No. 92310-8

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 40333-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Slert,

Appellant.

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

The Honorable Judge James Lawler

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT SHOULD HAVE SUPPRESSED EVIDENCE OBTAINED IN VIOLATION OF MR. SLERT'S FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES AND HIS RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7.

A. The existing record establishes that evidence was unlawfully seized from Mr. Slert's car.

Searches and seizures conducted without a warrant "'are *per se* unreasonable...subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt,* 163 Wash.2d 628, 185 P.3d 580 (2008). The burden is on the state to prove that a warrantless search fits within an exception. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009).

A warrantless search may be based on voluntary consent, but only if the officer(s) did not exceed the scope of the consent. *State v. Reichenbach*, 153 Wash.2d 126, 131-32, 101 P.3d 80 (2004). The voluntariness of consent is evaluated under the totality of the circumstances. Relevant factors include (1) the administration of *Miranda* warnings, (2) the degree of education, intelligence, experience, and sobriety of the person giving consent, (3) whether the consenting person

was advised of the right not to consent, (4) the conduct of the police, (5) any physical restraint imposed, and (6) the public or private nature of the place where consent was obtained. *Id, at* 132 (citing *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)); *United States v. Sanders,* 424 F.3d 768, 773 (8th Cir. 2005); *State v. Garcia*, 140 Wash.App. 609, 625-26, 166 P.3d 848 (2007).

Here, the existing record affirmatively shows that Mr. Slert's consent was neither free nor voluntary. *See* Appellant's Opening Brief, pp. 9-22, 29-46. Ranger Nehring detained and handcuffed Mr. Slert in a secluded area, failed to provide *Miranda* warnings, and neglected to advise Mr. Slert of his right to refuse consent. RP (11/18/09) 21, 28, 30-31, 33-36, 121; RP (11/20/09) 8-9, 41, 57. In addition, Mr. Slert lacked criminal history and thus had no experience with invoking or waiving his rights; he also had mental health issues, a below-average IQ, and was suffering the effects of heavy alcohol consumption. RP 228, 826-831, 840, 855-856; CP 1, 5.

Under these circumstances, Mr. Slert's consent was not freely given. *Reichenbach, supra.* Respondent does not argue that Mr. Slert's consent was free and voluntary. Brief of Respondent, pp. 8-9. Instead, Respondent implies that the court should neither review the error (because

it is not "manifest") nor reverse the conviction (because any error was harmless). Brief of Respondent, p. 9.

Respondent is incorrect on both counts.

1. The Court of Appeals has three different avenues for reviewing Mr. Slert's argument (that he did not freely and voluntarily consent to a search of his car).

The Court of Appeals may review the issue under three different theories.

First, a manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A "preview" of the merits of the error suggests that "the argument is likely to succeed;" this likelihood makes the error manifest. *State v. Walsh,* 143 Wash.2d 1, 8, 17 P.3d 591 (2001). Furthermore, the error is manifest because it had "practical and identifiable consequences in the case." *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Accordingly, the Court should review the error under RAP 2.5(a)(3).

Second, the Court has discretion to accept review of *any* issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell,* ___ Wash.2d ___, ___, ___ P.3d ___ (2011). This includes constitutional errors that are not manifest. *Id.* Under *Russell,* the Court may review the issue even if it agrees with Respondent that the error is not manifest. *Id.*

If the prosecution actually possesses additional evidence relevant to the voluntariness of Mr. Slert's consent[1]—evidence that was never introduced in the lower court during Mr. Slert's three separate trials and associated pretrial hearings—it can ask the Court to remand for a suppression hearing.[2] Thus Respondent's argument (that additional evidence proves the voluntariness of Mr. Slert's consent) should not pose an obstacle to review under *Russell.*

Third, the Court can review the issue as part of Mr. Slert's ineffective assistance of counsel claim. This argument is addressed elsewhere in the brief.

Mr. Slert's argument addresses an error that is obvious in the record and that had practical and identifiable consequences at trial. Accordingly, there is no basis for the Court of Appeals to refuse review. His conviction must be reversed and the illegally-seized evidence suppressed. *Reichenbach, supra.*

2. The erroneous admission of illegally-seized evidence prejudiced Mr. Slert.

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[1] *See* Brief of Respondent, p. 9 ("Under the circumstances, the State had no reason to introduce further evidence regarding Ranger Nehring's request for consent.")

[2] In the alternative, the prosecution can ask permission to supplement the record with additional evidence. RAP 9.11.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmless error. *State v. Jasper*, 158 Wash.App. 518, 536, 245 P.3d 228 (2010). An appellate court will "not tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt." *State v. Fisher*, 165 Wash.2d 727, 755, 202 P.3d 937 (2009). To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, or formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *In re Detention of Pouncy*, 168 Wash.2d 382, 392, 229 P.3d 678 (2010). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke,* 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

Here, the prosecution introduced illegall-seized items, including firearms, ammunition, and prescription medication. CP 266; RP (11/18/09) 21, 31; RP (11/20/09) 8-9. Respondent argues that "any error was harmless, because it [sic] bolstered the defense case." Brief of Respondent, p. 9. Respondent's reasoning is severely flawed. The admission of illegally seized evidence—the firearms and ammunition—did not bolster Mr. Slert's defense; instead, it strengthened the state's case

against him. Mr. Slert's truthfulness, openness, and cooperativeness (all of which suggested he had nothing to hide) are the things that bolstered his defense. Evidence of his attitude could have been introduced even if the fruits of the warrantless search were suppressed.

Respondent presents no harmless-error analysis addressing the admission of the illegally-seized items. Respondent does not suggest that any reasonable jury would have reached the same result, or that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Burke, at* 222.

The record establishes that evidence was illegally seized from Mr. Slert's car without a warrant. Respondent does not dispute this, and does not provide a logical harmless error analysis. The state's proof of second-degree murder was weak, and was undoubtedly bolstered by the illegally-seized evidence. Accordingly, Mr. Slert's conviction must be reversed, the evidence suppressed, and the case remanded for a new trial. *Reichenbach, supra.*

B. The police unlawfully intruded on the curtilage of Mr. Slert's dwelling.

1. The law of the case doctrine does not apply to Mr. Slert's curtilage argument.

Mr. Slert is not barred from arguing that officers unlawfully searched the curtilage surrounding his tent. This is so for five reasons.

First, the law of the case doctrine does not apply to this decision of the trial court. The doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation. *State v. Schwab*, 163 Wash.2d 664, 671-72, 185 P.3d 1151 (2008). It has no application where the prior appellate decision did not explicitly or implicitly address the issues. See, e.g., *State v. Trask*, 98 Wash.App. 690, 695, 990 P.2d 976 (2000). Prior to the third trial, neither the superior court nor the Court of Appeals had addressed the officers' search of the curtilage. CP 25-37, 48-66.

Second, application of the doctrine would violate Mr. Slert's constitutional right to appeal under Wash. Const. Article I, Section 22. The superior court allowed the parties to litigate the issue, entered findings and conclusions, and denied Mr. Slert's suppression motion on its merits. CP 351-357. This decision of the lower court, necessarily involving the exercise of judgment and discretion, has not yet been subject to appellate review. Any denial of review on technical procedural grounds would infringe Mr. Slert's right to appeal. Article I, Section 22; *see also, e.g., State v. Elmore,* 154 Wash.App. 885, 897, 228 P.3d 760 (2010).

Third, the doctrine is inapplicable whenever there is a substantial change in the evidence since the prior appeal. See, e.g, *State v. Worl*, 129 Wash.2d 416, 425, 918 P.2d 905 (1996) (quoting *Folsom v. County of*

Spokane, 111 Wash.2d 256, 263-64, 759 P.2d 1196 (1988)). There has been a substantial change in the evidence here: at the most recent suppression hearing in Mr. Slert's case, the parties developed facts relating to the curtilage issue. These facts were not presented prior to the earlier appeals; accordingly, they represent a substantial change in the evidence. *See* CP 25-37, 48-66; RP (11/18/09) 4-244; RP (11/20/09) 4-162.

Fourth, the Court has the power under RAP 2.5(c) (captioned "Law of the Case Doctrine Restricted") to review a trial court decision, even if the appellant failed to dispute a similar decision in an earlier appeal. The rule provides that "the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case." RAP 2.5(c)(1). This rule authorizes the Court to hear Mr. Slert's argument, even if it were otherwise barred by the law of the case doctrine.

Fifth, the law of the case doctrine is "highly discretionary," and is not an absolute bar to the relitigation of issues, even if they were explicitly settled in a prior appeal. *Trask, at* 695. Even if the law of the case doctrine applied to the curtilage issue, the court could—and should—exercise discretion to review the arguments and decide on the merits. *Id.*

For all these reasons, Respondent's contention that "Slert was barred from relitigating the search issue" under the law of the case

doctrine is incorrect. Brief of Respondent, pp. 11-12. The Court should evaluate the merits of the issue.

2. Mr. Slert's tent and surrounding curtilage were protected by the Fourth Amendment and Article I, Section 7.

The Fourth Amendment and Article I, Section 7 apply with greatest force when police intrude upon a dwelling. *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *State v. Young*, 123 Wash.2d 173, 184-185, 867 P.2d 593 (1994). This includes the area contiguous with the dwelling—the curtilage—which is "intimately tied to the home itself." *State v. Ross*, 141 Wash.2d 304, 312, 4 P.3d 130 (2000) (citation and internal quotation marks omitted).

A warrantless search of the curtilage is unconstitutional[3] unless the prosecution establishes that police had legitimate business, stayed within areas impliedly open to the public, and conducted themselves in the manner of a reasonably respectful citizen. *Id, at* 312-313. Whether a portion of curtilage is impliedly open to the public depends on the totality of the circumstances. *State v. Jesson,* 142 Wash.App. 852, 858-859, 177 P.3d 139, *review denied,* 164 Wash.2d 1016, 195 P.3d 88 (2008).

Where the prosecution contends that the area searched falls outside the curtilage, it must prove facts establishing this conclusion. *United*

States v. Johnson, 256 F.3d 895, 901 (9th Cir. 2001). Under the Fourth Amendment, four factors aid in defining the extent of a home's curtilage: (1) proximity to the home, (2) the presence of an enclosure, (3) the uses to which the area is put, and (4) the steps taken to protect the area from observation by passersby. *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987).

Washington courts have yet to determine whether a similar analysis applies under Article I, Section 7. The state constitutional provision explicitly protects the home and is generally more protective than the Fourth Amendment. *Young*, *at* 184-185. Accordingly, a citizen of Washington should be able to expect greater safeguards against government intrusion into the area surrounding the home than are provided under the federal constitution.

A tent lawfully erected on public lands qualifies as a dwelling, and is protected against warrantless intrusions. *LaDuke v. Nelson*, 762 F.2d 1318, 1326 n. 11, 1332 n. 19 (9th Cir.1985); *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993).[4] Article I, Section 7, with its strong

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[3] Assuming it does not fall within an exception to the warrant requirement.

[4] *see also* Doyle Baker, *Search and Seizure: Reasonable Expectation of Privacy in Tent or Campsite* 66 A.L.R.5th 373 (1999); *United States v. Sandoval*, 200 F.3d 659, 660-661 (9th Cir. 2000); *People v. Hughston*, 168 Cal. App. 4th 1062, 1068-1071 (2008); *People v. Schafer*, 946 P.2d 938, 944-945 (Colo. 1997); *Alward v. State*, 912 P.2d 243, 249 (Nev.

Continued

protection of privacy rights and its explicit reference to the home, almost certainly protects the area surrounding a lawfully erected tent. *Young, supra.* Even under the Fourth Amendment's lesser safeguards, the area surrounding a tent may comprise constitutionally protected curtilage. *Kelley, at* 875; *see also Olson v. State*, 303 S.E.2d 309, 311 (Ga. Ct. App. 1983); *but see United States v. Basher*, 629 F.3d 1161, 1169 (9th Cir. 2011) (rejecting claim that campsite surrounding tent qualified as curtilage under Fourth Amendment).

Mr. Slert's lawfully-erected tent[5] was a dwelling entitled to protection under both the state and federal constitutions. *LaDuke*, *supra; Gooch*, *supra; see also* Conclusion No. 2.2, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, CP 356; *State v. Slert*, No. 31876-8-II (Slert I), p. 3-4; *State v. Slert*, No. 36534-1-II (Slert II), p. 7; CP 25-37, 48-66. Whether examined under the *Dunn* factors or under Article I, Section 7, at least some portion of Mr. Slert's campsite qualified as curtilage subject to constitutional protection.

Respondent contests the merits of Mr. Slert's curtilage argument, yet fails to even mention Article I, Section 7 and the heightened privacy

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1996) overruled on other grounds by *Rosky v. State*, 111 P.3d 690 (Nev. 2005); Kelley v. State, 245 S.E.2d 872, 875 (Ga. Ct. App. 1978).

[5] *See* Suppression Hearing Exhibit 3, Supp. CP; CP 253.

protections it provides a person at their dwelling. Brief of Respondent, pp. 10-16. This failure to address the state constitution may be treated as a concession. *See In re Pullman,* 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, the evidence seized from the campsite must be suppressed because the police violated Article I, Section 7. *Young, supra.*

Without any reference to *Dunn*, Respondent seeks to create an amorphous "public lands" exception to the protections afforded curtilage under the Fourth Amendment. Brief of Respondent, pp. 12-13. According to Respondent, curtilage protection applies only to private property:

> [the] fact that curtilage is private land is what imbues it with constitutional protection, because that is the basis for the proprietor's reasonable expectation of privacy.

Brief of Respondent, pp. 12-13[6] (citing *State v. Cleator*, 71 Wash. App. 217, 857 P.2d 306 (1993)).

Respondent is incorrect.

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[6] Respondent undermines this argument, however, by suggesting in a footnote that "[a] rented and numbered campsite... might constitute curtilage because the area is designated as separate, the camper can reserve the space ahead of time, and the camper can exclude others from the site during the duration of the rental." Brief of Respondent, p. 13, n. 2. Respondent does not explain what causes an area to be "designated as separate;" nor does Respondent provide a principled basis for differentiating between campsites that are numbered and those that are unnumbered or campsites that can be reserved and those that cannot. Brief of Respondent, p. 13, n. 2. Furthermore, the ability to exclude others may have some bearing on a camper's reasonable expectation of privacy under the Fourth Amendment; however, reasonableness is not at issue under Article I, Section 7. See, e.g., *Eisfeldt at* 634.

The U.S. Supreme Court has long held that "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (citing *Katz*). The ownership of the property—whether public or private—is not determinative. *Id; see also O'Connor v. Ortega,* 480 U.S. 709, 719, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (five justices concurring) (public employee has a reasonable expectation of privacy in publicly owned desk and file cabinets). Instead, the question is whether or not the claimed privacy interest is one that society is prepared to recognize as reasonable. *Minnesota v. Olson*, 495 U.S. 91, 95-96, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

Respondent's approach would lead to absurd results: under the state's proposed test, a tent on a privately-owned lot within city limits would enjoy Fourth Amendment protection of its curtilage, while a tent pitched in a remote (but publicly owned) forest, miles from civilization, would not—even if the occupant of each tent had a reasonable expectation of privacy. A person who is camping does not expect others to cross the campsite boundaries—however poorly defined—without permission. Society generally recognizes this expectation as reasonable; it is this

"camper's etiquette" that allows outdoor enthusiasts to leave gear, cooking equipment, and other possessions outside their tent without fear that strangers will intrude and examine it. Furthermore, a stranger will generally not come and sit at the picnic table or campfire of an occupied campsite, in the absence of permission from the person whose tent is pitched on the site.

Nor does Mr. Slert's alleged inability to exclude others from the land require a different result.[7] By parking a car or erecting a tent on public land, a person does not surrender her or his right to privacy in the contents of the car or the tent. Nor does a person surrender privacy rights in a suitcase, backpack, or other item of personal property simply by carrying it into a public place. Under Respondent's "public lands" exception, police could search any car, container, dwelling, computer, notebook, or other item on public land, without a warrant or an exception to the warrant requirement. No homeless person would be able to claim the protection of the Fourth Amendment or Article I, Section 7, unless he or she was fortunate enough to be permitted a corner of privately-owned property.

[7] The testimony introduced at trial on this subject actually related to the authority of the forest ranger, who testified that he could not legally ban one person from trespassing on the campsite of another. RP (11/18/09) 58.

Respondent's proposed exception for curtilage on publicly-owned property conflicts with decades of Supreme Court precedent. The proper test (under the Fourth Amendment) is whether or not Mr. Slert had a legitimate expectation of privacy in the area surrounding his tent. The proper test under Article I, Section 7 is whether or not Mr. Slert had a privacy interest which citizens of Washington have held, and should be entitled to hold, safe from governmental trespass absent a warrant. *Eisfeldt, at* 637.

Respondent also suggests that Mr. Slert's campsite was "especially open" because Mr. Benson "drove right up to Slert's tent without any invitation..." Brief of Respondent, p. 13. According to Respondent, this means Mr. Slert could not have a legitimate expectation of privacy in any areas outside his tent. Brief of Respondent, pp. 13-14. This is incorrect for two reasons. First, when Mr. Benson drove to Mr. Slert's campsite, he parked his truck in the roadway, rather than driving into the bare area of the campsite itself. RP 229. Second, the campsite itself "was a bare area," which was sufficiently distinct from its surroundings to allow the rangers to park behind Benson's truck, "well outside the boundaries of the camp." RP 230. Third, the arrival and location of the truck suggests (at most) that the driveway into the campsite was impliedly open to the public. This does not rule out the existence of curtilage surrounding the tent.

The trial court failed to examine the *Dunn* factors, relied solely on the general characteristics of "dispersed site camping" (rather than the specific characteristics of Mr. Slert's campsite), and based its decision on the Fourth Amendment, ignoring the enhanced protections afforded by Article I, Section 7. CP 351-357. The evidence from the campsite should have been suppressed. *Dunn, supra; LaDuke, supra; Gooch, supra.* In the alternative, the case must be remanded for entry of findings addressing the *Dunn* factors, the extent of the curtilage, and the legality of the officers' conduct. *See, e.g., United States v. Depew*, 210 F.3d 1061, 1067 (9th Cir. 2000) (remanding case for lower court "to determine whether the agents were within the curtilage.")

C. The five-hour detention without formal arrest violated Mr. Slert's rights under Article I, Section 7.

Article I, Section 7 prohibits extended detentions without formal arrest, even if police have probable cause to arrest. A formal arrest triggers certain constitutional protections, and is thus a critical point in the investigation of a suspect. For example, a person who has been formally arrested must be brought before a neutral magistrate within 48 hours of arrest for a judicial determination of probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *County of*

Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991).

Because Mr. Slert was detained for hours without being arrested, his right to privacy was violated, and any evidence obtained by exploiting the illegal detention must be suppressed. *See* Appellant's Opening Brief, pp. 9-22, 40-45. Respondent answers by arguing that the police had probable cause to arrest Mr. Slert. Brief of Respondent, pp. 17-21. This argument is irrelevant. While probable cause may justify a prolonged seizure under the federal constitution,[8] it does not overcome the violation under Article I, Section 7. *See* Appellant's Opening Brief, pp. 40-45.

Respondent next urges the Court to ignore prior cases interpreting Article I, Section 7 as more protective than the Fourth Amendment, and to allow extended detentions without formal arrest under the state constitution. Brief of Respondent, pp. 21-22. Respondent cites no authority establishing that the two provisions are coextensive in this regard. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

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[8] *See State v. Belieu*, 112 Wash.2d 587, 595, 773 P.2d 46 (1989).

Finally, Respondent attempts to stretch the independent source doctrine to apply to Mr. Slert's argument. Brief of Respondent, pp. 21-22. Respondent's attempt at applying that principle displays a misunderstanding of the doctrine. Under the independent source rule, "evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." *State v. Gaines*, 154 Wash.2d 711, 718, 116 P.3d 993 (2005). The independent source rule thus applies only to evidence lawfully obtained. It has no application to this issue.

Mr. Slert was unlawfully detained for hours without being formally arrested; this violated Article I, Section 7. *See* Appellant's Opening Brief, pp. 9-19, 40-45. The officers extracted statements during this illegal detention, and may also have obtained physical evidence. Respondent does not suggest any independent source for the information contained in Mr. Slert's statements. Instead, Respondent appears to claim that since the officers *could have* lawfully arrested Mr. Slert, the violation should therefore be overlooked. Brief of Respondent, p. 22. This argument is nearly identical to the one rejected by the Supreme Court in *State v. O'Neill*, 148 Wash.2d 564, 585-586, 62 P.3d 489 (2003).

The prolonged detention without formal arrest violated Mr. Slert's rights under Article I, Section 7. All evidence derived from that violation—including his statements—must be suppressed. *Wong Sun v. United States,* 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Mr. Slert's conviction must be reversed, the evidence suppressed, and the case remanded for a new trial. *O'Neill, supra.*

II. MR. SLERT WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Defense counsel should have objected to the introduction of Mr. Slert's statements on *corpus delicti* grounds.

The prosecution is obligated to prove the *corpus delicti* of the specific crime charged by evidence independent of the accused person's statements. *State v. Brockob*, 159 Wash.2d 311, 329, 150 P.3d 59 (2006). Such independent evidence must support each element of the charged crime. *Id; accord State v. Dow,* 168 Wash.2d 243, 254, 227 P.3d 1278 (2010). If the independent evidence "supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient" to establish the *corpus delicti* as to the charged crime. *Brockob, at* 330. Failure to object on *corpus delicti* grounds constitutes ineffective assistance *per se*, because a successful objection results in dismissal of the charged crime. *State v. C.D.W.*, 76 Wash.App. 761, 764-765, 887 P.2d 911 (1995).

In this case, the prosecution was required to present independent evidence establishing an intentional killing. *Brockob, supra;* RCW 9A.32.050. Respondent argues that the gunshot wound to the back of Mr. Benson's head[9] was sufficient to establish the *corpus delicti.* Brief of Respondent, p. 24. This is incorrect.

Although this evidence was consistent with an intentional killing, it was also consistent with an accidental killing or with a self-inflicted wound. In other words, "the independent evidence support[ed] hypotheses of both guilt and innocence" of the charged crime (second-degree intentional murder). *Brockob, at* 335. It did not eliminate the possibility that Mr. Slert was guilty of manslaughter, or that Mr. Benson committed suicide.

Because of this, a proper objection would have ended the state's ability to pursue a murder charge. *Id.* Defense counsel's failure to object deprived Mr. Slert of the effective assistance of counsel. *C.D.W., supra.* Accordingly, his conviction must be reversed and his case remanded for a new trial. *Id.*

[9] The forensic evidence regarding this wound was inconsistent and hotly disputed at the third trial.

B. Defense counsel provided ineffective assistance by failing to seek instructions on the lesser-included offenses of Manslaughter in the First and Second Degree.

1. Mr. Slert's argument remains viable even after the Supreme Court's decision in *Grier.*

The Supreme Court has recently restricted an appellant's ability to argue ineffective assistance when defense counsel makes a strategic decision not to pursue instructions on a lesser-included offense. *State v. Grier*, ___ Wash.2d ___, 246 P.3d 1260 (2011). Critical to the *Grier* decision were two facts not present in this case.

First, Grier's attorney proposed and then affirmatively withdrew the lesser-included instructions. *Grier, at* ___. Thus in *Grier,* counsel's decision not to pursue a lesser-included offense was clearly a strategic choice, and one that ultimately fell on counsel's shoulders.[10] Indeed, the *Grier* Court returned to this fact in its conclusion: "under the standard... set forth in *Strickland,* the withdrawal of jury instructions on lesser included offenses did not constitute ineffective assistance." *Grier, at* ___

[10] *See Grier, at* ___ ("the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel.")

(citing *Strickland v. Washington,* 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).[11]

In this case, by contrast, counsel did not affirmatively withdraw a set of previously proposed instructions. CP 273-305, 308-309, 314-315. No mention was made of the lesser-included offense instructions during the court's on-the-record instructions conference. RP 875. Nor does the record otherwise establish a tactical decision to forgo instructions on a lesser-included offense. Thus, unlike the attorney's performance in *Grier,* defense counsel's failure to pursue a lesser-included offense on Mr. Slert's behalf cannot be evaluated as a strategic choice. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.")

Second, in *Grier* the Court concluded from the record "that defense counsel consulted with Grier as to the exclusion of lesser included offenses and that Grier agreed to defense counsel's withdrawal of these instructions." *Grier, at* ___. Here, by contrast, there is no affirmative indication that counsel ever discussed the option of a lesser-included

[11] Presumably, there remain some situations in which counsel's tactical decision to forgo a lesser-included offense would constitute deficient performance.

offense with Mr. Slert. Nothing in the record suggests that Mr. Slert acquiesced in a strategic decision to forgo a lesser-included offense.

These factual differences distinguish this case from *Grier.* Counsel's failure to request any lesser-included offense instructions cannot be analyzed as strategic choice. *Hendrickson, at* 78-79. The *Grier* decision did nothing to undermine the Supreme Court's decision in *Hendrickson.* Accordingly, even after *Grier,* a defense attorney's mistakes cannot be dismissed as legitimate strategy unless there is some support in the record—whether direct or indirect—that counsel actually was pursuing such a strategy. *Id.* Respondent's argument (that Mr. Slert and his attorney made a reasonable strategic decision to pursue an outright acquittal) finds no support in the record. Brief of Respondent, pp. 26-27. Respondent does not provide any citation to bolster the claim that counsel decided pursuing an outright acquittal "was a risk the defense decided was worth taking." Brief of Respondent, pp. 26-27.

2. Mr. Slert was entitled to instructions on manslaughter, and his attorney's nonstrategic failure to request such instructions prejudiced him.

Because counsel's mistake cannot be dismissed as strategy, it must be evaluated under the general standards set forth in *Strickland. Grier, at* ___ ("Today, we reaffirm our adherence to *Strickland*..."). Reversal is required if counsel's performance was deficient and if there is "a

reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach, at* 130 (citing *Strickland*).

This showing is slightly more difficult after *Grier,* given the Supreme Court's abandonment of the three-part test first outlined in *State v. Ward*, 125 Wash.App. 243, 104 P.3d 670 (2004). However, counsel's performance must still be evaluated under the traditional test for ineffective assistance. *Strickland, supra.* The *Grier* Court did not purport to announce a *per se* rule that failure to request a lesser-included offense instruction could never constitute deficient performance. Instead, the Court abandoned *per se* rules in favor of the fact-specific requirements of the *Strickland* test. *See, e.g., Grier, at* ___ ("Ineffective assistance of counsel is a fact-based determination that is 'generally not amenable to *per se* rules.'") *Grier, at* ___ (citation omitted).

Under *Strickland,* an attorney must be familiar with the relevant legal standards and instructions appropriate to the representation. *See, e.g., State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). Given the absence of any suggestion counsel made a strategic choice to forgo instructions on manslaughter, counsel's failure to propose appropriate instructions must

have been based on a misunderstanding of the law or an inaccurate analysis of the facts.

Mr. Slert was entitled to instructions on manslaughter, and Respondent's arguments to the contrary are incorrect. Brief of Respondent, p. 25-27. Respondent suggests that "[m]anslaughter instructions were not supported by the evidence," first because Mr. Slert admitted that he intended to shoot Benson, and second because Mr. Slert fired one shot that hit Benson in the head.[12] Brief of Respondent, p. 25.

But intent to shoot differs from intent to kill. Mr. Slert consistently told police that his initial shot(s) was/were[13] fired in self-defense as Benson attacked; he did not make any statements establishing intent to kill.[14] RP 179, 187, 215, 227, 267, 494, 513, 552-553. The shot to Benson's head—because Benson was "still moving"—*could* imply intent to kill, as Respondent suggests. Brief of Respondent, p. 25. However, the head shot (even when considered in conjunction with Mr. Slert's statement that Benson was "still moving") could also be explained as an instinctive and unthinking reaction to Benson's continued movement, given Mr.

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[12] As noted previously, the forensic evidence regarding this "head shot" was inconsistent, and hotly disputed at the third trial.

[13] Mr. Slert could not remember whether he'd fired two times or four times. RP 594.

[14] Other than the alleged statement relayed by the jailhouse informant Douglas Schwenk. RP 433.

Slert's hyper-vigilance and the inexplicable ferocity of Benson's attack. RP 826-857. A reasonable jury could believe that Mr. Slert fired the fatal shot *without* intent to kill. Because the evidence must be interpreted in favor of an instruction's proponent, Mr. Slert was entitled to have the jury instructed on manslaughter. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000).

The failure to propose proper instructions constituted deficient performance under *Strickland.* Counsel's deficient performance prejudiced Mr. Slert, because there is a reasonable possibility that the jury would have acquitted him of murder in favor of a manslaughter conviction. The *Grier* court's implied suggestion that this type of error can *never* prejudice a criminal defendant is *dicta*, and should not be followed here. *See Grier, at* ___ ("Because the jury returned a guilty verdict, we must presume that the jury found Grier guilty beyond a reasonable doubt of second degree murder.") Indeed, the Supreme Court has held that allowing conviction on a lesser included offense "ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard..." *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).[15] There is no reason to ignore the *Beck* Court's

[15] In *Beck,* which was a capital case, the Court explicitly reserved the question of whether or not the rule should apply in noncapital cases. *Beck, at* 638, n.14. Some federal courts only

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analysis of the potential for prejudice, simply because the error arose because of counsel's mistake, rather than the trial judge's error.

Because Mr. Slert was deprived of effective assistance, his conviction must be reversed. The case must be remanded to the superior court for a new trial. *Strickland, supra.*

C. If Mr. Slert's suppression arguments are not available on review, defense counsel was ineffective for failing to seek suppression and/or to argue the correct grounds for suppression of evidence and statements.

Mr. Slert rests on the arguments set forth in his Opening Brief.

D. Defense counsel was ineffective for failing to argue Mr. Slert's mental health issues and failed self-defense claim in mitigation of his sentence.

Mr. Slert rests on the arguments set forth in his Opening Brief.

III. THE TRIAL COURT VIOLATED THE STATE AND FEDERAL CONSTITUTIONAL REQUIREMENT THAT TRIALS BE OPEN AND PUBLIC.

The state and federal constitutions impose a requirement that trials be open to the public, to ensure that an accused person "is fairly dealt with and not unjustly condemned." *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009); *see also State v. Bone-Club*, 128 Wash.2d 254, 259,

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review a state court's failure to give a lesser included instruction in noncapital cases when the failure "threatens a fundamental miscarriage of justice..." *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990)

906 P.2d 325 (1995). Furthermore, "the presence of interested spectators may keep [the accused person's] triers keenly alive to a sense of the responsibility and to the importance of their functions." *Id.* The requirement of open and public trials serves institutional functions as well: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode,* 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007).

The requirement of open and public trials "applies to all judicial proceedings." *Momah*, *at* 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely "ministerial." *See, e.g., Strode, at* 230 ("This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'") (quoting *State v. Easterling, at* 180).

The requirement of an open and public trial includes jury selection. *State v. Brightman*, 155 Wash.2d 506, 515, 122 P.3d 150 (2005); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 723, ___ L.Ed.2d ___ (2010) (*per curiam*). Where even a portion of jury selection is unnecessarily closed, reversal is automatic. *Strode, at* 231 *and* 236 (six justices concurring); *Presley, supra; State v. Paumier,* 155 Wash.App.

673, 683-685, 230 P.3d 212 (2010). A criminal defendant may assert the right following conviction, even if s/he made no objection at the time of the closure. *Bone-Club, at* 261-262, 257; *see also Strode, at* 229, 235-236 (six justices concurring); *Brightman, at* 517-518.

Here, the trial judge held a closed hearing in chambers prior to excusing four jurors.[16] RP 5. The decision to excuse the jurors was not explained on the record or in writing, and the court did not consider alternatives to closure or mention the *Bone-Club* factors. RP 5. Although Mr. Slert did not object to the closure, the issue may be raised even absent objection. *Id.*

Because of this, Mr. Slert's conviction must be reversed and the case remanded for a new trial. *Bone-Club.* Respondent erroneously contends that the courtroom closure was a "run-of-the-mill circumstance" that did not require *Bone-Club* analysis. Brief of Respondent, p. 32. In support of this argument, Respondent cites *In re Ticeson,* 159 Wash.App. 374, 246 P.3d 550 (2011).

But *Ticeson* is a civil case, in which Division I explicitly declined to extend the public trial protections of Article I, Section 22 to

[16] One of the four belonged to the alternate jury panel, which was later excused as a whole. CP 194-196. The Clerk's Minutes indicate that the decision was made with the agreement of counsel. This appears to be the clerk's interpretation of the trial judge's announcement. CP 194-196.

proceedings under RCW 71.09, and instead decided the case solely with reference to Article I, Section 10. *Ticeson, at* 381. The court held that Ticeson had waived his right to object under that provision (although it did go on to analyze the issue in *dicta*). *Id, at* 382-384. Rather than being "squarely on point," as Respondent contends, *Ticeson* is inapplicable. *See* Brief of Respondent, p. 33.

A more apt citation would be to *State v. Sublett*, 156 Wash.App. 160, 231 P.3d 231, *review granted,* 170 Wash.2d 1016, 245 P.3d 775 (2010).[17] In *Sublett,* Division II held that the public trial right does not apply to "purely legal issue[s] that ... [do] not require the resolution of disputed facts." *Id, at* 182.

Sublett was wrongly decided and should not control this case.[18] The evils addressed by the requirement of open and public trials do not arise solely in the context of adversary proceedings to resolve disputed facts. Instead, a judge, an attorney, or another player in the judicial system can be guilty of impropriety at any stage, regardless of the substance of the hearing. Without public scrutiny, such impropriety remains hidden.

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[17] Respondent does cite *Sublett* earlier in its brief. Brief of Respondent, p. 31.

[18] The Supreme Court has accepted review of *Sublett* and the case is set for argument in June, 2011 (84856-4).

The problem is primarily one of appearance. For example, a murder victim's family, already upset that the murder weapon was suppressed prior to trial, might feel that the judge is colluding with the defense upon learning—after an acquittal is entered—that a jury question about the missing gun was met only with an instruction to continue deliberating. While such a response may well be appropriate, the fact that it was arrived at in secret could lead the victim's family to feelings of resentment and speculation about judicial impropriety.

However, the difficulty with closed hearings does extend beyond mere appearance issues. In another era, racist judges, prosecutors, and defense attorneys may have met secretly in chambers to ensure that a black defendant was convicted, or a white defendant acquitted. Milder forms of misconduct may have taken the form of grumblings about female or minority jurors.[19] Such blatant sexism and racial prejudice may be less common now than they were in years past; however, closed hearings allow such prejudices to be voiced with impunity, regardless of whether or not the hearing involves adversarial positions or disputed facts.

[19] Similarly, in chambers, a judge may improperly silence a contract public defender's objections in a particular case by threatening to withhold assignment to future indigent cases. Such pressure could be applied during argument over purely legal issues, and would place counsel's ethical duties in conflict with her or his livelihood.

Even without actual malfeasance of the sort described, secret hearings degrade the public's perception of the judicial system. When hearings are conducted behind closed doors, members of the public are free to imagine the worst: the conspiracy-minded will see vast plots, the cynical will see corruption or incompetence. Only by opening all hearings—no matter how trivial—to the light of public scrutiny, can the judiciary be assured that it will be accorded the respect it deserves.

In this case, the *in camera* hearing violated Mr. Slert's public trial right under the state and federal constitutions. It also violated the public's right to monitor proceedings, in a case that was of significant public interest. For these reasons, Mr. Slert's conviction must be reversed, and the case remanded for a new trial. *Bone-Club, supra; Presley, supra.*

IV. THE SUPREME COURT'S DECISION IN *STATE V. IRBY* REQUIRES REVERSAL OF MR. SLERT'S CONVICTION FOR VIOLATION OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT DURING JURY SELECTION.

An accused person has a constitutional right to be present during all critical stages of trial, including jury selection. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22; *State v. Irby*, 170 Wash.2d 874, 884, 246 P.3d 796 (2011). In *Irby,* the Supreme Court held that an email exchange between the court and counsel (resulting in dismissal of several jurors) violated the defendant's right to be present. *Irby, at* 887.

This case is controlled by the Supreme Court's decision in *Irby.* Reversal is required unless the state can show that the error was harmless beyond a reasonable doubt. *Id, at* 886-887. Respondent has made no attempt to do so.[20] Brief of Respondent, pp. 33-34. The conviction must be reversed and the case must be remanded for a new trial. *Id.*

V. THE TRIAL COURT VIOLATED MR. SLERT'S RIGHT TO CONFRONT WITNESSES BY RESTRICTING CROSS-EXAMINATION OF TWO PROSECUTION WITNESSES.

Mr. Slert relies on the arguments set forth in his Opening Brief.

VI. THE TRIAL COURT VIOLATED MR. SLERT'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Mr. Slert was in custody immediately after he contacted Ranger Nehring.

Whether or not a person is in custody for *Miranda* purposes is a mixed question of law and fact subject to *de novo* review. *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). Respondent contends that Mr. Slert was seized, but that he was not in custody for *Miranda* purposes when he spoke with Ranger Nehring (prior to the arrival of other officers). Brief of Respondent, p. 44. Respondent's

[20] Nor can it do so, since the excused jurors might have sat on the jury and reached a different verdict, just as the excused jurors in *Irby* might have in that case. *Irby, at* 886-887.

flawed analysis rests on a misunderstanding of the phrase "formal arrest." *See* Brief of Respondent, p. 44 (citing *State v. Heritage*, 152 Wash.2d 210, 218, 95 P.3d 345 (2004)).

A person is in custody for *Miranda* purposes if the circumstances are such that a reasonable person would feel that s/he was not at liberty to terminate the encounter and leave. *Heritage, at* 218. If a reasonable person would not feel free to leave, then her or his freedom has been restrained "to a degree associated with formal arrest," and *Miranda* warnings are required. *Id.* For example, in *Heritage,* the Washington Supreme Court concluded that the suspect could not have reasonably believed her freedom was curtailed because (1) questioning occurred in a public place, (2) the suspect was not separated from her friends, and (3) any doubts she had were dispelled by the officers' assurances (before questioning) that they could not arrest her. *Id, at* 219.

In this case, after Mr. Slert contacted Ranger Nehring and told him he had shot someone, Nehring instructed him not to move and to put his hands out his car window. Nehring then seized guns from Mr. Slert's car and asked what had happened. RP (11/18/09) 18-20, 26-28. A reasonable person in Mr. Slert's circumstances—a person who had just confessed to shooting someone, who had been instructed not to move, who had been ordered to put his hands outside his car window, and whose guns had been

seized by a federal officer—would not feel free to terminate the encounter and leave. *Heritage, at* 218.

It is irrelevant that Mr. Slert was "in public,"[21] that he was "in or near his own vehicle," and that the interrogation was for "initial investigative purposes." Brief of Respondent, p. 44. The circumstances were nothing like those faced by the teenager in *Heritage.*

Respondent's argument rests on an erroneous application of the phrase "formal arrest," and implies that Mr. Slert was not formally arrested until later in the encounter, when Mr. Slert was handcuffed. *See* Brief of Respondent, p. 44 ("It was not until the other Rangers arrived and Slert was put into protective custody that his freedom was sufficiently curtailed for *Miranda* to take effect.") Although the words "formal arrest" are used in the test (as outlined in *Heritage*), Respondent distorts the test by looking beyond the reasonable person standard to other indicia of formal arrest, such as the application of handcuffs. Brief of Respondent, p. 44.

Mr. Slert was in custody for *Miranda* purposes when Nehring first questioned him, because a reasonable person would not have felt free to leave. *Heritage.* Accordingly, any statements that preceded the

[21] Although the encounter took place on public property, it was not "in public" because there were no members of the public who could observe the encounter.

administration of *Miranda* warnings should have been suppressed.[22] *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). His conviction must be reversed and the case remanded for a new trial. *Id.*

B. The trial court should have suppressed statements and evidence derived from the failure of the police to scrupulously honor Mr. Slert's invocation of his right to remain silent.[23]

1. Mr. Slert's argument is not barred by the law of the case doctrine from arguing that the officers failed to scrupulously honor his invocation of his right to remain silent.

Mr. Slert is not barred from arguing that officers failed to scrupulously honor his invocation of the right to remain silent. This is so for four reasons.

First, the superior court allowed the parties to develop evidence and argue the issue.[24] RP (11/18/09) 16-244; RP (11/20/09) 4-154. It also

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[22] In passing, Respondent asserts that Mr. Slert "affirmatively admitted that there was no *Miranda* problem with *those statements*," because counsel "noted that Slert had been fully Mirandized by the Forest Service Personnel." Brief of Respondent, pp. 45-46 (emphasis added). Respondent does not clarify what is meant by "those statements." Respondent appears to suggest—without apparent logic—that Mr. Slert somehow waived any challenge to the admission of his pre-*Miranda* custodial statements, because his attorney acknowledged that forest service personnel later administered *Miranda* warnings.

[23] Without argument, Respondent claims that officers "scrupulously honored [Mr. Slert's invocation of] rights during the investigation." Brief of Respondent, p. 46 (heading "B"). Respondent does not assign error to the lower court's order suppressing statements obtained at the scene after Mr. Slert invoked his right to remain silent. Brief of Respondent, pp. 46-52; *see* RP (11/20/09) 155-156; CP 351-357. In fact, Respondent later acknowledges that the superior court was "right to suppress all evidence obtained after Slert invoked his rights at the scene." Brief of Respondent, p. 51.

entered findings and conclusions, ruling against Mr. Slert on the merits of the argument. CP 351-357. This decision involved the exercise of judgment and discretion. Denial of review on procedural grounds would infringe Mr. Slert's right to appeal. Wash. Const. Article I, Section 22; *Elmore, at* 897.

Second, the doctrine does not apply if there is a substantial change in the evidence since the prior appeal. *Worl, at* 425. Judge Lawler (who presided over the most recent CrR 3.5 hearing) heard evidence that was not considered by the judge who presided over the first trial. For example, at the first CrR 3.5 hearing, McCroskey's testimony reflected that he "did not actively engage Slert in conversation or encourage his statements." *Slert* I, CP 25 *et seq,* p. 5. At the most recent CrR 3.5 hearing, by contrast, McCroskey acknowledged that he may have initiated some of the conversations about the case during the lengthy car ride to the jail, and admitted that he'd asked Mr. Slert clarifying questions. RP (11/18/09) 127-128, 141. The most recent CrR 3.5 hearing also included more detail about the 78-minute unrecorded interview, which commenced without benefit of *Miranda* warnings. *Compare Slert* I, CP 25 *et seq*, with RP (11/20/09) 48-51. In addition, Judge Lawler heard more detailed

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[24] As Respondent puts it: "Slert was able to conduct a full-blown 3.5 hearing in this third trial..." Brief of Respondent, p. 52.

testimony about the polygraph and Mr. Slert's later phone calls to Wetzold. *See* Brief of Respondent, p. 52.

Third, the Court has the power to revisit a prior appellate decision under RAP 2.5(c), which provides that "[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." RAP 2.5(c)(2). This rule authorizes the Court to hear Mr. Slert's argument, even if it were otherwise barred by the law of the case doctrine.

Fourth, the law of the case doctrine is "highly discretionary," and does not pose an absolute bar to relitigation of issues explicitly settled in a prior appeal. *Trask, at* 695. Prior errors, changes in the law, or other factors may justify revisiting a previously decided issue. See, e.g., *Schwab, at* 645; *Elmore, at* 896. The prior appellate decision in this case did not analyze the effect of Wetzold's failure to scrupulously honor Mr. Slert's invocation of his right to remain silent, or the effect of this violation on Mr. Slert's later decision to speak with McCroskey and then with the detectives. Slert I. In doing so, the Slert I Court explicitly relied on the *Edwards v. Arizona* standard. Slert I. (citing *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)). This was

clearly erroneous; the proper standard is set forth in cases applying *Michigan v. Mosley,* 423 U.S. 96, 104-106, 96 S.Ct. 321, 326-328, 46 L.Ed.2d 313 (1975). Accordingly, even if the law of the case doctrine applies here, the Court could—and should—exercise discretion to review the arguments and decide Mr. Slert's case on the merits. *Id.*

For all these reasons, Respondent's contention that "Slert's statements ... are all clearly covered by the law of the case doctrine" is incorrect. Brief of Respondent, pp. 50-51. Furthermore, Mr. Slert is not asking the Court to "reconsider its prior decision." Brief of Respondent, p. 52. Mr. Slert asks the Court to address an issue that was raised and litigated in the trial court, and to consider the lower court's ruling in the context of the evidence that was introduced at the most recent CrR 3.5 hearing. The Court should reach the merits of the issue.

2. The trial court should have suppressed all statements tainted by Wetzold's failure to scrupulously honor Mr. Slert's invocation of his right to remain silent.

Failure to scrupulously honor invocation of the right to silence can taint later interactions. *United States v. Tyler*, 164 F.3d 150, 157-58 (3d Cir. 1998) (citing *Mosley, supra*).[25] In fact, the U.S. Supreme Court, the Washington Supreme Court, and the Washington Court of Appeals have

never published an opinion sanctioning the introduction of statements made after police failed to scrupulously honor a suspect's invocation of *Miranda* rights.

In order to dissipate the taint from a *Mosley* violation, police must readminister *Miranda* warnings. *Tyler, at* 157-158. Admissibility then turns on (1) the amount of time between the violation and the later statements, (2) the subject matter of the second conversation, and (3) police conduct during the later interaction. *Tyler, at* 157-158. The fact that the accused person initiated the second conversation does not make the later statements admissible. *See, e.g., State v. Sargent,* 111 Wash.2d 641, 654, 762 P.2d 1127 (1988).

Here, the first trial court implicitly[26] found that the officers failed to scrupulously honor Mr. Slert's assertion of his right to remain silent. *Slert* I, CP 25 *et seq,* p. 5 and n.6. This ruling—that Mr. Slert's invocation of his right to remain silent was not scrupulously honored—has never been challenged by the prosecution. Nor does Respondent challenge it in this appeal.[27] *See* Brief of Respondent, pp. 46-52. In fact,

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[25] *See also, e.g., Arizona v. Strayhand,* 911 P.2d 577 (1995); *Tennessee v. Crump*, 834 S.W.2d 265 (1992)

[26] The opinion in *Slert* I does not use the phrase "scrupulously honor," but notes that statements were suppressed following Mr. Slert's invocation.

[27] As noted above, Respondent does include the claim that the officers "scrupulously honored [Mr. Slert's] rights during the investigation" in an argument heading. Brief of

Continued

Respondent concedes that the trial court was correct to suppress Mr. Slert's post-invocation statements. Brief of Respondent, p. 51.

The first court's finding on the officers' failure to scrupulously honor Mr. Slert's invocation is further supported by the evidenced introduced at the most recent suppression hearing. After Mr. Slert unambiguously told Wetzold—on tape—that he did not want to talk further,[28] Wetzold and Brown both asked Mr. Slert about various items they found as they processed the campsite. RP (11/18/09) 203, 205, 207. Other officers may have asked questions as well. RP (11/18/09) 207. Finally, Wetzold returned to confront Mr. Slert with discrepancies between his statements and the physical evidence. RP (11/18/09) 202-204.

Following the most recent CrR 3.5 hearing, the trial court suppressed some of the statements obtained from Mr. Slert after he invoked his right to remain silent, but did not suppress all the statements that were tainted by that violation. *See* RP (11/20/09) 155-156; CP 351-357. The trial judge did not examine the effect of the *Mosley* violation on Mr. Slert's subsequent statements. Because Wetzold and Brown (and

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Respondent, p. 46 (heading "B"). Respondent does not include argument or authority supporting this claim.

[28] According to a transcript of the recording, Mr. Slert said, "All right. Why don't we just leave it at that then and uh, I won't say any more." Suppression Exhibit 11, Supp. CP.

possibly other officers as well) questioned Mr. Slert after he'd invoked his right to remain silent, Mr. Slert's statements to McCroskey, during the jail interview, and after his release should have been suppressed.

Statements to McCroskey. Mr. Slert's statements to McCroskey were inadmissible *per se*. *Tyler, at* 157-158. This is so even if Mr. Slert initiated the conversation, because McCroskey did not immediately stop and readminister *Miranda* warnings. *Id.* This failure to readminister *Miranda* warnings is fatal to the admission of any statements obtained following a *Mosley* violation. *Id.* In addition, suppression is required because (1) only a short time elapsed between the *Mosley* violation and the car ride and (2) the conversation (including McCroskey's clarifying questions) focused on the same subject matter. *Id; see* RP (11/18/09) 107-108, 127-128, 139, 141.

Unrecorded jail interview. Similarly, Mr. Slert's statements during the 78-minute unrecorded jail interview were inadmissible *per se*. *Id.* Like McCroskey, Detectives Brown and Wetzold failed to readminister *Miranda* warnings when they began the unrecorded interview.[29] This failure automatically precludes admission of Mr. Slert's unrecorded statements. *Id.*

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[29] Detective Brown testified that Wetzold (erroneously) reminded Mr. Slert that his waiver was still in effect. RP (11/20/09) 49. Wetzold, by contrast, claimed that he was not present

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Recorded jail interview. Mr. Slert's recorded statement during the jail interview must also be suppressed. First, it was tainted by the *Mosley* violation. Second, it was corrupted by the improper custodial interrogations (the McCroskey interview and the unrecorded jail interrogation). Third, it involved the same subject matter as the earlier interrogations. The trial judge did not make a finding addressing the length of time between the *Mosley* violation and the jail interview; nor did the findings address the amount of pressure exerted by the detectives at the jail.[30] CP 351-357.

In addition, the recorded interview must be suppressed under the Supreme Court's *Seibert* decision,[31] because it was conducted immediately after an unwarned 78-minute interrogation. When *Miranda* warnings are inserted in the midst of a continuing interrogation, they are likely to mislead, and thus foreclose the possibility of a knowing,

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when Brown began the interview, and testified that he did not remind Mr. Slert of his rights. RP (11/18/09) 210-212. The trial court did not specifically find that the unrecorded portion of the interview was preceded by *Miranda* warnings. Findings Nos. 1.C.2 and 1.C.3, CP 354-355.

[30] Although the detectives may not have used unusually coercive tactics and the interview may have been somewhat insulated by the passage of time, these factors should be accorded less influence because of the intervening interrogations, both of which were improper.

[31] In *Seibert,* the Court fragmented on the appropriate standards to determine admissibility. Because there was no majority opinion, the controlling test was announced by Justice Kennedy, whose concurrence provided the narrowest grounds agreed to by a majority of justices. *See Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977).

intelligent, and voluntary waiver. *Seibert*, *at* 613-614. In such cases, the post-*Miranda* statements must be excluded unless the prosecution establishes circumstances justifying admission. *United States v. Ollie*, 442 F.3d 1135, 1142-1143 (8th Cir. 2006).

Under *Seibert,* the state must prove either (a) that the failure to provide warnings was inadvertent,[32] or (b) that the police took sufficient curative action before obtaining the statement. *Id.* In this case, the state did not prove (and the trial court did not find) that the failure to provide *Miranda* warnings was inadvertent, or that the police took curative action sufficient to dissipate the taint. CP 351-357. Accordingly, the recorded jail interrogation must be suppressed. *Id.*

Subsequent statements. These continuing violations also tainted Mr. Slert's subsequent statements, including any he made during the polygraph test or in the course of his later phone conversations with Wetzold. The prosecution never presented evidence of an uninterrupted period of time without new violations, followed by a fresh administration of *Miranda* warnings. The absence of a "clean" period means that all of Mr. Slert's statements made after the *Mosley* violation must be suppressed.

[32] In which case admission is governed by the test announced in *Oregon v. Elstad* 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

After Mr. Slert invoked his right to remain silent, Wetzold, Brown, and other officers processing the scene improperly came to him seeking information about items discovered at the campsite, and explanations for apparent inconsistencies between the physical evidence and Mr. Slert's earlier statements. RP (11/18/09) 101, 176, 202-205, 207. This violated *Mosley*. The law presumes that the *Mosley* violation prompted Mr. Slert to reflect on the discrepancies, and to try to explain his version of events, first to McCroskey and then during the jail interviews. *Tyler, supra; see also, e.g., Sargent, at* 654. The *Mosley* violation tainted everything that followed. *Tyler, supra.* Accordingly, Mr. Slert's statements—even those made during conversations he may have initiated—should have been suppressed. *Tyler, supra; Sargent, supra.*

VII. 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.

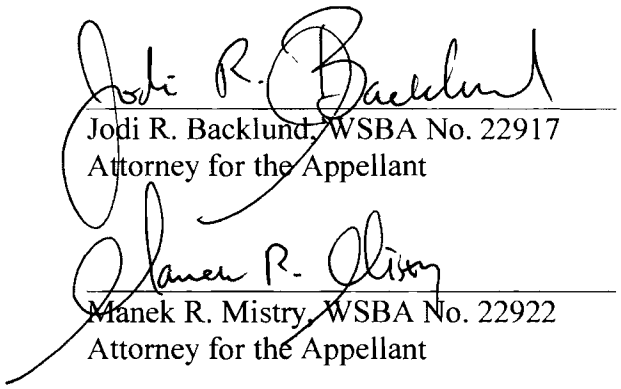
Mr. Slert rests on the arguments set forth in his Opening Brief.

CONCLUSION

Mr. Slert's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on March 31, 2011.

BACKLUND AND MISTRY



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STATE OF WASHINGTON
BY
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Kenneth Slert, DOC #872135
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

and to:

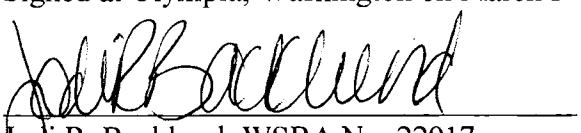
Lewis County Prosecutor
360 NW North St.
Chehalis, WA 98532

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 31, 2011.

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 March 31, 2011.



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