NO. 29513-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

V.

MERLE WILLIAM HARVEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Tari S. Eitzen, Judge

PRO SE SUPPLEMENTAL BRIEF

STATEMENT OF ADDITIONAL GROUNDS

MERLE WILLIAM HARVEY
Pro Se Appellant
CLALLAM BAY CORRECTIONS CENTER
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

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A. ASSIGNMENTS OF ERROR

1. The Trial court violated Appellant's Constitutional right to a public trial by conducting large portions of vior dire in closed courtroom.

2. The Trial court deprived Appellant, and potential objectors, of a meaningful opportunity to object to closure of portions of voir dire by not infonming Appellant that he had a Constitutional Right to a public trial, and by not allowing public into courtroom during initial trial proceedings.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The Trial Court conducted significant portions of Jury Selection in closed courtroom, and outside public view without conducting Bone-Club Hearing. Did this closure violate Appellant's Constitutional right to public trial?

2. The Trial Court failed to inform Appellant that he had a Constitutional right to a public trial. Did such failure to inform affect Appellants ability to object to courtroom closure?

B. STATEMENT OF THE CASE

1. Procedural Facts

Merle Harvey was convicted of one count of Murder in the First Degree, one Count of Murder in the Second Degree, and two counts of First Degree Unlawful Possession of a firearm, which as found to be same criminal conduct. He was sentenced to 753 months and appealed. CP 411-412. In an Unpublished opinion, filed March 29, 2012, this court affirmed Harvey's conviction, in part because it did not have the record before it. See State v. Harvey, 167 Wn.App. 1026, 2012 WL 1071234 (2012).

On November 3, 2012 the Washington Supreme Court, after considering Mr. Harvey's Affidavit that his voir dire portion of jury selection was conducted in closed court and out of presence of public, and an Affidavit by Marla Drader who declared under penalty of perjury that she attempted to view jury selection but was turned away from the courtroom by court personnal with the explanation that only the jury was permitted in the courtroom during jury selection. After the Supreme Court considered the two affidavits and Mr. Harvey's contention that he needed the voir dire transcripts, which as it turns out his Trial Attorney initially secured a Court Order for at close of trial, the Supreme Court Remanded the case back to the Trial Court with instructions to produce the missing transcripts and for this Court to consider his claims. See State v. Harvey, 175 Wn.2d 919, 920-922, 288 P.3d 1111 (2012).

2. Jury Selection

The New Transcripts reveal that on September 13, 14 and 15, 2010 the entire Jury Pool of 30 prospective Jurors were brought into the courtroom all at one time. The large number of jurors filled the entire courtroom, including overflow which had to sit in the jury box. Because of this there was no room for any spectators or the press. The Trial Judges own words support this fact. See SRP 1-13. As discussed below the trial jueye addressed all the people in the courtroom as jurors, swore in all the people in the court room as jurors, and closed the first portion of jury selection by informing the courtroom that there are people out in the hallway who are interested in the case and that the they were not to even make eye contact with them while making there way to the Jury lounge.

a. Courts instructions to all in Courtroom/First Portion of Jury Selection

During the initial portion of jury selection all 80 prospective Jurors were brought into the courtroom and the Judge introduced the prospective jurors to counsel, reporter and assistants before swearing in the entire courtroom as prospective Jury Panel. SRP 6-13. The following is a direct quote from the Judge to all of the Courtroom:

"I'm going to ask that you listen very closely to these instructions because it's critical.

A really important part of the trial, and you're going to understand this over the next couple days, is the selection of the jury. And the law requires that before we start asking you any questions, you be sworn in. So I'm going to ask all of you in the courtroom to, please, stand and raise your right hand and listen to Steve.

(Prospective Jury Panel sworn in.)

THE COURT: Thank you so much. Please sit down.

The remarks that I make and the questions I am going to ask you and the questions that I will let the lawyers ask you and the instructions I give you are directed at each and every juror in the courtroom, not only those seated currently in the box, but the rest of you seated on the benches." END

The first portion of jury selection ended when the Trial Judge directed the overflowing courtroom of prospective jurors what to do next. The following is a direct quote of that engagement:

THE COURT: "Any questions? Okay. On your way back, follow Ali. Don't talk to anybody in the hallway. There are a lot of witnesses and interested people, people interested in the case who are going

to be out in the hallway. Do not even look at them, say hello to them, don't let them say hello to you. Don't stop in the restrooms in the hallway. Don't stop at the drinking fountain. Go an alternate route. Just follow Ali back to the jury lounge and fill out the paper. you all understand the reasons for all of this. Okay.

Any questions from the jurors about what we are doing?

All right. And then I will be seeing you all back in the courtroom at different times over the next couple days, and then we'll get started with the trial after we choose a jury. Don't read anything about this case. Don't read anything about the case on the internet, in the newspaper. Don't listen to the radio or watch television as to local news. I know it's an inconvenience, but it's absolutely critical that every single thing you hear about this case comes to you only in this courtroom where I can sort of control the circumstances of that information. So no local news until further direction.

Any questions on that? Okay.

If your neighbor calls you up and asks you what case you're on, say "I can't tell you. I will tell you later." Because after the trial is over, I will release you from these instructions and you can talk about it, but not until later. So you're going to go with Ali and I will see all of you at different times.

(Prospective Jury Panel exits courtroom.)" END.

b. Second Portion of Jury Selection

During the second portion of Jury Selection there was some indication that someone other than counsel and individual jurors in the courtroom. See SRP 23 (court says, "Ladies, I don't allow

any talking in the courtroom.") However, there is no indication of whom the Judge was talking to. Whether it was a spectator or merely some assistants working for the attorneys, it is impossible to tell. However, there is strong indication that the courtroom was closed to the public. While questioning Juror No. 26, Mr. Johnson, who was also an attorney, it was discovered that he knew everybody in the courtroom. He expressed concern that people in the hallway could hear what's going on. The Judge ordered the door closed every time a juror entered. See SRP 43-49. The following is a direct quote from those proceedings:

THE COURT: Mr. Mason.

MR. MASON: Thank you, Your Honor.

Mr. Johnson, that's what I was going to ask. I am a little worried on the other side: you're going to hold me to a higher standard so it dosen't look like you're unfair.

JUROR NO. 26: That's the problem. I understand that. I do know Detective Gilmore, as well, through my church, so I know pretty much--

MR. MASON: You know everybody in the room.

JUROR NO. 26: Yeah.

MR. MASSON: All right. You know how this works. You're going to be getting jury instructions. You're going to be sworn as a juror and you're going to be told the burden of proof. You're going to have to hold the State to its standard. Anything about the relationships, the knowledge that you know of people in the courtroom, that are going to cause you not to be able to do that?

JUROR NO. 26: I don't believe so. I think I can do it.

MR. MASSON: Okay. Great. Thank you. I don't have any other questions.

THE COURT: Go back into the jury room again, please, and then Ali will give you further instructions. Thanks.

JUROR NO 26: I will tell you one thing. If you stand down the hall, sometimes you can hear what's going on, so I don't know if anyone told you that.

THE COURT: Thank you.

JUROR NO. 26: I walked down the hall further so I didn't. So you can hear it if someone wanted to concentrate.

THE COURT: Thank you. Maybe we should have Ali close the door every time.

(Juror No. 26 exited the courtroom.) END

The next instance that shows the counsel and court were concerned about people in hallway hearing what was going on in the courtroom occurred on page 63, just after Juror No. 30 exited the Courtroom. Mr. Nagy, prosecuting attorney, exhibited hesitance in continuing because he was unsure if Judge was waiting for 'them' to go down the hall far enough so as not to hear what was going on in the courtroom. See SRP 63 lines 3-9.

The next indication in the record which shows the judge was concerned about spectators in the hallway hearing what was going on in the courtroom is on pages 33-34 where the Judge stated the following:

"THE COURT: I did get to the bottom of the issue about the everybody can hear down the hallway. It seems there is one among us who has a booming voice.

MR. NAGY: I will be careful.

THE COURT: Okay. During this particular part. I remember I asked you during the last question if you were in the broadcasting business because you have the natural voice for it.

MR. NAGY: I've heard that before, Your Honor, and may be headed there in the future.

THE COURT: If this lawyering thing doesn't work out for you."

SEE SRP 33-34 Lines 19-6.

c. Third Portion of Jury Selection

After the individual questioning of jurors who were interview individually about their answers to the Jury Questionnaires the entire jury panel of 30 prospective jurors were brought back into the courtroom and questioning of the entire group commenced in closed courtroom without any spectators or the press present. The Trial Judge inquired if the jurors in the back corner seats could see the Defendant Merle Harvey. An unidentifed Juror responded in the affirmative and the Trial Judge informed them that they would be able to move forward as they started thinning out the jury pool. SEE SRP 145 Lines 18-24.

The Trial Judge was so concerned with controlling what the jury could possibly hear about the case outside the courtroom that she gave the entire courtroom admonishments before recessing for noon period. The Trial Judge addressed the entire courtroom as one body of jurors, and did not once throughout entire voir dire distinguish jurors from anyone else, because only the jury pool was present in the courtroom. The Judges admonishments are quoted herein as follows:

THE COURT: All right.

What we're going to do is break now for the noon period. I'm going to give you some admonishments before we do that. Throughout this trial you must come and go directly as instructed. Until the jury is seated, after we have sessions, you will follow Ali directly back to the jury congregation room. You will not leave from this room on your own. There are a number of witnesses, as you now know, a large number of witnesses, some of whom may be in the corridors, outside in the elevator, on the stairway and around the building you're no able to recognize them by sight. Even an inadvertant innocent contact could cause us to have to start over or to exclude you from this trial or start over on a whole jury selection. So it's absolutely critical that you follow the directions.

When you leave here, you will follow Ali back to the jury coordination room. You will stay there until she releases you. I'm instructing you not to speak to anyone about this case, the subject matter of this case, or anything to do with this case. It's essential to a fair trial that everything you learn about this case come to you in the courtroom and only in the courtroom. Do not put yourself in a situation of overhearing anyone making comments about this case.

If you're going to stay around this area, around the courthouse for lunch, I'm going to give you some specific directions. You can eat your lunch in the jury congregation room on the third floor of the Annex. That's the safest thing to do if you brought your lunch or going to pick it up somewhere in the area. If you go to the restaurant in the immediate courthouse area, I want you to wear that pink number. That's the only way people affiliated with a trial and the court system will know that you are a potential juror, and

hopefully that will cause them to be cautious around you. Be careful if you go to a restaurant in the immediate vicinity that you're sitting in a table or booth right next to somebody involved in the case and they're talking or you're talking. That's the danger. So absolutely no conversation about the case. Don't put yourself in a situation of overhearing anything about the case. And you will have to disclose if inadvertently something like that happens, disclose it to Ali so she can advise me and I can discuss with counsel what to do about it.

If you're going home for the noon period, you will leave from the jury coordination room. At no time come back to this area of the courthouse. Ali is going to escort you to the jury congregation room. You will leave from there. Do not come back on the third floor of this wing of the courthouse. There are witnesses out and around. If you're going home or back to your office for the noon period, leave the pink number on until you get to your mode of transportation, either a car or bus, whatever. And when you get back to the courthouse area, put that pink number back on so that as you're walking into the courthouse and approaching the courthouse, people see that number and they're more careful around you.

Do not listen to any local news over the noon period or tonight if you're still involved at that point. Do not go on the internet and do any research about any local news whatsoever. Don't look up any words in the dictionary that have anything to do with this case or the subject matter of this case. Don't look up the law. You absolutely cannot do any research on you own. Everything you need to know to make a determination in this case will come to you in

the courtroom in the carefully controlled circumstances that we hope to create. Don't listen to the radio, local news, and don't read the newspaper.

Any questions? We're going to start at probably about, I hope as soon as after 1:30 So I want you all back in the jury lounge, that jury coordination room on the third floor of the Annex by about 25 after 1. Okay.

If anything occurs that I need some attention, that you think you need to call to my attention during the noon hour, let Ali know. When you back to the court, do not go to this area of the courthouse. Go directly to the jury coordination lounge.

Any questions at all? Have a good lunch period and I will see you at 1:30." END

After the court selected a jury, but before it was disclosed who the jury would be the following took place:

THE COURT: All right. We have a jury. If you would, please, pay very close attention to Steve. He is going to instruct everyone where to be seated.

THE CLERK: If I call your name and you're seated in the jury box, you need to step out of the box and have a seat wherever you can find one.

THE COURT: Can you hear him back there?

THE CLERK: I'm going to call the people from the jury box out of their seat and they just need or they are going to go back and have a seat in the benches where you guys all are." END

STS SRP 301 Line 1-11.

C. ARGUMENT

1. THE COURT VIOLATED HARVEY'S RIGHT TO A PUBLIC TRIAL WHEN IT FAILED TO SPLIT THE JURY POOL INTO TWO GROUPS AND NECESSARILY DEPRIVED THE PUBLIC AND PRESS FROM VIEWING THE FIRST AND THIRD PORTIONS OF JURY SELECTION WITHOUT CONDUCTING A BONE-CLUB HEARING.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1 § 22; U.S. Const. amend. VI. Additionally, article 1, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Prejudice is presumed where there is a violation of the right to a public trial. In re Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). The remedy is reversal of the convictions and remand for a new trial. Id at 814. In other words, the violation of the right to open court proceedings is structural error. State v. Watt, 160 Wn.2d 626, 632, 160 P.3d 640 (2007).

The right to a public trial encompasses jury voir dire. Presley v. Georgia, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010)(Holding that under the First and Sixth Amendments, voir dire of prospective jurors must be open to the public and that this requirement is "binding on the States.") Id at 723. Also see State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). Even where, as in Harvey's case, only part of jury selection is improperly closed to the public, such closure can violate a defendant's Constitutional right to a public trial. See State v. Brawley, 167 P.3d 595-97 (2007)(trial court's private portion of jury selection, which

addressed each venire person's answers to a jury questioner, violated right to public trial).

The right to a public trial is not absolute. State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1994). A trial court may restrict the right only "under the most unusual circumstances." Bone-Club 128 Wn.2d at 259. Before a trial judge can close any part of a trial from the public, it must first apply on the record the five factors set forth in Bone-Club. The Court must also enter specific findings that justify a closure order. Easterling, 157 Wn.2d at 175.

Failure to object to trial closure does not waive the right to a public trial. Brightman, 155 Wn.2d at 517. Further, it is the trial judge's obligation to seek the defendant's objection to any closure. Easterling, 157 Wn.2d at 175-76 n.7. Finally, the waiver of a constitutional right must be knowing and voluntary. Frawley, 167 P.3d at 596.

The State may attempt to distinguish Harvey's case from Brightman because only a portion of jury voir dire was private. Such an argument is unavailing. The Brightman court ruled where jury selection or a part of the jury selection is closed, the closure is not de minimis or trivial. Brightman, 155 Wn.2d at 517.

The State may also attempt to distinguish Harvey's case because there was no specific closure order by the judge, and therefore a lack of evidence showing a specific closure. Mr. Harvey urges this Court not to adopt Momah's reasoning. The Momah Court relied on the absence of an express trial court order banning the public form certain proceedings to distinguish it facts from those in Brightman, Orange, and Bone-Club. This is a distinction without a difference.

Such debate is of no significance, however, because as Division II has acknowledged in Paumier, Presley has eclipsed Momah and Strode and controls the outcome of this case. See State v. Leyerle, No. 37036-7-II (Wash.App. Div. 2, 10-05-2010) Citing Presley, 130 S.Ct. at 725.

The core holding of the Supreme Court's well-established authority is a trial court may not conduct trial proceedings outside the public eye. No Washington Court until Momah has conditioned a defendant's right to a public trial on the existence of an express closure order. The proper inquiry is whether the trial court used a procedure that effectively barred public observation, not whether the court expressly ordered the procedure.

To the extent that the State's argument may be that the Court did not enter a closure order, we look to the record to determine the presumptive effect of the court's action and words. Here the Trial Court Judge brought in such a large number of prospective jurors, 30 in total, that all of the seats in the back of the court were taken and the jury box was utilized to handle the overflow.

Here, the Trial Judge instructed everyone in the court to stand and take the jurors oath. Clearly, had there been press members and public in the courtroom the Judges words would have been more selective by asking only the prospective jurors to rise and take the oath.

Further, the Trial Judge specifically informed the 30 prospective jurors that; "There are a lot of witnesses and interested people, people interested in the case who are going to be out in the hallway. Do not even look at them, say hello to them, don't let them say hello

to you. Don't stop in the restrooms in the hallway. Don't stop at the drinking fountain. Go an alternate route. Just follow Ali back to the Jury lounge and fill out the paper."

Clearly the Trial Judge was very concerned about the jury having contact with spectators, so much so that she would have given specific instructions that the jury were not to talk to spectators in the courtroom, had there been any present.

Additionally, Mr. Harvey has provided this Court, as Exhibit "1, an Affidavit declaring that he witnessed the courtroom being cleared out of all spectators because the whole courtroom was needed for the 30 member strong jury pool, and that no spectators were allowed in the courtroom during the entire jury voir dire.

Additionally, an Affidavit by Marla Grader has been provided as Exhibit "2. Ms. Grader attested that on or about the 13th and 14th day of September, 2010., she attempted to attend and view the jury selection stage of Merle W. Harvey's Trial in Spokane County Courthouse, but was told that due to the shear number of prospective jurors, 30 in total, that the public could not view the Jury Selection process, but could attend the trial once the jury was selected. (See Exhibit No. 2).

Here, Mr. Harvey has provided this Honorable Court with the Record of voir dire, which affirmatively establishes his claim that the courtroom was closed to the public and the press because of the overwhelming number of prospective jurors in attendance. The State bears the burden on appeal to show that a closure did not occur, and rebut the two Affidavits point for point.

2. THE TRIAL COURT JUDGE FAILED TO INFORM DEFENDANT THAT HE HAD A CONSTITUTIONAL RIGHT TO OPEN AND PUBLIC TRIAL PRIOR TO CLOSING PORTIONS OF JURY SELECTION FROM PUBLIC AND PRESS, THEREBY DEPRIVING HIM OF A MEANINGFUL OPPORTUNITY TO OBJECT TO THE CLOSURE, AND DENIED PUBLIC AN OPPORTUNITY TO OBJECT BY PREVENTING THEM FROM ENTERING THE COURTROOM DURING VOIR DIRE PROCEEDINGS.

The United States Supreme Court in Presley v. Georgia, 130 S.Ct. 721 (2010), stated the following:

> "There is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. "Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the Defendant." Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979). There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his benefit. That rationale suffices to resolve the instant matter. The Supreme Court of Georgia was correct in assuming that the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors."

As was held in Paumier, "Presley, applying the federal constitution, resolves any question about what a trial court must do before excluding the public form trial proceedings, including voir dire." Paumier, 155 Wn. App. at 635.

Similar to what occurred in Paumier, the trial court here conducted a portion of voir dire outside the public forum. By doing so, without first considering alternatives to such closure of this portion of the voir dire proceedings and making appropriate Findings explaining why such closure was necessary, the trial court violated Harvey's and the public's right to an open proceeding. Presley requires reversal of Harvey's convictions.

The rational for the rule requiring the trial court to advise the defendant fully of his rights is as clear as the rule itself. Since the rights involved are fundamental to a fair trial, courts

have a serious and weighty responsibility to ensure that the relinquishment of a vested constitutional right is made in a clear and informed manner. Johnson, 304 U.S. at 465, also see U.S. v. Martinez, 833 F.2d 750 (9th Cir. 1989).

A criminal defendant, unfimiliar with the intricate rules binding the Constitution to the criminal trial, may simply not comprehend his rights. Absent instruction of the substantive rules, a defendant could all to easily lose fundamental privileges in the shuffle of trial. While the basic question whether the trial court should fully advise the defendant of his right to testify is an issue of first impression. The decision to testify, like the right to determine what plea to enter, the right to a jury trial, the right to counsel, the right to a public trial, the right to counsel, and the right to be present at trial, is so fundamental that procedural safeguards must be employed on the record to insure that the defendant's waiver of such rights was made voluntarily, knowingly, and intelligently. State v. Neuman, 371 S.E.2d 77, 81 (W.Va. 1988).

This is not a case of invited error.

Invited error occurs when the defense proposes the same course of action complained about on appeal. State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979),("A party may not request an instruction and later complain on appeal that the requested instruction was given.") The invited error doctrine applies only where the defendant engages in some affirmative action by which he knowingly and voluntarily set up the error. Participation without objection does not constitute invited error. Strode, 317 P.3d at 315.

While Momah was not precluded from raising the issue on appeal, his affirmative position in response to a Motion to close was a factor that could be considered by the appellate court as supporting the trial court's decision to close. Unlike in Harvey's case, Momah and his counsel were both aware of the right to an open and public trial... They carefully considered and weighed the competing tactical interest, argued for even greater closure than contemplated by the court, and explained the rights sought to be protected by closure on the record and before closure. Such was not the circumstances in Harvey's case and reversal is required.

D. CONCLUSIONS

There is more than adequate evidence establishing that large portions of jury voir dire was closed to the public. The Trial Judge addressed the entire courtroom as the jury pool, 80 prospective jurors were brought in at one time filling the courtroom to its maximum capacity, precluding any spectators, instructed entire courtroom to avoid eye contact with interested people out in the hallway when moving to and from the courtroom and jury lounge. SRP 12.
Trial Judge ordered the door closed after each juror entered to ensure that no spectators in the hallway could hear what was going on the the courtroom during voir dire. SRP 48-49.

Petitioner was not advised about his constitutional right to a public trial. The record does not show that he acknowledged in any way that he knowingly, intelligently or voluntarily waived his Constitutional right. He did not request closure, did not understand closure. And did not benefit from closure. This is structural error requiring Reversal and a New Trial.

DATED this 4 day of July, 2013.

Respectfully Submitted,

Appellant,
Merle William Harvey #213231
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

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EXHIBIT

#1

EXHIBIT

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

Merle E. Harvey,	)	
	)	County No. 09-1-01057-1
Petitioner,	)	No. 29512-3-III
	)	
v.	)	
	)	
STATE OF WASHINGTON,	)	DECLARATION OF MERLE HARVEY
	)	IN SUPPORT OF PETITION
Respondent,	)	OF APPELLANT, PRO SE
	)	
	)	

PURSUANT TO 28 U.S.C. § 1746 (1976), Merle William Harvey hereby declares the following:

1. I am over the age of 18, am competent to be a witness, and have personal knowledge of the following:

2. I am the named appellant in the above entitled cause.

3. I was present in the courtroom during jury voir dire of prospective jurors.

4. The entire jury pool was brought into the courtroom and the doors closed to the public due to the fact that there was no room. Nearly every seat in the courtroom was occupied by jurors and the jury box was also full of jurors.

5. I was never informed by the Trial Court Judge that I had a right to a public trial or a right to be present, and therefore was unable to lodge an objection to the closure of the jury selection. The only rights I was made aware of was my right to an attorney and my right to remain silent.

I, Merle W. Harvey, do declare and affirm pursuant to the laws of the United State of America and to the laws of the State of Washington, under penalty of Perjury, that the foregoing is true, correct and not meant to mislead, to the best of my knowledge.

Dated this 4 day of July, 2013.

Merle William Harvey #912251 C[illegible]-7
CLALLAM BAY CORRECTIONS CENTER
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

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EXHIBIT

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EXHIBIT

IN THE COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

MERLE W. HARVEY, Appellant, VS. STATE OF WASHINGTON, Respondent.	CAUSE NO. 29513-3-III County No. 09-1-04057-6 DECLARATION OF _____ NAME OF DECLARANT

1. I am a relative of Merle W. Harvey and an interested party in the above entitled action and make this declaration based upon personal knowledge.

2. I am over the age of eighteen years. I am competent to be a witness therein.

3. I swear under penalty of perjury, the following is true and correct to the best of my knowledge, informaton, and belief.

4. That on or about the 13TH 14TH day of September, 2010., I attempted to attend and view the jury selection stage of Merle W. Harvey's Trial in Spokane County Courthouse, but was told that due to the shear number of prospective jurors, 80 in total, that the public could not view the Jury Selection process, but could attend the trial once the jury was selected.

VERIFICATION

I, Marla Drader, do declare and affirm pursuant to U.S.C. Title 28 § 1746, Under Penalty of Perjury, that I have read the foregoing, that it is true, correct and not meant to mislead, to the best of my knowledge.

Dated this 17 day of Oct., 2011.

Marla Drader
SIGNATURE OF DECLARANT

1 of 1

29513-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

MERLE WILLIAM HARVEY, APPELLANT

V.

STATE OF WASHINGTON, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

AMENDMENT TO APPELLANT'S SUPPLEMENTAL STATEMENT OF ADDITIONAL GROUNDS

Pro Se Appellant,
Merle William Harvey #818251
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

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RULES STATUTES AND OTHER AUTHORITIES

I. IDENTITY OF MOVING PARTY.

Comes now, Merle William Harvey, pro se, moves this Honorable Court for the relief set forth herein.

II. STATUS OF MOVING PARTY.

Appellant, Merle William Harvey, appears now on Remand by the Supreme Court of Washington, presenting issues that could not have been properly presented earlier due to lack of Trial Transcripts. Mr. Harvey recently received the last of the Ordered Transcripts and Clerks Papers, from his newly appointed Attorney. Specifically, Mr. Harvey received the last of the transcripts on July 29, 2013.

Because an Appellant is entitled to brief the record in its entirety, this Court should allow this Amended Brief, also, since the State has not yet, as of the date of the signing of this Brief, responded to the Supplemental Brief filed on July 24, there is no prejudice and this Brief should be allowed.

Mr. Harvey now has sufficient Transcripts to formulate the issues herein, and is doing so lawfully and within the Rules of Appellate Procedure. RAP 10.10(e) provides in part that; "counsel should promptly serve a copy of the verbatim report of proceedings on the defendant/appellant and should file in the appellate court proof of such service. The pro se statement of additional grounds for review should then be filed within 30 days after service of the verbatim report of proceedings." As the Supreme Court noted in this Case, Mr. Harvey has a right to appeal the record, as evidenced by its Remand. (See Exhibit No.1).

The issues presented herein have direct correlation to the Transcripts and Clerk's papers recently received by Mr. Harvey from his Appeal Attorney. Previously, Mr. Harvey was not in possession of any of the Clerk's papers, including the Charging Information, Proposed Jury Instructions or the instructions presented to the jury. Therefore, it was previously impossible for Mr. Harvey to present the claims presented herein.

This Court should take Notice that Mr. Harvey will, if necessary, take this issue all the way to the Supreme Court as a motion for discretionary review, if by chance this Court refuses to allow him to present these issues on direct appeal, and he is likely to win a remand, just as he did previously.

III. FACTS RELEVANT TO THIS BRIEF.

Mr. Harvey was in a public parking lot of an apartment complex in Spokane Washington, trying to repossess a stolen vehicle. He arrived at the parking lot after target practicing with his .22 rifle and his 30.06 rifle.

The person who took his vehicle was present in the parking lot as a visitor, and was sitting in a car next to Mr. Harvey's stolen vehicle. The vehicle belonging to Mr. Harvey appeared to have plates on it not registered to the vehicle. Mr. Harvey got out of the passengers seat of the truck his girlfriend was driving. He spoke to Mr. Lamere, who had stolen the vehicle, about getting the vehicle back. Mr. Lamere indicated that he would not give the vehicle back until Mr. Harvey produced the vehicle he had left behind when he took off in Mr. Harvey's vehicle. Mr. Harvey instructed his girlfriend

to go make a phone call to have someone bring the car to the location. While she was gone Mr. Lamere went into an apartment, returning a few moments later with a pistol tucked into his waistband. Mr. Harvey observed Mr. Potter, Lamere's friend, also had what appeared to be a pistol tucked into his waistband. Mr. Harvey then became frightened enough to assemble his .22 rifle, which was unloaded and disassembled. After assembling the rifle Mr. Harvey placed it on the seat of the truck and waited for his girlfriend to return. When she finally returned she informed them that the car was on its way to the location. At this point Mr. Lamere said something about taking off in the vehicle he had taken form Harvey. Mr. Harvey's girlfriend got into the truck she was driving and pulled it forward so as to block the Blazer from moving. She got out of the truck and was standing next to the drivers door. At this point Jack Lamere and Mr. Potter, and an unknown man, huddled together like football players. as if making up a plan. The three men split apart and approached Mr. Harvey and his girlfriend in a threatening manner. Mr. Harvey seen that Jack Lamere had removed the pistol from his waistband and was carrying it in his hand as he approached the two. Fearing for his life and the life of his girlfriend Mr. Harvey opened the truck door and pulled out the .22 rifle. He pointed it in the general direction of both Lamere and Potter and fired four or five rounds. He saw Potter run and crouch behind a car and seen Lamere fall down. At this point other friends of Potter and Lamere were approaching, one with a baseball bat. Mr. Harvey then pulled out his 30.06 rifle, which happened to be loaded since target practice, and he fired two warning shots to ward off what he perceived as an

immanent threat. Once the approaching threat backed off he and his girlfriend got into the truck and drove off.

The Trial Judge determined that there was sufficient evidence to warrant self defense and denied the State its request for First Aggressor Instruction, while at the same time denying Defense its proposed no-duty-to-retreat defense.

During Opening Statements the State informed the Jury that it intended to show that Mr. Harvey went to that parking lot yelling something to the effect of; "I'm taking my Blazer back. You're not going to steal from me anymore." However, no witnesses ever testified to such effect. In telling the jury this the State inferred that Mr. Harvey was the aggressor, that he provoked the situation. He did not. The Trial Judge specifically denied the State its proposed 'first aggressor' instruction because all evidences showed that Mr. Lamere was the first aggressor by brandishing a pistol. Additionally, the Manager of the apartment complex testified that Jack Lamere did not live at the complex, that he was a visitor.

Factually speaking, the State never produced one shred of evidence disproving self-defense.

IV. SUPPLEMENTAL GROUND FOR RELIEF.

A. THE STATE WAS RELIEVED OF ITS BURDEN TO DISPROVE SELF DEFENSE BECAUSE THE TRIAL COURT FAILED TO SUBMIT PROPOSED NECESSITY INSTRUCTION, WHICH NECESSARILY PREJUDICED DEFENDANT

Defendant submitted a Proposed Jury Instructions as follows;

> "A person prohibited by law from possessing a firearm may still be justified in defending him or herself. Such a person could lawfully slay another with a firearm and still be convicted of unlawfully possessing a firearm."

(See Exhibit Proposed Jury Instructions).

Because the Trial Court failed to submit that Proposed Jury Instruction, over Defendant's Objection, (See RP 1289), the State was relieved of its burden to disprove self-defense beyond a reasonable doubt as it necessarily negated Instruction 37 by inferring upon Jury that the Homicide was not Justifiable because Defendant was not lawfully in possession of Firearm when he acted in Self-Defense by slaying two armed and aggressive attackers.

Here, the only evidence the State produced to show that the homicide was not justifiable was the Defendant's stipulation that he has previously been convicted of a serious offense.
(See Instruction No. 36).

Instruction 37 stated in part that; "Homicide is justifiable when committed in the lawful defense of the defendant or any person in the defendant's presence or company."

Here, Instruction No. 36 necessarily informed the Jury that because the Defendant stipulated that he has previously been convicted of a serious offense the State had already proven beyond a reasonable doubt that he was unlawful in such possession, and therefore inferred upon the Jury that such defense of himself or another was necessarily unlawful because he was not supposed to be in possession of a firearm.

Further, Instruction 37 (3) stated that;

> "(3) the defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as the reasonably appeared to the defendant, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident."

What such Instructions allowed the Jury to do was consider the fact that Defendant was unlawfully in possession of a firearm, and any reasonably prudent person would not be in possession of a firearm considering all the facts and circumstances, and that any use of a firearm in defense of himself or another person was unlawful, and, therefore, was not justifiable.

Given the fact that the State produced absolutely no evidence disproving self defense, it can only be concluded that the lack of proper jury instructions informing the jury that a person may still be justified in defending himself with a firearm which he was not necessarily allowed to possess, substantially prejudiced Defendant and relieved the State of its burden of proof, or rather burden to disprove self-defense beyond a reasonable doubt. See State v. Jefferey, 77 Wn.App. 222, 889 P.2d 956 (1995).

Under Federal case law, a defendant is entitled to a necessity instruction for the crime of unlawful possession of a firearm if he can satisfy four factors similar to those articulated in State v. Gallegos, 73 Wash.App. 644, 651, 871 P.2d 621 (1994), (1) he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. United State v. Paolello, 951 F.2d 537 (3d Cir.1991); United State v. Harper, 802 F.2d 115, 117 (5th Cir.1986).

An instruction that is correct in the abstract, or correct as applied to one set of facts, may become misleading when applied to another set of facts. State v. Meyers, 96 Wash. 257, 763, 164 P. 926 (1917).

Here, the Jury Instructions standing alone properly informed the jury of the law, however, taken together, and considering the set of circumstances in Mr. Harvey's case became misleading and allowed the jury to consider and apply the fact that Mr. Harvey was unlawfully in possession of a firearm to determine guilt on the murder charges and discount self defense because of unlawful act of possession.

The only proper remedy was to instruct the Jury on the law as set forth in Defendant's Proposed Jury Instruction as set forth above.

The Statutes do not address the unforseen and sudden situation when an individual is threatened with impending danger. Certainly, the legislature did not intend for a person threatened with immediate

harm to succumb to an attacker rather than act in self defense. A number of Jurisdictions support this view. See, e.g., People v. King, 22 Cal.3d 12, 582 P.2d 1000, 148 Cal.Rptr. 409 (1978); Mungin v. State, 458 So.2d 293 (Fla.Dist.Ct.App. 1984); People v. Govan, 169 Ill.App.3d 329, 119 Ill.Dec. 825, 830, 523 N.E.2d 581, 586 (1988); State v. Walton, 311 N.W.2d 113 (Iowa 1981); State v. Blache, 480 So.2d 304 (La. 1985); State v. Crawford, 308 Md. 683, 521 A.2d 1193, 1199 (1987); State v. Spaulding, 296 N.W.2d 870 (Minn.1980); Johnson v. State, 650 S.W.2d 414 (Tex.Crim.App.1983).

This Court has also held in Jeffrey that; "We are persuaded a situation can arise that will permit necessity as a defense." Therefore, this Court should hold the necessity instruction as set out in Lemon can in certain circumstances be presented to a jury in a self-defense case as a factor distinguishing unlawful possession of a firearm from lawful defense.

Further, the Defendant Proposed the following Instruction be provided to the Jury:

> "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other reason."

(WPIC 5.05).

The Trial Court failed to give that instruction, and as a result the Jury was allowed to apply such knowledge in determining guilt on all charges, including whether or not the state disproved self defense beyond a reasonable doubt. Had the jury been given this instruction it may have been reluctant in applying unlawful possession

of a firearm to the lawful defense of self-defense.

The Questions asked in this case are;

1. Can evidence that a person was unlawfully in possession of a firearm be submitted to a jury in a self-defense case so as to prove that defendant was not justified in the lawful defense of himself, where the jury was instructed that the defendant is doing an unlawful act by possessing a firearm?

2. When a person is unlawfully in possession of a firearm, can that person lawfully defend himself from attackers with such firearm? and,

3. Was it necessary, in this case, to instruct the jury that; "A person prohibited by law from possessing a firearm may still be justified in defending him or herself. Such a person could lawfully slay another with a firearm and still be convicted of unlawfully possessing a firearm."?

B. THE TRIAL COURT ERRED BY NOT SUBMITTING TO THE JURY INSTRUCTION ON NO DUTY TO RETREAT WHEN DEFENDANT'S TESTIMONY INCLUDED SPECULATION REGARDING THE CHANCES FOR A SUCCESSFUL RETREAT.

The Trial Court, after correctly denying the State its proposed "First Aggressor" instruction, erred by denying Defense its proposed "No-Duty-To-Retreat" jury instruction. State v. Redmond, 150 Wn.2d 489, 494-95, 78 P.3d 1001 (2003); State v. Williams, 81 Wn.App. 738, 742-43, 916 P.2d 445 (1996) Id. at 744.

A "no-duty-to-retreat" instruction need not be submitted if the defendant was actively retreating at the time of the fatal act.

Here, there was no indication in the record that Mr. Harvey was retreating at time of the fatal act.

In Williams, the Court of Appeals "clarified the rule" to hold that "where a jury may conclude that flight is a reasonable effective alternative to the use of force in self defense, the no duty to retreat instruction should be given." Noting that other States would require the taking of available withdrawal rather than the use of deadly force and that the wisdom of a contrary policy was "open to debate." the court adhered to what is called the long standing policy of Washington that one "should not be made to yield and flee by a show of unlawful force against him. 81 Wn.App. at 744. See also State v. Wooten, 87 Wn.App. 821, 945 P.2d 1144 (1997).

It is clear by the State's Opening Statements that the State was relying upon the presumption that Mr. Harvey had a duty to retreat after he seen that Mr. Lamere had armed himself with a revolver. (See Opening Statements RP 5 at Lines 9-18, Filed on July 23, 2013, but not provided to Appellant until July 26, 2013).

Throughout the entire Trial the State repeatedly hit on the subject of duty to retreat, inferring that Mr. Harvey was in a place he was not allowed to be. It is clear the State was relying upon such as evidence of Mr. Harvey's guilt. Mr. Ames, defense Counsel, presented in his Proposed Jury Instructions WPIC 16.08 Duty to retreat instruction due to the State's claim throughout trial that Mr. Harvey had a duty to retreat and that he was somehow not authorized to be in the apartment complex public parking lot.

The Trial Court Judge correctly removed from the instructions the first aggressor instruction proposed by the State. It also removed

the no-duty-to-retreat instuction, which was Proposed by Defense, both of which Trial Judge previously approved. The Defendant has Standing Objection to the not giving no-duty-to-retreat instruction. (See RP 1230-1231 and 1289).

The removal of the no-duty-to-retreat instruction prejudiced Defendant by allowing the jury to consider that Mr. Harvey had a duty to retreat from a place he had every right to be.

Testimony by Raymond Mashtare established that Jack Lamere did not live at the Boone Street appartments or at Jordan Property where the slaying occurred, that Jack Lamere was only a visitor. (See RP 1030-1031).

Since both Jack Lamere and Merle Harvey were both visitors at 1310 West Boon and were in a public parking lot they both were in a place they lawfully were allowed to be, therefore, Mr. Harvey had no duty to retreat and instruction on duty to retreat, which was proposed by defense, should have been given.

The State argued that because the Judge denied the State its proposed instruction on 'First Aggressor' then the Court should strike the "no-duty-to-retreat" instruction. Defense Counsel argued that Mr. Harvey was under no burden to leave because Mr. Mashare, the manager at 1310 West Boon testified that Jack Lamere was not a resident, but only a visitor. Subsequently the Trial Court ruled as follows;

> THE COURT: All right. I'm not going to give the no-duty-to-retreat. We are taking out the aggressor and taking out no duty to retreat.

(See RP 1230 and RP 1030-31).

Further, Mr. Harvey's Testimony included speculation by Prosecution regarding the chances for a successful retreat. Repeatedly the Prosecution drilled Mr. Harvey concerning his ability to leave when he observed Mr. Lamere and Mr. Potter produce pistols, speculating on his chances for a successful retreat. (See RP 1087 through 1105).

The Trial Court's failure to present to the jury instruction on "no-duty-to-retreat" allowed the jury to conclude that flight is a reasonably effective alternative to the use of force in self-defense and necessarily relieved the State of its burden of proof and burden to disprove self defense beyond a reasonable doubt.

Here, the failure to present the no-duty-to-retreat instruction inadequately conveyed the law of self defense to the jury under the facts of his case because the remaining instructions did not make it manifestly clear to the Jury that it could consider the long standing policy of Washingtonthat that one "should not be made to yield and flee by a show of unlawful force against him."

This Court should rule as the Supreme Court ruled in State v. Redmond, 150 Wn.2d 489, 494-95, 78 P.3d 1001 (2003); and State v. Williams, 81 Wn.App. 738, 742-43, 916 P.2d 445 (1996), and reverse for new tiral.

C. THE TRIAL COURT, OVER OBJECTIONS, FAILED TO SET FORTH ELEMENT OF PREMEDITATION AND THE STATE WAS RELIEVED OF ITS BURDEN OF PROOF, VIOLATING THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Under due process clause of the fifth amendment, the prosecutor is required to prove beyond a reasonable doubt every element of the crime charged. In re Winship, 397 U.S. 358, 346 (1970).

The reasonable doubt standard applies in both State and Federal proceedings. Sullivan v. La., 508 U.S. 275, 278 (1993).

The reasonable doubt standard protects three interests. (1) it protects defendant's liberty interests, (2) it protects the defendant from the stigma of conviction, (3) it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. In this regard, the court stated, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent man are being condemed. See Apprendi v. N.J., 530 U.S. 466, 488-92 (2000)(State must prove every element that distinguishes lesser from greater crime).

The burden of proof consists of two parts; 'the burden of production and the burden of persuasion. See LaFave, Criminal Law § 1.8 (4th ed.2003) and McCormick, Evidence §§ 336-337 (5th ed.1999).

Premeditation is a factor describing a charge, or type of charge. Just as Felony describes a type of charge. For example, when Felony Murder is charged the 'Felony' is not an element, just as Premeditated is not an element of Premeditated Murder. There are Statutes setting forth such Felonies which are elements of Felony murder, just as there is a Statute which sets froth the element of Premeditated.

Simply stating "with premeditated intent" does not sufficiently lay out the element of premeditation. Failure to define every element of Premeditation is an error of Constitutional magnitude.

Here, the Element of Premeditated is; "more than a moment in point of time."

While intent means only; "acting with the objective or purpose to accomplish a result which constitutes a crime," Premeditation involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Brooks, 97 Wash.2d 873 at 876, 651 P.2d 217 (1982).

It is, therefore, possible for one to form an intent to kill that is not premeditated. For this reason, premeditation cannot be inferred from the intent to kill. State v. Williams, 285 N.W.2d 248, 268 (IOWA 1997), cert denied, 446 U.S. 921 (1980).

Here, Defense Counsel objected to Instruction No. 9 because it did not adequately present the element of Premediation, nor did it adequately convey the legal standard. The jury should have been instructed that "a person can form an intent to kill that is not premeditated if it is done for the purpose defending himself or another with whom is in his company." (See RP 1289).

This Court should find that the instruction given to the jury did not convey the appropriate legal standard as applied to the circumstances in this case. The lack of proper instructions allowed the jury to believe that any formation to kill in Defendant's mind is premeditated, and therefore unlawful. It is not so in all cases. Premeditation cannot simply be inferred from the intent to kill. this Court should Reverse and Remand for New Trial.

D. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE THE CHARGING INFORMATION IN COUNTS ONE AND TWO IS INVALID ON ITS FACE AS IT FAILED TO SET FORTH THE MATERIAL ELEMENT OF PREMEDITATION, "MORE THAN A MOMENT IN POINT OF TIME."

Premeditation is a distinct circumstance of premeditated murder in the first degree. RCW 9.32.030; State v. Brooks, 97 Wash.2d 873, 876, 651 P.2d 217 (1982). While intent means only "acting with the objective or purpose to accomplish a result which constitutes a crime", Premeditation involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. It is, therefore, possible for one to form an intent to kill that is not premeditated. For this reason, premeditation cannot simply be inferred from the intent to kill.

Here, the Amended Information charged Murder in the First Degree, Premeditated. RCW 9A.32.030(1)(A)-F, as follows;

> COUNT I: MURDER IN THE FIRST DEGREE, committed as follows: That the defendant, MERLE WILLIAM HARVEY, in the State of Washington, on or about September 26, 2009, with premeditated intent to cause the death of another person, did cause the death of JACK THAMAS LAMERE, a human being, and the defendant being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3),

Here, the Information failed to set forth the element of Premeditation, "more than a moment in point of time." The State will likely argue that "more than a moment in point of time" is only a definition of premeditation. However, this is not the case. When one looks up Premeditation in the Black's Law Dictionary Seventh Edition, or even in Burton's Legal Thesaurus, one cannot find any reference to "more than a moment in point of time", therefore, it can in no way be construed as a definition. Rather, "more than a moment in point of time" is the actual Element of Premeditation, not a definition.

It can only be concluded that the Charging Information failed to set forth every element of the crime. This Denied to Defendant his right to know the charges against him and prepare a defense against them.

It is well-settled rule that a charging document satisfies these Constitutional principles only if it states all the essential elements of the crime charged, both statutory and non-statutory. Kjorvik, 117 Wn.2d at 97; State v. Vangerpen, 125 Wn.2d 782 (1995).

If a charging document is challenged for the first time on review, however, it will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction by be found, on the face of the document. Kjorvik, at 105. However, if the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it. State v. Mavenzadeh, 135 Wn.2d 359 (1998).

Thus, reading the information liberally, this Court must employ the Kjorsvik two-prong test; (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so, (2) can the defendant show he or she was actually prejudiced by the inartful language. Kjorsvik, at 105-06.

If the necessary elements are not found or fairly implied, however, the court must presume prejudice and reverse without reaching the question of prejudice. City of Auburn v. Brooke, 119 Wn.2d 623, 636, 836 P.2d 212 (1992)(one does not reach question of prejudice unless there is some language in the document, however inarful, relating to the necessary elements).

Preliminary Subject matter jurisdiction cannot be conferred "by consent, waiver, or estoppel on the part of the accused. 42 C.J.S. indictments and Informations, Sec 2 (1991). Thus, Mr. Harvey can now attack subject matter jurisdiction, even though he failed to do so in the trial court.. First union Mgt., v. Slack, 36 Wash.App. 849, 854, 697 P.2d 936 (1984)(jurisdition can be challenged at any time).

The law is well settled that an order entered without Jurisdiction is void. Patchett v. Superior Court, 60 Wash.2d 784, 787, 375 P.2d 747 (1962). Thus, if a Superior Court acts without subject matter jurisdiciton, its acts are void. Snohomish Cy. v. Sperry, 79 Wash.2d 69, 74, 483 P.2d 608, cert denied, 404 U.S. 939 (1971).

Mr. Harvey posits the proposition that the Charging information should have read as follows, to correctly convey the element of premeditation, and adequately appraise him of the charges against him;

> "That the Defendant, MERLE WILLIAM HARVEY, in the State of Washington, on or about September 26, 2009, did developed in his mind, for more than a moment in point of time, the premeditated intent to unlawfully cause the death of another person, and after forming such intent, did cause the death of JACK THOMAS LAMERE, a human being, and the defendant being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3).

Since the Charging Information here failed to set forth any elements of premeditation, the trial court did not have subject matter jurisdiction to sentence on crime not adequately presented in indictment. Here, the jury's verdict is invalid and this Court MUST VACATE, and Remand for New Trial.

V. CONCLUSION

Because the Trial Court failed to submit Defendant's Proposed Jury Instruction that "A person prohibited by law from possessing a firearm may still be justified in defending him or herself. Such a person could lawfully slay another with a firearm and still be convicted of unlawfully possessing a firearm", this Court should hold that the jury was not adequately appraised of the applicable law, as applied to the circumstances of the case, and that the jury was subsequently misled by the inadequate self defense instruction and allowed to consider and apply the fact that Mr. Harvey was unlawfully in possession of a firearm in determining guilt on the murder charges, and allowed to discount self defense because of the unlawful act of possession.

Further, this court should find that the Trial Court erred by not submitting to the jury the proposed instruction on "no-duty-to-retreat" because Defendant's testimony included speculation regarding the chances for a successful retreat, and, this Court should hold that the removal of the 'no-duty-to-retreat instruction prejudiced Mr. Harvey by allowing the jury to consider that Mr. Harvey had a duty to retreat from a place he had every right to be. Such inadequate instructions allowed the jury to conclude that flight was a reasonably effective alternative to the use of force in self defense and necessarily relieved the State of its burden to disprove self defense beyond a reasonable doubt. The failure to give the instruction inadequately conveyed the law of self defense to the jury under the facts of the case by failing to make it manifestly clear to the jury that it could consider the long standing

policy that "one should not be made to yield and flee by a show of unlawful force against him." This Court should necessarily Reverse and Remand for New trial.

Additionally, This Court should hold that the Trial Court lacked Jurisdiction because the Charging Information failed to set forth the element of Premeditation "more than a moment in point of time", and that the jury instruction regarding premeditation was inadequate to properly convey the law and failed to define every element of premeditation. The Court properly conveyed the 'intent' portion of the charge, however it failed to set forth the law of self defense, that it is possible for one to form an intent to kill that is not premeditated. Here, premeditation was inferred form the intent to kill when such intent was in self defense. This Court should hold that the instruction given to the jury did not convey the appropriate legal standard as applied to the circumstances in this case, and Remand for New Trial.

RESPECTFULLY SUBMITTED.

Dated this 18 day of August, 2013.

Merle William Harvey #818251
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

EXHIBIT

1

COURT OF APPEALS, STATE OF WASHINGTON

DIVISION III

Merle W. Harvey,	)	
	)	County No. 09-1-04057-6
Petitioner,	)	No. 29513-3-III
	)	
VS.	)	
	)	
STATE OF WASHINGTON,	)	DECLARATION OF MERLE W. HARVEY
	)	
Respondent,	)	
	)	
	)	

I, Merle William Harvey, do hereby declare the following to be true and correct, pursuant to the laws of Washington State and the laws of the United State of Americ, under Penalty of Perjury.

1. That I received in the U.S. Mail Transcripts of "Opening Statements" and a Letter from David B. Koch, Attorney at Law, Dated July 25, 2013, Re State v. Harvey, No. 29513-3-III, Informing me as follows; "Enclosed is the final transcript we were waiting on - opening statements."

2. That I received such letter and Transcripts on July 29, 2013.

I swear under penalty of Perjury that the foregoing is true, correct and not meant to mislead, to the best of my knowledge.

Dated this 18 day of August, 2013.

Merle Harvey

Merle W. Harvey #818251 C-C-6
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723