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APR 30 2014

King County Prosecutor  
Appellate Unit

SUPREME COURT NO. 90231-3

NO. 67560-~~0~~-1<sup>5</sup>

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ISAIAH KALEBU,

Petitioner.

**FILED**

MAY 15 2014

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 APR 30 PM 4:09~~

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael C. Hayden, Judge

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Isaiah Kalebu, the appellant below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION

Kalebu requests review of the Court of Appeals decision in State v. Kalebu, COA No. 67560-5-I, filed March 31, 2014, and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Do the Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to be present for a discussion between the court and defense counsel regarding the potential benefits and detriments of the defendant waiving his right to silence and testifying on his own behalf at trial?

2. Do the even greater guarantees under article 1, section 22 of the Washington Constitution require the defendant's presence for such a discussion?

3. Did defendant's exclusion from the hearing on this subject violate his state and federal constitutional rights to make a knowing, intelligent, and voluntary decision on whether to testify or stay silent at trial?

4. Is review appropriate under RAP 13.4(b)(1) and (2) because the Court of Appeals decision conflicts with State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011), and this case involves significant constitutional questions?

D. STATEMENT OF THE CASE

1. Trial Proceedings

*a. The crimes*

Shortly after midnight on the evening of Saturday, July 18, 2009, an intruder entered Teresa Butz's home and repeatedly raped Butz and her partner, Jennifer Hopper, at knifepoint. Slip Op., at 1-2. The intruder repeatedly reassured both women that he was there for sex and did not intend to harm them. 37RP 138-139 ("I don't want to hurt you, I just want [sex]."); 37RP 150 (rapist says just there for sex, he did not want to hurt them, and they should do as he said); 37RP 155 (when women expressed fear he might hurt them, he continued to reassure them they would not be injured); 38RP 18-20 (rapist assured them he would be gone in time for them to attend a wedding the next day); 38RP 32 (tip of knife touched Hopper's arm, she said "ouch," and rapist apologized, thereby reassuring her); 38RP 33-34 (rapist indicated he planned to be long gone by time women called the police).

Eventually, however, both women were seriously injured. Near the end of the ordeal, while raping Hopper, the rapist had his right arm over Butz – as if to hold her down – and the knife in his right hand. According to Hopper, it felt as though he was ejaculating inside her and, about that same time, she heard Butz ask, “Why are you cutting me? Why are you cutting me?” 38RP 37. Butz resisted and the rapist told her to stop or he would kill Hopper. She did stop, but then Hopper began resisting. In response, according to Hopper, the rapist jumped up from the bed and told both women to follow him. 38RP 37-38.

Hopper testified that she and Butz followed the man into another bedroom, where he turned on the light. 38RP 39. On the bed was a pair of jeans, which Hopper assumed belonged to him. The rapist reached into a pocket and removed a small item concealed in hand. 38RP 40. It looked like a small knife.<sup>1</sup> 38RP 41. As both women pleaded for the rapist not to hurt them, he forced them back into the original bedroom and on the bed. 38RP 41.

The rapist now had a knife in each hand. As he pinned Hopper and Butz on the bed using his knees, both women physically resisted his

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<sup>1</sup> Crime scene investigators believed this smaller knife, like the larger one the rapist initially used to threaten the women (both of which were recovered in the home) came from the set in the kitchen. 40RP 130-131.

efforts. 38RP 42. Hopper then heard Butz say, “You got me, you got me, you got me.” 38RP 42. The intruder began cutting Hopper’s throat and switched from a cutting motion to a stabbing motion while both women continued to resist. 38RP 43. Hopper decided to stop fighting and played dead just as she felt a powerful surge of energy from Butz. 38RP 44. Butz was able to push and kick the rapist off the bed. 38RP 44. The two struggled and Butz was able to grab a small metal table next to the bed and use it to push him away. She then used the table to push through a front window in the bedroom. She fell to the ground just outside the window, but was able to get up and run to the curb before collapsing on the ground. 38RP 45.

Back in the bedroom, the intruder and Hopper looked at one another. Rather than attack Hopper further, the intruder ran out of the room and disappeared. 38RP 45-46. Hopper then also left the room, heading out the front door of the home, and seeking the assistance of neighbors. 38RP 46. The sound of breaking glass and Hopper’s pleas for help alerted others, who called 911. 35RP 50-51; 36RP 16-17, 53; 38RP 48-50.

Police and other emergency responders arrived at the scene. 35RP 58-59. Hopper was transported to Harborview Medical Center. 38RP 54.

She had sustained multiple lacerations on the left side of her neck and left arm. 42RP 15-17, 19-22. Butz died where she collapsed by the curb. 36RP 99; 37RP 38. She had sustained sharp and blunt force injuries during her struggle with the intruder, including a stab wound to her left chest, which penetrated the left ventricle of her heart and proved fatal. 42RP 39, 48-69, 74-83.

DNA evidence, as well as multiple prints lifted from the scene, helped police identify Isaiah Kalebu as the rapist. He was located and arrested. Slip Op., at 2-3.

b. *Kalebu's absence from a critical hearing*

The Honorable Michael Hayden presided at trial. Kalebu repeatedly acted up in court; for example, claiming a conspiracy to poison him and that he was an emperor. 8RP 4-9; 11RP 6; 18RP 6; 19RP 10-12. Based on several expert evaluations, Judge Hayden found that while Kalebu suffered from bipolar disorder and “clearly has issues,” he was competent to proceed. 10RP 2-4; 12RP 4-6; 17RP 156-158; 19RP 3-4; 28RP 65-67; 32RP 6-36; CP 54-55.

After several outbursts in court, however, Judge Hayden ordered that Kalebu watch the remainder of trial from a remote location until he agreed to control himself. 18RP 3-24; 19RP 8-12, 27-29, 32-33; 21RP 25-

28; 22RP 10-13; 24RP 2-8, 33-35, 40. On those days where Kalebu would not commit to proper behavior, he could watch the proceedings on a monitor from the jury room associated with a different courtroom and could send messages to his attorneys. 25RP 8-17, 68-77; CP 101-103.

After the State had called its last witness, defense counsel Michael Schwartz informed the court that Kalebu wished to take the stand in his own defense. 46RP 86. Schwartz suggested, however, that before Kalebu testified, “the court should undertake a colloquy with him so that the court understands the full picture of what he wants to do outside the presence of the jury.” 46RP 86. Schwartz added, “I will tell the court that if he chooses to [testify], we will have no questions for him. If he does so, he will be testifying in a narrative style.”<sup>2</sup> 46RP 86.

Judge Hayden indicated he had never before encountered a similar situation. 46RP 86-87. Prosecutor Brian McDonald indicated he had never heard of counsel refusing to examine his client, either. 46RP 87. McDonald suggested Judge Hayden bring Kalebu into the courtroom, ensure he was willing to conduct himself in an appropriate fashion while

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<sup>2</sup> As Schwartz would later reveal, Kalebu had informed his attorneys that he wished to testify how poorly he had been treated, that he has significant mental health issues, and that he needs to be in a hospital. 47RP 8.

testifying, and then address the issue of counsel's refusal to question his client. 46RP 87-88.

Jurors were brought into the courtroom, the State formally rested, and Judge Hayden then ordered a recess to address Kalebu's testimony. 46RP 88. Kalebu was brought into court, where Judge Hayden confirmed that he wished to testify. 46RP 89-90. Kalebu committed to dressing for trial and acting appropriately in front of jurors. 46RP 90-92. Judge Hayden indicated that defense counsel did not intend to ask Kalebu any questions, to which Kalebu responded, "Yeah, well, you know, they ain't been intending on doing a whole lot of question asking, I've noticed." 46RP 92.

The court and counsel briefly discussed the restraints that would be used on Kalebu for his court appearance. 46RP 92-94. The conversation then returned to Schwartz's indication he would not pose any questions to Kalebu. Judge Hayden asked Schwartz if he wanted to have a conversation with Kalebu regarding the manner of Kalebu's testimony. 46RP 95. Schwartz replied:

Your Honor, I can tell the court that I've already spoken to Mr. Kalebu about the subject matter of his testimony. Based on that conversation, I have nothing to ask him. I understand what the court wants is whether that should be in a narrative form or by question and answer, him posing the questions to himself and then answering.

46RP 95. Judge Hayden ordered Schwartz to assist Kalebu in preparing questions, which Kalebu would ask himself while on the stand. 46RP 95-96. Court was then recessed for the day. 46RP 97.

The following morning, Kalebu watched the proceedings by video feed and was not brought down to the courtroom. 47RP 2. Returning to the subject of Kalebu's possible testimony, Judge Hayden asked Schwartz on what authority he could simply decline to ask his client questions. 47RP 2. Schwartz responded:

The court rules provide that a party or representative of the party cannot put forth or present evidence that is not material or relevant to the matter that is at trial.

As I indicated yesterday, based on my discussions with Mr. Kalebu, I do not believe that -- in one part what he wants to testify about is material or relevant to this matter.

The second part, I can't tell the court. If the court wants to hear that in chambers, I'd be happy to tell the court what that is.

47RP 3.

Judge Hayden, both defense counsel, and a court reporter then retreated to the privacy of Judge Hayden's chambers without making accommodations so that Kalebu could see or hear what was happening from his remote location. 47RP 8. Schwartz informed Judge Hayden of Kalebu's initial indication that he wanted to testify to how poorly he has

been treated, his significant mental health issues, and his need for hospitalization. 47RP 8. The more difficult aspect of his testimony, however, was that he now also wanted to confess but claim that God told him to commit the crimes and made him do it. 47RP 8-10. Kalebu had not informed his attorneys of his intent to testify that he committed the crimes at God's direction until that very morning. 47RP 10.

Schwartz explained that, although the defense had originally provided notice of a mental health defense, that defense had been withdrawn. 47RP 8. His concern was that if Kalebu admitted the crimes but testified that God told him to commit them, the defense would then move for a recess to have him examined concerning mental illness at the time of the crime, and the court would refuse that request. 47RP 11. On appeal, he and co-counsel, Ms. Brandes, could be found ineffective for allowing Kalebu to take the stand and confess knowing his testimony would not lead to a mental defense. 47RP 11.

Judge Hayden indicated that, regardless of counsel's concerns, Kalebu had the right to take the stand and testify that God made him do it and "[w]e'll just deal with the appeal when it comes." 47RP 12. The court and defense counsel then discussed the mechanics of posing questions to Kalebu. 47RP 12-16. During this discussion, Schwartz

indicated his reluctance to ask Kalebu questions stemmed solely from the consequences of Kalebu confessing in front of the jury:

Schwartz: . . . . The issue for me is as I indicated to you. I understand he has a constitutional right to testify. He also has a constitutional right to effective assistance of counsel.

Court: He does.

Schwartz: If he gets up there and asks questions so he confesses, he's giving up one of them.

Court: He is, but then he gives up his right to counsel when he takes a plea too.

Schwartz: At trial, that's true.

Court: I think he – if somebody wants to get up in trial and say, “I did it,” I don't know that we can stop them. As a practical matter that doesn't – if he gets up at trial and says, “I did it,” that doesn't necessarily thwart where I perceive it to be going anyway. But he certainly puts himself at risk of putting real jeopardy to your theory of the case.

47RP 16.

Ms. Brandes indicated she would be contacting an expert again to determine whether he could evaluate Kalebu for a mental defense. 47RP 17. The court and counsel agreed that Kalebu would be told to draft the questions he wanted to answer on the stand and counsel would ask them.

47RP 17. Schwartz then suggested that Kalebu be brought down to the courtroom and told about the court's decision. 47RP 17-18.

At the conclusion of the in-chambers hearing, Judge Hayden partially summarized for the prosecution what had occurred and explained the agreed-upon process. 47RP 18.

Prosecutor McDonald belatedly noted concern that Kalebu had not been present for a discussion that involved his right to testify and the manner of his testimony. 47RP 18. Judge Hayden responded that Kalebu would receive a transcript of the hearing and he was unaware of any requirement that a defendant attend a conference in chambers.<sup>3</sup> 47RP 18. Judge Hayden also assured McDonald that his only rulings were that Kalebu had to draft the questions and that the examination would be in a question and answer format. 47RP 18-19. McDonald wanted to clarify that Judge Hayden had not made any ruling concerning the scope of Kalebu's testimony, and Judge Hayden indicated he had not. 47RP 20.

Kalebu was brought down to the courtroom. 47RP 20. Judge Hayden did not share with Kalebu all that occurred in the in-chambers hearing. Rather, he simply told Kalebu that he – with Schwartz's assistance – could draft the questions he wished to answer on the stand, Schwartz would ask those questions, and Kalebu would testify in response.

47RP 21. Kalebu indicated he understood and that he did not plan on acting up in front of jurors. 47RP 21-22. The discussion then turned to Kalebu's request for a Bible to be used when affirming that he would testify truthfully, what he would wear to court, and the use of restraints during his testimony. 47RP 22-45.

At Kalebu's request, he was taken back upstairs for the remainder of the hearing. 47RP 45-46. McDonald once again raised the issue of Kalebu's absence from chambers. 47RP 66. He obviously was not fully aware of what occurred in chambers, but wanted the court to consider an opinion – State v. Berrysmith, 87 Wn. App. 268, 944 P.2d 397 (1997), review denied, 134 Wn.2d 1008, 954 P.2d 277 (1998) – in deciding whether Kalebu's absence created an issue. 47RP 67. Judge Hayden responded, "I'm satisfied that the only thing we discussed in chambers were legal issues pertaining to the matter in which the testimony would be elicited." 47RP 67. Defense counsel concurred. 47RP 67.

*c. Kalebu's testimony, proposed instructions, and closing arguments*

The following day, just prior to Kalebu taking the stand, defense counsel requested that Kalebu be evaluated again for competency to stand trial and evaluated for the first time to determine his state of mind at the

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<sup>3</sup> There is no indication a transcript was ever prepared until this appeal.

time of the offenses. Counsel indicated the motion was based on the information disclosed in chambers the prior day and their interactions with Kalebu since. Funding had already been approved and the evaluation could occur that Friday (this request was made Wednesday). 48RP 8-9. The motion was denied. 48RP 9-10.

Kalebu's then took the stand and provided very brief testimony in response to defense counsel's questions. As counsel predicted, he confessed:

Q: Mr. Kalebu, do you know anything about the events that occurred in the early morning hours of July 19th, 2009, at 727 South Rose Street?

A: I was there, and I was told by my God and God of Abraham, Isaac, and Jacob, to attack my enemies. I did so. I followed the -- I followed the instructions by God.

48RP 11. After the court indicated it was having a hard time hearing, Kalebu was asked to repeat his testimony. 48RP 12.

Q: Would you answer the question again?

A: I was instructed by my God, the God of Abraham, Isaac, and Jacob, to attack my enemies. I did so.

Q: Mr. Kalebu, have you ever been diagnosed as having a mental illness?

PROSECUTOR: Objection, calls for hearsay.

DEFENDANT: Yeah, I have been diagnosed several times.

48RP 12.

The attorneys argued the admissibility of Kalebu's last answer, and the court excused the jury. 48RP 12-13. Ultimately, the court ruled the answer inadmissible hearsay and struck it. 48RP 15-16. The prosecution did not cross-examine Kalebu, and the defense rested. 48RP 26.

Defense counsel proposed supplemental instructions on the affirmative defense of not guilty by reason of insanity. 48RP 38-40, 50-53; CP 166-178, 294-295. The prosecution objected on two grounds – lack of timely notice and absence of sufficient supporting evidence. 48RP 40-41, 49-50, 53. Defense counsel noted their request for a recess to have Kalebu evaluated for the mental defense had been denied despite the fact Judge Hayden already knew in advance – from the prior day's in-chambers hearing – the nature of Kalebu's testimony. 48RP 52, 57. Judge Hayden denied the defense instructions, citing the absence of timely notice of the defense and the absence of substantial evidence demonstrating that Kalebu suffered from a mental disease or defect. 48RP 53-59.

Despite Kalebu's testimony that he was in the victims' home and followed God's instruction to attack the women, during closing argument, defense counsel maintained their original strategy and argued that the State

had failed to establish that Kalebu was present or that the attack with the knives was premeditated. 48RP 117-135 (identity), 135-144 (premeditation).

The jury convicted Kalebu of (count 1) Aggravated Murder in the First Degree (Butz); (count 2) Murder in the First Degree (Butz); (count 3) Attempted Murder in the First Degree (Hopper); (count 4) Rape in the First Degree (Hopper); and (count 5) Burglary in the First Degree. Jurors also answered “yes” to each question on the deadly weapon and aggravating factor special verdict forms. CP 233-235, 237-249. Judge Hayden imposed a mandatory sentence of life in prison without the possibility of parole on count 1,<sup>4</sup> an exceptional 540-month term on count 3, an exceptional minimum 540-month term on count 4, and a standard range minimum 89-month term on count 5. CP 283-284, 286, 288. With the deadly weapon enhancements, the total sentence imposed was life plus 1,176 months. CP 288. Kalebu appealed. CP 272-281.

## 2. Argument On Appeal

In the Court of Appeals, Kalebu cited State v. Irby and argued that his exclusion from the private in-chambers hearing on the subject of his testimony violated his right to be present at trial under the federal

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<sup>4</sup> In light of the conviction on count 1, Judge Hayden dismissed the conviction on count 2 on double jeopardy grounds. CP 274.

Constitution and the broader rights afforded by the Washington Constitution. Brief of Appellant, at 33-42; Reply Brief of Appellant, at 7-11.

Kalebu pointed out that, had he been present, he would have heard his attorneys articulate the very scenario that eventually played itself out – Kalebu would confess that he was the attacker, he would claim that he was following God’s command, the court would not permit the defense to argue an insanity defense, and Kalebu would be convicted as charged, having sealed his fate by choosing to testify. Brief of Appellant, at 36-38, 42. Kalebu also would have witnessed that Judge Hayden did not disagree with the predicted chain of events. Brief of Appellant, at 38-39, 42. To the contrary, his responses at the private hearing seemed to confirm the scenario, telling counsel that Kalebu had the right to testify that God made him do it and “[w]e’ll just deal with the appeal when it comes.”<sup>5</sup> 47RP 12. When Schwartz indicated that by confessing on the stand, Kalebu may be giving up his right to effective representation, Judge Hayden agreed. 47RP 16. Moreover, Judge Hayden stated that if Kalebu confessed on the stand, “he certainly puts himself at risk of putting real jeopardy to your theory of the case.” 47RP 16. Kalebu heard none of this before choosing

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<sup>5</sup> Since there would be no appeal, of course, unless Kalebu were convicted, this remark implies the court’s belief that Kalebu’s testimony would lead to findings of guilt.

to take the stand and admitting he was following God's command when he attacked the victims.

Kalebu noted that he had a constitutional right to testify or stay silent at trial and argued that, because he had been denied critical information from the in-chambers hearing, his ultimate decision to waive his right to remain silent and take the stand in his own defense was not knowing, intelligent, or voluntary. Brief of Appellant, at 39-40; Reply Brief of Appellant, at 2-11.

Kalebu also argued the State could not show these constitutional violations were harmless beyond a reasonable doubt. A primary trial defense had been that the knife attack on the victims was not premeditated (an essential element of the most serious charges). Kalebu had repeatedly assured both women that he did not intend to hurt them, and the defense sought to convince jurors that the stabbings were simply an impulsive reaction to the women's resistance. See 48RP 135-144. But once Kalebu took the stand – based on less than full information – and said he was told to “attack my enemies” and followed that instruction, there no longer was any realistic chance jurors would find an absence of premeditation. His testimony undermined his trial defense because it revealed a conscious,

deliberate, and planned decision to attack both women. Brief of Appellant, at 42-46; Reply Brief of Appellant, at 12-14.

The Court of Appeals rejected Kalebu's claim. There was no indication whatsoever that Kalebu had been informed of the critical discussions during the private hearing (by transcript or otherwise). Still, the Court of Appeals found no violation, pointing out that there had been other opportunities for Kalebu to discuss with counsel whether he would testify and noting Kalebu had been informed of the general subject matter of the private hearing ("the procedure by which Kalebu would testify"). Slip Op., at 8-9. The Court failed to acknowledge, much less address, Kalebu's claim under article 1, section 22. Instead, the Court merely addressed his absence under federal constitutional standards. Slip Op., at 9. The Court also reasoned that, even if there had been a violation, it was harmless given the overwhelming evidence Kalebu was the intruder. The Court did not address the impact of Kalebu's decision to testify on his premeditation defense. Slip Op., at 9-10.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE COURT OF APPEALS DECISION CONFLICTS WITH IRBY AND THIS CASE PRESENTS SIGNIFICANT CONSTITUTIONAL QUESTIONS.

As this Court's opinion in State v. Irby makes clear, the right to be present at trial is guaranteed under both the federal and state Constitutions. Moreover, the rights afforded by our state Constitution are even greater than those under the federal Constitution.

Under the federal Constitution, a defendant has the right to be present "“whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.”” Irby, 170 Wn.2d at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)). While there is no absolute right to be present, "“the presence of a defendant is a condition of due process to the extent a fair and just hearing would be thwarted by his absence.”” Id. (quoting Snyder, 291 U.S. at 107-108).

Under article 1, section 22, however, the defendant must be present "“at every stage of the trial when his substantial rights may be affected.”” Id. at 885 (quoting State v. Shultzler, 82 Wash. 365, 367, 144 P. 284 (1914)). The right does not turn on what the defendant might do or gain

by attending . . . or the extent to which the defendant's presence may have aided his defense[.]” Id. at 885 n.6.

The Court of Appeals' failure to address Kalebu's claim under article 1, section 22 seems to presume there is no distinction between the state and federal guarantees. In this respect, the decision is in direct conflict with Irby, which not only discusses the differing standards, but also reverses under both. See Irby, 170 Wn.2d at 885, 887. Moreover, since our state provision turns on whether “substantial rights may be affected,” Kalebu established a violation. His absence deprived him of information critical to making a knowing, intelligent, and voluntary decision on whether to testify, making it impossible for him to adequately weigh the potential benefits (an insanity defense) and costs (conceding critical elements of the State's proof).

Moreover, this Court should find that, under federal guarantees, Kalebu also established a violation. The Court of Appeals cited Matter of Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994), and Matter of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), for the proposition defendants have no right to attend in chambers hearings on ministerial or legal matters not requiring resolution of disputed facts. Slip Op., at 9. While Lord and Pirtle do indeed say that, in neither case was this Court faced with a situation where the defendant was denied information

necessary to ensure another fundamental constitutional trial right (in Kalebu's case, whether to waive his right to silence and testify).

The Court of Appeals has not necessarily interpreted this Court's precedent as drawing a rigid line between ministerial and legal matters on the one hand and factual matters on the other. See Berrysmith, 87 Wn. App. at 273-274 (even if purely legal, right attaches where presence bears substantial relation to opportunity to defend or a fair and just hearing was thwarted). Moreover, recently, this Court rejected defining the *public's* right to be present based on whether a hearing involved purely ministerial or legal matters, recognizing these labels cannot accurately determine such rights in every case. See State v. Sublett, 176 Wn.2d 58, 71-73, 292 P.3d 715 (2012). The same is true when defining a *defendant's* right to be present. However one labels the hearing in Kalebu's absence, it bore a substantial relation to his opportunity to defend and, therefore, he had a federal constitutional right to attend. Snyder, 291 U.S. at 105-106.

Finally, the Court of Appeals harmless error analysis fails to address Kalebu's primary claimed harm. Kalebu explained in detail in his appellate briefing how his admissions on the stand undermined any claim that the injuries he inflicted with the knives were not premeditated. Instead of addressing this issue, the Court of Appeals merely found any error harmless

because of the overwhelming evidence – beyond Kalebu’s testimony – that Kalebu was the rapist. See Slip Op., at 10. But his identity as the rapist and whether he premeditated the attack that resulted in Hopper’s injuries and Butz’s death are two entirely different issues and warrant separate scrutiny of harmless error.

In summary, under federal constitutional provisions – and particularly in light of recent developments for the public trial right – whether Kalebu was denied his constitutional right to be present presents an important constitutional issue. But even if this Court were to find that Kalebu had no *federal* constitutional right to be present for the in-chambers hearing, he most certainly had a right to be there under article 1, section 22 and the Irby Court’s correct interpretation of that provision. The Court of Appeals’ contrary decision conflicts with Irby. This case warrants review.

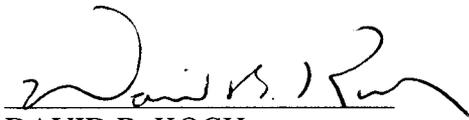
F. CONCLUSION

For the reasons discussed above, Kalebu respectfully asks this Court to grant his Petition and reverse the Court of Appeals.

DATED this 30<sup>th</sup> day of April, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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## **APPENDIX**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
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 ISAIAH M. KALEBU, )  
 )  
 Appellant. )

No. 67560-5-1  
DIVISION ONE  
UNPUBLISHED OPINION  
FILED: March 31, 2014

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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GROSSE, J. — King County local court rules require that a jury be summoned from an assignment area in which the crime took place, here, Seattle. In the present case, 3,000 potential jurors were summoned from the entire county rather than from the designated assignment area. In order to comport with the local rules, the trial court removed the incorrectly summoned jurors, leaving a venire of approximately 2,000 potential jurors from the correct assignment area. The trial court did not abuse its discretion in proceeding with the jury selection over defense counsel's objection, particularly here, where there were more than sufficient jurors from which to obtain a jury panel. In addition, we find no merit to the defendant's contention that he was denied his constitutional right to be present at a critical stage of the trial. We affirm the judgment and conviction.

FACTS

At midnight on Saturday, July 18, 2009, Teresa Butz and her partner, Jennifer Hopper, went to bed in Butz's three bedroom home in Seattle. Shortly after midnight, Butz and Hopper awoke to find Isaiah Kalebu standing over Butz with a knife in his hand. Kalebu put the knife to Hopper's throat, telling her to be quiet, that he only

wanted sex. He then proceeded to rape both Hopper and Butz multiple times while holding the knife. At one point both women were resisting and Kalebu was cutting and stabbing both of them. Butz managed to force Kalebu off the bed and they struggled. While Butz struggled, Hopper was screaming as loudly as she could. Butz picked up a metal bedside table and pushed Kalebu back with it and then crashed through a closed window, landing outside, and running as far as the curb before she collapsed. Hopper and Kalebu both ran in different directions. Hopper ran to the neighbors who had heard the window break and the screams and called 911.

Butz suffered several injuries, including eight cuts across her throat, a stab wound that severed her left bicep muscle, and another that penetrated her heart. She died in the street. Hopper had two cuts to the inside of her left arm, four lacerations on her neck, one of which severed her external jugular vein. Hopper was taken by ambulance to the emergency room where a plastic surgeon repaired her cuts. Swabs were used to collect evidence samples from both Hopper's and Butz's bodies.

The evidence from the swabs was entered into the deoxyribonucleic acid (DNA) databank and the profile matched that of an unknown male from a 2008 police case. There was a security video from that case which was shown to the media five days after the crimes. The man was identified as Isaiah Kalebu by a prosecutor who was handling an ongoing criminal case against Kalebu and had seen him at two hearings that week. Kalebu's mother also identified him.

Police found blood on the window ledge and saw dirty fingerprints on the edge of the tub. A latent print on the outside of the bathtub was identified as the print from Kalebu's left ring finger. Kalebu's left palm print was identified in two separate

examinations. Additionally, a print of the outer edge of Kalebu's left palm was found on the front edge of the dresser in the northwest bedroom. All of the prints were identified separately by two examiners.

Bare footprints found at the scene were identified as Kalebu's. Spermatozoa found on khaki shorts matched Kalebu's profile. A DNA profile matching Kalebu was obtained from boxer shorts found in the house. The swabs taken from Butz contained two DNA profiles, Butz's and Kalebu's. Additionally, swabs taken from Hopper also revealed Kalebu's DNA profile.

When Kalebu was arrested, he was wearing jeans that tested positive for DNA for which Kalebu, Butz, and Hopper were also possible contributors. Hopper identified Kalebu as the assailant.

Kalebu was arrested. Throughout the pretrial court proceedings, Kalebu's behavior was outrageous. After a three day contested competency hearing, the trial judge found Kalebu competent to stand trial. Kalebu continued to act outrageously, engaging in a tirade asserting his incompetency and threatening suicide. The trial judge found that Kalebu's erratic behavior was a result of his conscious choices to act in ways that he thought would benefit him. Recognizing that such behavior would impact a jury, the judge barred Kalebu from the courtroom. The court provided Kalebu with a remote location from which he could watch the trial proceedings. Kalebu had access to his attorneys and was able to communicate with them. Even separated from the courtroom, there was no end to his fractious behavior.

A jury convicted Kalebu of aggravated first degree murder, attempted first degree murder, first degree rape, and first degree burglary, all with deadly weapon

enhancements. The court imposed the mandatory term of life without the possibility of early release on the aggravated murder conviction. Additionally, the court imposed exceptional sentences on the aggravating factor of deliberate cruelty that the jury found as to counts 3 and 4. Kalebu was sentenced to life plus 1,176 months.

Kalebu appeals contending the trial court erred in denying his motion to strike the entire venire because the court initially summoned jurors from outside the assignment area rather than the one required by the local rule. Kalebu also argues that he was denied his constitutional right to be present for all critical stages of the trial when he was absent from an in-chambers discussion regarding the procedure that would be followed for Kalebu's testimony.

## ANALYSIS

### Venire

Kalebu argues that the trial court, by summoning jurors county-wide, violated both RCW 2.36.055 and King County Local General Rule (LGR) 18(e). We disagree. We review the decision excusing jury venire members for an abuse of discretion.<sup>1</sup> Where there is substantial compliance with the statute, the defendant must show prejudice. Prejudice is presumed only where that has been a material departure from the statutes.<sup>2</sup> “[T]he purpose of the jury selection statutes is to ‘provide a fair and impartial jury, and if that end has been attained and the litigant has had the benefit of

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<sup>1</sup> State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

<sup>2</sup> Tingdale, 117 Wn.2d at 600.

such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity.”<sup>3</sup>

RCW 2.36.055 provides:

The superior court at least annually shall cause a jury source list to be compiled from a list of all registered voters and a list of licensed drivers and identicard holders residing in the county.

In a county with more than one superior court facility and a separate case assignment area for each court facility, the jury source list may be divided into jury assignment areas that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area. Jury assignment area boundaries may be designated and adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges of the superior court when required for the efficient and fair administration of justice.<sup>[4]</sup>

The intent of the legislature was to lessen the burden of travel on potential jurors in counties with more than one superior court.<sup>5</sup> King County implemented this statute by promulgating LGR 18(e):

Location for Jury Assignment Areas for Civil and Criminal Cases Filed in King County.

(1) *Designation of Jury Assignment Areas*. The jury source list shall be divided into a Seattle jury assignment area and a Kent jury assignment area that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area. The area within each jury

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<sup>3</sup> State v. Rice, 120 Wn.2d 549, 562, 844, P.2d 416 (1993) (quoting State v. Finlayson, 69 Wn.2d 155, 157, 417 P.2d 624 (1966)).

<sup>4</sup> (Emphasis added.)

<sup>5</sup> “The legislature finds that superior courts with more than one superior court facility are asking some jurors to travel excessively long distances to attend court proceedings. In these cases, the legislature further finds that consideration of a juror's proximity to a particular courthouse can be accommodated while continuing to provide proportionate jury source list representation from distinctive groups within the community. The legislature intends to lessen the burdens borne by jurors fulfilling their civic duties by providing a mechanism that narrows the geographic area from which the jurors are drawn while maintaining a random and proportionate jury pool.” LAWS OF 2005, ch. 199 § 1.

assignment area shall be identified by zip code and documented on a list maintained by the chief administrative officer for the court.

(2) *Where Jurors Report.* Individuals receiving a jury summons shall report for service to the Court facility in the jury assignment area identified on the face of the summons.

(3) *Adjustment of Jury Assignment Area Boundaries.* The jury assignment areas contained in this rule may be adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges of the superior court when required for the efficient and fair administration of justice.

Kalebu's case was assigned a Seattle case designation at filing. Because the court understood that every aggravator case tried since the new rule went into effect had drawn jurors from the entire county, the court anticipated the defense requesting the same and ordered jurors be summoned from the entire county. However, defense counsel objected to the venire being from the entire county. Defense counsel sought to strike the entire venire.

The entire venire consisted of a group of 3,000 potential jurors, 1,000 of whom were identified as being from the south end. Rather than dismiss the entire venire, the court directed the clerk to notify the jurors from the south assignment area not to appear. That left a venire of approximately 2,000 jurors from the north end from which to choose a jury.

In support of his argument that the venire should have been dismissed, Kalebu cites State v. Tingdale.<sup>6</sup> There, over defense objection, the trial court authorized the court clerk to excuse three people from the panel based on the clerk's subjective knowledge that they were acquainted with the defendant. Our Supreme Court concluded the trial court's ruling was not in substantial compliance with chapter 2.36 RCW because the practice permitted the trial court or the clerk "to assemble a jury

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<sup>6</sup> 117 Wn.2d 595, 817 P.2d 850 (1991).

panel of their own choosing," violating the statutorily required element of chance and calling into doubt the impartiality of the jury.<sup>7</sup> The court also noted that there was no factual basis to dismiss two of the three potential jurors for cause.<sup>8</sup> Here, unlike Tingdale, the trial court did not systematically exclude specific individuals who were favorable to the defendant.

Tingdale is completely inapposite. Kalebu has shown neither a material departure from the jury selection statute nor any resulting prejudice. The trial court did not abuse its discretion in resolving this procedural irregularity. This is in accord with Supreme Court cases that have held that when a jury list of county residents is not drawn exactly as required by law, it is not a material departure from the law where the defendant has been provided a fair and impartial jury.<sup>9</sup> No single method of jury selection is required "so long as fair and random selection of the master jury list and jury panels is achieved." RCW 2.36.065. Here, the jurors were chosen from the area specified by both the statute and the court rule. The trial court did not abuse its discretion in fashioning this remedy.

#### Chambers Conference

Kalebu next argues that he was excluded from a critical stage of the proceedings. At the conclusion of the State's case in chief, defense counsel notified the court that Kalebu would be testifying but that counsel would not be asking him any

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<sup>7</sup> Tingdale, 117 Wn.2d at 601.

<sup>8</sup> Tingdale, 117 Wn.2d at 601-602.

<sup>9</sup> See, e.g., City of Tukwila v. Garrett, 165 Wn.2d 152, 196 P.3d 681 (2008) (jurors selected from outside city limits but city was located entirely in one county and all jurors were drawn from the county in which the crime was committed); W.E. Roche Fruit Co. v. Northern Pac. Ry. Co., 18 Wn.2d 484, 139 P.2d 714 (1943) (women jurors solicited by coupon ad in the newspaper).

questions. The court was concerned about the procedure by which Kalebu would testify and inquired of counsel why no questions would be asked of him. Kalebu's counsel explained:

The court rules provide that a party or representative of the party cannot put forth or present evidence that is not material or relevant to the matter that is at trial.

As I indicated yesterday, based on my discussions with Mr. Kalebu, I do not believe that -- in one part what he wants to testify about is material or relevant to this matter.

The second part, I can't tell the court. If the court wants to hear that in chambers, I'd be happy to tell the court what that is.

In chambers, without the defendant or the prosecutor, defense counsel informed the court that Kalebu told counsel he wanted to take the stand and confess, planning to testify that God made him do it. Such testimony would raise the specter of an obligation on the part of defense counsel to seek a mental health defense, a strategy not pursued after the court found Kalebu's competent. But the court noted that it was Kalebu's right to testify even if counsel advised against such testimony. However, the court did not want Kalebu to testify in a narrative form and requested that defense obtain from Kalebu questions that Kalebu wanted asked and that his attorneys would pose those questions to him.

Kalebu was aware of the issue that was being addressed both before and after the conference. A court reporter was present at the discussion in chambers for the specific purpose of providing a transcript to Kalebu.<sup>10</sup> Defense counsel said he had explained to Kalebu that he had a choice whether to testify or not. Defense counsel also advised Kalebu that if he wanted to confess, pleading guilty might be the better course. Kalebu refused.

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<sup>10</sup> There is nothing in the record to indicate whether Kalebu received this transcript.

As the court noted, ultimately the decision over whether to testify is the defendant's decision. The question the court was concerned with here was how his testimony would be presented, the procedure by which Kalebu would testify, not his testimony itself. This was not a critical stage of the proceedings.

A defendant's fundamental right to be present at all critical stages of a trial derives from the confrontation clause of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments.<sup>11</sup> Critical situations are those in which the defendant's presence is necessary in order to provide him an opportunity to defend against the charge.<sup>12</sup> But a defendant does not have a constitutional right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least where those matters "do not require a resolution of disputed facts."<sup>13</sup> Here, there were no disputed facts. The court was simply setting forth the procedure by which Kalebu would present his testimony.

We note that even if we were to find that Kalebu had the right to be present, any violation of that right is subject to harmless error analysis.<sup>14</sup> The State bears the burden of proving beyond a reasonable doubt that the error is harmless.<sup>15</sup> A defendant has the right to be present for proceedings involving ministerial matters.<sup>16</sup>

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<sup>11</sup> State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citing Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)).

<sup>12</sup> Irby, 170 Wn.2d at 880-81 (quoting Snyder v. Commonwealth of Mass., 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled in part on other grounds sub nom by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

<sup>13</sup> Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

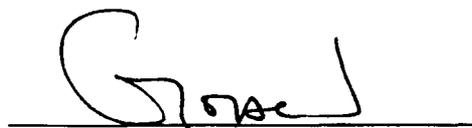
<sup>14</sup> Irby, 170 Wn.2d at 885.

<sup>15</sup> Irby, 170 Wn.2d at 886 (quoting State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)).

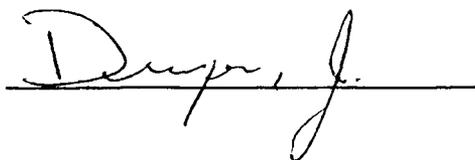
<sup>16</sup> Matter of Pirtle, 136 Wn.3d 467, 484, 965 P.2d 593 (1998).

Here, Kalebu argues that his absence from the chambers consultation deprived him of an opportunity to revisit his decision about testifying. However, that does not explain how his absence affected the outcome. The evidence in this case was overwhelming. Kalebu's claim that he might have reconsidered testifying had he heard the discussion in chambers is without merit. Kalebu's identity as the attacker was proven multiple times, by overwhelming forensic evidence, including his footprints at the foot of the bed in the bedroom where the attacks occurred; his palm print on the dresser in that room; his fingerprint and palm print on the bathtub where the intruder entered; his footprint on a document in the hallway; DNA matching Kalebu's on the khaki shorts he used to wipe himself, on swabs from two areas on each of the women attacked, and on two locations on the boxer shorts left by Kalebu when he left. Kalebu was identified by the surviving victim.

Affirmed.

A handwritten signature in black ink, appearing to be "Grove", written above a horizontal line.

WE CONCUR:

A handwritten signature in black ink, appearing to be "Dwyer, J.", written above a horizontal line.A handwritten signature in black ink, appearing to be "COX, J.", written above a horizontal line.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )

Respondent, )

v. )

ISAIAH KALEBU, )

Petitioner. )

SUPREME COURT NO. \_\_\_\_\_  
COA NO. 67560-5-1

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ISAIAH KALEBU  
DOC NO. 350965  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF APRIL 2014.

X Patrick Mayovsky

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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