim, it discussed the argument at length and concluded that the detention did not "run[] afoul of Slert's rights under article I, section 7." Opinion, p. 40.

The Supreme Court has never addressed—much less upheld—an investigative detention approaching five hours. Nor does it appear that any published opinion has ever upheld an investigative detention of that duration.¹¹ The Supreme Court should accept review and hold that a five-hour investigative detention is categorically improper under Article I,

¹¹*See, e.g., State v. Avila-Avina*, 99 Wash. App. 9, 991 P.2d 720 (2000) *abrogated on other grounds by State v. Winterstein*, 167 Wash. 2d 620, 220 P.3d 1226 (2009) (suppressing evidence obtained following a 6-hour detention).

Section 7. Mr. Slert's case—and the lower court's ruling—present constitutional issues that are of substantial public interest, and should be determined by the Supreme Court. RAP 13.4(b)(3)(4).

C. The Supreme Court should accept review and hold that Mr. Slert was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. This case presents significant constitutional issues of substantial public importance and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

Defense counsel provided ineffective assistance by failing to object to admission of Mr. Slert's statements under the *corpus delicti* rule, by failing to seek instructions on the lesser-included offenses of Manslaughter in the First and Second Degree, by failing to seek suppression of certain evidence and/or to argue the correct grounds for suppression, and by failing to argue Mr. Slert's mental health issues and failed self-defense claim in mitigation at sentencing.

Mr. Slert's arguments are set forth in full in the briefing submitted to the Court of Appeals, and are incorporated herein. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

D. The Supreme Court should accept review and hold that the trial court violated Mr. Slert's Sixth Amendment right to confront witnesses by restricting cross-examination of two prosecution witnesses. This case presents significant issues of constitutional law that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

The trial court should have allowed Mr. Slert great latitude in cross-examining the jailhouse informant Schwenk on matters respecting his

credibility, and should have permitted him to cross-examine Sheriff McCroskey regarding whether or not he'd illegally recorded their conversation. Mr. Slert's arguments are set forth in full in his briefing to the Court of Appeals and are incorporated herein. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

E. The Supreme Court should accept review and hold that the trial court violated Mr. Slert's Fifth and Fourteenth Amendment privilege against self-incrimination. The Court of Appeals decision conflicts with the U.S. Supreme Court's standards for determining when a person is in custody for *Miranda* purposes. Furthermore, Mr. Slert's case presents significant constitutional issues that are of substantial public importance and should be decided by the Supreme Court. RAP 13.4(b)(1), (3), and (4).

To implement the Fifth Amendment privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)); *State v. Nelson*, 108 Wash.App. 918, 924, 33 P.3d 419 (2001).

The Court of Appeals refused to suppress Mr. Slert's statements to Rangers Nehring, Langley, and Kirschner, holding that Mr. Slert was not in custody for *Miranda* purposes and that the rangers did not interrogate him. Opinion, pp. 24-26. This holding conflicts with decisions of the U.S. Supreme Court.

Whether or not a person is “in custody” for *Miranda* purposes rests upon “[t]wo discrete inquiries...: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (footnote omitted). If a reasonable person would not feel at liberty to terminate the interrogation and leave, the circumstances are equivalent to formal arrest and the person is ‘in custody’ for *Miranda* purposes.¹² *Keohane*, at 112.

Contrary to the Court of Appeals’ decision, Mr. Slert was in custody for *Miranda* purposes from almost the very beginning of his interaction with Nehring. The ranger directed him not to move, ordered him to hold his hands out of the window, seized his guns, ordered him out of his car, took his knife from him, and handcuffed him. Nehring himself indicated that Mr. Slert was in “protective custody.” RP (11/18/09) 18-21, 26-28, 30, 33-34.

He was then placed in Ranger Langley’s forest service vehicle and driven to the campsite. RP (11/18/09) 33, 44; RP (11/20/09) 10, 29. Under these circumstances, a reasonable person would not feel at liberty to

¹² The use of handcuffs or retention of a suspect’s property will ordinarily establish that the suspect is in custody. *See, e.g., U.S. v. Martinez*, 462 F.3d 903, 909 (8th Cir. 2006) (use of handcuffs); *U.S. v. Chavira*, 614 F.3d 127, 134 (5th Cir. 2010) (retention of property).

terminate the conversation and leave. *Keohane*, at 112. The statements he made prior to administration of *Miranda* should have been suppressed. *Seibert*, at 608.

The Court of Appeals concluded that Mr. Slert was not in custody because—in its view—the lengthy detention could be justified as a *Terry* stop. Opinion, pp. 23 (citing *State v. Heritage*, 152 Wash.2d 210, 95 P.3d 84 (2011), 24-25, and 43-44. This reliance on *Heritage* is misplaced.

The *Heritage* court discussed the U.S. Supreme Court’s decision in *Berkemer*, which refined the definition of ‘custody’ for *Miranda* purposes, exempting “routine, on-the-street *Terry* stops [and] comparable traffic stops” from the requirement that warnings be administered. *Heritage*, at 218 (citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)). But the *Berkemer* decision, by its terms, applies only to routine stops. According to the Supreme Court

[D]etention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist’s expectations, when he sees a policeman’s light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way... [Furthermore] the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist’s fear that, if

he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability.

Berkemer, at 437-438.

The decision here untethers the *Berkemer* exception from its rationale. Mr. Slert was in an isolated setting with no passersby for miles, handcuffed, and confronted by three officers, who retained his property, under circumstances—Mr. Benson’s death—where no person would believe they’d be “allowed to continue on his way.” *Id.*

The lower court’s opinion conflicts with *Keohane*. Furthermore, Mr. Slert’s case presents a significant constitutional issue that is of substantial public interest. Accordingly, the Court should accept review under RAP 13.4(b)(1), (3) and (4).

F. The Supreme Court should accept review and suppress evidence obtained after police failed to scrupulously honor Mr. Slert’s invocation of his right to remain silent. The court of appeals decision conflicts with the U.S. Supreme Court’s decision in *Mosley*. Furthermore, this case presents significant issues of constitutional law that should be decided by the Supreme Court. RAP 13.4(b)(1)(3) and (4).

When police fail to scrupulously honor a suspect’s invocation of his right to remain silent, subsequent statements and derivative evidence must be suppressed. *Michigan v. Mosley*, 423 U.S. 96, 104-106, 96 S.Ct. 321, 326-328, 46 L.Ed.2d 313 (1975).; *see also U.S. v. Lafferty*, 503 F.3d 293, 304-305 (3d Cir. 2007). This includes any evidence tainted by the interaction. *U.S. v. Tyler*, 164 F.3d 150, 157-58 (3d Cir. 1998).

In this case, Detectives Wetzold and Brown failed to scrupulously honor Mr. Slert's invocation of his right to remain silent. Instead, while both were still at the campsite, both officers continued to question Mr. Slert about evidence as it was discovered, suggesting at times that the physical evidence was inconsistent with Mr. Slert's version of events. At Mr. Slert's first trial, the court suppressed only post-invocation statements made at the scene, a decision that was upheld in his first appeal. Opinion, p. 27. The issue was relitigated at Mr. Slert's most recent trial, with the same result. Mr. Slert raised the issue in the current appeal. *See* Appellant's Opening Brief, pp. 74-82.

The Court of Appeals declined to reach the issue, holding that it was controlled by the earlier decision under the law of the case doctrine. Opinion, p. 27. This was a mistake: the earlier decision was clearly erroneous, and thus should have been reconsidered under RAP 2.5(c)(2).

It is undisputed that Wetzold and Brown failed to scrupulously honor Mr. Slert's invocation of his right to remain silent. Nothing insulated this violation from the statements Mr. Slert made to McCroskey on the long ride from the campsite to the jail; accordingly, his statements to McCroskey were inadmissible as a matter of law (because of the latter's failure to readminister *Miranda* warnings). *See Tyler, at* 157-158. Nor were the later statements to Wetzold and Brown (extracted from Mr. Slert

at the jail) sufficiently insulated from the violation to be admissible, despite the readministration of *Miranda* warnings.¹³ This is so because of the other circumstances bearing on the situation – the length of the initial detention, the flagrancy of Brown and Wetzold’s violation at the scene, and the lack of any significant time gap (between the violation at the scene, the conversation with McCroskey during the two-hour ride, and the later interrogations at the jail). *See Tyler, at 157-158.*

Mr. Slert’s statements to McCroskey, as well as his statements to Brown and Wetzold at the jail, should have been suppressed. *Tyler, at 157-158.* The Court of Appeals decision conflicts with the U.S. Supreme Court’s decision in *Mosley*, and presents a significant question of constitutional law that is of substantial public interest and should be decided by the Supreme Court. Accordingly, review is appropriate under RAP 13.4(b)(1), (3), and (4).

¹³ Furthermore, the record is clear from Mr. Slert’s later repeated calls to Wetzold that Mr. Slert’s conversations with Wetzold and Brown, starting with the claimed discrepancies pointed out at the scene, continued to haunt Mr. Slert throughout the entire course of the investigation, even after he was released from custody.

G. The Supreme Court should accept review and hold that the trial judge violated Mr. Slert's state constitutional right to a jury trial by erroneously denying a challenge for cause and thereby forcing him to exhaust his peremptory challenges. This significant constitutional issue is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3)(4).

The trial court erroneously failed to excuse Juror No. 24 for cause.

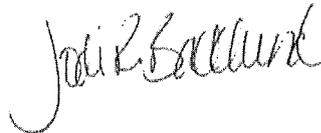
This violated Mr. Slert's state constitutional right to a jury trial by forcing him to exhaust peremptory challenges. Mr. Slert's *Gunwall* analysis and argument is set forth in full in his briefing to the Court of Appeals, and is incorporated herein. The Supreme Court should accept review under RAP 13.4(b)(3) and (4).

III. CONCLUSION

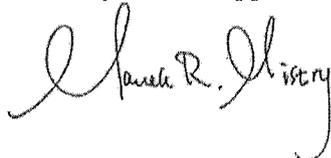
For the foregoing reasons, this Court should not accept review. If review is accepted, this Court should review the additional issues above.

Respectfully submitted on October 3, 2012.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of this Answer to the State's Petition postage pre-paid, to:

Kenneth Slert, DOC #872135
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

With the permission of the recipient, I delivered an electronic version of the brief, via email, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Answer to the State's Petition via email with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 3, 2012.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant