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No. 92310-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Kenneth Slert,

Appellant/Respondent.

Lewis County Superior Court County Superior Court

Cause No. 04-1-00043-7

The Honorable Judge James Lawler

Respondent's Supplemental Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Respondent

BACKLUND & MISTRY

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

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STATEMENT OF FACTS

In October of 2000, Kenneth Slert met John Benson while both were hunting on national forest land. RP 491-492, 548. They became intoxicated together, argued, and fought. RP 153-154, 405, 492, 548-550, 616, 764-769. Mr. Slert shot and killed Benson. RP 492, 517.

Mr. Slert contacted a forest ranger for help. RP 176-178. He told the ranger that he'd acted in self-defense, that he'd been afraid the other man would choke him to death, and that he'd feared for his life. RP 179, 187, 215, 217.

Over the course of the next four years, Mr. Slert consistently maintained that he'd acted in self-defense. He had a poor recollection of the details of the incident, and repeatedly engaged the case's lead detective in conversation about the shooting. This officer made no record of these conversations. RP (11/8/09) 89-102, 175-222; RP (1/27/10) 483-521; RP (1/28/10) 528-611.

Four years after the shooting, the state charged Mr. Slert with second-degree murder. CP 1-3. After two successful appeals, Mr. Slert was tried a third time in 2010. CP 25-37, 48-66. At the start of his 2010 trial, prospective jurors completed a sworn questionnaire to determine their fitness to serve. CP 359-361.

The trial judge held a pretrial conference in chambers. Mr. Slert was not present for this meeting, RP 5. In it, the judge excused four prospective jurors. CP 194-197. The court disclosed this just prior to the start of *voir dire* in open court:

THE COURT: There are a couple other things. We have had the questionnaires that have been filled out. I have already, based on the answers, after consultation with counsel, excused jurors number 19, 36, and 49 from panel two which is our primary panel and I've excused juror number 15 from panel one, the alternate panel that we'll be using today.
RP 5.

The court clerk destroyed the completed jury questionnaires.¹ *See State v. Slert*, No. 40333-1-II, 2015 WL 5042148, at *1 (Wash. Ct. App. Aug. 26, 2015) (Slert I).

Mr. Slert appealed and the Court of Appeals reversed. In addition to finding a public trial violation, the Court of Appeals held that the trial court's *in camera* dismissal of prospective jurors violated Mr. Slert's right to be present. *State v. Slert*, 169 Wn. App. 766, 769, 282 P.3d 101 (2012) *review granted in part*, 176 Wn.2d 1031, 299 P.3d 20 (2013) (Slert II). The Supreme Court accepted review on the public trial issue and reversed the Court of Appeals. *State v. Slert*, 181 Wn.2d 598, 609, 334 P.3d 1088 (2014) (Slert III). The court remanded the case for the Court of Appeals to

¹ The trial judge retained a draft copy of the blank questionnaire, which was later made part of the record. CP 359-361.

determine “whether the violation of Slert’s right to be present is harmless beyond a reasonable doubt.” *Id.* On remand, the Court of Appeals concluded that the error was not harmless beyond a reasonable doubt. *Slert I*, No. 40333-1-II, 2015 WL 5042148, at *3-6.

The Supreme Court accepted the state’s Petition for Review on the issue of whether Mr. Slert’s absence from the pretrial conference was harmless error.

ARGUMENT

I. THE SUPREME COURT SHOULD AFFIRM THE COURT OF APPEALS BECAUSE THE VIOLATION OF MR. SLERT’S RIGHT TO BE PRESENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

A. The trial court violated Mr. Slert’s right to be present at a critical stage of his trial.

An accused person has a fundamental constitutional right to be present at all critical stages of trial. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). Jury selection is a critical stage under both the state and federal constitutions. *Id.*, at 884-885; *State v. Love*, 183 Wn.2d 598, 608, 354 P.3d

841 (2015).² Jury selection includes any proceeding in which jurors are dismissed for case-specific reasons. *Irby*, 170 Wn.2d at 882.³

Here, the trial court excused jurors for substantive case-specific reasons, in Mr. Slert's absence, during a pretrial conference in chambers.⁴ RP 5. The judge put the matter on the record after the case was called: "I have already... excused [four] jurors." RP 5.⁵ He explained that he'd excused the prospective jurors based on their answer to a questionnaire, after consultation with counsel. RP 5.

Petitioner repeatedly and erroneously suggests that the prospective jurors were dismissed by agreement. Petitioner's Supplemental Brief Re:

² See also *United States v. Hanno*, 21 F.3d 42, 47 (4th Cir. 1994) ("[I]t has been authoritatively decided that jury selection is a critical stage of a criminal trial and that the presence of the accused is required.")

³ The *Irby* dissent acknowledged that the defendant's rights were violated by removal of jurors for "substantive" rather than administrative (hardship) reasons under the procedure followed in that case. *Id.*, at 887-900 (Madsen, C.J., dissenting). The dissent found the error harmless because three of the jurors removed for substantive reasons had no chance of sitting on the jury (based on their position in the venire); the fourth was dismissed on the record by agreement in the defendant's presence. *Id.*, at 900-901 (Madsen, C.J., dissenting).

⁴ Petitioner implies that Mr. Slert wasn't *completely* absent when the prospective jurors were dismissed. Petitioner's Supplemental Brief Re: Harmless Error (filed 3/31/16), p. 4, 10. This is improper: Mr. Slert's absence from the proceedings is a settled fact. See, e.g., *Slert III*, 181 Wn.2d at 609 (remanding to determine "whether the violation of Slert's right to be present is harmless beyond a reasonable doubt.") The current Petition did not ask the Supreme Court to revisit evidence of Mr. Slert's absence, and the issue is not before the court.

⁵ The judge's use of the present perfect tense ("I have... excused") indicates that the action took place at an unspecified time before the present. Englishpage.com, retrieved March 19, 2016 from <http://www.englishpage.com/verbpage/presentperfect.html>. This is emphasized by his use of the adverb "already," which means "before this time," or "before now." Merriam-Webster Dictionary, retrieved March 17, 2016 from <http://www.merriam-webster.com/dictionary/already>.

Harmless Error (filed 3/31/16), pp. 1, 4, 9, 10, 14, 16. In fact, the judge “consult[ed] with counsel,” but the record does not show that he obtained the attorneys’ agreement. RP 5. The verb “consult” means “to ask the advice or opinion of.” Merriam-Webster Dictionary, retrieved April 1, 2016 from <http://www.merriam-webster.com/dictionary/consult>. By contrast, the verb “agree” means “to have the same opinion.” Merriam-Webster Dictionary, retrieved April 1, 2016 from <http://www.merriam-webster.com/dictionary/agree>.

This violated Mr. Slert’s state and federal constitutional rights to be present. *Irby*, 170 Wn.2d at 884-885; *Slert III*, 181 Wn.2d at 609.

B. The violation prejudiced Mr. Slert and the state cannot show harmlessness beyond a reasonable doubt.

Constitutional violations are presumed prejudicial. *State v. Lamar*, 180 Wn.2d 576, 588, 327 P.3d 46 (2014). The burden is on the state to show, beyond a reasonable doubt, that any constitutional violation was harmless. *Id.* These general rules apply to violations of the right to be present at a critical stage. *Irby*, 170 Wn.2d at 886.

The state cannot show that the violation here was harmless beyond a reasonable doubt.⁶ This is due, in part, to the superior court’s destruction

⁶ Indeed, the state made no attempt to do so prior to this court’s remand to the Court of Appeals in September of 2014. See Brief of Respondent, Respondent’s Supplemental Brief
(Continued)

of the completed questionnaires that formed the basis for the trial court's decision to excuse four prospective jurors.⁷ See *Slert I*, No. 40333-1-II, 2015 WL 5042148, at *1.

Violation of the right to be present during jury selection is only harmless when prospective jurors who were excused in the defendant's absence "had no chance to sit on [the] jury." *Irby*, 170 Wn.2d at 886. *Irby* suggests that the state can show "no chance to sit" in two ways.

In this case, the state cannot show "no chance to sit" through either means identified by the *Irby* court.

First, the state cannot meet its burden of proving "no chance to sit" by showing that the prospective juror was outside "the range of jurors who ultimately comprised the jury." *Id.* Three of the four jurors excused in Mr. Slert's absence were within the range of jurors who ultimately comprised the jury. CP 194-197.

Second, the state cannot meet its burden of proving "no chance to sit" by proving that a prospective juror's "alleged inability to serve" was tested by "questioning in [the accused person's] presence." *Id.* The

(filed October 3, 2011), Supplemental Response Brief (filed November 15, 2011), Petition for Review (filed September 6, 2012); State's Supplemental Brief (filed June 7, 2013).

⁷This was apparently done without notice to the parties or a written order of the court.

prospective jurors in this case were excused without any opportunity for questioning in Mr. Slert's presence.⁸ RP 5.

The state proposes a third way, beyond the two alternatives addressed in *Irby*.⁹ But the state's proposal relies on circular reasoning rather than facts. Without citation to authority, Petitioner argues that the removal of the prospective jurors, by itself, proves that they had no chance to sit. Petition, pp. 12-17. In essence, the state asks this court to uphold the trial judge's decision even in the absence of any record supporting that decision. Petition, pp. 12-17.

This court should decline to do so.

First, Petitioner's request eviscerates the constitutional harmless error standard. The state's proposal substitutes a presumption of judicial correctness (that the trial judge properly excused only those jurors who truly had "no chance to sit") for the government's burden to show harmlessness beyond a reasonable doubt. *Lamar*, 180 Wn.2d at 588. Had the court taken this approach in *Irby*, it would have affirmed the defendant's conviction, based simply on the judge's exercise of its

⁸ Indeed, as in *Irby*, it appears that the prospective jurors here "were not questioned at all." *Id.*

⁹ Petitioner apparently concedes its burden to show beyond a reasonable doubt that prospective jurors had "no chance to sit." Petition, pp. 12-17.

discretion to excuse prospective jurors. Adopting the state's approach would require this court to overrule *Irby*.¹⁰

Second, under the facts of this case, Petitioner's approach is unworkable. The Supreme Court cannot meaningfully evaluate the "circumstantial evidence" Petitioner advances to support its harmlessness argument. Petition, pp. 12-14. The completed questionnaires providing the basis for the court's decision have been destroyed. The record does not even establish the final text of the questionnaire itself: only the judge's copy of a draft questionnaire survives. CP 359-361. Any "consultation with counsel" occurred in chambers off the record. RP 5. The transcript does not make clear whether either attorney had reservations about the judge's *in camera* decision. RP 5.

Petitioner misrepresents the record by asserting that defense counsel "commented that those jurors were dismissed because they had knowledge of prior trials." Petitioner's Supplemental Brief Re: Harmless Error (filed 3/31/16), p. 4-5, 9-10, 13 (citing RP 11). The cited transcript passage is ambiguous; counsel's reference to "none of the other ones other than the ones The Court has already pulled" can be read in more than one way. RP 11. Furthermore, contrary to Petitioner's repeated claims, the

¹⁰ The doctrine of *stare decisis* requires this court to refrain from overruling a prior decision absent a clear showing that it is both incorrect and harmful. *In re Yates*, 183 Wn.2d 572,
(Continued)

record does not conclusively establish that the judge actually excused prospective jurors for reasons of bias. *See* Petitioner’s Supplemental Brief Re: Harmless Error (filed 3/31/16), p. 10 (claiming that “the four dismissed jurors were so obviously prejudiced... that everyone knew, without further questioning, that they could not sit on the jury”); *see also* pp. 1, 6, 7, 9, 13, 15. The record establishes only that the dismissals were based on the questionnaire. RP 5. But some jurors may have written non-responsive statements on their questionnaires, leading the judge to dismiss jurors for reasons other than exposure to pretrial publicity.

There is no way for this court to determine whether or not the trial judge made the correct decision.¹¹ Indeed, it is impossible to determine how carefully the judge reviewed the questionnaires, what additional information he considered, what input he received from counsel, or anything else pertaining to his decision. The record here contains less information than was available to support the trial court’s decisions in *Irby*. The *Irby* court had both an email trail and the completed

577, 353 P.3d 1283 (2015). *Irby* is neither incorrect nor harmful.

¹¹ This distinguishes this case from *Miller*, upon which Petitioner relies. Petitioner’s Supplemental Brief Re: Harmless Error (filed 3/31/16), pp. 13-15 (citing *State v. Miller*, 184 Wn. App. 637, 338 P.3d 873 (2014) *review denied*, 182 Wn.2d 1024, 347 P.3d 459 (2015)). In *Miller*, the Court of Appeals had a transcript of the material to which the excused juror had been exposed, and thus was able to independently review the correctness of the trial court’s decision and determine that the defendant’s absence was harmless beyond a reasonable doubt. *Miller*, 184 Wn. App. at 640. No such record is available here.

questionnaires, and thus had a basis to independently evaluate each released juror's alleged inability to serve. It declined to do so, in the absence of questioning in the defendant's presence. *Irby*, 170 Wn.2d at 886.¹²

Third, Petitioner's request improperly presumes the correctness of the prospective jurors' questionnaire answers. Mr. Slert should have had the opportunity to test their "alleged inability to serve"¹³ through questioning in his presence, regardless of their answers to the questionnaire.¹⁴ Such questioning could have exposed misunderstandings or mistakes.¹⁵ It could also have revealed a change of heart since the juror completed the questionnaire.¹⁶

¹² The *Irby* dissent declined to comment on the merits of the trial judge's decision excusing on substantive grounds a juror (No. 36) who was within numerical range of those ultimately selected. *Irby*, 170 Wn.2d at 901 (Madsen, C.J., dissenting). Instead, the dissent pointed out that this particular juror was excused on the record in the defendant's presence. *Id.*

¹³ *Irby*, 170 Wn.2d at 886.

¹⁴ The surviving draft of the questionnaire provided only a very brief description of the allegations and instructed prospective jurors to "simply give the best and most complete answer that you can," even if they were "not entirely certain." CP 389-391.

¹⁵ For example, a prospective juror may have had in mind an unrelated case when claiming exposure to news reports or other familiarity with Mr. Slert's case. Such a juror would have had a chance to sit on the jury, once the mistake was cleared up by questioning in Mr. Slert's presence.

¹⁶ *See, e.g., United States v. Pratt*, 728 F.3d 463, 473 (5th Cir. 2013) *cert. denied*, 134 S.Ct. 1328, 188 L.Ed.2d 338 (2014) (Prospective juror "said he had 'thought about that question since the questionnaire' and concluded that he could judge [the defendant] on the evidence alone.")

Mr. Slert had a constitutional right to be present during jury selection. He should have had a full opportunity to test a particular juror's "alleged inability to serve" through questioning. *Irby*, 170 Wn.2d at 886. Prejudice is presumed from the violation. *Lamar*, 180 Wn.2d at 588.

The state cannot prove harmlessness beyond a reasonable doubt. The record here does not and cannot show that the jurors excused in Mr. Slert's absence had "no chance to sit" on the jury. *Irby*, 170 Wn.2d at 886.

Mr. Slert's case must be remanded for a new trial. *Id.*

II. HAVING DEMONSTRATED A CONSTITUTIONAL VIOLATION, MR. SLERT DOES NOT BEAR THE ADDITIONAL BURDEN OF SHOWING PREJUDICE.

A. Mr. Slert has established a constitutional violation because he was absent during jury selection, a "critical stage;" courts do not engage in a case-by-case analysis to determine if a critical stage is truly "critical."

Once an accused person establishes a constitutional violation, prejudice is presumed. *Lamar*, 180 Wn.2d at 588. The burden then shifts to the state to show harmlessness beyond a reasonable doubt. *Id.*

The constitutional right to be present applies to any "critical stage" of trial. *Irby*, 170 Wn.2d at 880. Under both the state and federal

constitutions, jury selection is a critical stage.¹⁷ *Love*, 183 Wn.2d at 608; *Irby*, 170 Wn.2d at 885. Jury selection necessarily includes “decisions...on the basis of [a] questionnaire about the ability of particular jurors to try [a] specific case.” *Irby*, 170 Wn.2d at 882.¹⁸

Here, in Mr. Slert’s absence, the judge removed four prospective jurors for substantive case-specific reasons. RP 5. Mr. Slert was thus absent during a portion of jury selection, a critical stage even under the *Irby* dissent’s reasoning. RP 5; *Irby*, 170 Wn.2d at 882; *see also Irby*, 170 Wn.2d at 887-900 (Madsen, C.J, dissenting). This violated his right to be present under the state and federal constitutions. *Irby*, 170 Wn.2d at 884-885.

¹⁷ Under federal law, a “critical stage” is one in which the defendant’s presence ““has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.”” *Id.*, at 881 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)). Under the state constitution, a “critical stage” is one at which the defendant’s ““substantial rights may be affected.”” *Irby*, 170 Wn.2d at 885 (emphasis added by *Irby*) (quoting *State v. Shutzler*, 82 Wash. 365, 367, 144 P. 284 (1914) *overruled in part on other grounds by State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 466 (1983)). The state constitutional right appears to be broader than the corresponding federal right. *See Irby*, 170 Wn.2d at 885 n. 6. Mr. Slert’s independent state constitutional argument is set forth below.

¹⁸ As noted above, even the *Irby* dissent considers such decisions to be part of the critical stage of jury selection where made for “substantive” reasons. *Irby*, 170 Wn.2d at 887-900 (Madsen, C.J, dissenting).

Petitioner’s “possibility of prejudice” argument reflects a misunderstanding of the law.¹⁹ Petition, pp. 8-11 (citing *Caliguri*, 99 Wn.2d 501 and *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997)). The cases upon which Petitioner relies—*Caliguri* and *Bourgeois*—do not address a critical stage such as jury selection. Instead, both addressed ex parte communication between the court and the jury. Although improper, such communication does not require reversal unless there is some possibility of prejudice. *Bourgeois*, 133 Wn.2d at 407; *Caliguri*, 99 Wn.2d at 509.

But courts do not make a preliminary case-by-case determination regarding the possibility of prejudice where a critical stage is concerned. *See, e.g., Irby*, 170 Wn.2d at 884-885; *State v. Pruitt*, 145 Wn. App. 784, 799, 187 P.3d 326 (2008). Instead, a defendant’s absence from a critical stage of trial violates the right to be present as a matter of law. *Irby*, 170 Wn.2d at 884-885. It is this constitutional violation that raises the presumption of prejudice the state must rebut by proof beyond a reasonable doubt. *Id.*, at 886. A defendant’s absence during a critical stage may, in the end, prove harmless, but, as with all constitutional violations,

¹⁹ It also reflects a misunderstanding of the issue before this court, which remanded to the Court of Appeals to determine “whether the violation of Slett’s right to be present is harmless beyond a reasonable doubt.” *Slett III*, 181 Wn.2d at 609.

the burden is on the state to make that showing.²⁰ *Id.*; *Lamar*, 180 Wn.2d at 588.

Petitioner seeks to encumber appellate courts with the task of determining whether or not a critical stage (such as jury selection) is truly “critical” in a particular case. *See* Petition, pp. 8-11. Under Petitioner’s flawed approach, a reviewing court could, depending on its preliminary assessment of the possibility of prejudice, decide that absence during any critical stage—whether jury selection, the presentation of evidence, return of the verdict, or sentencing—might not actually rise to the level of constitutional violation. *See* Petition, pp. 8-11.

This court should not indulge Petitioner’s effort to evade its well-established obligation under the constitutional test for harmless error. The burden of showing harmlessness rests with the state.²¹ *Lamar*, 180 Wn.2d at 588.

Furthermore, even if this court were to adopt a new threshold “possibility of prejudice” standard for critical stages, Mr. Slert has met that standard. First, some jurors excused in his absence were within “the

²⁰ Thus, contrary to Petitioner’s unsupported assertions, Mr. Slert has no burden to “suggest some reason that [the excused jurors] were fit to serve.” Petitioner’s Supplemental Brief Re: Harmless Error (filed 3/31/16), p. 1; *see also* p. 9 (faulting Mr. Slert for failing to “suggest[] why the four excused potential jurors in this case *should* have been on the jury.”) (emphasis in original).

²¹ It would be especially unfair to require Mr. Slert to prove prejudice in this case, given the trial court’s destruction of the completed jury questionnaires.

range of jurors who ultimately comprised the jury.” *Irby*, 170 Wn.2d at 886. Second, these jurors’ exposure to pretrial publicity did not necessarily disqualify them from serving in Mr. Slert’s case. *See, e.g., State v. Toennis*, 52 Wn. App. 176, 185, 758 P.2d 539 (1988) (upholding denial of challenges for cause in light of jurors’ assurances “that they would base their decisions solely on the evidence.”) Third, jury selection always poses a possibility of prejudice because “[r]easonable and dispassionate minds may look at the same evidence and reach a different result.” *Irby*, 170 Wn.2d at 886-87.

Mr. Slert’s absence denied him the opportunity “to give advice or suggestion or even to supersede his lawyers altogether.” *Id.*, at 883 (quoting *Snyder*, 291 U.S. at 106). He was deprived of his state and federal right to be present during a critical stage of his trial. *Id.*, at 886-887. His conviction cannot stand.

B. Mr. Slert has shown a violation of the state constitutional right to be present, because he was absent from a proceeding affecting his “substantial rights.”²²

Courts consider six factors in determining whether the state constitution provides broader protection than the federal constitution. *State v. Gunwall*, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986). Here, *Gunwall* analysis favors an independent interpretation of art. I, § 22.

Our state constitution explicitly guarantees the right to “appear and defend *in person*.” Art. I, § 22 (emphasis added). The Supreme Court has determined that (1) this language, (2) its difference from the corresponding federal provision, and (3) common law and state constitutional history all support an independent application of this provision of art. I, § 22. *State v. Martin*, 171 Wn.2d 521, 530-531, 252 P.3d 872 (2011) (discussing *Gunwall* factors 1-3).

The fourth *Gunwall* factor (“preexisting state law”) addresses preexisting state law that is not of constitutional dimension. *Gunwall*, 106 Wn.2d at 61-62. This factor also favors an independent interpretation of art. I, § 22’s protection of the right to appear and defend in person. First, CrR 3.4 is captioned “Presence of the Defendant,” and directs that the

²² It is not too late for Mr. Slert to argue in favor of an independent interpretation of art. I, § 22. Respondent did not raise its “possibility of prejudice” argument in its initial briefing in the Court of Appeals or in the first proceeding in the Supreme Court. Only after remand did the state argue the issue for the first time. *See State’s Supplemental Brief Re: Harmless*

(Continued)

defendant “shall be present... at every stage of the trial including the empaneling of the jury...” CrR 3.4. Second, even prior to statehood, Washington’s territorial code prohibited the government from trying a defendant for aailable offense “unless personally present during the trial.” Code of 1881, §1086. Third, Washington’s former statutory protection (now CrR 4.3) was “only declaratory of the common law,”²³ which encompassed the right “to be brought face to face with the jurors” during jury selection. *Lewis v. United States*, 146 U.S. 370, 376, 13 S.Ct. 136, 36 L.Ed. 1011 (1892).²⁴

Gunwall factor 5 (“structural differences”) always favors an independent application. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 713, 257 P.3d 570 (2011). This is so because the federal constitution “is a *grant* of limited power to the federal government, while the state constitution imposes *limitations* on the otherwise plenary power of the state.” *Id.*, (quoting *State v. Foster*, 135 Wn.2d 441, 458–59, 957 P.2d 712 (1998)). This factor is particularly salient here: the right to “appear

Error (filed December 2, 2014). The Court of Appeals did not decide the issue, but found that Mr. Slert had satisfied any burden to allege a possibility of prejudice. Opinion, p. 5.

²³ *State v. Main*, 66 Wash. 381, 384, 119 P. 844 (1911) (addressing 1 Rem. & Bal. Code, § 2145).

²⁴ Federal Rule of Criminal Procedure 43(a), upon which CrR 4.3 is modeled, “incorporated [this] more expansive common law understanding of the right as well as the constitutional standard.” *United States v. Reyes*, 764 F.3d 1184, 1189 (9th Cir. 2014) *cert. denied*, 135 S.Ct. 1721, 191 L.Ed.2d 691 (2015).

and defend in person” imposes an explicit (rather than merely implied) limit on the state’s power to conduct proceedings in the absence of the accused person.

Likewise, *Gunwall* factor 6 (“matters of particular state interest or local concern”) generally favors an independent application, unless “there appears to be need for national uniformity.” *Gossett v. Farmers Ins. Co. of Washington*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997). Absent violation of a fundamental principle of justice, there is no need for national uniformity regarding matters of state criminal procedure. *Medina v. California*, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (citing *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)).

All six *Gunwall* factors thus favor an independent interpretation of art. I, § 22. Historically, both at common law and as reflected in the territorial code, an accused person in Washington had a right to be present during jury selection. Code of 1881, §1086; *Lewis*, 146 U.S. at 376. This is “the sense in which the framers understood [art. I, § 22] in 1889,” when the constitution was adopted. *State v. Norman*, 145 Wn.2d 578, 593, 40 P.3d 1161 (2002) (quoting *Boeing Aircraft Co. v. Reconstruction Fin. Corp.*, 25 Wn.2d 652, 658, 171 P.2d 838 (1946)).

Mr. Slert was absent during a stage of the trial when his substantial rights might be affected. *Irby*, 170 Wn.2d at 885. This was a critical stage under art. I, § 22. *Id.* He has shown a constitutional violation, and the burden is on the state to prove harmlessness beyond a reasonable doubt. *Id.*, at 885-887.

CONCLUSION

The trial court violated Mr. Slert's right to be present at a critical stage. The state cannot show the error harmless beyond a reasonable doubt. The Supreme Court should affirm the Court of Appeals and remand the case for a new trial.

Respectfully submitted on April 1, 2016.

BACKLUND AND MISTRY



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



Manek R. Mistry, WSBA No. 22917
Attorney for the Respondent

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Respondent's Supplemental Brief, postage prepaid, to:

Kenneth Slett, DOC #872135
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

With the permission of the recipient(s), I delivered an electronic version of the brief to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov
Eric.Eisenberg@lewiscountywa.gov

I filed the Supplemental Brief electronically 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 April 1, 2016.



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

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Attached is Respondent's Supplemental Brief.

Thank you.

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Backlund & Mistry
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870