No. 87290-2

THE SUPREME COURT OF WASHINGTON

MERLE WILLIAM HARVEY

Appellant/Movant.

MOTION FOR DISCRETIONARY REVIEW

i.e., PETITION FOR REVIEW

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

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I. IDENTITY OF MOVING PARTY.

COMES NOW Merle William Harvey, brings this MOTION FOR DISCRETIONARY REVIEW/PETITION FOR REVIEW, Pursuant to RAP 13.4, of the Decision terminating review in the Court of Appeals Division III, Cause No. 29513-3-III, Supreme Court No. 87290-2.

II. STATUS OF MOVING PARTY.

Merle William Harvey sought a stay of proceedings in this Court until this Court determines his Petition for Review of the Commissioner's Ruling in Court of Appeals No. 30347-1-III, which is opened in this Court under Cause No. 87357-7.

This Court has now determined Cause No. 87357-7 and therefore Mr. Harvey is now submitting his Motion for Discretionary Review under No. 32790-2.

III. FACTS RELEVANT TO MOTION FOR DISCRETIONARY REVIEW.

In July 2009, Jack Lamere came to Merle Harvey's home because Mr. Harvey had a truck for sale or trade. Jack Lamere and Mr. Harvey test drove each others vehicles. Mr. Harvey test drove the Cadillac Jack was driving while Jack test drove Mr. Harvey's Chevy Blazer. During the test drive, Jack drove off with the Blazer leaving Merle with the Cadillac. No titles were ever exchanged, and Jack never returned Merle's Blazer.

The license tabs on the Cadillac were expired, so without the title Merle could not get the car licensed to drive. For reasons unknown, Jack refused to give Merle the title to the Cadillac or allow anyone else to provide Merle with the title. Nor did Merle ever agree to any trade. While Merle was in possession of a vehicle he could not drive, and did not even know if it was stolen, Jack continued to possess Merle's

Chevy Blazer. Merle made many phone calls and pleas asking Jack to either give him the title to the Cadillac or return the Blazer, but Jack did neither. The problem was compounded by the fact that Merle was aware of Jack's history of violence and torture. Jack was a convicted felon, known as a debt collector ("taxman") and enforcer. He often carried a firearm and usually carried a knife and/or brass knuckles, and had done federal prison time for torture which included burning a mans testicles with a candle.

On the evening of September 28, 2009, Merle Harvey and Diana Richardson were riding in a flat bed truck. They came across Jack Lamere in the parking lot of his apartment complex. The Chevy Blazer and numerous other people were present. It was dark outside and the area was dimly lit. Merle and Jack discussed Merle taking his Blazer back and Jack refused to allow it without the Cadillac. At this time, the Cadillac was parked at Merle's home.

Diana Richardson left the area to find a phone to ask someone at the home to drive the Cadillac to their location. She was able to borrow a cell phone from an STA security guard and called Merle's home. She spoke to Aaron Cuningham. Diana order Aron to get the Cadillac to their location as fast as possible. She returned to the parking lot. Upon her return, Jack Lamere asked where the Cadillac was and Diana responded it was on its way. For whatever reason, Jack and April became anxious with Diana leaving and returning indicating the Cadillac was on its way.

At some point before Diana's return, Jack Lamere and April Fletcher went into the apartment and armed themselves. Jack came out with a pistol and April was armed with a kitchen knife. At this time Merle began to

get scared but was unable to drive off because Diana had the keys to the truck. Merle had a .22 caliber rifle in the truck but it was not assembled so he sat in the truck and assembled the weapon while both Jack lamere and Jacob Potter visibly armed themselves with weapons, i.e., Guns, Knives, Brass Knuckles and a pistol-grip flashlight, that looked like a gun. Both Lamere and Potter took aggressive postures and aggressively approached Mr. Harvey and his girlfriend Diana Richardson from opposite sides. Fearing for his life and the life of Diana Richardson, who had just then returned from making a phone call, Mr. Harvey stepped out of the passenger side of his truck and revealed his weapon and fired. Witness accounts indicate Jack Lamere had the pistol in his waist band at times and in his right hand at times, making it visible to everyone present. Police photos show there was a mettle baseball bat and an open knife on the floor of the car Jack was working on when Mr. Harvey arrived. In a toolbox near Jack there was a loaded Jennings semi automatic pistol with eight rounds in the magazine. There was also an open knife near Jack on the bed of the truck. Both Jack and Jacob potter had brass knuckles on their persons and Jack's had spikes on them. Furthermore, the autopsy report shows both Jack and Potter had high levels of methamphetamine in their systems that evening. Jack had 1.23 mg/1 in his bloodstream, while Potter had 1.71 mg/1.

Mr. Harvey had two guns in his truck but he had not made them visible to anyone up to this point. It was not until the scene became hostile and Mr. Harvey felt Diana's and his life were being threatened that he revealed the weapons and fired.

The Court found sufficient evidence to warrant a self defense instruction and also found insufficient evidence to support the State's requested first Aggressor Instruction.

Thus, Mr. Harvey provided sufficient evidence to support a rational finding of self-defense beyond a reasonable doubt.

During the trial the Court, over objections, refused to instruct the Jury that State had to prove the absence of self-defense, even after the Jury requested further instructions. Additionally, the State failed to prove all the elements of the crime charged and failed to disprove self defense beyond a reasonable doubt.

Mr. Harvey contends that he is innocent because he acted in self defense, and that the only thing he is guilty of is possessing two firearms at the same time and for same purpose, unlawfully, and even at that he was not informed at his prior felony conviction that he could not possess firearms. No documentation was presented to the Trial Court concerning his prior sentence and judgment, the Court relied upon his concession that he had been previously convicted of a most serious offense. However, he did inform his trial attorney that he was never informed that his right to possess firearms was restricted. The only thing Mr. Harvey is guilty of here is trying to repossess his rightful property from two violent and drugged out methheads.

IV. GROUNDS FOR RELIEF.

1. THE COURT OF APPEALS ERRED BY FAILING TO ADDRESS SUFFICIENCY OF THE EVIDENCE CLAIM.

The COA erred by not addressing issue raised in SAG 1. Here, Mr. Harvey argued that the State failed to prove the absence of self defense beyond a reasonable doubt, effectively raising a sufficiency of the evidence claim.

The COA erroneously transmogrified this claim by stating that "Mr. Harvey argues that the trial court failed to instruct the Jury that the State must prove the absence of self-defense beyond a reasonable doubt."

Here, the COA effectively changed the issue raised in order to avoid having to address the merits of the sufficiency of the evidence claim. While failure to instruct the jury that the State must prove the absence of self defense was a factual point of the argument in Mr. Harvey's Statement of Additional Ground No. 1, it was not the issue raised, only a factual error that allowed the State to obtain a conviction that it could not prove beyond a reasonable doubt.

The issue left unresolved, by the Court of Appeals, is the sufficiency of the evidence, that the State needed to prove the absence of self defense beyond a reasonable doubt.

In Mr. Harvey's claim entitled "THE STATE FAILED TO PROVE THE ABSENCE OF SELF DEFENSE BEYOND A REASONABLE DOUBT," he raised three undisputed points of fact, a, b, c;

(a). "Mr. Harvey first provided sufficient evidence to support a rational finding of Self-Defense, and thus, shifted the burden of proof to the State to disprove self-defense beyond a reasonable doubt."

(b). "The Court, over Objections, erroneously refused to instruct the jury that the State had to prove the absence of self-defense beyond a reasonable doubt, which relieved the State of its burden of proof."

(c). "The State produced no evidence to support the crimes charged in Counts I and III, and failed to disprove self-defense."

These FACTS are supported by the record on appeal, and are Undisputed by the State.

Self defense is defined by Statute as a lawful act. RCW 9A.16.020(3). It is therefore impossible for one who acts in self defense to be aware of facts or circumstances "described by a statute defining an offense." RCW 9A.08.010(1)(b)(i). This is just another way of stating proof of self-defense negates the knowledge element of second degree assault. Since proof of self-defense negates knowledge, due process and prior case law require a holding that the State must disprove self-defense in order to prove that the defendant acted unlawfully.

Here, the Court's refusal to instruct the jury that the State bears the burden to disprove self-defense beyond a reasonable doubt, as was requested by Defense Counsel, violated due process by improperly shifting the burden of proof to Mr. Harvey to disprove an element of the crime. State v. McCullum, 98 Wash.2d 484, at 500 (1983).

The legislature has not clearly imposed the burden of proving self-defense on criminal defendants, therefore, the obligation to prove the absence of self-defense remains at all times with the prosecution. Even assuming arguendo that the new criminal code places the burden of proof on petitioner to establish self-defense, that burden can be

Constitutional only if self-defense does not negate one or more of the essential ingredients of murder in the first or second degree. Mullaney v. Wilbur, 421 U.S. 684 (1975); State v. Hanton, 94 Wash.2d 129, cert. denied, 449 U.S. 1035 (1980).

Since "intent" is expressly made an element of the crime of First Degree Murder, the prosecution must prove it beyond a reasonable doubt. Hanton, supra; State v. Roberts, supra.

A person acting in self-defense cannot be acting intentionally as that term is defined in RCW 9A.08.010(1)(a). There can be no intent to kill within the First Degree Murder Statute unless a defendant kills "unlawfully", i.e., "With the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a). Since self-defense is explicitly made a "lawful" act under Washington law, RCW 9A.16.020(3), RCW 9A.16.050(1) & (2), State v. Hanton, supra at 133, it negates the element of "unlawfulness" contained within Washington's Statutory definition of criminal intent.

The COA has cited no part of the record on behalf of the State that disputes the claims presented and has failed to address the issue raised on direct appeal. Nor has the COA presented any evidence, on behalf of the State, that shows the State disproved Self-Defense beyond a reasonable doubt. For these reasons this Court should conclude that the COA erred by failing to address the merits of the claim raised and accept review of these issues, and ORDER the State to respond to the Merits of the Claim.

Because the State failed to file a brief, the prima facie error rule continues in force. Here, Appellant established a prima facie case of reversible error. Brown, 71 Wn.App. at 616.

2. THE COURT OF APPEALS ERRED BY NOT ADDRESSING THE ISSUE RAISED IN STATEMENT OF ADDITIONAL GROUNDS NUMBER TWO: THAT THE JURY WAS INSTRUCTED THAT THEY WERE REQUIRED TO GIVE A DEFINITIVE "NO" ANSWER WHEN ITS MEMBERS CANNOT AGREE AND THEREFORE THE UNANIMITY INSTRUCTION WAS INCORRECT AND HARMFUL.

Mr. Harvey initially argued that the Bashaw fix the Trial Court instructed the jury on concerning unanimity instruction for the special verdict failed to cure the deficiency because it both instructed the jury that it had to be unanimous and had to fill in the form with a "NO" answer if any jurors were not in agreement, and that the instruction was misleading. This Court's Ruling in Nunez, No. 35739-0 does not change that argument, rather, it supports the argument, though from a different proposition.

a. The instruction implied that the Jury must act as one when returning a verdict on the Special Verdict Froms.

Mr. Harvey raised in his argument to the COA that the unanimity instruction was defective because it confused the jury by instructing them that; "If you unanimously agree that the answer to the question is "NO" or if after full and fair consideration of the evidence you are not in agreement, as to the answer, you must fill in the blank with the answer "NO." and "Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision."

Taken together these two instructions imply that the Jury must act as one when returning a verdict on the Special Verdict Forms. According to State v. Nunez, No. 85739-0 En Banc decision on June 7, 2012, This Court found that instruction erroneous and a mistatemen of the Law. This Court held that the more correct instruction, as in Brett, is to instruct the jury that if they were not in agreement to

leave the form blank. See 126 Wn.2d 173. This issue warrants revisitation in light of Nunez.

b. The nonunanimity rule subverts the Jury's duty to deliberate carefully and consider one anothers opinions.

A Rule that allows a jury to give a definite answer on a special verdict form when the jurors are not in agreement frustrates one of the core purposes of jury unanimity, which is to promote the jurors' full discussion and well-considered determinations before returning a verdict. Jones v. United States, 527 U.S. 373, 382, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1990); State v. Cross, 156 Wn.2d 580, 616, 132 P.3d 80 (2006)("We want juries to deliberate, not merely vote their initial impulses and move on.").

Requiring that jury give a definitive "NO" answer when its members cannot agree frustrates this prupose. A "NO" answer on a special verdict form would not necessarily reflect the jury's considered judgment but could very well be the result of an unwillingness to fully explore the reasons for any disagreement.

Here, it was possible that the jury was so confused by this instruction that they did not know precisely what was required of them. It is possible that one or more of the jurors wished to answer "no" and because they all had to agree as to the "yes" or "no" they simply put it to a vote wherein the majority prevailed. The right to a jury trial is the right to be judged by 12 jurors individually, not a majority rule. The instruction given here allowed such a majority rule.

Furthermore, the Trial Court failed to enter Facts Findings and Conclusions of Law as required by the SRA, therefore, this Court cannot address such document in its determination. It was error for the Trial

Court to not enter those findings and conclusions of law.

Because the trial Court's error had Constitutional dimension and practical and identifiable consequences, the jury's Special Verdicts added an additional consequence raising the maximum penalty on both first degree and second degree murder convictions, each by 120 months, totaling 240 months for both enhancements.

Because this Court found the nonunanimity rule is both incorrect and harmful, and the jury in this case was instructed that if any of the jurors were not in agreement then they must all return a verdict yes or no. This Court should vacate the Special Verdict Findings in this Case and remand for resentencing without the aggravation of penalty factors.

3. THE COURT OF APPEALS DECISION THAT THE TRIAL COURT DID NOT ERROR BY FAILING TO DISMISS ONE OF THE TWO UNLAWFUL POSSESSION OF FIREARM CHARGES BECAUSE RCW 9.41.040(7) PROVIDES THAT EACH FIREARM UNLAWFULLY POSSESSED SHALL BE A SEPARATE OFFENSE, IS IN CONFLICT WITH OTHER DECISIONS OF THE WASHINGTON COURTS.

Other State Court decisions have previously held that multiple, unlawful firearm possession conviction constitute the same criminal conduct if the possession occurred at the same time and place. State v. Stockmyer, 148 P.3d 1077 (2006); State v. Simonson, 91 Wn.App. 874, 885-86 (1998), review denied, 137 Wn.2d 1016 (1999); State v. Westling, 145 Wn.2d 607, 40 P.s2d 669 (2002).

Mr. Harvey argues that the trial court should have counted his two possession of firearm conviction as "same criminal conduct," thus giving him a lower offender score at sentencing. Preliminarly the State based each of the firearm counts on RCW 9.41.040. That statute was amended by the "Hard Time for Armed Crime" initiave, which passed in 1995. As amended, it provides in part that "each firearm unlawfully passed under this section shall be a separate offense." Accordingly, the State was authorized to charge one count of each firearm. Charging, however, is different from Sentencing.

Sentencing is controlled by RCW 9.94A.400, which was not amended by the "Hard Time for Armed Crime" initiative. Insofar as pertinent here, RCW 9.94A.400 provides "That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct than those current offenses shall be counted as one crime." It further provides that "same criminal conduct"...Means two or more crimes that (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. The absence of any one of these criteria prevents a finding of same criminal conduct.

Here, Mr. Harvey possessed both firearms with the same intent, he possessed both firearms at the same time and place, and the possession was in violation of the piece and dignity of the State of Washington. Here, all three requirements have been satisfied, and the State has failed to contest otherwise. Further, the Trial Court found the two Conviction to encompass the same criminal conduct, yet it failed to vacate one of the two conviction and counted both convictions in his offender score, Thus violating Double Jeopardy. State v. Simonson 91 Wash.App. 874, No. 21327-3-II (1998).

Two reasons compel reversal of one of the convictions for unlawful Possession of Firearm under the former Statute.

One, both interpretations of the former Statute are reasonable, and because they cannot be reconciled with each other, the Statute is ambiguous. Criminal Statutes that are ambiguous are to be strictly construed in favor of the defendant. State v. Wissing, 66 Wash.App. 745, rev denied, 120 Wash.2d 1017 (1992).

Two, the replacement Statute with the new subsection (7) is a material change in the wording of the Statute, and that when the Legislature makes a material change to a Statute a change in the legislative purpose is presumed. State v. Bell, 8 Wash.App. 670 (1973). Moreover, criminal Statutes are to be strictly construed with doubts as to whether conduct was criminal is resolved in favor of the defendant. Bell, at 674.

Because other Court Case law contradict the Court of Appeals Ruling in this matter, and because the Trial Court found the two multiple firearm convictions constituted the same criminal conduct, and because Mr. Harvey possessed the two firearms with the same intent, possessed

both firearms at the same time and the possession involved the same victim, i.e., the Sate of Washington, this Court should find that the Trial Court erred by not vacating one of the two possession of firearm conviction in violation of double jeopardy and the Court of Appeals erred by entering a ruling absent a genuine conflict before it, in violation of the prima facie error rule. State v. Wilburn, 51 Wn.App. 927, 755 P.2d 842 (1988).

In this Case the State did not file a brief contesting Mr. Harvey's Statement of Additional Grounds, and the Standard of review for the Court of Appeals was limited to the determination of whether the appellant's brief, considered in light of the record, establishes a prima facie case of reversable error. The record, here, clearly establishes that the two unlawful possession of firearm convictions constituted the same criminal conduct and warrant vacation of one of the two conviction. Brown, 71 Wn.App. at 616.

4. ISSUES RELATED TO STATEMENT OF ADDITIONAL GROUND NUMBER FOUR.

a. THE COURT OF APPEALS ACTED OUTSIDE ITS PROVINCE BY RAISING PRETERMITED DEFENSES ON BEHALF OF RESPONDENT, AND THUS VIOLATED CJC CANNON 2(a) AND 3(A)(5), AND VIOLATED THE PRIMA FACIE ERROR RULE.

In this case the State refused to reply to any of the issues brought forth in Appellant's Statement of Additional Grounds. Because the State bears the burden of proving that a violation of the defendant's right to be present was harmless beyond a reasonable doubt, the Court of Appeals has shown bias against Appellant by acting as advocate in violation of Canon 3(5). State v. Rice, 110 Wash.2d 577, 613-14 (1988), cert. denied, 491 U.S. 910, 105 L.Ed.2d 707 (1989).

In this case the Respondent did not file a Brief in response to Appellant's Statement of Additional Grounds, and therefore the COA was limited in its standard of review, by the Prima Facie Error Rule first announced in Aquarian Found v. KTVW, Inc., Supra, to the determination of whether the appellant's brief, considered in light of the record, establishes a Prima Facie case of reversible error. Brown, 71 Wn.App. at 616; State v. Wilburn, 51 App. 827, 755 P.2d 842 (1988).

Here, there was no controversy before the Court and no proof presented that Appellant's right to be present was harmless. Factually speaking, there was no conflict before the court upon which it could resolve. The Court of Appeals both produced a conflict, and then resolved it, without consideration to impartiality. Accordingly, Appellant was denied opportunity to rebut such pretermited defense brought forth by the Court on behalf of the Respondent.

b. THE RULING HERE IS IN CONFLICT WITH ANOTHER COURT OF APPEALS DECISION.

Mr. Harvey argued that his right to be present was violated when the Trial Court responded to a question presented by the Jury concerning testimony that supported his self-defense standing.

The Court of Appeals erred in determining that Appellant was not entitled to be present when the Trial Court answered a Factual question presented by the Jury.

Appellant's entire defense rested upon Self-Defense, that he acted in self-defense when Jack Lemere and Jacob Potter visibly armed themselves with guns, knives, brass knuckles, and then approached him and his girlfriend in a threatening manor.

Testimony during Trial, of Mr. Harvey and L. Averill, establidhed that Jack Lemere did have his gun on his person when Merle Harvey put together the .22 caliber rifle.

The jury presented to the Court one inquiry that asked; "According to the testimonies of L. Averill and M. Harvey did Jack Lemere have his gun on his person when Merle Harvey put together the .22?"

Here, the Jury simply wished clarification of trial testimony from L. Averill and Mr. Harvey, i.e., Factual Matters.

Mr. Harvey insists that he had a right to be notified of the Jury's Questions to the Court, and had a right to suggest appropriate response to the question. Here, the Ruling by the Court of Appeals is in conflict with State v. Jasper, No. 63442-9-I.

c. THE COURT OF APPEALS ERRED BY RULING THAT "THE TRIAL COURT WOULD HAVE INVADED THE JURY'S PROVINCE AS FACT FINDER BY TELLING IT WHETHER MR. LAMERE WAS ARMED WHEN MR. HARVEY ASSEMBLED THE .22 RIFLE. THE TRIAL COURT HAD NO CHOICE BUT TO ANSWER THE SECOND QUESTION AS IT DID." THAT RULING IS IN CONFLICT WITH OTHER STATE AND FEDERAL LAW.

Had the Trial Court not violated CrR 6.15 by failing to notify the parties of the questions presented by the Jury Mr. Harvey would have invariably requested that the Jury be allowed to review the testimony during its deliberation, or that the Jury be brought back into court so that the testimony could be read back to them by the Court Reporter.

A trial Court has discretion to permit a Jury to review witness testimony during its deliberation. State v. Monroe, 107 Wn.App. 637, 638, 27 P.3d 1249 (2001), rev. denied, 146 Wn.2d 1002 (2002). However, that discretion is circumscribed by the concern that such a review does not unduly emphasize any portion of testimony. Thus, in exercising discretion, the Trial Court must take into account the danger of undue emphasis and adopt safeguards appropriate to the particular facts and circumstances of the case. Trial Court's "MUST" consider how the reply can be limited to respond to the Jury's request and the procedures necessary to protect the parties. However, that did not occur here. State v. Koontz, 145 Wn.2d 650, at 655, 41 P.3d 475 (2002).

While there is no absolute prohibition on playing an audiotape of trial testimony, or reading to the Jury trail testimony from the record, during deliberations, the right to a fair and impartial jury, is guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Articl 1 Section 22 of Washington State Constitution., requires that the trial court balance the need to provide the jury with

relevant portions of testimony to answer a specific inquiry against the danger of allowing a witness to testify a second time.

Here, the trial court never entertained any discussion with Counsel concerning such balance. It was within the discretion of the Trial Court to readback witness testimony as an appropriate response to the Jury's request. United States v. Sandoval, 990 F.2d 481,486-87 (9th Cir.1993). Here, the Trial Court did have a choice other than answering the question as it did, contrary to the Court of Appeals assertion.

d. THE TESTIMONY THE JURY SOUGHT TO REVIEW WAS CRITICAL FACTUAL MATTER THAT SUPPORTED DEFENDANT'S DEFENSE , AND THUS, WOULD HAVE AFFECTED THE OUTCOME OF THE TRIAL, HAD SUCH OPPORTUNITY NOT BEEN FORECLOSED.

The testimony the Jury sought review of was a critical point of factual testimony that undeniably supported Defendant's Self-Defense defense. It is reasonable to conclude, therefore, that had such Testimony been provided for the Jury's review during deliberations, that the outcome of the trial would have been different.

e. THE COURT OF APPEALS ERRED WHEN IT FOUND NO PUBLIC TRIAL VIOLATION WHEN TRIAL COURT ANSWERED JURY QUESTION CONCERNING TESTIMONIAL EVIDENCE OUTSIDE PUBLIC FORUM AND OUTSIDE PRESENCE OF COUNSEL.

Here, the question presented by the Jury to the Judge concerned a question about testimony given by prosecution witness L. Averill as well as testimony given by Defendant. Both testimonies corroborated the fact that the victims were armed with weapons, including a firearm, for which the Jury wanted clarification.

The Court of Appeals seems to reason, on behalf of the State, that the trial court was presented with a question about witness testimony that the court could not answer, and therefore Defendant was not entitled

to be notified or entitled to a public hearing in open court, on an evidentiary issue.

Mr. Harvey has demonstrated that the Trial Court had discretion to permit a jury to review witness testimony during its deliberation. State v. Monroe, 107 Wn.App. at 638 (2001).

Here, the Court of Appeals assertion that the trial court could not answer the Jury's question is not a valid defense, and as such its assertion that Defendant was not entitled to a public hearing pursuant to CrR 6.15 is wrong.

In State v. Jasper, No. 63442-9-I at [56], the court stated; "The Jury shall be instructed that any question it wished to ask the court about the instruction or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response, and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court, or in writing if upon any point of law.

Here, the parties were not notified or given an opportunity to comment upon an appropriate response, nor was the questions and answers conducted in open court pursuant to CrR 6.15(f)(1).

Because this issue concerns disputed Facts and Testimonial Evidence, Appellant had a right to notification, opportunity to comment and a constitutional right to be present, and a right for the hearing to be conducted in open court.

When reviewing for harmless error, appellate court must determine if government has proven "with fair assurance...that the judgment was

not substantially swayed by the error." U.S. v. Curbelo, 343 F.3d 273, 286 (4th Cir.2003).

Error is harmless unless a reviewing court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. United States v. Stewart, 360 F.3d 295, 323 (6th Cir.2002).

Error harmless unless error had a substantial influence on the outcome of the proceeding or leaves one in grave doubt as to whether it had such an effect. U.S. v. Thompson, 287 F.3d 1244, 1253 (10th Cir.2002).

Erroneous evidentiary ruling is basis for reversal only if defendant can demonstrate error had "substantial influance" on jury's verdict.

Error in jury instruction shifting the government's burden of proof to defendant not harmless beyond a reasonable doubt. U.S. v. Tarwater, 308 F.3d 494, 521 (6th Cir.2002).

Because of all the violations associated with Mr. Harvey's Statement of Additional Grounds number 4, i.e., right to be notified, right to be present, right to suggest appropriate response to jury's questions, and because the Court of Appeals erred in raising a pretermited defense on behalf of Respondent, and erred in ruling that the trial court would have invaded the jury's province, this Court should remand for new trial in this case.

5. THE COURT OF APPEALS ERRED BY NOT ADDRESSING THE RECORD ON APPEAL WHEN ADDRESSING HIS RIGHT TO BE PRESENT CLAIM.

In SAG 5, Mr. Harvey argued that his right to be present was violated when the Trial Court conducted a hearing on May 10, 2012.

The Court of Appeals argues, on behalf of Respondent, that a transcript from the May 10, 2010 Hearing, and any order signed that day, is not in the record, and therefore the record is insufficient to support the argument.

Mr. Harvey contends that the Clerk's Papers contain enough information for the Court to determine this issue. The Clerk's Papers contain the Minutes of all Hearings held in the Case and evidence who was in attendance, as well as the issues that were brought before the Court, as well as the resolution of the issues. However, if the Clerk's Minutes are not in the Record this Court should conduct an evidentiary Hearing to find out why the Records are missing. Further, this Court, as well as the Court of Appeals, has the power to order additional records or transcripts that it feels are needed for a complete resolution of the issues before it.

Mr. Harvey has requested his Attorney to provide him with the Clerk's Minutes. She has refused, and subsequently withdrew from representing him with his Motion for Discretionary Review. As it stands Mr. Harvey only has the "Testimony Portion of his Trial" and nothing else. He has no Clerks Papers, no Jury Instructions, no motions filed with the Trial Court, no papers whatsoever that were filed with the Trial Court. Therefore, he is unable to point this Court to any specific Minutes in the Record or argue what such records Contain. However, he does believe the Minutes are in the record filed with the Court of

Appeals, and this Court, and that they support his claim in this matter. For this reason this Court should review the Clerks Papers filed and dated on May 10, 2010, and conclude, based upon the record, that the Court of Appeals Erred by arguing for Respondent, and finding the record insufficient to support his claim. Alternatively, this Court Should conduct an Evidentiary Hearing and Order additional Transcripts to resolve this issue, as the Court of Appeals should have done in the first place.

6. THE COURT OF APPEALS ERRED IN RULING THAT THE RECORD IS UNCLEAR AS TO WHETHER MR. HARVEY WAS PRESENT AT THE HEARING DATED SEPTEMBER 10, 2010, AS TO SAG 13.

Mr. Harvey argued that his right to be present for the Hearing dated September 10, 2010 was violated.

The Court of Appeals argued, on behalf of Respondent, that the record is unclear as to whether Mr. Harvey was present at the hearing. The COA, after raising the argument on behalf of Respondent, concluded that the record is insufficient to support Mr. Harvey's argument.

Mr. Harvey contends that the record is sufficient to support his argument. The Trial Court's keep detailed records called "Minutes" wherein the Court Clerk writes down who is present in the Court, the Date of the Hearing, the time of the Hearing, what transpired during the Hearing and the Court's resolution of the issues before it. These Court Minutes are in the Clerk's Papers before this Court. All it takes is to review those Minutes. If the Minutes for September 10, 2010 do not specifically indicate the defendant's presence in the Court Room, then it can only be concluded that Mr. Harvey was not present.

However, if the Court's Minutes are not in the Clerk's Papers, then this Court should Conduct an Evidentiary Hearing to determine why the Minutes are missing.

Further, the Hearing at question here is before the Court, as it was Transcribed and entered into the record. At the beginning of every Hearing the Trial Judge declares who is present, if the defendant is present, if he is represented by counsel, etc. Additionally, the record at question here should have been recorded via video camera, either on video cassette or by digital media. In either case, it would be but a simple thing for this Court to view the Hearing of September 10, 2010 and see with it's own eyes that Mr. Harvey was not present during the Hearing.

This Court should review the Record before it, as the Court of Appeals failed to so do, and rule on the merits of the claim.

7. THE COURT OF APPEALS DETERMINATION IN SAG 7 THAT "THERE IS NO SUCH RULING IN THIS RECORD" WHEN ADDRESSING PUBLIC TRIAL VIOLATION IS IN CONFLICT WITH OTHER COURT OF APPEALS DECISIONS.

Mr. Harvey raised, in SAG 7, that his conviction must be reversed because the trial court erroneously closed jury voir dire without conducting the required inquiry under Bone-Club, in violation of the Constitutional guarantee of a Public Trial.

The Court of Appeals ruled that;

> "Mr. Harvey argues that the trial court's ruling that spectators had to leave the courtroom to accommodate a large jury pool violated his right to a public trial. An order that spectators may not view voir dire due to a courtroom's space and the size of the jury pool can be reversible error. In re Orange, 157 Wn.2d 795 (2004); State v. Njonge, 161 Wn.App. 568, 578-59 (2011). But there is no such ruling in this record."

This Ruling by the Court of Appeals is in conflict with other Court of Appeals Decision. Several Washington Court's have held that a courtroom closure can occur even in the absence of an explicit court order. See Strode, 167, Wn.2d at 227; State v. Heath, 150 Wn.App. 121 (2009); State v. Erickson, 146 Wn.App. 200 (2008).

This Supreme Court recently held; "We hold that Njonge is not required to show an express closure order to make an objection in order to obtain review on his public trial argument raised the first time on appeal."

Here, the Court of Appeals Ruling that "But there is no such ruling in this case," is in conflict with State v. Momah, 167 Wn.2d at 156, and State v. Njonge, 161 Wn.App. 568 at [33].

The issue here is not, as the Court of Appeals argues, that of a specific ruling in the record, but that of a closure of the trial absent any Bone-Club analysis, in violation of the Constitutional guarantee of a public Trial.

This Court should Hear this Issue on the Merits of the Case, and Order the Respondent to file a brief and submit any documentation necessary for this Court to determine this issue.

8. THE COURT OF APPEALS ERRED BY NOT ADDRESSING STATEMENT OF ADDITIONAL GROUNDS NUMBER SIX.

Mr. Harvey raised in SAG 6 that; THE TRIAL COURT ERRED WHEN IT IMPOSED SENTENCE ENHANCEMENTS ON TWO COUNTS FOR SAME CRIMINAL CONDUCT IN VIOLATION OF DOUBLE JEOPARDY.

The Court of Appeals combined this issue with SAG 8, and held;

> SAG 6 and 8. Mr. Harvey argues that the amended information did not provide him with sufficient notice because it did not inform him that he could be convicted of second degree murder with a firearm enhancement as an alternative to first degree murder with a firearm enhancement. RCW 10.61.003 provides that a person may be convicted of offense of a lesser degree of the crime charged in the information. This statute provided Mr. Harvey with sufficient notice. State v. Garcia, 146 Wn.App. 821, 829-30, 193 P.3d 181 (2008).

The Court of Appeals ruling did not address the substantive issue raised in SAG 6. Further, the case cited by the Court of Appeals, State v. Garcia, has nothing to do with a double jeopardy.

Additionally, RCW 10.61.003 was never cited in the Information, as the Court of Appeals argues on behalf of Respondent. Therefore, Mr. Harvey was never informed that he could be convicted of a lesser degree of the crime charged in the Information. However, that has more to do with SAG 8, than it does with the issue raised here.

The Issue raised here addresses Double Jeopardy because the Trial Court imposed sentence enhancements on two conviction, in violation of double jeopardy. Here, both murder convictions were enhanced due to one act of misconduct.

The Sentence Enhancement here is, while armed with a firearm. Mr. Harvey acted in self defense, with one firearm, against two heavily armed aggressors. Being Armed with a Firearm was one act, and it was double jeopardy to impose sentence enhancements twice for that one act.

The Court of Appeals Erred in failing to address the double jeopardy issue.

While the Court of Appeals is correct that RCW 10.61.003 provides that a person may be convicted of offense of a lesser degree of the crime charged in the information, and that the Statute, if properly cited in the Information, would have provided sufficient notice, such statement does not address the double jeopardy issue. Even so, sentencing is different than charging. SAG 6 raised issue of Charging Information, while SAG 6, raised sentencing issue.

Sentencing is controlled by RCW 9.94A.400, which has nothing to do with RCW 10.61.003.

Further, because the Court of Appeals only addressed the Charging Information in this double jeopardy claim, Mr. Harvey would be remiss in not addressing the Information now. The Charging Information never alleged "while armed with a firearm" in connection with Second Degree Murder. This is so because the Charging Information never charged Second Degree Murder.

For these reasons this Court should vacate the sentence enhancement attached to the Second Degree Murder Conviction. This would alleviate both issues.

9. THE COURT OF APPEALS DECISION, IN SAG 8, THAT RCW 10.61.003 PROVIDED MR. HARVEY WITH SUFFICIENT NOTICE IS IN CONFLICT WITH OTHER COURT OF APPEALS DECISIONS AND DECISIONS OF THE SUPERIOR COURT, AS WELL AS FEDERAL LAW.

Mr. Harvey claimed in SAG 8 that he was convicted of Second Degree Murder that was not charged in the information, and not Amended by Information, and that the Conviction for Second Degree Murder Omitted an essential element, i.e., "Premeditation".

Here, the State was relieved of its burden to prove all essential elements of the offense charged by instructing the jury on a uncharged alternative means of committing murder.

The Court of Appeals contends, on behalf of the State, that RCW 10.61.003 provides that a person may be convicted of offense of a lesser degree of the one charged in the information, and that the Statute provided sufficient notice.

Mr. Harvey looked up the Case cited by the COA, State v. Garcia, 146 Wn.App. 821, (2008). That Case has absolutely nothing to do with a lesser degree of the crime charged, and has no bearing upon the case at hand.

Mr. Harvey contends that RCW 10.61.003 was never cited in the information, as the Court of Appeals argues for the State. Therefore, Mr. Harvey was never informed that he could be convicted of any alternative lesser degree of the crime charged in the Information.

Here, the Court of Appeals decision is in conflict with a decision of another Court of Appeals and a decision of the Supreme Court.

State v. Peterson, 948 P.2d 381 (1997), Stated in Pertinent part: "While it is true that the jury may find a defendant not guilty of the crime charged, but guilty of an offense of lesser degree, or of an

offense necessarily included within that charged, it is also true that "accusation must precede conviction," and that no one can legally be convicted of an offense not properly alleged. The accused, in criminal prosecutions, has a constitutional right to be appraised of the nature and cause of the accusation against him. Const. Art. 1. Sec. 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged.

The significant difference which distinguishes the case before the court is that Harvey was not convicted of the higher crime of First Degree Murder with which he was charged. Rather, he was convicted of the lesser included offense which was improperly given to the jury absent any Amendment. Washington v. Bailey, 114 Wash.2d 340 (1990). Consequently, Harvey was convicted of an uncharged alternative means of committing murder. Here, the Constitutional error is that of omitting an element of the crime charged, i.e., premeditated element. The Constitution requires the jury be instructed on all elements of the crime charged. Linehan, 147 Wn.2d at 653. An instruction that omits an essential element of a crime relieves the State of its burden of proving each element of the crime beyond a reasonable doubt. Id at 654. Such an error is a violation of due process and harmless solely if the reviewing Court's convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error. State v. Easter, 130 Wn.2d 228 (1996).

Because Jury instructions omitting elements of the charged crime constitute a manifest error affecting a constitutional right, this court may consider the issue for the first time on appeal. RAP 2.5(a)(3), see State v. Eastmond, 129 Wn.2d 497 (1996).

See State of Washington v. Jennifer L. Kirwin, No. 28972-9-III.

Additionally, the State has failed to respond to the merits of Mr. Harvey's Statement of Additional Grounds. Because the State failed to respond the Court of Appeals standard of review was limited to the determination of whether the appellant's brief, considered in light of the record, establishes a prima facia case of reversible error. Brown, 71 Wn.App. at 616; Foley v. Smith, 14 Wn.App. 285, 289 (1975).

In this case the State never provided the Court of Appeals with any evidence that Mr. Harvey was informed that he could be convicted of a crime not presented in the information, i.e., an alternative means of committing the crime charged. The Court of Appeals never identified any portion of the Charging Information that cited RCW 10.61.003, because it never did. It appears that the COA is under the impression that it was Mr. Harvey's responsibility to go searching for any and all statutes that may or may not have applied to his case. In State v. Jeske, 87 Wash.2d 760, 765 (1976), the Court held that "Defendant's should not have to search for the rules or regulations they are accused of violating." This rule should also apply to being informed that one could be convicted of a lesser degree of the crime charged, even though not specifically charged in the Information. Even if it were Mr. Harvey's responsibility to search for RCW's not proclaimed in the Information, it was beyond his ability to do so. First Mr. Harvey was locked in a cell, in the county jail and had no access to legal books. Second, it was beyond Mr. Harvey's mental ability to do so. Mr. Harvey only has an IQ of less than 80, cannot read more than a few simple words. Plainly speaking Mr. Harvey could not understand the Statutes even if he read the words.

Here, the State knew it had not proven all the elements of the crime charged, i.e., Premeditation. In order to secure a conviction it submitted improper jury instructions, which relieved the State of its burden of proof.

Because Second Degree Murder was not charged in the Information the Superior Court lacked subject matter jurisdiction. It 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).

Ultimately, identifying the proper reference point for sufficiency of the evidence review must be guided by the reason for sufficiency of evidence review, which is "to guarantee the fundamental protection of due process of the law." Jackson v. Verginia, 443 U.S. 307 (1979). The Due Process Clause, U.S. Const. amend. XIV, protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 385 (1970).

Federal cases consistently articulate the substantial evidence standard as focusing on the crime actually charged. United States v. Williams, 998 F.2d 258 (5th Cir.1993)("If a rational Jury could have found the defendant guilty beyond a reasonable doubt of the essential elements of the crimes charged, the conviction should be upheld."), cert denied, 510 U.S. 1099 (1994); U.S. v. Inigo, 925 F.2d 641 (3rd Cir. 1991)(Holding that the evidence against certain defendants "was insufficient at to the crimes charged against them in the indictment.").

Washington Const art. 1 § 22 also requires that sufficiency of evidence be tested with respect to the crimes charged. After the State rests it case-in-chief, it cannot amend the information to charge a

different or greater crime, or add an essential element of the crime. Vangerpen, 125 Wn.2d at 789-91. This is so because a defendant is entitled to have the sufficiency of the evidence to convict him tested against the original information. Sufficiency of evidence review is a means of guaranteeing due process only if it is with reference to a charge of which the defendant was given notice and the opportunity to defend. Surely the State cannot deprive Mr. Harvey of that right and then claim the prerogative to try a second time by something as simple as submitting or overlooking erroneous Jury instructions. And it is no answer that defendant failed to object to the instructions. Where he has defended himself once against the crimes charged, he cannot be deprived of his right to have sufficiency of evidence tested against the information because he failed to detect and correct errors made by the State and the Court.

The only evidence Mr. Harvey need provide this Court to support sufficiency of the evidence claim is that the Jury did not convict of First Degree Murder, which alleged Premeditation. Essentially the Jury acquitted him of that charge, finding that he did not premeditate the killing. Had the State not attempted improper amendment, allowing its evidence to be weighed in light of its original charge, Mr. Harvey would have won his motion to dismiss the charge, been acquitted, or succeeded in challenging the sufficiency of evidence on appeal.

This Court should remand with directions to vacate the Second Degree Murder Count with prejudice to the State's ability to recharge.

10. THE COURT OF APPEALS ERRED BY NOT CONSIDERING MR. HARVEY'S CLAIM THAT HE WAS PREJUDICED AND HIS SHOWING OF HOW THE TWO EXPERT WITNESSES COULD HAVE CHANGED THE OUTCOME OF THE TRIAL HAD THEY NOT BEEN EXCLUDED BY THE TRIAL JUDGE BECAUSE OF COUNSEL'S FAILURE TO PROVIDE THE STATE WITH EXPERT WITNESS LIST ON TIME.

In Mr. Harvey's SAG 11 he demonstrated how his Counsel's representation was deficient. Indeed, the Trial Judge stated over and over again how she was giving Mr. Harvey a slam dunk ineffective assistance of counsel claim by excluding the witnesses. The State acknowledged the issue and insisted that the witnesses be excluded anyhow. VRP 236-258.

Mr. Harvey demonstrated how the expert on tattoos was essential to his self defense because of his intelligence limitations prevented him from properly expressing what the tattoos meant to him and the fear they instilled upon him, which contributed to his acting in self defense.

Further, Mr. Harvey sufficiently demonstrated how the Expert on Self Defense, Robert Smith, was essential to his Self Defense standing. The exclusion of Robert Smith was due to trial Counsels failure to present the State with Expert Witness List. Since his entire trial defense rested completely on Self Defense, the exclusion of his Self Defense Expert invariably affected the outcome of the Trial, and violated his right to have compulsory process for obtaining witnesses in his favor.

Evidently the Court of Appeals expected, not just a showing of prejudice but, a showing of some sort of speculation of how the trial would have been different had the two Expert Witnesses not been excluded because of Counsels failure to submit the Expert Witness List promptly. Mr. Harvey contends that such speculation is immaterial and outside

the record. Had he presented the Court of Appeals with some scenarios of how his trial could or would have been different, the Court most certainly would have concluded that such speculation is just that, speculation.

It does not take much of an imagination to visualize how the testimony of a Expert on Self Defense could or would affect the outcome of a trial where the Defendant's only defense is Self Defense.

Here, the Court of Appeals denied Mr. Harvey's claim of prejudice due to Counsels ineffectiveness, that resulted in the exclusion of two of his most important witnesses, because he failed to show a possible theoretical outcome. Such reasoning is absurd and outside the record on appeal.

The Record speaks for itself. Counsel failed to present witness list on time and Trial Judge excluded two important Expert Witnesses because of Counsels ineffectiveness. These FACTS are undisputed by the State. The State refused to respond to any of the issues raised in Mr. Harvey's Statement of Additional Grounds. As such, the Court of Appeals standard of review was limited to the determination of whether the appellant's Brief, considered in light of the record, establishes a prima facie case of reversible error. Foley v. Smith, 14 Wn.App. 285, 298 (1975); State v. Wilburn, 51 Wash.App. 827 (1988).

To prove prejudice, the defendant must establish a "reasonable probability" that but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 692.

There is a reasonable probability that, except for Counsels failure to submit the Expert Witness List, the result of the trial would have been different because the Judge most certainly would not have Excluded the Self Defense Expert or the Tattoo Expert, as was indicated on VRP Page 255-256.

However, Mr. Harvey is not a tattoo expert or a Self Defense Expert, nor is he the Jury, therefore he cannot make a showing of how his trial could or would have been resolved differently had the experts not been excluded due to Counsels failure to provied the list promptly.

The Court has rejected the proposition that the defendant must prove more likely than not that the outcome would have been altered. Woodford v. Visciotti, 537 U.S. 19, 22-23 (2002).

Counsel's failure to submit Expert Witness List on time amounted to the same thing as failing to call Expert witnesses because outcome the same, it was ineffective assistance because testimony of those witnesses would have rebutted prosecution's already weak case, and objectively reasonable performance by counsel would have created reasonable probability of different verdict. Pavel v. Hollins, 261 F.3d 210, 217-18 (2d Cir.2001); Hart v. Gomez, 174 F.3d 1067, 1073 (9th Cir.1999).

This issue involves a significant question of law under the Constitution of the State of Washington Article 1, sec. 22, and the U.S. Constitution amend. VI, i.e., "to have compulsory process to compel the attendance of witnesses in his own behalf."

This Court should find that Counsel's failure prejudiced Mr. Harvey's right to call witnesses in his favor and vacate the conviction and remand for new trial.

II.

THE COURT OF APPEALS ERRED IN NOT ADDRESSING A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION AND CONSIDERED EVIDENCE NOT IN THE RECORD WHEN RULING UPON SAG 12.

The significant question of law under the Constitution raised here is whether Mr. Harvey's Due process right to the guarantees of the Sixth Amendment right to a speedy and public trial, which is binding on the States through the Due process Caluse of the 14th Amendment, was violated.

Here, Mr. Harvey argued that somehow his Trial date was moved from June 7, 2010 to September 9, 2010, and that it violated his right to a speedy trial because he asserted his speedy trial right on April 16, 2010 and objected to any continuances beyond June 9, 2010.

There is evidence in the record that the Prosecuting Attorney submitted a motion for a continuance on May 7, 2010. CP 5-6. However, there is no evidence that the Trial Court granted or denied the Motion, or even conducted a hearing on the motion.

There is further evidence in the Record that Trial Counsel filed a Motion to Dismiss the charges because of the Speedy Trial Violation. RP 7-8. Because Mr. Harvey does not have any of the Minutes, or any of the Clerk's Papers, he is unable to ascertain whether the Motion to Dismiss is in the record on appeal. It is evident that the Trial Court's Ruling on the Motion to Dismiss, if any, is not in the record on appeal.

The Standard of review that the Court of Appeals should have determined is set forth by Four Baker Factors, (1) the length of the delay; (2) the reason for delay; (3) whether, when and how the defendant asserted his right to speedy trial; and (4) whether the defendant was prejudiced by the delay. Baker v. Wingo, 407 U.S. 514, 534 (1972).

The Court of Appeals only addressed one of the four Baker Factors, (2) the reason for the delay. However, even that reason could not have been reached reliably because any ruling, if any ever was conducted, was not in the Record on Appeal. It was well within the Court of Appeals authority to conduct an evidentiary hearing and order the State to respond to the Merits of Mr. Harvey's contentions and order additional portions of the trial record to be entered into the record on appeal. It did not do so. That was error. State v. Allan, 562 P.2d 632, 88 Wash.2d 394; usual remedy for defects in the record should be to Supplement record with appropriate affidavits. State v. Miller, 698 P.2d 1123, 40 Wash.App. 483 rev. denied 104 Wash.2d 1010.

The Supreme Court of the Untied States, in ruling on the Baker case, stated that "different weights should be assigned to different reasons" for delay. Here, the COA could not weigh differing reasons because it did not have before it any ruling by the Trial Court on the issue, only the State's Motion.

Mr. Harvey declared that he never attended any Hearings between April 16, 2010 and July 1, 2010, and that this declaration amounts to an Affidavit because it was verified to under penalty of perjury. See SAG P. 36 and 44.

The attestation by Mr. Harvey that he did not attend any hearings between April 16 and July 1, 2010, the only time-frame that any Continuance Hearing could have been conducted in, brings forth a sub-issue dealing with Mr. Harvey's Constitutional Right to be present, which the COA failed to address.

Mr. Harvey was charged in October 2009, more than one year later he was finally brought to trial. Courts have held delays approaching one year are generally presumptively prejudicial. Wells v. Petsock, 941 F.2d 253 (3d Cir.1991); Untied States v. Tinklenberg, No. 09-1498 (U.S. 5-26-2011).

Here, the Standard of review, aside from the four Baker factors, was limited to the determination of whether the Appellant's brief, considered in light of the record, established a prima facie case of reversible error. Because Respondent chose to proceed on appeal without filing a brief, he did so at his own peril. Foley v. Smith, 14 Wn.App. 285, 298 (1975); State v. Wilburn, 51 Wn.App. 827 (1988); Martin v. Schoonover, 13 Wn.App. 48, 51 (1975).

Because the Court of Appeals failed to consider more than one of the four Baker factors it necessarily failed to address a significant question of law under the Constitution of the State and United States, and because it considered a hypothetical Ruling that was not before it, this Court should grant review and order an evidentiary hearing in order to address the remaining three Baker Factors the COA failed to address, and hear the issue on the merits. Or Alternatively, Remand back to the Court of Appeals for an evidentiary hearing and a determination of all Baker Factors on the merits.

12. THE COURT OF APPEALS ERRED BY APPLYING STATUTE OF LIMITATIONS AS CAUSE TO DENY REVIEW OF ISSUES RAISED IN SUPPLEMENTARY SAG ON REMAND, AN AFFIRMATIVE DEFENSE NOT RAISED BY RESPONDENT.

The State never responded to any issues raised by Appellant in either of his Statement of Additional Grounds raised on direct appeal. However, the COA denied review of Appellant's Supplemental Statement of Additional Grounds raised on Remand because of some unknown Statute of Limitations.

Statute of Limitations is an affirmative defense that must be raised by respondent to be preserved. United States v. Hansel, 70 F.3d 6 (2nd Cir. 1995).

The Sixth Circuit held that "The statute of limitations in §2244(d) is an affirmative defense that must be pleaded to avoid waiver," and that respondent waived the statute of limitations defense by failing to plead it. Scott v. Collins, 286 F.3d 923, 928 (6thCir.2002).

Sua Sponte invocation of procedural default serves no important federal interest. Esslinger v. Davis, 44 F.3d 1515 (1995).

The Ninth Circuit Court of Appeals held in Scott v. Schriro, 567 F.3d 573 (2009), that "Where a petitioner raises a colorable claim [to relief], and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing." Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir.2001).

Unless a court specifically (not implicitly) states that it is relying upon a procedural bar, we must construe an ambiguous state court response as acting on the merits of a claim, if such construction is plausible. Crittenden v. Ayers, 620 F.3d 962 (9thCir.2010).

A state court's summary rejection of a claim qualifies as an adjudication on the merits...so as to warrant deference. Ferguson v. Culliver, 527 F.3d 1144, 1146 (11thCir.2008).

Here, Petitioner has presented issues to the COA that have never been heard and determined on the merits, and he is now presenting them to this Honorable Court before he can present them to the Federal Court's. The Court of Appeals has refused to address many of the issues on the merits even though they were properly raised. Further, the State has declined to contest any of the issues in either of the SAG filed before remand or the one filed after Remand. Because Respondant chose to proceed on appeal without filing a brief addressing any of the issues raised in Appellant's Statement of Additional Grounds, it did so at it's own peril. Foley v. Smith, 14 Wn.App. 285, 293 (1975); State v. Wilburn, 51 Wn.App. 327 (1988); Martin v. Schoonover, 13 Wn.App. 48, 51, (1975).

Because the State has not responded to or contested any of the issues Appellant raised in SAG's, and has not raised Statute of Limitation, this Honorable Court should conclude that the Court of Appeals erred by refusing to consider the issues in the Supplemental SAG on the merits, and Remand once again with directions instructing the COA to rule on the substantive issues raised, on the merits.

13. COURT OF APPEALS ERRED BY NOT LOOKING TO THE RECORD TO DETERMINE THE PRESUMPTIVE EFFECT OF THE TRIAL COURT'S DIRECTIVE WHICH PRECLUDED ANY SPECTATORS OR PRESS FROM VIEWING PORTIONS OF JURY VOIR DIRE, AND ERRED BY NOT CONSIDERING AFFIDAVIT OF MARLA DRADER THAT AFFIRMATIVELY PROVES PORTIONS OF VOIR DIRE WERE CLOSED TO THE PUBLIC, AS THE STATE RAISED THE ARGUMENT THAT "NOR WAS ANYONE DE FACTO EXCLUDED" IN ITS ONLY RESPONSE TO THE PUBLIC TRIAL ISSUE.

The court in Brightman, 155 Wn.2d at 517, held that when the plain language of a trial judge's ruling calls for closure, the state bears the heavy burden to overcome the strong presumption the courtroom was closed. In Mr. Harvey's SAG he presented the COA with the argument that

the trial judge's express ruling that all 80 prospective jurors attend voir dire at same time necessarily called for closure because the court room was not large enough to accomodate 80 jurors and the public. Further, the Trial Judge expressly addressed the entire courtroom when swearing in all 80 prospective jurors. If there had been public members present the trial judge would not have swore in the public as jurors.

In State v. Duckett, No. 25614-6-III, 11/27/2007, the Court of Appeals stated that; ("To the extent that the State's argument is that the court did not enter a closure order, we look to the record to determine the presumptive effect of the court's directive.")

Here, the trial judge's directive swearing in the entire courtroom as jurors, and addressing the entire courtroom as single body of jurors, presents the strong presumption that the Courtroom was closed.

The State bears the burden on appeal to show that, despite the court's ruling, a closure did not occur. Here, the State has failed to respond to the public trial violation grounds raised by Mr. Harvey in his SAG, therefore it did not raise an affirmative defense and this Court should remand with instructions to consider the issue of public trial violations in the SAG on the merits.

Further, Mr. Harvey presented the COA with sufficient evidence that portions of the voir dire was factually closed to the public by presenting an Affidavit by a member of the public, who claims under penalty of perjury that she attempted to view the first portion of voir dire but was turned away at the door by court personnel who claimed that the public was not allowed to view jury selection due to size of jury pool. Again, the State had ample opportunity to contest Mr. Harvey's claims and Marla Drader's Affidavit under penalty of perjury. It did not.

Where a trial court, as here, obviously conducted portions of voir dire with all 30 prospective jurors present at same time, the burden should be on the state to show the proceedings were open to the public.

The COA erred by shifting the burden of proof to the Defendant because the trial court never ordered the proceeding to be closed to any spectators or family members, or rather that the record does not evince a closure order.

Whether jury voir dire is conducted in a closed courtroom, a jury room, or a judge's chambers is a distinction without a difference. The Constitutional rights to a public and open trial is to guarantee public access, which the trial court failed to do when it refused to allow Marla Drader access to the voir dire portion of trial.

There are certain Constitutional errors that are presumed prejudicial, or as to which prejudice is obvious and inherent. Public Trial violation is such an issue. In such cases, proof of the Constitutional violation will entitle the petitioner to relief. In re Farney, 91 Wn.2d 72, 583 P.2d 1210 (1978). However, this is direct appeal not a petition, and therefore the burden lies with the State to disprove the allegations. Nonetheless, Mr. Harvey has provided uncontroverted evidence that the doors to the Courtroom were closed to the public during a portion of the voir dire, the portion where the entire jury pool were in the courtroom all at once, all 30 of them. Such uncontroverted evidence is Marla Drader's Affidavit. See Pro Se Supplemental Statement of Additional Grounds Exhibits 1 and 2.

In the State's supplemental brief, (the only one filed), the State stated that; "Here, the courtroom was never closed, nor was anyone de facto excluded since all substantive matters were conducted in open court."

Such contention has been contested by Mr. Harvey with the introduction of Marla Drader's Affidavit under penalty of perjury. If not for any other reason than this contention by the State, this Court should consider Marla Drader's Affidavit, because the State raised it first and it is evidence which disproves the State's contention. (See Supplemental Brief of Respondent Page 10 Lines 1-3)

The COA claims it cannot consider anything that is not in the record, however, it seems to have no problem considering defenses on behalf of the State that were never raised by the State. Such double standard is contrary to the contention that justice is blind. The claims presented in the supplemental SAG is based upon the record already developed and needs no further factual findings, (here the Affidavit by Marla Drader has been developed and is factual), and there is no excuse for not making the argument on direct appeal. However, if this Court determines that the Affidavit by Marla Drader is not a part of the record, even though it has been included in the record by way of exhibit to SAG, than Petitioner posits the proposition that further factual development is necessary and requests this Court to either remand the claim to the COA or leave the Appellant to his post-conviction remedies by declining to rule on the claim, in which case it will necessarily come before this Court yet again for consideration. See e.g., McGill, 952 F.2d at 19 & n.5. However, Appellant insists that this Court's Remand and appointment of new counsel on appeal protects the claims presented from porcedural bar.

This Court should remand with directions to determine Mr. Harvey's SAG's on the merits because the State has failed to present any affirmative defenses to the grounds raised on direct appeal.

14. THE COA ERRED BY CONCLUDING THAT THE TRIAL COURT DID INSTRUCT THE JURY THAT THE STATE HAD TO DISPROVE SELF DEFENSE BEYOND A REASONABLE DOUBT.

The Court of Appeals, in its response to sub issues of ground number 1 (b), as addressed in this Motion for Discretionary Review, made a factual error by citing to CP 293 as evidence that the Trial Court did instruct the jury that the State had to disprove self defense beyond a reasonable doubt.

While this issue was raised as a sub issue in Appellant's initial SAG, he did not have sufficient Clerk's Papers to adequately formulate the argument. All he had was the Trial Transcripts where the Judge read the instructions to the jury. He did not have the proposed instructions by defense or any motions filed by trial defense counsel.

Because the record provided to Appellant was inadequate during first SAG he subsequently raised it again.

Now that Appellant has adequate record it is apparent from the record that the COA's citation of CP 293 does not exist and is not part of the record on appeal. However, Appellant has considered that the COA may have been referring to the Report of Proceedings, rather than the Clerk's Papers, therefore, he has reviewed RP at 293 and has come to the conclusion that there is no jury instructions to the jury at that portion of the transcripts, nor at any portion of the transcripts.

The COA's ruling on this issue is based upon a fallacy, and is wholly incorrect. For this reason he has raised this issue again in his Supplemental SAG. This Court should conduct an evidentiary hearing to determine whether or not the jury was properly instructed that the state had to disprove self defense beyond a reasonable doubt, and if the Trial Court failed to so instruct, vacate convictions and Remand for NEW TRIAL.

V. CONCLUSIONS.

Because the State has chosen to proceed on appeal without filing a response to Mr. Harvey's Statement of Additional Grounds, it has done so at its own peril. The State has not contested any issues brought on behalf of Mr. Harvey, nor has it raised any affirmative defenses, such as Statute of Limitations, and therefore, the COA has erred by acting as advocate and raising affirmative defense on behalf of the State, in violation of CJC Cannon 2(a) and 3(A)(5). Here, the standard of review was limited to the determination of whether the appellant's brief, (SAG), considered in light of the record, establishes a prima facie case of reversable error.

Because the Court of Appeals decision concerning Appellant's Statement of Additional Grounds is in convlict with decisions of the Supreme Court, decisions of other Court of Appeals, and significant questions of law under the Constitution of the State and Federal government is involved, and because the direct appeal involves issues of substantial public interest that should be determined by the Supreme Court, this Court should review and either order an evidentiary hearing, or Remand back to the COA with directions to rule on the merits of Appellant's Supplemental Statement of Additional Grounds.

Alternatively, this Court should hear all issues raised on the merits and vacate the convictions with prejudice because the Trial Court failed to instruct jury that the burden to disprove self defense beyond a reasonable doubt was upon the State, and because the State failed to disprove self defense beyond a reasonable doubt.

This Court should determine the issues on the merits and Vacate the Convictions with Prejudice.

VI. VERIFICATION.

I, Merle William Harvey do hereby declare and affirm under penalty of perjury, pursuant to U.S.C. Title 28 § 1746, that I have read the foregoing, that it is true, correct and not meant to mislead, to the best of my knowledge.

Dated this 25 day of June, 2014.

Merle Harvey

Merle William Harvey

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IN THE SUPREME COURT OF WASHINGTON

Merle William Harvey,	)	COA NO. 29513-3-III
	)	
Appellant,	)	Spokane County # 09-1-04575
	)	
VS.	)	DECLARATION OF SERVICE
	)	BY U.S. MAIL
WASHINGTON,	)	
	)	
Respondent.	)	
	)	

I. Merle William Harvey, do hereby declare that I presented to DOC Officials the following documents for mailing by U.S. Mail.

1. Motion for Discretionary Review/Petition for Review.
2. Motion for Oversized Petition for Review.

The above documents were addressed to the following;

Supreme Court of Washington
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

The above documents were given to DOC official for mailing on the below noted date.

VERIFICATION

I, Merle William Harvey, do hereby declare and affirm, pursuant to U.S.C. Title 28 § 1746, under penalty of perjury of the laws of the United States of America, and the laws of Washington State, that I have read the aforesaid, that it is true, correct and not meant to mislead, to the best of my knowledge.

Dated this 25 day of June, 2014.

Merle Harvey

Merle William Harvey #318251
Clallam Bay Corrections Center
1330 Eagle Crest Way
Clallam Bay, WA 98326-9723

FILED
JUNE 10, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON, Respondent, v. MERLE WILLIAM HARVEY, Appellant.	)	No. 29513-3-III ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING OPINION DATED May 6, 2014

THE COURT has considered appellant's motion for reconsideration of this court's decision of May 6, 2014, and having reviewed the records and files herein, is of the opinion the motion should be granted in part. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby partially granted.

IT IS FURTHER ORDERED that the opinion shall be amended by replacing footnote one on page 2 with the following:

> We do not separately address the SAG filings. In his supplemental SAG, Mr. Harvey raises public trial issues separate from those raised by counsel. However, the record does not show that any of the closures claimed by Mr. Harvey occurred. The remaining pro se arguments address trial matters rather than the jury selection issues that are the subject of this second appeal. Some of those arguments were made previously and all of them

could have been raised earlier. In particular, we note that Mr. Harvey had copies of the jury instructions prior to filing his original SAG. We do not review the trial issues in this opinion.

DATED: June 10, 2014

PANEL: Jj. Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

Laurel H Siddoway, CJ

LAUREL H. SIDDOWAY
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. MERLE WILLIAM HARVEY, Appellant.	)	No. 29513-3-III
	)	UNPUBLISHED OPINION

KORSMO, J. — In this second review of Merle Harvey's convictions for first and second degree murder, along with two counts of unlawful possession of a firearm, we consider his claims that his public trial and due process rights were violated during jury selection. His arguments are resolved by our decision in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013). Accordingly, we once again affirm the convictions.

PROCEDURAL HISTORY

This court previously affirmed the convictions in an unpublished case *State v. Harvey*, noted at 167 Wn. App. 1026, 2012 WL 1071234. Mr. Harvey, pro se, then successfully petitioned the Washington Supreme Court to permit supplementation of the

record with a transcription of the jury selection proceedings. The matter was remanded to this court.

We appointed new counsel for Mr. Harvey and, after receipt of the transcript, the parties filed additional briefs addressing jury selection. Mr. Harvey filed additional statements of additional grounds (SAG).[1]

The jury selection transcript showed that 80 jurors appeared for jury selection on September 13. The court gave the preliminary instruction on only one occasion, a fact that suggests all jurors were in the courtroom at the same time. The record also reflects that the jurors were given a questionnaire to fill out. Some of the prospective jurors were questioned individually in the courtroom outside the presence of the other jurors. One of the jurors mentioned that it was possible to hear what was happening in the courtroom from out in the hallway.

General voir dire of the entire panel commenced the following morning with all jurors in the courtroom. Seven jurors were struck during this period. After a brief sidebar conference, juror 19 was struck due to the juror's prescheduled business trip.

---

[1] We do not separately address the SAG filings. Mr. Harvey raises the same two arguments concerning jury selection that his counsel raised. As counsel has adequately briefed those arguments, we do not address Mr. Harvey's version of them. RAP 10.10(a). The remaining pro se arguments address trial matters rather than the jury selection issues that are the subject of this second appeal. Some of those arguments were made previously and all of them could have been raised earlier. We do not review them in this action.

Juror 38 was also stricken for cause during this court session, although that did not happen at sidebar.

General voir dire continued that afternoon. A brief sidebar was held during the afternoon session when defense counsel objected to the prosecutor asking a juror about an instruction that had not been given. Another objection was heard at sidebar when the prosecutor took exception to defense counsel getting too case specific in his questions to the prospective jurors. Another sidebar was held after some jurors expressed that they could not sit in judgment of the defendant. Jurors 43, 60, and 77 were struck during this conference. The court adjourned for the day after these excusals.

Jury selection continued the next day, September 15. The first thing mentioned this day was that juror 78 had been dismissed by stipulation during the intervening hours:

> THE COURT: Good morning. Please be seated. Where had we ended in terms of the voir dire?
> MR. MASON [defense counsel]: Mr. Nagy was allowed to ask some questions, and then I think we were done.
> THE COURT: Are we done?
> MR. NAGY [deputy prosecutor]: Yes, Your Honor.
> THE COURT: And then we had done the for causes.
> MR. AMES [defense counsel]: Yes, Your Honor.
> THE COURT: Since that time, we have also released No. 78 by stipulation. Is that correct, gentlemen?
> MR. MASON: Yes.
> MR. NAGY: Yes.

Report of Proceedings at 297.

The venire was brought in to the courtroom and a sidebar was held to clear up confusion over the exercise of peremptory challenges. The peremptory process then was conducted by counsel marking their challenges on a juror sheet. The jury selection process was then completed.

ANALYSIS

This appeal contends that Mr. Harvey's article I, section 22 right to a public trial was violated by conducting portions of jury selection, including the exclusion of jurors at sidebar, in private. The defense also argues that these same actions violated the defendant's right to be present. We address each contention in turn.

Public Trial

Article I, section 22 guarantees those accused of crimes the right "'to a speedy public trial by an impartial jury.'" *Love*, 176 Wn. App. at 916. The right to a public trial is violated whenever proceedings that are required to be "open" to the public are "closed." *Id.* Whether or not a particular aspect of trial proceedings is required to be open to the public is determined by application of the "experience and logic test." *Id.* (citing *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012)). Jury selection typically is open to the public. *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009).

Mr. Harvey specifically challenges the excusal of jurors for cause at sidebar, the excusal of juror 78 when the court apparently was not in session, the sidebar conferences

during the peremptory challenge process, and the written exercise of peremptory challenges. These challenges largely have been resolved by *Love*.

In *Love*, we declined to decide whether or not a sidebar conference constituted a closure of the courtroom. 176 Wn. App. at 917. Instead, applying the experience and logic test to the subject of the sidebar conference at issue there, we concluded that the action of excusing jurors for cause was not required to be conducted in public. *Id.* at 919-20. Similarly, we concluded that exercising peremptory challenges in writing did not violate article I, section 22. *Id.*

We adhere to those conclusions in this case. The fact that four jurors were excused for cause at sidebar did not violate our constitution. Likewise, there was no public trial violation by the use of a written peremptory challenge process. Mr. Harvey's remaining arguments were not at issue in *Love*, and we now turn to them.

With respect to the claim that it was improper to hold a sidebar conference during the peremptory challenge process, *Love* is still suggestive. There we noted that it was the subject of the sidebar conference that determined whether the matter needed to be considered in public. 176 Wn. App. at 917-18. The additional sidebar conferences now under challenge here involved procedural matters for the attorneys—whether questions of the venire were appropriate and how the peremptory process applied to alternate jurors. These matters, too, involve questions for the trial judge and did not need public oversight.

Under the experience and logic test, the subject matter of these sidebars did not implicate Mr. Harvey's public trial right.

The sole remaining issue was the decision to excuse juror 78 by stipulation of the parties off the record. On this record, we do not know anything about when or where or how this occurred—whether at the end of proceedings the night before, just prior to going on the record that morning, whether it took place in the courtroom or in chambers, or on the street outside the courthouse. In short, the record is woefully inadequate to decide this issue. However, for the same reasons that the challenges for cause in *Love* did not implicate the public trial right, we also are convinced that the right to a public trial was not implicated here. The experience and logic test indicates that challenges for cause are legal issues that do not depend upon the right to have the public present in the courtroom. *Love*, 176 Wn. App. at 919-20. Accordingly, despite the fact that there is no indication where this action took place, we do conclude that Mr. Harvey's article I, section 22 rights were not violated by the agreed excusal of juror 78.

Mr. Harvey has not established that any of the challenged actions violated his right to a public trial.

Right to be Present

Mr. Harvey also argues that the sidebar conferences and the off-the-record excusal of juror 78 violated his right to be present at all proceedings. The status of this record does not permit us to consider these claims for the first time in this appeal.

We faced a similar argument in *Love* and summarized the governing law in this manner:

> A criminal defendant has a due process right to be present at all critical stages of his criminal trial. *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). This includes the voir dire and empanelling stages of the trial. *Id.* at 883-84.
>
> However, Mr. Love did not contest the use of the sidebar procedure to hear his challenges for cause. The general rule in Washington is that appellate courts will not hear challenges that were not presented to the trial court. RAP 2.5(a). An exception is made for issues of "manifest error affecting a constitutional right." RAP 2.5(a)(3). Such issues may be raised if the record is sufficient to adjudicate them. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The alleged error must both be of constitutional nature and be "manifest" in the sense that it actually prejudiced the defendant. *Id.*

Love, 176 Wn. App. at 920-21.

We then concluded that because Mr. Love did not establish how the sidebar conferences had prejudiced him, the alleged error was not manifest. *Id.* at 921. We also questioned, although we did not decide, whether Mr. Love was "absent" from the proceedings while sitting in the courtroom while the sidebar conferences occurred a few feet away from him. *Id.* n.9.

We reach the same conclusion here. As to the sidebar conferences that occurred on the record while he was in the courtroom and the written peremptory challenges, Mr. Harvey has not shown that he was in some manner prejudiced. Accordingly, the allegation that he was not present is not manifest constitutional error.

We reach the same conclusion, although for additional reasons, with respect to the joint exclusion of juror 78. As noted previously, this record does not provide any information about how that occurred. For all this record shows, the action may well have taken place in the presence of Mr. Harvey or, perhaps, with his express blessing. There is absolutely nothing in the record to establish that this action occurred outside his presence. For this additional reason, too, we conclude this claim is not manifest constitutional error. If it is to be considered, it will have to be in the form of a personal restraint petition with appropriate documentation. *E.g., State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

Mr. Harvey's right-to-be present arguments do not present manifest questions of constitutional law. RAP 2.5(a). Accordingly, we decline to address them.

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, A.C.J.

Lawrence-Berrey, J.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

June 10, 2014

E-mail
David Bruce Koch
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA 98122-2842

E-mail
Mark Erik Lindsey
Spokane County Prosecuting Attorneys
1100 W Mallon Ave
Spokane, WA 99260-2043

E-mail
Eric J. Nielsen
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA 98122-2842

CASE # 295133
State of Washington v. Merle William Harvey
SPOKANE COUNTY SUPERIOR COURT No. 091040576

Dear Counsel:

Attached is a copy of the Order Granting Motion for Reconsideration and Amending Opinion of this Court's opinion under date of May 6, 2014.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:mk
Attach.
c: Merle William Harvey
#818251
1830 Eagle Crest Way
Clallam Bay, WA 98326

Log Number: U-077
Oral Argument Date:

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 29513-3
Title of Case: State of Washington v. Merle William Harvey
File Date: 05/06/2014

SOURCE OF APPEAL

Appeal from Spokane Superior Court
Docket No: 09-1-04057-6
Judgment or order under review
Date filed: 11/15/2010
Judge signing: Honorable Tari S Eitzen

JUDGES

Authored by Kevin M. Korsmo
Concurring: Robert E. Lawrence-Berrey
George B. Fearing

COUNSEL OF RECORD

Counsel for Appellant(s)

Janet G. Gemberling
Janet Gemberling PS
Po Box 9166
Spokane, WA, 99209-9166

Eric J. Nielsen
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA, 98122-2842

David Bruce Koch
Nielsen Broman & Koch PLLC

1908 E Madison St
Seattle, WA, 98122-2842

Counsel for Respondent(s)

Mark Erik Lindsey
Spokane County Prosecuting Attorneys
1100 W Mallon Ave
Spokane, WA, 99260-2043

FILED
MAY 6, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 29513-3-III
Respondent,	)	
	)	
v.	)	
	)	
MERLE WILLIAM HARVEY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — In this second review of Merle Harvey's convictions for first and second degree murder, along with two counts of unlawful possession of a firearm, we consider his claims that his public trial and due process rights were violated during jury selection. His arguments are resolved by our decision in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013). Accordingly, we once again affirm the convictions.

PROCEDURAL HISTORY

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---

[1] We do not separately address the SAG filings. Mr. Harvey raises the same two arguments concerning jury selection that his counsel raised. As counsel has adequately briefed those arguments, we do not address Mr. Harvey's version of them. RAP 10.10(a). The remaining pro se arguments address trial matters rather than the jury selection issues that are the subject of this second appeal. Some of those arguments were made previously and all of them could have been raised earlier. We do not review them in this action.

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Report of Proceedings at 297.

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This appeal contends that Mr. Harvey's article I, section 22 right to a public trial was violated by conducting portions of jury selection, including the exclusion of jurors at sidebar, in private. The defense also argues that these same actions violated the defendant's right to be present. We address each contention in turn.

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Article I, section 22 guarantees those accused of crimes the right "'to a speedy public trial by an impartial jury.'" *Love*, 176 Wn. App. at 916. The right to a public trial is violated whenever proceedings that are required to be "open" to the public are "closed." *Id.* Whether or not a particular aspect of trial proceedings is required to be open to the public is determined by application of the "experience and logic test." *Id.* (citing *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012)). Jury selection typically is open to the public. *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009).

Mr. Harvey specifically challenges the excusal of jurors for cause at sidebar, the excusal of juror 78 when the court apparently was not in session, the sidebar conferences

during the peremptory challenge process, and the written exercise of peremptory challenges. These challenges largely have been resolved by *Love*.

In *Love*, we declined to decide whether or not a sidebar conference constituted a closure of the courtroom. 176 Wn. App. at 917. Instead, applying the experience and logic test to the subject of the sidebar conference at issue there, we concluded that the action of excusing jurors for cause was not required to be conducted in public. *Id.* at 919-20. Similarly, we concluded that exercising peremptory challenges in writing did not violate article I, section 22. *Id.*

We adhere to those conclusions in this case. The fact that four jurors were excused for cause at sidebar did not violate our constitution. Likewise, there was no public trial violation by the use of a written peremptory challenge process. Mr. Harvey's remaining arguments were not at issue in *Love*, and we now turn to them.

With respect to the claim that it was improper to hold a sidebar conference during the peremptory challenge process, *Love* is still suggestive. There we noted that it was the subject of the sidebar conference that determined whether the matter needed to be considered in public. 176 Wn. App. at 917-18. The additional sidebar conferences now under challenge here involved procedural matters for the attorneys—whether questions of the venire were appropriate and how the peremptory process applied to alternate jurors. These matters, too, involve questions for the trial judge and did not need public oversight.

Under the experience and logic test, the subject matter of these sidebars did not implicate Mr. Harvey's public trial right.

The sole remaining issue was the decision to excuse juror 78 by stipulation of the parties off the record. On this record, we do not know anything about when or where or how this occurred—whether at the end of proceedings the night before, just prior to going on the record that morning, whether it took place in the courtroom or in chambers, or on the street outside the courthouse. In short, the record is woefully inadequate to decide this issue. However, for the same reasons that the challenges for cause in *Love* did not implicate the public trial right, we also are convinced that the right to a public trial was not implicated here. The experience and logic test indicates that challenges for cause are legal issues that do not depend upon the right to have the public present in the courtroom. *Love*, 176 Wn. App. at 919-20. Accordingly, despite the fact that there is no indication where this action took place, we do conclude that Mr. Harvey's article I, section 22 rights were not violated by the agreed excusal of juror 78.

Mr. Harvey has not established that any of the challenged actions violated his right to a public trial.

Right to be Present

Mr. Harvey also argues that the sidebar conferences and the off-the-record excusal of juror 78 violated his right to be present at all proceedings. The status of this record does not permit us to consider these claims for the first time in this appeal.

We faced a similar argument in *Love* and summarized the governing law in this manner:

> A criminal defendant has a due process right to be present at all critical stages of his criminal trial. *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). This includes the voir dire and empanelling stages of the trial. *Id.* at 883-84.
>
> However, Mr. Love did not contest the use of the sidebar procedure to hear his challenges for cause. The general rule in Washington is that appellate courts will not hear challenges that were not presented to the trial court. RAP 2.5(a). An exception is made for issues of "manifest error affecting a constitutional right." RAP 2.5(a)(3). Such issues may be raised if the record is sufficient to adjudicate them. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The alleged error must both be of constitutional nature and be "manifest" in the sense that it actually prejudiced the defendant. *Id.*

Love, 176 Wn. App. at 920-21.

We then concluded that because Mr. Love did not establish how the sidebar conferences had prejudiced him, the alleged error was not manifest. *Id.* at 921. We also questioned, although we did not decide, whether Mr. Love was "absent" from the proceedings while sitting in the courtroom while the sidebar conferences occurred a few feet away from him. *Id.* n.9.

We reach the same conclusion here. As to the sidebar conferences that occurred on the record while he was in the courtroom and the written peremptory challenges, Mr. Harvey has not shown that he was in some manner prejudiced. Accordingly, the allegation that he was not present is not manifest constitutional error.

We reach the same conclusion, although for additional reasons, with respect to the joint exclusion of juror 78. As noted previously, this record does not provide any information about how that occurred. For all this record shows, the action may well have taken place in the presence of Mr. Harvey or, perhaps, with his express blessing. There is absolutely nothing in the record to establish that this action occurred outside his presence. For this additional reason, too, we conclude this claim is not manifest constitutional error. If it is to be considered, it will have to be in the form of a personal restraint petition with appropriate documentation. *E.g., State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

Mr. Harvey's right-to-be present arguments do not present manifest questions of constitutional law. RAP 2.5(a). Accordingly, we decline to address them.

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, A.C.J.

Lawrence-Berrey, J.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

May 6, 2014

E-mail
Eric J. Nielsen
David Bruce Koch
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA 98122-2842

E-mail
Mark Erik Lindsey
Spokane County Prosecuting Attorneys
1100 W Mallon Ave
Spokane, WA 99260-2043

CASE # 295133
State of Washington v. Merle William Harvey
SPOKANE COUNTY SUPERIOR COURT No. 091040576

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure

c: **E-mail** Honorable Tari Eitzen

c: Merle William Harvey
#818251
1830 Eagle Crest Way
Clallam Bay, WA 98326

Log Number: U-077
Oral Argument Date:

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 29513-3
Title of Case: State of Washington v. Merle William Harvey
File Date: 05/06/2014

SOURCE OF APPEAL

Appeal from Spokane Superior Court
Docket No: 09-1-04057-6
Judgment or order under review
Date filed: 11/15/2010
Judge signing: Honorable Tari S Eitzen

JUDGES

Authored by Kevin M. Korsmo
Concurring: Robert E. Lawrence-Berrey
George B. Fearing

COUNSEL OF RECORD

Counsel for Appellant(s)

Janet G. Gemberling
Janet Gemberling PS
Po Box 9166
Spokane, WA, 99209-9166

Eric J. Nielsen
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA, 98122-2842

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1908 E Madison St
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Counsel for Respondent(s)
Mark Erik Lindsey
Spokane County Prosecuting Attorneys
1100 W Mallon Ave
Spokane, WA, 99260-2043

OPINION FACT SHEET

Case Name: State v. Harvey
Case Number: 29513-3-III

1. TRIAL COURT INFORMATION:

A. SUPERIOR COURT: Spokane
Judgment/Order being reviewed: **Judgment and Sentence**
Judge Signing: **Eitzen**
Date Filed: **November 12, 2010**

2. COURT OF APPEALS INFORMATION:

(X)	Affirmed	( )	Other
( )	Affirmed as Modified	( )	Reversed and Dismissed
( )	Affirmed in Part/Remanded**	( )	Remanded **
( )	Affirmed/Rev'd-in part & Remanded	( )	Reversed
( )	Affirmed/Vacated in part	( )	Reversed In Part
( )	Affirmed In Part/Rev'd in Part	( )	Remanded with Instructions**
( )	Denied (PRP, Motions, Petitions)	( )	Reversed and Remanded **
( )	Dismissed (PRP)	( )	Rev'd, Vacated and Remanded **
( )	Granted/Denied in Part	( )	Vacated and Remanded **
( )	Granted (PRP, Motions, Petitions)		

* These categories are established by the Supreme Court
** If remanded, is jurisdiction being retained by the Courts of Appeals? ( ) YES ( ) NO

3. SUPERIOR COURT INFORMATION:

(IF THIS IS A CRIMINAL CASE, CHECK ONE)
Is further action required by the superior court?
( ) YES (X) NO

Authoring Judge's Initials