No. 90840-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross-respondent,

v.

LORENZO WEBB,

Respondent/Cross-petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT AND RELIEF REQUESTED

Pursuant to RAP 13.4(b) and (d), Respondent Lorenzo Webb asks this Court to deny the State's petition for review. If this Court grants review, Mr. Webb asks the Court to review the important constitutional question whether conducting peremptory challenges to members of the jury venire by secret ballot violates the right to a public trial.

B. ISSUES

1. The Court of Appeals followed settled law and properly determined under State v. Ammons,[1] Custis v. United States,[2] and State v. Roberts,[3] that a conviction was unconstitutional on its face for sentencing purposes where the conviction was based on a crime that did not exist and where it was clear from the face of the plea document that the conviction was unconstitutional. Has the State failed to show a basis for review under RAP 13.4(b)?

2. Where the trial court conducted peremptory challenges by secret ballot, out of the scrutiny of the public's eyes and ears, was Mr. Webb's and the public's right to an open trial violated, implicating an important constitutional issue and a question of substantial public interest meriting

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[1] State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 726 amended, 105 Wn.2d 175, 718 P.2d 796 (1986).

[2] Custis v. United States, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

[3] State v. Roberts, 142 Wn.2d 471, 14 P.3d 713, (2000), as amended on denial of reconsideration (Mar. 2, 2001).

review? RAP 13.4(b)(3); RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Lorenzo Webb was convicted of one count of assault in the second degree with a deadly weapon with deadly weapon and domestic violence aggravators. CP 132-137. At sentencing, the trial court found two prior convictions — one from 1982 and one from 1992 — valid and comparable as most serious offenses and counted both prior convictions as strike offenses. RP 444-453. The court found Mr. Webb was a persistent offender and sentenced him to life imprisonment with no possibility of parole. RP 453, 455.

On appeal, Division Two of the Court of Appeals held, in relevant part, that the 1982 conviction was not comparable to a most-serious offense and thus was not a strike offense. Additionally, the Court of Appeals found that the 1992 conviction was not comparable and was unconstitutional on its face because the crime of which Mr. Webb was convicted in 1992 had been repealed. The State seeks review only of the court's determination that the 1992 conviction is facially constitutionally invalid. The State concedes that the 1982 conviction was not comparable to a most serious offense. As set forth below, the State fails to establish a basis for review under RAP 13.4(b). Should this Court grant review, Mr. Webb asks the Court to accept review of the Court of Appeal's decision

that peremptory challenges need not be made in open court.

D. ARGUMENT

1. Review is unwarranted because the law is settled and the Court of Appeals decision was consistent with Ammons and Custis.

The Court of Appeals properly held the 1992 conviction could not be used to sentence Mr. Webb as a persistent offender because it was unconstitutional on its face. In so holding, the Court acknowledged this Court's decision in State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719 amended, 105 Wn.2d 175, 718 P.2d 796 (1986), and correctly applied it. The State incorrectly contends the 1992 conviction could only be excluded from Mr. Webb's criminal history in a subsequent sentencing proceeding if he was either: (1) denied assistance of counsel in 1992; or (2) another court held the 1992 conviction to be invalid. Petition for Review at 5. The State contends there is no way for the 1992 conviction to be excluded from Mr. Webb's offender score unless the conviction fits into one of those two categories. Id. at 8. The State denies that there are any other possibilities for a conviction to be "unconstitutional on its face." Id.

A court "cannot consider a prior conviction that is constitutionally invalid on its face." State v. Phillips, 94 Wn. App. 313, 317, 972 P.2d 932 (1999). The State argues that "unconstitutional on its face" can only mean those convictions that violate the right to counsel, but this Court has more

broadly held that "[c]onstitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." Ammons, 105 Wn.2d at 188. "'[O]n its face' has been interpreted to mean those documents signed as part of a plea agreement." In re Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000) (citing Phillips, 94 Wn. App. at 317). However, a court cannot find a prior conviction unconstitutional on its face when it "would have to go behind the verdict, sentence, and judgment to make such a determination." Ammons, 105 Wn.2d at 189.

Here, the Court of Appeals found the 1992 conviction unconstitutional on its face by reviewing documents signed as part of a plea agreement. State v. Webb, 333 P.3d 470, 474 (Wash. Ct. App. 2014). The Court did not have to go behind the verdict, sentence, or judgment. By reviewing the plea agreement, the Court found that the "invalidity is clear from the face of the judgment." Id. This was correct: not only does the 1992 plea form cite to a repealed statute, the plea tracks the elements of the repealed statute. EX 3D.

The State attempts to minimize the constitutional defect as an "erroneous statutory citation." Petition for Review at 15. But, as the Court of Appeals noted in its decision, the elements of the repealed statute and the elements of the then-existing assault in the second degree are

substantially different. In 1992, second degree assault required a person to "intentionally assault[] another thereby recklessly inflict[ing] **substantial** bodily harm. RCW 9A.36.021(1)(a)(1988) (emphasis added). Webb's 1992 conviction states that Webb "knowingly inflict[ed] **grievous** bodily harm upon...a human being, with a weapon, to-wit: a knife." Webb, 333 at 474 ((emphasis added).

"Grievous bodily harm" means "hurt or injury calculated to interfere with the health or comfort of the person injured; it need not necessarily be an injury of a permanent character." State v. Salinas, 87 Wn.2d 112, 121, 549 P.2d 712 (1976). Grievous means "atrocious, aggravating, harmful, painful, hard to bear, serious in nature." Id. Substantial bodily harm, by contrast, is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

As the Court of Appeals held, **the two types of harm are not comparable**, and the error was not merely an "erroneous citation." Because the 1992 conviction tracks the elements and citation to a crime that did not exist at the time, the unconstitutionality was clear from the face of the conviction.

For this reason, the State's reliance on State v. Hopper, 118 Wn.2d 151, 822 P.2d 775 (1992), is misplaced. Petition for Review at 12. That case dealt with a challenge to a defective charging document, made for the first time on appeal. Id. at 153. The defendant proceeded to a trial at which the jury was correctly instructed. Id. at 154. Applying its recent decision in State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991), this Court held that the information, liberally construed, provided sufficient notice of the essential elements of the charged crime, and that Hopper did not allege that he was prejudiced by the defect. Id. Hopper has no bearing on this case, in which Mr. Webb actually pleaded guilty to a non-existent statute.[4]

The State relies on State v. Roberts, 142 Wn.2d 471, 14 P.3d 713, (2000), as amended on denial of reconsideration (Mar. 2, 2001), to support its claim that an attack on the validity of a plea does not implicate the validity of the judgment. Petition for Review at 7. This is not at issue here. Moreover, the State misunderstands this Court's holding. This Court reiterated that the defendant bears the burden of proving a presumptively valid conviction suffers from some constitutional defect. Roberts, 142 Wn.2d at 529 ("absent facial constitutional invalidity **or an affirmative showing of infirmity by the defendant**, the sentencing court should not

[4] Presumably, if the jury in Hopper had been instructed in a way that tracked the language of the defective information, the outcome of that case would have been quite different.

be forced to conduct an appellate review of each of the defendant's priors") (emphasis added). The Court of Appeals did not hold otherwise. Neither Roberts nor Ammons support the State's contention that the Court of Appeals's opinion was wrongly decided.

Finally, the State obliquely contends that the decision in Webb would lead sentencing courts to "rummage through frequently nonexistent or difficult to obtain state[]court transcripts or records that may date from another era." Petition for Review at 7 (citing Custis v. United States, 511 U.S. 485, 496, 114 S. Ct. 1732, 1739, 128 L. Ed. 2d 517 (1994)). These concerns are not present here and the narrow Court of Appeals opinion does not invite this result in future cases: the sentencing court had access to the plea agreement and from the face of the plea agreement, it properly found the conviction unconstitutional on its face.

Because the Court of Appeals correctly and consistently with Ammons determined that Webb's 1992 was unconstitutional on its face and could not be used in a sentencing proceeding, the State's petition for review should be denied.

2. If this Court grants review, it should also review the important constitutional issue and substantial question of public importance of whether secret peremptory challenges violates the public trial right.

As explained above, this Court should deny review. However, if review is granted, this Court should also review the important constitutional issue and substantial question of public importance of whether the trial court violated Mr. Webb's right to a public trial by conducting peremptory challenges by secret ballot.

This Court recently decided several public trial cases, but *none* resolve the question presented *here*. *See* State v. Slert, 334 P.3d 1088 (Wash. 2014) (lead opinion holds that in-chambers pre-voir dire discussion on jurors' answer to questionnaires does not implicate the public trial right); State v. Frawley, 334 P.3d 1022 (Wash. 2014) (addressing whether in-chambers questioning of jurors during voir dire constituted closure of the court); State v. Koss, 334 P.3d 1042 (Wash. 2014) (public trial right did not attach to preliminary in-chambers conference about jury instructions); State v. Njonge, 334 P.3d 1068 (Wash. 2014) (addressing whether a trial court can exclude: observers during hardship excusals, members of the press during voir dire, and a

family member of the victim who was also a witness); State v. Smith, 334 P.3d 1049 (Wash. 2014) (discussing whether on-the-record sidebar conference implicates the public trial right); State v. Shearer, 334 P.3d 1078 (Wash. 2014) (addressing whether an in-chambers discussion to determine whether a juror had a felony conviction was a courtroom closure and required a Bone-Club analysis). This Court has not addressed whether peremptory challenges must be made in the public's view.

In rejecting Webb's contention that peremptory challenges must be made in open court, the Court of Appeals applied its prior decisions in State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014) and State v. Love, 176 Wn. App. 911, 309 P.3d 1209, (2013). While the Love Court acknowledged that "[j]ury selection in a criminal case is considered part of the public trial right and is typically open to the public," it applied the "experience and logic" test to the practice of holding secret peremptory challenges and found that peremptory challenges need not be done in public. Love, 176 Wn. App. at 916 (citing State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009)). The process of excusing prospective jurors is a critical part of voir dire that must also be open to the public. E.g., Batson v. Kentucky, 476 U.S. 79, 98, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). The "interplay of challenges for cause and peremptory challenges" is an essential part of criminal trial proceedings. State v. Vreen, 99 Wn. App.

662, 668, 994 P.2d 905 (2000), aff'd, 143 Wn.2d 923 (2001).

Challenges to the venire must be held in open court. State v. Jones, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013). When the record "lacks any hint that the trial court considered [the] public trial right as required by Bone-Club, [an appellate court] cannot determine whether the closure was warranted" and reversal is required. State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). Here, the court identified no compelling interest that required peremptory strikes to be conducted in secret while for-cause challenges were done "on the record." Voir Dire RP 64-65; RP 20-23. Further, the court failed to consider any of the Bone-Club factors on the record. See Voir Dire RP 64-65; RP 20-23.

One vital purpose of an open public trial is to provide a check on the judicial process. Open trials deter misconduct and perjury; they temper biases and undue partiality. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Openness...enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Peremptory challenges are particularly susceptible to abuse when the challenges are exercised by secret ballot.

Here, the public has no ability to tell who excused whom and in

what order. Because the public could not view when particular venire members were removed, it would be impossible to tell whether an attorney had targeted a specific group based on race or gender. While the public could attempt to find the court files and determine which jurors were dismissed based on peremptory challenges, the list included in the court files are in alphabetical order and do not denote attributes of the particular jurors, such as race, gender, religious affiliation, or sexual orientation. Thus, in order to ensure the fairness of the trial proceeding, members of the public would need to: (1) be present during the peremptory challenges; (2) record names and obvious attributes of jurors; (3) find the court file once it is available; and (4) attempt to match those excused to the self-prepared list. Additionally, because the court file lists the jurors in alphabetical order, it is impossible to tell in which order jurors were excused because the trial court excused everyone except the selected jury at once.

The Court in Love found that the written record protected the public's interest in the cause and peremptory challenges. Love, 176 Wash. App. at 920. However, in noting that a public trial is a "core safeguard in our system of justice," this Court held that the public "can keep watch over the administration of justice when the courtroom is open" because the "open and public judicial process helps assure fair trials." Wise, 176 Wn.

2d at 5-6. A public trial also "provides for accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized." Id. Peremptory challenges by secret ballot frustrates these purposes because there is no accountability or transparency and the challenges are nearly impossible to scrutinize.

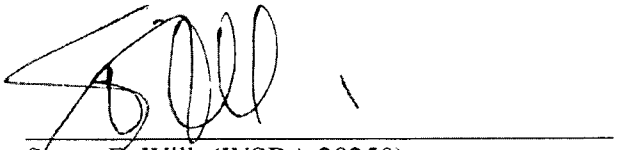
Because the trial court allowed peremptory challenges by secret ballot without considering the five Bone-Club factors, this Court should grant review.

E. CONCLUSION

For the reasons set forth above, Mr. Webb respectfully requests that this Court deny the State's petition for review. In the alternative, the Court should grant review of the public trial issue.

DATED this 27th day of October, 2014.

Respectfully submitted:



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Answer to Petition for Review and Cross-Petition

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