Supreme Court No. 92310-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

Kenneth Slert

Appellant/Respondent

Lewis County Superior Court Cause No. 04-1-00043-7

The Honorable Judge James Lawler

ANSWER TO PETITION

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

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

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

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

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

The trial judge excused four prospective jurors during a pretrial conference held in chambers. CP 194-197. The court disclosed this just prior to the start of *voir dire* in open court:

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

Mr. Slert was not present for this pretrial conference in chambers. RP 5. Three of the four jurors were within the range of prospective jurors ultimately selected to serve on the jury.[1] RP 5; CP 194-197. The court clerk destroyed the completed jury questionnaires.[2] *See State v. Slert*, No. 40333-1-II, 2015 WL 5042148, at *1 (Wash. Ct. App. Aug. 26, 2015) (Slert I).

Mr. Slert appealed and the Court of Appeals reversed. In addition to finding a public trial violation, the Court of Appeals held that the trial court's *in camera* dismissal of prospective jurors violated Mr. Slert's right to be present. *State v. Slert*, 169 Wn. App. 766, 769, 282 P.3d 101 (2012)

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[1] The state repeatedly calls this the "agreed-upon dismissal" of the jurors, but that is not established in the record. See Petition, page 1, 2, 4, 5, 7, 10; RP (1/25/10) 2-12. Maybe omit, since majority kind of agreed with them?

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

review granted in part, 176 Wn.2d 1031, 299 P.3d 20 (2013) (Slert II). The Supreme Court accepted review on the public trial issue and reversed the Court of Appeals. *State v. Slert*, 181 Wn.2d 598, 609, 334 P.3d 1088 (2014) (Slert III). The court remanded the case for the Court of Appeals to determine "whether the violation of Slert's right to be present is harmless beyond a reasonable doubt." *Id.*

On remand, the Court of Appeals concluded that the error was not harmless beyond a reasonable doubt. *Slert* I, No. 40333-1-II, 2015 WL 5042148, at *3-6.

ARGUMENT WHY REVIEW SHOULD BE DENIED

THE PETITION SHOULD BE DENIED BECAUSE THE CASE DOES NOT MEET CRITERIA FOR REVIEW UNDER RAP 13.4(B).

This case is not appropriate for review.

It involves a straightforward application of well-settled law. Acceptance of review would accomplish nothing: the end result would be near-mechanical affirmance under *State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011). Reversing the Court of Appeals would involve overruling *Irby,* a result forbidden by *stare decisis,* because *Irby* is neither incorrect nor harmful. *See State v. W.R., Jr.*, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014) ("We will overrule a prior decision only upon a clear showing that the rule it announced is incorrect and harmful.")

Furthermore, the case raises no issues that merit review under RAP 13.4(b). The Court of Appeals decision does not conflict with another appellate decision, does not raise a significant constitutional question, and does not present an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

Finally, the Supreme Court has already rejected review of the same issue in this very case. The Supreme Court should again deny review.

A. This court previously rejected the state's Petition on the right-to-be-present issue.

Petitioner previously asked this court to review the Court of Appeals' decision regarding the application of *Irby*[3] to Mr. Slert's case. *See* Petition for Review (filed 9/6/12), No. 87844-7, pp. 1, 10-12. At that time, this court did not accept review of the right-to-be-present issue. *See* Order (filed 4/8/13), No. 87844-7 (granting review "only on the public trial issue.")

This case involves a straightforward application of established Supreme Court precedent. The issue addressed by Petitioner did not merit review in April of 2013 and does not merit review now. The court should deny review. RAP 13.4(b).

[3] *Irby*, 170 Wn.2d at 886.

B. *Irby's* test for prejudice clearly and unequivocally requires reversal of Mr. Slert's conviction.

The Supreme Court should deny review because Mr. Slert's case is controlled by clearly established precedent. Denial of the right to be present requires reversal unless the state shows harmlessness beyond a reasonable doubt. *Irby*[4], 170 Wn.2d at 886. Where the denial involves jury selection, the state must show beyond a reasonable doubt that the excused jurors "had no chance to sit on [the] jury." *Id.*

As in *Irby,* three jurors in this case "fell within the range of jurors who ultimately comprised the jury and their alleged inability to serve was never tested by questioning in [Mr. Slert's] presence." *Id.;* RP 5; CP 194-197. Thus, as in *Irby,* the state cannot prove beyond a reasonable doubt that they had "no chance" to serve in Mr. Slert's case.[5] *Id.*

Contrary to Petitioner's assertions, *Irby* does not impose additional requirements on a defendant whose constitutional rights have been violated. *Id.* Petitioner erroneously seeks to shift the burden to Mr. Slert, arguing that he must show "that the jurors were somehow fit to serve on

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[4] The state claims repeatedly that the Court of Appeals Opinion holds that citing to Irby . This is a gross and inaccurate oversimplification of the court's analysis and holding in this case. See *Slert* I, No. 40333-1-II, 2015 WL 5042148; Petition, page 6, 8.

[5] In fact, the record available to the state in this case makes the task of showing harmlessness even more impossible than that faced by the state in *Irby.* The *Irby* court had a chain of emails showing the basis for excusing each potential juror. *Id.,* at 878. Here, by contrast, the court has destroyed the completed jury questionnaires and there is no record of the *in camera* proceeding. RP 5; *See Slert* I, No. 40333-1-II, 2015 WL 5042148, at *1.

the jury... before the State must disprove the error beyond a reasonable doubt." Petition, p. 9.[6]

This is wholly incorrect. Once the defendant shows a violation of his constitutional right, the burden shifts to the state to show harmlessness beyond a reasonable doubt. This is the rule in *Irby* and in all other cases involving constitutional error. *See, e.g., W.R., Jr.*, 181 Wn.2d at 770; *State v. Lamar*, 180 Wn.2d 576, 588, 327 P.3d 46 (2014).

Petitioner's attempt to shift the burden is understandable, because the state cannot show harmlessness under any standard.[7] The court's destruction of completed jury questionnaires[8] and the lack of a record of the *in camera* hearing means that Petitioner "has not and cannot show that [the excused jurors] had no chance to sit on [Mr. Slert's] jury." *Irby,* 170 Wn.2d at 886.

As in *Irby,* any bias suggested by answers to juror questionnaires should have been resolved through questioning in Mr. Slert's presence. *Id.* Questioning may have dispelled concerns about juror bias. For

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[6] Petitioner later urges the court to accept review "to clarify that *Irby* requires some showing that the jurors in question *substantively* could have served..." Petition, p. 11 (emphasis in original).

[7] In other words, Mr. Slert can easily show a possibility of prejudice above and beyond that required by the *Irby* court. Using Petitioner's terminology, the dismissed jurors "*substantively* could have served..." Petition, p. 11 (emphasis in original). This is because the trial judge had discretion to seat even those jurors whose questionnaires expressed bias stemming from pretrial publicity, as outlined below.

[8] *See Slert* I, No. 40333-1-II, 2015 WL 5042148, at *1.

example, one or more of the jurors may have mistakenly believed that a newspaper article or local radio item pertained to Mr. Slert's case, when, in fact, it related to some other notorious crime.[9] The destruction of the questionnaires and the lack of a transcript make it impossible for the state to prove beyond a reasonable doubt that such a mistake did not occur.

Similarly, a juror who expressed bias in the questionnaire might change his or her mind during questioning. For example, in one high-profile case, a prospective juror initially condemned the defendant's associates; however, "when asked to explain these [biased] statements during voir dire, [the prospective juror] said he had 'thought about that question since the questionnaire' and concluded that he could judge [the defendant] on the evidence alone." *United States v. Pratt*, 728 F.3d 463, 473 (5th Cir. 2013) *cert. denied,* 134 S.Ct. 1328, 188 L.Ed.2d 338 (2014). Again, given the destruction of the questionnaire and the court's failure to conduct proceedings in Mr. Slert's presence, the state cannot prove beyond a reasonable doubt that each of the jurors had no chance of sitting on the jury. *Irby,* 170 Wn.2d at 886.

Furthermore, a trial judge has discretion to seat jurors who have been exposed to publicity. *See, e.g., State v. Grenning*, 142 Wn. App.

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

518, 540, 174 P.3d 706 (2008) *aff'd,* 169 Wn.2d 47, 234 P.3d 169 (2010). Generally, "the question is whether a juror with preconceived ideas can set them aside." *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). Even those jurors exposed to pretrial publicity who "admit[ ] to forming negative opinions" are not necessarily "unable to perform their duties" and thus may be allowed to serve. *Pratt*, 728 F.3d at 473.

Had Mr. Slert been present, he would have had the right to ask his attorney to waive objection to certain defense-oriented jurors who said they could be fair despite exposure to pretrial publicity. The absence of the completed questionnaires and the lack of a transcript of the *in camera* hearing means that the state cannot prove beyond a reasonable doubt that the dismissed jurors had no chance of sitting on the jury. *Irby,* 170 Wn.2d at 886.

The procedure used here violated Mr. Slert's constitutional right to be present. *Irby,* 170 Wn.2d at 886. Three jurors excused in his absence were within the range of jurors who ended up on the jury, and the state cannot show harmlessness beyond a reasonable doubt.

The Court of Appeals correctly applied *Irby.* This case presents no new issues. The Supreme Court should deny review. RAP 13.4(b).

The lower court's decision does not conflict with *Miller.*

The state bears the burden of proving constitutional error harmless beyond a reasonable doubt. *Irby*, 170 Wn.2d at 886. In cases such as this one, the prosecution must show that jurors dismissed in the defendant's absence had no chance of sitting on the jury. *Id.* The state failed to do so here, in part because of the destruction of the questionnaire and the lack of a record of the *in camera* proceeding. RP 5; *See Slert* I, No. 40333-1-II, 2015 WL 5042148, at *1.

Where a complete record exists of the reason for dismissal, the state can show that a prospective juror had no chance of sitting. *State v. Miller*, 184 Wn. App. 637, 647, 338 P.3d 873 (2014) *review denied,* 182 Wn.2d 1024, 347 P.3d 459 (2015). In *Miller,* the trial judge dismissed a prospective juror who inadvertently sat in on pretrial discussions. *Id.,* at 640.

In *Miller,* the court found the error harmless without determining that a violation had occurred.[10] *Id.,* at 646. The dismissed juror had no chance to remain on the jury because the potential prejudice was "far too great." *Id.,* at 647. The *Miller* court was able to reach this conclusion because it had a record of the proceedings to which the prospective juror had been exposed. *Id.,* at 640.

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[10] Prospective jurors in *Miller* had not yet been sworn; nor had they answered a case-specific questionnaire. *Miller,* 184 Wn. App. at 641. In this case, as well as in *Irby*, the jurors had been sworn and did complete case-specific questionnaires. *Irby.*

In this case, the Court of Appeals did not have such a record. Had the court retained copies of the completed juror questionnaires, the record might have been sufficiently complete to allow the Court of Appeals to determine that each dismissed juror had no chance of sitting. However, in the absence of the completed questionnaires, the state cannot provide any details as to why each prospective juror was dismissed. For example, a prospective juror who barely recalled seeing a newspaper headline years earlier might be allowed to sit on the jury, despite exposure to pretrial publicity. *See, e.g., Grenning*, 142 Wn. App. at 541.

The absence of a record is what distinguishes this case from *Miller*. There is no conflict between the two decisions. The Supreme Court should deny review.

CONCLUSION

The Petitioner fails to raise any issues meriting review under RAP 13.4(b). This case involves a direct application of well-settled law. Reversing the Court of Appeals would require overruling *Irby* and complicating what has been a clear rule. Furthermore, Petitioner raised this very issue in a prior petition; the Supreme Court rejected review then and should do so again now.

Respectfully submitted on October 13, 2015.

BACKLUND AND MISTRY

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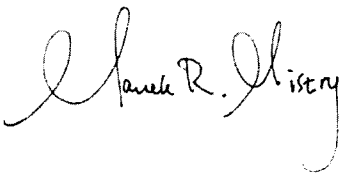

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Attorney for the Appellant/Respondent

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of this Answer to the State's Petition postage pre-paid, to:

Kenneth Slert, DOC #872135
Stafford Creek Corrections Center
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Aberdeen, WA 98520

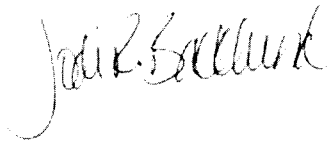
and I emailed an electronic version of the brief to:

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

I filed the Answer electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 13, 2015.



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Attached is respondent's answer to petition.

Thank you.

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