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DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

No. 40333-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Slert,

Appellant.

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

The Honorable Judge James Lawler

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES vi

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 5

A. On October 23, 2000 Kenneth Slert shot and killed a stranger during an altercation at Mr. Slert’s campsite in the Gifford Pinchot National Forest..... 5

B. Mr. Slert was acquitted of first-degree murder; his conviction for second-degree murder was twice reversed on appeal. 8

C. The trial court held a CrR 3.5 hearing to address the admissibility of Mr. Slert’s statements. 9

D. The court denied Mr. Slert’s motion to suppress evidence obtained without a search warrant. 16

E. The judge excused four potential jurors during a pretrial conference held in chambers, before the commencement of *voir dire*. 19

F. At trial, the prosecutor introduced Mr. Slert’s statements and other evidence that the court had refused to suppress..... 20

G. The court limited Mr. Slert’s cross-examination of convicted felon Douglas Schwenk and of Sheriff McCroskey..... 22

H. Mr. Slert presented evidence of his mental health problems.....	24
I. Defense counsel did not propose instructions on the lesser-included offense of manslaughter, or any other instructions that allowed the jury to take into account Mr. Slert’s mental health issues, and the prosecutor exploited this fact in closing.	25
J. Mr. Slert was convicted and sentenced to 280 months in prison, and he appealed.....	27
ARGUMENT.....	28
I. Summary Of Argument.....	28
II. The trial court should have suppressed evidence obtained in violation of Mr. Slert’s Fourth Amendment right to be free of unreasonable searches and seizures and his right to privacy under Article I, Section 7.....	29
A. Standard of Review.....	29
B. The state and federal constitutions generally prohibit searches and seizures conducted without the authority of a search warrant.	30
C. The prosecution failed to establish that Mr. Slert voluntarily consented to a search of his car.	31
D. The warrantless search of Mr. Slert’s campsite violated both the state and federal constitutions, because the police unlawfully intruded on the curtilage of Mr. Slert’s dwelling.	33
E. The officers violated Mr. Slert’s rights under Article I, Section 7 by detaining him for nearly five hours without to arresting him.	40

F. The trial court should have excluded evidence and statements tainted by the unconstitutional 5-hour detention and by the illegal search of Mr. Slert’s campsite..... 45

III. Mr. Slert was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. 46

A. Standard of Review..... 46

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel..... 47

C. Defense counsel provided ineffective assistance by failing to object to admission of Mr. Slert’s statements for violation of the *corpus delicti* rule. 48

D. Defense counsel provided ineffective assistance by failing to seek instructions on the lesser-included offenses of Manslaughter in the First and Second Degree..... 51

E. If Mr. Slert’s suppression arguments are not available on review, defense counsel was ineffective for failing to seek suppression and/or to argue the correct grounds for suppression of evidence and statements. 57

F. Defense counsel was ineffective for failing to argue Mr. Slert’s mental health issues and failed self-defense claim in mitigation of his sentence. 59

IV. Mr. Slert’s conviction must be reversed because the trial court failed to conduct a *Bone-Club* analysis prior to holding a closed hearing in chambers. 61

A. Standard of Review..... 61

B. Criminal trials must be open and public. 61

C. The trial judge violated Mr. Slert’s First, Sixth, and Fourteenth Amendment right to an open and public trial by conducting closed proceedings in chambers..... 62

V. The trial judge violated Mr. Slert's constitutional right to be present at all critical stages by excusing jurors in his absence.	63
A. Standard of Review.....	63
B. An accused person has a constitutional right to be present at all critical stages of trial.	63
C. Mr. Slert's conviction must be reversed because the trial judge violated his Fourteenth Amendment right to be present at all critical stages of trial.	64
VI. The trial court violated Mr. Slert's right to confront witnesses by restricting cross-examination of two prosecution witnesses.....	65
A. Standard of Review.....	65
B. The Sixth and Fourteenth Amendments guarantee the right to confront witnesses.	66
C. Mr. Slert should have been allowed great latitude in cross-examining Schwenk.	66
D. Mr. Slert should have been allowed to cross-examine McCroskey regarding whether or not he'd illegally recorded their conversation.	69
VII. The trial court violated Mr. Slert's Fifth and Fourteenth Amendment privilege against self-incrimination.	70
A. Standard of Review.....	70
B. Custodial statements are presumed to have been obtained in violation of the Fifth and Fourteenth Amendment right to remain silent.	71
C. The trial court should have suppressed Mr. Slert's initial unwarned custodial statements to Rangers Nehring, Langley, and Kirschner.....	73

D. The trial court should have suppressed statements and evidence derived from the failure of the police to scrupulously honor Mr. Slert's invocation of his right to remain silent..... 74

VIII. The trial judge violated Mr. Slert's state constitutional right to a jury trial by erroneously denying a challenge for cause and thereby forcing him to exhaust his peremptory challenges..... 83

A. Standard of Review..... 83

B. Erroneous failure to excuse a juror for cause violates an accused person's state constitutional right to a jury trial when the accused is forced to exhaust peremptory challenges..... 83

C. The trial court's failure to excuse Juror No. 24 violated Mr. Slert's state constitutional right to a jury trial by forcing him to exhaust peremptory challenges. 89

CONCLUSION 91

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) 32

Becton v. Barnett, 2 F.3d 1149 (4th Cir. 1993)..... 66, 67

Bond v. United States, 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365
(2000)..... 36

Browash v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)
..... 49

Campaneria v. Reid, 891 F.2d 1014 (2d Cir.1989) 86

Childers v. Floyd, 608 F.3d 776 (11th Cir. 2010)..... 74, 75, 76, 77

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).... 74

Detrich v. Ryan, ___ F.3d ___ (9th Cir. 2010) 66, 67

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)
..... 95

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)
..... 51

Hart v. Attorney General of Florida, 323 F.3d 884 (C.A.11, 2003)..... 81

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)
..... 32, 36

Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)
..... 72

LaDuke v. Nelson, 762 F.2d 1318 (9th Cir.1985)..... 37, 39, 42

Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)..... 80

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)..... 31

<i>Michigan v. Mosley</i> , 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)	84, 85, 87, 88, 91
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	3, 14, 33, 34, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89
<i>Missouri v. Seibert</i> , 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004)	81, 84
<i>On Lee v. United States</i> , 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952)	76
<i>Oregon v. Elstad</i> , 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985)	93
<i>Payton v. New York</i> , 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)	35
<i>Pennsylvania v. Muniz</i> , 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990)	82
<i>Presley v. Georgia</i> , ___ U.S. ___, 130 S.Ct. 721, ___ L.Ed.2d ___ (2010) (<i>per curiam</i>)	69, 70
<i>Rawlings v. Kentucky</i> , 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980)	46
<i>Rhode Island v. Innis</i> , 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)	82
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	52
<i>Snyder v. Massachusetts</i> , 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934)	72
<i>Taylor v. Alabama</i> , 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982)	50
<i>Thompson v. Keohane</i> , 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)	79, 82, 84
<i>U.S. v. Bautista</i> , 145 F.3d 1140 (10th Cir. 1998)	86

<i>U.S. v. Brobst</i> , 558 F.3d 982 (C.A.9, 2009).....	82, 83
<i>U.S. v. Chavira</i> , ___ F.3d ___ (5th Cir. 2010).....	83
<i>U.S. v. Davis</i> , 530 F.3d 1069 (9th Cir. 2008)	39
<i>U.S. v. Depew</i> , 210 F.3d 1061 (9th Cir. 2000).....	43
<i>U.S. v. Dunn</i> , 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987) 38, 39, 40, 42	
<i>U.S. v. Gagnon</i> , 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) . 71, 73	
<i>U.S. v. Gonzalez</i> , 214 F.3d 1109 (9 th Cir. 2000).....	101
<i>U.S. v. Gooch</i> , 6 F.3d 673 (9th Cir. 1993).....	37, 39, 42
<i>U.S. v. Gordon</i> , 829 F.2d 119 (D.C. Cir. 1987).....	72, 73
<i>U.S. v. Johnson</i> , 256 F.3d 895 (9th Cir. 2001)	38
<i>U.S. v. Lafferty</i> , 503 F.3d 293 (3d Cir. 2007)	85
<i>U.S. v. Martinez</i> , 462 F.3d 903 (8th Cir. 2006)	83
<i>U.S. v. Martinez-Salazar</i> , 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000).....	94
<i>U.S. v. Powell</i> , 483 F.3d 836 (D.C. Cir. 2007).....	46
<i>U.S. v. Salemo</i> , 61 F.3d 214 (3 rd Cir. 1995).....	52
<i>U.S. v. Sanders</i> , 424 F.3d 768 (8th Cir. 2005).....	33
<i>U.S. v. Sandoval</i> , 200 F.3d 659 (9th Cir. 2000).....	37
<i>U.S. v. Tureseo</i> , 566 F.3d 77 (2d Cir. 2009).....	72
<i>U.S. v. Tyler</i> , 164 F.3d 150 (3d Cir. 1998)	85, 86, 88, 89, 91, 92
<i>U.S. v. Williams</i> , ___ F.3d ___ (6th Cir. 2010).....	49, 50

U.S. v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) 44,
45, 48

Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)..... 49

WASHINGTON STATE CASES

City of Cheney v. Grunewald, 55 Wash.App. 807, 780 P.2d 1332 (1989)
..... 101, 102

City of Pasco v. Mace, 98 Wash.2d 87, 653 P.2d 618 (1982) 94, 96, 97

Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wash.2d
791, 83 P.3d 419 (2004)..... 98

In re Detention of D.F.F., 144 Wash.App. 214, 183 P.3d 302 (2008)
review granted, 164 Wash.2d 1034, 197 P.3d 1185 (2008) 68

In re Fleming, 142 Wash.2d 853, 16 P.3d 610 (2001)..... 51

In re Hubert, 138 Wash.App. 924, 158 P.3d 1282 (2007)..... 53

McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 236 P. 797
(1925)..... 99, 100

Sofie v. Fibreboard Corp., 112 Wash.2d 636, 771 P.2d 711 (1989)..... 96

State v. Armenta, 134 Wash.2d 1, 948 P.2d 1280 (1997)..... 42, 90, 91

State v. Beito, 147 Wash.App. 504, 195 P.3d 1023 (2008) 43

State v. Belieu, 112 Wash.2d 587, 773 P.2d 46 (1989)..... 44, 45

State v. Berlin, 133 Wash.2d 541, 947 P.2d 700 (1997)..... 59

State v. Bone-Club, 128 Wash.2d 254, 906 P.2d 325 (1995) ... 5, 68, 69, 70

State v. Brightman, 155 Wash.2d 506, 122 P.3d 150 (2005)..... 69

State v. Brockob, 159 Wash.2d 311, 150 P.3d 59 (2006)..... 53, 54, 55

State v. Byrd, 110 Wash.App. 259, 39 P.3d 1010 (2002)..... 42, 90, 91

<i>State v. C.D.W.</i> , 76 Wash.App. 761, 887 P.2d 911 (1995).....	54, 55, 56
<i>State v. Cho</i> , 108 Wash.App 315, 30 P.3d 496 (2001).....	101, 102
<i>State v. Chrisman</i> , 100 Wash.2d 814, 676 P.2d 419 (1984).....	35
<i>State v. Cleator</i> , 71 Wash.App. 217, 857 P.2d 306 (1993).....	36
<i>State v. Contreras</i> , 92 Wash.App. 307, 966 P.2d 915 (1998).....	30
<i>State v. Daniels</i> , 160 Wash.2d 256, 156 P.3d 905 (2007).....	79
<i>State v. Darden</i> , 145 Wash.2d 612, 41 P.3d 1189 (2002).....	75, 77
<i>State v. Dorey</i> , 145 Wash.App. 423, 186 P.3d 363 (2008).....	44
<i>State v. Dow</i> , 168 Wash.2d 243, 227 P.3d 1278 (2010).....	54
<i>State v. Easter</i> , 130 Wash.2d 228, 922 P.2d 1285 (1996).....	80
<i>State v. Eisfeldt</i> , 163 Wash.2d 628, 185 P.3d 580 (2008).....	32
<i>State v. Fankhouser</i> , 133 Wash.App. 689, 138 P.3d 140 (2006).....	78
<i>State v. Fernandez-Medina</i> , 141 Wash.2d 448, 6 P.3d 1150 (2000)..	57, 58
<i>State v. Fire</i> , 145 Wash.2d 152, 34 P.3d 1218 (2001).....	94, 95, 99, 100
<i>State v. Foster</i> , 135 Wash.2d 441, 957 P.2d 712 (1998).....	74
<i>State v. Garcia</i> , 140 Wash.App. 609, 166 P.3d 848 (2007).....	34
<i>State v. Garvin</i> , 166 Wash.2d 242, 207 P.3d 1266 (2009).....	32, 48
<i>State v. Gatewood</i> , 163 Wash.2d 534, 182 P.3d 426 (2008).....	29
<i>State v. Gonzales</i> , 111 Wash.App. 276, 45 P.3d 205 (2002).....	93
<i>State v. Grier</i> , 150 Wash.App. 619, 208 P.3d 1221 (2009).....	56
<i>State v. Grier</i> , 150 Wash.App. 619, 208 P.3d 1221 (2009), <i>review granted</i> <i>at</i> 167 Wash.2d 1017, 224 P.3d 773 (2010).....	56, 57, 58, 63

<i>State v. Gunwall</i> , 106 Wash.2d 54, 720 P.2d 808 (1986) 32, 95, 96, 97, 98, 99, 100	
<i>State v. Hendrickson</i> , 129 Wash.2d 61, 917 P.2d 563 (1996)	53
<i>State v. Hickman</i> , ___ Wash.App. ___, ___ P.3d ___ (2010)	80
<i>State v. Hoke</i> , 72 Wash.App. 869, 866 P.2d 670 (1994)	39
<i>State v. Horton</i> , 136 Wash.App. 29, 146 P.3d 1227 (2006)	51
<i>State v. Hughes</i> , 106 Wash.2d 176, 721 P.2d 902 (1986)	62
<i>State v. Jackson</i> , 150 Wash.2d 251, 76 P.3d 217 (2003).....	41
<i>State v. Jesson</i> , 142 Wash.App. 852, 177 P.3d 139, <i>review denied</i> , 164 Wash.2d 1016, 195 P.3d 88 (2008)	35, 36
<i>State v. Jones</i> , 95 Wash.2d 616, 628 P.2d 472 (1981).....	61
<i>State v. Kirwin</i> , 165 Wash.2d 818, 203 P.3d 1044 (2009).....	30
<i>State v. Kyllo</i> , 166 Wash.2d 856, 215 P.3d 177 (2009)	53
<i>State v. Ladson</i> , 138 Wash.2d 343, 979 P.2d 833 (1999).....	47
<i>State v. Martinez</i> , 135 Wash.App. 174, 143 P.3d 855 (2006)	43
<i>State v. McFarland</i> , 127 Wash.2d 322, 899 P.2d 1251 (1995).....	30
<i>State v. Moody</i> , 7 Wash. 395, 35 P. 132 (1893).....	99, 100
<i>State v. Muller</i> , 114 Wash. 660, 195 P. 1047 (1921).....	99, 100
<i>State v. Nelson</i> , 108 Wash.App. 918, 33 P.3d 419 (2001).....	81
<i>State v. Nguyen</i> , 165 Wash.2d 428, 197 P.3d 673 (2008)	58, 62
<i>State v. O'Neill</i> , 148 Wash.2d 564, 62 P.3d 489 (2003).....	46
<i>State v. Parker</i> , 102 Wash.2d 161, 683 P.2d 189 (1984).....	57, 58
<i>State v. Parnell</i> , 77 Wn.2d 503, 463 P.2d 134 (1969).....	100

<i>State v. Patterson</i> , 183 Wash. 239, 48 P.2d 193 (1935)	99, 100
<i>State v. Paumier</i> , 155 Wash.App. 673, 230 P.3d 212 (2010)	70
<i>State v. Pentecost</i> , 64 Wash.App. 656, 825 P.2d 365 (1992)	36
<i>State v. Pittman</i> , 134 Wash.App. 376, 166 P.3d 720 (2006)	52, 56, 63
<i>State v. Pruitt</i> , 145 Wash.App. 784, 187 P.3d 326 (2008).....	71
<i>State v. Rankin</i> , 151 Wash.2d 689, 92 P.3d 202 (2004)	44
<i>State v. Reichenbach</i> , 153 Wash.2d 126, 101 P.3d 80 (2004) 33, 34, 52, 64	
<i>State v. Roberts</i> , 142 Wash.2d 471, 14 P.3d 713 (2000)	94
<i>State v. Rooks</i> , 130 Wash.App. 787, 125 P.3d 192 (2005)	55
<i>State v. Rutten</i> , 13 Wash. 203, 43 P. 30 (1895)	99, 100
<i>State v. Sargent</i> , 111 Wash.2d 641, 762 P.2d 1127 (1988) ... 86, 88, 89, 92, 93	
<i>State v. Saunders</i> , 91 Wash.App. 575, 958 P.2d 364 (1998)	64, 65
<i>State v. Schaaf</i> , 109 Wash.2d 1, 743 P.2d 240 (1987)	97
<i>State v. Schaler</i> , 169 Wash.2d 274, 236 P.3d 858 (2010)	68, 71, 74, 93
<i>State v. Setterstrom</i> , 163 Wash.2d 621, 183 P.3d 1075 (2008)	32
<i>State v. Smith</i> , 124 Wash.App. 417, 102 P.3d 158) <i>aff'd</i> , 159 Wash.2d 778, 154 P.3d 873 (2007) (“ <i>Smith II</i> ”).....	66, 67
<i>State v. Smith</i> , 150 Wash.2d 135, 75 P.3d 934 (2003) (“ <i>Smith III</i> ”).....	97
<i>State v. Smith</i> , 154 Wash.App. 272, 223 P.3d 1262 (2009) (<i>Smith I</i>).....	58
<i>State v. Stentz</i> , 30 Wash. 134, 70 P. 241 (1902)	99, 100
<i>State v. Strode</i> , 167 Wash.2d 222, 217 P.3d 310 (2009)	69
<i>State v. Walsh</i> , 143 Wash.2d 1, 17 P.3d 591 (2001).....	30

<i>State v. Ward</i> , 125 Wash.App. 243, 104 P.3d 670 (2004)	56, 63
<i>State v. Warden</i> , 133 Wash.2d 559, 947 P.2d 708 (1997)	61
<i>State v. White</i> , 135 Wash.2d 761, 958 P.2d 962 (1998)	32
<i>State v. Whitfield</i> , 99 Wash.App. 331, 994 P.2d 222 (1999)	66
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	45, 48
<i>State v. Workman</i> , 90 Wash.2d 443, 584 P.2d 382 (1978)	58
<i>State v. WWJ Corp.</i> , 138 Wash.2d 595, 980 P.2d 1257 (1999)	31
<i>State v. Xiong</i> , 164 Wash.2d 506, 191 P.3d 1278 (2008)	43
<i>State v. Young</i> , 123 Wash.2d 173, 867 P.2d 593 (1994).....	99
<i>State v. Young</i> , 22 Wash. 273, 60 P. 650 (1900).....	57
<i>Whren v. United States</i> , 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).....	47

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I.....	68
U.S. Const. Amend. IV	1, 3, 29, 31, 37, 38, 39, 41, 44, 45, 50
U.S. Const. Amend. V	79, 80, 84, 85
U.S. Const. Amend. VI.....	1, 2, 4, 5, 51, 68, 70, 71, 74, 94, 96
U.S. Const. Amend. XIV ...	1, 2, 4, 5, 31, 51, 68, 70, 71, 72, 73, 74, 79, 80, 84, 85, 94
Wash. Const. Article I, Section 10.....	68
Wash. Const. Article I, Section 21.....	94, 95, 96, 97, 100
Wash. Const. Article I, Section 22.....	4, 5, 52, 68, 74, 94, 96, 100

Wash. Const. Article I, Section 71, 3, 29, 31, 34, 35, 39, 41, 43, 45, 47, 48, 50	
Wash. Const. Article I, Section 9.....	80

WASHINGTON STATE STATUTES

RCW 10.61.010	57
RCW 4.44.170	101
RCW 9.94A.535.....	66
RCW 9A.32.050.....	55
RCW 9A.32.060.....	59
RCW 9A.32.070.....	59

OTHER AUTHORITIES

<i>Alward v. State</i> , 912 P.2d 243 (Nev. 1996)	37
CrR 3.5.....	9, 14, 17, 87
Doyle Baker, <i>Search and Seizure: Reasonable Expectation of Privacy in Tent or Campsite</i> 66 A.L.R.5th 373 (1999).....	37
<i>Hartnett v. State</i> , 42 Ohio St. 568 (1885)	98
<i>Kelley v. State</i> , 245 S.E.2d 872 (Ga. Ct. App. 1978).....	38
<i>Ochs v. People</i> , 25 Ill.App. 379 (1887)	98
<i>Olsen v. State</i> , 303 S.E.2d 309 (Ga. Ct. App. 1983).....	38
<i>People v. Hughston</i> , 168 Cal. App. 4th 1062 (2008).....	37
<i>People v. Schafer</i> , 946 P.2d 938 (Colo. 1997).....	37
RAP 2.5.....	30, 34, 43

<i>Rosky v. State</i> , 111 P.3d 690 (Nev. 2005).....	37
Sentencing Guidelines Commission, <i>Adult Sentencing Manual</i> 2000, Section III	63
<i>State v. Harvey</i> , 581 A.2d 483 (N.J., 1990).....	86
<i>State v. Winter</i> , 72 Iowa 627 (1887).....	97
W. Blackstone, <i>Commentaries on the Laws of England</i> (1765).....	73

ASSIGNMENTS OF ERROR

1. The trial court erred by admitting Mr. Slert's unwarned custodial statements to Ranger Nehring, Ranger Langley, and Ranger Kirschner.
2. The trial court erred by admitting statements that were not sufficiently insulated from Mr. Slert's prior unwarned custodial statements to Rangers Nehring, Langley, and Kirschner.
3. The trial court erred by admitting evidence obtained by exploiting Mr. Slert's unwarned custodial statements.
4. The trial court erred by admitting custodial statements made following Detective Wetzold's failure to scrupulously honor Mr. Slert's invocation of his right to remain silent.
5. The trial court erred by admitting Mr. Slert's unwarned custodial statements to Sheriff McCroskey during the drive from the scene to the jail.
6. The trial court erred by admitting Mr. Slert's custodial statements to detectives following his arrival at the jail, because those statements were tainted by his prior unwarned statements and by the failure to scrupulously honor his invocation of his right to remain silent.
7. The trial court erred by admitting evidence and statements obtained in violation of Mr. Slert's Fourth Amendment rights.
8. The trial court erred by admitting evidence and statements obtained in violation of Mr. Slert's right to privacy under Wash. Const. Article I, Section 7.
9. The trial court erred by denying Mr. Slert's motion to suppress evidence obtained from a warrantless search of his campsite.
10. The police violated Mr. Slert's right to privacy and his right to be free from unreasonable seizures by detaining him in handcuffs for nearly five hours without arresting him.
11. The trial court erred by admitting evidence obtained by exploiting the nearly five-hour detention.
12. Mr. Slert was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
13. Defense counsel was ineffective for failing to object to the admission of Mr. Slert's statements under the *corpus delicti* rule.

14. Defense counsel was ineffective for failing to propose instructions on the lesser-included offense of Manslaughter in the First Degree.
15. Defense counsel was ineffective for failing to propose instructions on the lesser-included offense of Manslaughter in the Second Degree.
16. Defense counsel was ineffective for failing to seek suppression (and/or to argue the correct grounds for suppression) of evidence and statements.
17. Defense counsel was ineffective for failing to argue Mr. Slert's mental health issues in mitigation of his sentence.
18. The trial court violated Mr. Slert's Sixth and Fourteenth Amendment right to confront witnesses by restricting cross-examination of jailhouse informant Schwenk.
19. The trial court violated Mr. Slert's Sixth and Fourteenth Amendment right to confront witnesses by restricting cross-examination of Sheriff McCroskey.
20. The trial court violated Mr. Slert's First, Sixth, and Fourteenth Amendment right to an open and public trial.
21. The trial court violated Mr. Slert's right to an open and public trial right by conducting a closed hearing in chambers and dismissing four prospective jurors.
22. The trial court violated Mr. Slert's Sixth and Fourteenth Amendment right to be present by dismissing four prospective jurors following a closed discussion in chambers.
23. The trial judge violated Mr. Slert's state constitutional right to a jury trial by refusing to excuse Juror No. 24 for cause and thereby forcing him to exhaust his peremptory challenges.
24. The court erred by entering Finding of Fact No. 1.A.11.
25. The court erred by entering Finding of Fact No. 1.A.14.
26. The court erred by entering Finding of Fact No. 1.A.15.
27. The court erred by entering Finding of Fact No. 1.A.17.
28. The court erred by entering Finding of Fact No. 1.B.2.
29. The court erred by entering Finding of Fact No. 1.C.3.
30. The court erred by entering Conclusion of Law No. 2.3.
31. The court erred by entering Conclusion of Law No. 2.4.

32. The court erred by entering Conclusion of Law No. 2.5.
33. The court erred by entering Order No. 3.1.
34. The court erred by entering Order No. 4.1.
35. The court erred by entering Order No. 4.2.
36. The court erred by entering Order No. 4.3.
37. The court erred by entering Order No. 4.4.
38. The court erred by entering Order No. 4.5.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person's custodial statements are presumed to be coerced and may not be admitted at trial unless the prosecution establishes they were preceded by Miranda warnings and a valid waiver of the right to remain silent. Here, the prosecution failed to establish that Mr. Slert was advised of his rights before being asked about Benson's death. Did the trial court err by admitting his unwarned custodial statements?
2. Police must scrupulously honor a suspect's invocation of his or her right to remain silent. In this case, Mr. Slert invoked his right to remain silent but even after this, detectives asked him questions and told him that his version of events was inconsistent with the evidence. Did the trial court err by refusing to suppress statements made after Mr. Slert invoked his right to remain silent?
3. Except in limited circumstances, police may not search a dwelling or its curtilage without a search warrant. In this case, the police failed to obtain a search warrant prior to searching Mr. Slert's tent and his campsite. Did the warrantless search of Mr. Slert's tent and campsite violate his Fourth Amendment right to be free from unreasonable searches and seizures and his right to privacy under Wash. Const. Article I, Section 7?
4. An investigatory seizure must be limited in duration, and officers must use the least intrusive means available to dispel or confirm their suspicions. Here, Mr. Slert was handcuffed and held at the scene for 5 hours while the officers investigated. Did the lengthy detention violate Mr. Slert's right to privacy under Wash. Const. Article I, Section 7?

5. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Mr. Slert's defense counsel unreasonably failed to request instructions on the lesser-included offense of Manslaughter in the First or Second Degree. Was Mr. Slert denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

6. A reasonably competent defense attorney must vigorously defend his or her client, and must be familiar with relevant legal authority. In this case, defense counsel failed to seek suppression of certain evidence and statements, and failed to argue the correct grounds for suppression. If Mr. Slert's suppression issues are not preserved for appellate review, was he denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

7. A reasonably competent defense attorney will argue for an appropriate sentence using available evidence that mitigates the offender's culpability. In this case, defense counsel failed to use Mr. Slert's mental health problems to make the case for a sentence below the top of the standard sentencing range. Was Mr. Slert denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

8. An accused person has the constitutional right to confront witnesses. Here, the trial court restricted Mr. Slert's opportunity to cross-examine a jailhouse informant regarding his credibility. The judge also limited cross of the sheriff regarding an electronic recording that may have been made regarding Mr. Slert's custodial statements. Did the restriction on cross-examination violate Mr. Slert's Sixth and Fourteenth Amendment right to confront witnesses?

9. An accused person has a constitutional right to a public and open trial. Here, the trial judge consulted with counsel in chambers and excused four prospective jurors based on their answers to a jury questionnaire. Did the trial judge violate Mr. Slert's right to a public trial under the Sixth and Fourteenth Amendments of the U.S. Constitution and Wash. Const. Article I, Section 22 by holding a hearing in chambers without first conducting any portion of a *Bone-Club* analysis?

10. An accused person has the constitutional right to be present at all critical stages of trial, including jury selection. In this case, the court met in chambers with counsel and excused four prospective jurors based on their answers to a jury questionnaire. Did the trial judge violate Mr. Slert's

right to be present under the Sixth and Fourteenth Amendments and under Wash. Const. Article I, Section 22?

11. The state constitutional right to a jury trial is violated when an accused person is forced to exhaust peremptory challenges to remove a biased juror, after the trial judge erroneously denies a challenge for cause. In this case, the trial judge erroneously denied a challenge for cause, and Mr. Slert was forced to exhaust his peremptory challenges removing the biased juror. Did the trial judge violate Mr. Slert's state constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A. On October 23, 2000 Kenneth Slert shot and killed a stranger during an altercation at Mr. Slert's campsite in the Gifford Pinchot National Forest.

On the evening of October 23, 2000, a stranger pulled up to Kenneth Slert's campsite in the Gifford Pinchot National Forest. RP¹ 491-492. Mr. Slert was at the time a 55-year-old veteran with a below average IQ, and diagnoses for anxiety disorder, panic disorder, and dysthymia.² RP 826-831, 840, 855-856; CP 1. He had no criminal history. CP 5.

Camping in that area of the National Forest is "dispersed camping", which means that people can camp wherever they wish, and that services like plumbing and electricity are not supplied. There are no

¹ The Verbatim Report of Proceedings for the trial was sequentially numbered, so citations to the trial will be simply to the page number. Citations to other hearings will include the date.

² Mr. Slert has been hospitalized more than once at Veteran's Administration hospitals for his mental health issues. RP 826-829

designated camp sites. RP (11/18/09) 23-24, 58, 65, 68-71. Mr. Slert's campsite was at a flat spot along a ridge, at the end of a dirt road off the main forest service road. RP (11/18/09) 49, 76. The campsite was surrounded by brush and tall timber. RP (11/18/09) 50. His tent consisted of two tarps tied with rope and twine onto a pole. RP (11/18/09) 53-54. The tent was perpendicular to the campsite's "driveway." RP (11/20/09) 38. An observer standing directly in front of the tent could see objects inside. RP (11/18/09) 50-54. An observer standing on the forest service road would not be able to make out details of the interior of the tent except by using binoculars. RP (11/18/09) 74. Near the tent, Mr. Slert had a fire ring, a chair, and a Coleman stove (set up on a log). RP (11/18/09) 82-83. The tent was small and primitive; most camping activities would have to take place in the campsite area surrounding it. RP (11/20/09) 66-69, 97.

When the truck pulled up that day, the driver, later identified as John Benson, invited Mr. Slert to sit in the cab and talk, and Mr. Slert climbed into the passenger side. The two of them spoke, passing a bottle of whiskey back and forth. RP 492, 548.

Benson was five feet ten inches tall, and weighed 235 pounds. RP 335. He was not accustomed to drinking, and was soon intoxicated. Subsequent testing revealed that he had a blood alcohol content of .23. RP 153-154, 405, 764-769. He became disagreeably belligerent, and the two

men began to argue. Benson made numerous anti-government statements, leaned across the seat and got in Mr. Slert's face, yelling and shoving Mr. Slert. Mr. Slert punched Benson once or twice in return. RP 492, 548-550, 616.

After this scuffle, Mr. Slert got out of the truck and walked across his campsite to light a lantern. Benson also got out of the truck and followed Mr. Slert. He pushed, shoved, and grabbed at Mr. Slert, "mauling him like a bear" and "putting his hands to Mr. Slert's throat." RP 492-494.

The two ended up at the entrance to Mr. Slert's tent, where Benson choked Mr. Slert. Mr. Slert broke free and crawled inside his tent to find his pistol. As Benson came after him through the tent entrance, he fired the pistol. RP 492. Mr. Slert crawled out of the tent, stepping over Benson's body in the dark. RP 495. As he stepped over Benson, Benson grabbed at his leg in what Mr. Slert later described as a "death grip." RP 517. Mr. Slert reacted by shooting Benson a second time. RP 495, 513. He knelt down next to Benson, and then walked around in shock for a while. He returned to his tent and sat down on his sleeping bag. Eventually, he fell asleep. RP 495, 513.

In the morning, after waking up and seeing the body, Mr. Slert took his antidepressant medication and drank more whiskey. RP 219; Exhibit 59; *see also* Transcript, Exhibit No. 132, Supp. CP. He covered

the body with a blue tarp from his vehicle, and tried, unsuccessfully, to call for help using Benson's cell phone and his CB radio. Unable to reach anyone (or to figure out how the cell phone worked), he got in his car and drove on the forest service road towards town. RP 495, 514, 745.

Mr. Slert flagged down a park ranger, and told him that he'd killed someone. RP 176-178. He told the ranger that he'd shot Benson because he was afraid of being choked to death, and that he'd been afraid for his life. RP 179, 187, 215, 217.

B. Mr. Slert was acquitted of first-degree murder; his conviction for second-degree murder was twice reversed on appeal.

After a delay of four years, the state charged Mr. Slert with Murder in the First Degree (with a firearm enhancement). CP 1-3. He was tried and the jury acquitted him of Murder in the First Degree, but convicted him of Murder in the Second Degree (with a firearm enhancement). Judgment and Sentence filed 6/18/2004, Supp. CP.

The Court of Appeals overturned his conviction because the trial court erroneously refused a jury instruction and because defense counsel provided ineffective assistance. Mandate with Unpublished Opinion (filed in Superior Court 9/19/2005), Supp. CP. Mr. Slert was convicted again on retrial; this second conviction was reversed because the trial judge violated the appearance of fairness doctrine, because of problems with jury

instructions, and because Mr. Slert was again deprived of the effective assistance of counsel. Judgment and Sentence filed 6/11/2007, Mandate with Unpublished Opinion (filed in Superior Court 6/2/2009), Supp. CP.

This timely appeal stems from his conviction following the third retrial. CP 13.

C. The trial court held a CrR 3.5 hearing to address the admissibility of Mr. Slert's statements.

Mr. Slert moved to suppress the statements he'd made, arguing (in part) that law enforcement did not scrupulously honor his invocation of rights. RP (11/18/09) 8-16; RP (11/20/09) 132-150; Motion to Suppress Statements, Memorandum of Authorities, State's Response to Motion to Suppress Statements, Supp. CP. The court held an evidentiary hearing on November 18 and 20, 2009.

1. Mr. Slert made statements to park rangers and law enforcement officers at the scene.

National Park Service Ranger Uwe Nehring testified that Mr. Slert flagged him down on the forest service road at 10:40 am, and told him that he had just shot someone and had the firearms with him in the car. RP (11/18/09) 18-19. Nehring directed Mr. Slert not to move and to put his hands outside his car window, while he seized the guns. RP (11/18/09) 19, 26-27. He asked what had happened, and Mr. Slert explained that he'd shot another person who had put him into a chokehold. RP (11/18/09) 20,

28. Ranger Nehring had Mr. Slert get out of the car, and took his knife from him. RP (11/18/09) 28.

Five to ten minutes after Mr. Slert flagged Nehring down, Ranger Kirschner and Ranger Langley arrived. RP (11/18/09) 21, 28. At that point, Nehring took Mr. Slert into “protective custody” and handcuffed him (although he testified that he did not have probable cause to arrest at that point). RP (11/18/09) 21, 28, 30, 33-34. Nehring then asked for Mr. Slert’s consent for a search of his car; he found alcohol, antidepressant medication, and ammunition. RP (11/18/09) 21, 31, RP (11/20/09) 8-9.

About twenty minutes after arriving, Ranger Langley put Mr. Slert into his forest service vehicle, still handcuffed. He and Kirschner drove Mr. Slert up to the campsite. RP (11/18/09) 33; RP (11/20/09) 29. On the way, they stopped and read Mr. Slert his rights. RP (11/18/09) 44; RP (11/20/09) 10. The rangers asked Mr. Slert for directions, but did not ask any questions about the incident. Despite this, Mr. Slert talked with them about the shooting during the entire 15 to 20 minute ride, both before and after he was administered his rights. RP (11/20/10) 10-14.

The rangers waited with Mr. Slert at the campsite for about 30-45 minutes; at that time Lewis County Sheriff’s Deputy Shannon arrived. RP (11/20/09) 19-20. She read Mr. Slert his rights. RP (11/18/09) 46, 226. Mr. Slert was still handcuffed in the back of Ranger Langley’s vehicle. RP

(11/18/09) 67, 233. Mr. Slert agreed to talk, and gave a brief summary of what had happened. RP (11/18/09) 47-49, 228.

Lewis County Sheriff's Detective Kurt Wetzold testified that he arrived at the campsite at 1:36 pm, and that he, too, read Mr. Slert his constitutional rights. RP (11/18/09) 90, 92. Mr. Slert agreed to talk with him, and described what had happened at the campsite. RP (11/18/09) 95-98. Mr. Slert remained in handcuffs the entire time he was at the site. RP (11/18/09) 191.

Detective Wetzold asked Mr. Slert to give a taped statement, and Mr. Slert initially agreed. RP (11/18/09) 98. Wetzold started the recording and read Mr. Slert his rights again. RP (11/18/09) 98-99. Mr. Slert asked "Would I be better saying nothing as opposed to telling what I just told you?" Suppression Exhibit 11, Supp. CP. After Wetzold said that he couldn't really answer that question, Mr. Slert said, "All right. Why don't we just leave it at that then and uh, I won't say any more." Suppression Exhibit 11, Supp. CP.

Detective Wetzold stopped questioning Mr. Slert, but only temporarily. RP (11/18/09) 101, 176. While they processed the scene, both Wetzold and Lewis County Sheriff's Detective Brown asked Mr. Slert questions about various items they'd found at the campsite. RP (11/18/09) 203, 205, 207. They did this without reviewing his rights again, despite the

fact that he'd invoked his right to remain silent. RP (11/18/09) 204-205. Wetzold did not recall telling Brown or any other officers that Mr. Slert had chosen to remain silent, and he acknowledged that other officers might have asked Mr. Slert questions as well. RP (11/18/09) 207.

While Mr. Slert was still at the scene, handcuffed, Wetzold confronted Mr. Slert with information that was allegedly inconsistent with Mr. Slert's prior statements. RP (11/18/09) 202-204. Mr. Slert said that he was sticking with the same story. RP (11/18/09) 204.

2. Mr. Slert made statements to Lewis County's elected sheriff while being transported to the jail.

Sheriff McCroskey took Mr. Slert from the site to the jail, a drive of roughly two hours. RP (11/18/09) 104, 130. McCroskey said he did not know if Mr. Slert had been arrested, if he had been read his rights, if he'd invoked his right to remain silent, or if he had made any statements. RP (11/18/09) 125-127. At the suppression hearing, he testified that they discussed the case during the two-hour drive. RP (11/18/09) 107.

McCroskey claimed that Mr. Slert brought up the case, but also admitted that he (McCroskey) asked Mr. Slert questions about the shooting. RP (11/18/09) 127-128, 141. He acknowledged that he may have initiated some of their conversations about the case. RP (11/18/09) 127-128. At some point, Mr. Slert told him that before encountering Ranger

Nehring, he'd contemplated killing himself, fleeing the scene, or having a standoff with police. RP (11/18/09) 102.

3. Mr. Slert made statements to Detectives Wetzold and Brown at the jail that evening.

Late in the day, Wetzold and Brown drove together from the scene toward Chehalis. Wetzold told Brown that he had read Mr. Slert his rights, but he did not remember telling her that Mr. Slert had invoked his rights. RP (11/18/09) 209. According to Brown, Wetzold never said that Mr. Slert had invoked his right to remain silent. Instead, Brown was told Mr. Slert had merely declined to give a taped statement. RP (11/20/09) 69, 72.

Detective Brown consulted by telephone with Chief Criminal Deputy Prosecuting Attorney David Arcuri, who advised her that a refusal to be recorded was not an invocation of the right to remain silent. RP (11/20/09) 71-72. Brown testified that she would not have interviewed Mr. Slert if she was aware that he'd invoked his rights. RP (11/20/09) 72-73.

Wetzold and Brown met with Mr. Slert at the jail at 9:26 pm. RP (11/20/09) 49, 75. Initially, neither of them readvised Mr. Slert of his *Miranda* rights: Brown testified that Wetzold simply reminded Mr. Slert that his rights were still in effect before the interview began. RP (11/20/09) 49, 75. Wetzold, by contrast, testified that he was not present

when Brown initiated the interview, and that he did not readminister *Miranda* rights at any time after his arrival. RP (11/18/09) 210-212.

They conducted an unrecorded interview with Mr. Slert for 78 minutes, according to Brown's report and testimony. They then asked Mr. Slert to give a taped statement. RP (11/18/09) 211; RP (11/20/09) 49-50, 75-76. Mr. Slert agreed, and his rights were read to him on the recording. RP (11/18/09) 211.

4. Former Chief Criminal Deputy Prosecuting Attorney Arcuri alleged that Sheriff McCroskey had violated the Privacy Act by secretly recording a conversation with Mr. Slert.

At the CrR 3.5 hearing, former Chief Criminal Deputy Prosecutor David Arcuri testified that he had met with elected Prosecutor Jeremy Randolph and Sheriff McCroskey, just before Mr. Slert was released from custody without being charged. RP (11/20/09) 89. Arcuri said that during this meeting, McCroskey made it clear that he had secretly recorded Mr. Slert during their car ride from the scene. RP (11/20/09) 90-108.

McCroskey claimed that he didn't remember such a meeting, and denied having recorded his conversations with Mr. Slert in the car. RP (11/18/09) 129, 137-138. Randolph also claimed he didn't remember discussing the issue. RP (11/19/09) 145, 171.

5. Following his release from jail, Mr. Slert called Detective Wetzold and spoke with him about the case over the telephone.

After Mr. Slert was released, he contacted Wetzold by telephone numerous times. Throughout these conversations, Mr. Slert spoke as though trying to remember what happened, trying to reconcile his scant memories of the event with the physical evidence. RP 514-521.

On the first such occasion, Mr. Slert asked when his car would be returned to him. RP (11/18/09) 178-179. They discussed the case and Wetzold reiterated that he thought Mr. Slert's statements were inconsistent with the evidence. RP (11/18/09) 179. Mr. Slert later called again about the car, and they again discussed Wetzold's concerns about "inconsistencies". RP (11/18/09) 181.

On October 31, 2000, Mr. Slert called Wetzold and told him that his brother, a paralegal, had advised him not to talk with the police. Mr. Slert asked Wetzold what he thought about that, and Wetzold responded that he could not give legal advice. RP (11/18/09) 183. Wetzold told Mr. Slert that since he wasn't charged with a crime, he wouldn't be offered an attorney. RP (11/18/09) 215. Mr. Slert asked if the court could provide an attorney to advise him, and Wetzold said no. RP (11/18/09) 215-216.

In May of 2001, Wetzold called Mr. Slert and asked to set up a meeting to discuss the case. RP (11/18/09) 184. Mr. Slert told him that he didn't have any new information, but that he would be willing to have a meeting if he could have an attorney present. RP (11/18/09) 184, 186.

They again discussed the case during this phone conversation. RP (11/18/09) 218. Wetzold told him that the court could not appoint an attorney because Mr. Slert was not charged with a crime, and so Mr. Slert would need to hire an attorney on his own. RP (11/18/09) 187. A meeting was not arranged. RP (11/18/09) 222.

6. After hearing evidence and argument, the court suppressed some of Mr. Slert's statements and ruled others admissible.

Judge Lawler suppressed statements made by Mr. Slert immediately after he'd invoked his rights at the campsite. RP (11/20/09) 155-156. However, he admitted Mr. Slert's statements to McCroskey in the car, finding Arcuri's statement (about the secret recording) unpersuasive. RP (11/20/09) 156-157. The judge also admitted the statements Mr. Slert made to Wetzold and Brown at the jail. RP (11/20/09) 159. Finally, he suppressed portions of Mr. Slert's phone conversations with Wetzold that related to obtaining an attorney. RP (11/20/09) 161-162. The court entered written findings and orders after the trial. Findings of Fact, Conclusions of Law and Order on Motions, Supp. CP.

D. The court denied Mr. Slert's motion to suppress evidence obtained without a search warrant.

Mr. Slert moved to suppress evidence obtained during the warrantless search of his campsite. He argued that officers needed a warrant to enter his tent and the surrounding curtilage. RP (11/18/09) 8-

16; RP (11/20/09) 132-150; Motion to Suppress Evidence, Memorandum of Authorities, State's Response to Motion to Suppress Evidence, Supp. CP. The court considered Mr. Slert's motion to suppress in conjunction with the CrR 3.5 hearing.

In addition to the evidence summarized above, the prosecution presented the evidence of National Forest Service Officer Tokach. He described the Forest Service's camping policies for the area of the Gifford Pinchot National Forest where Mr. Slert had camped. Tokach testified that camping in this area was free, and that he lacked the authority to require a camper to move. He gave an example: if one person set up a camp in a specific location, and another wanted that spot, he could not exclude either party from the location. RP (11/18/09) 58-60, 85-87.

Every witness who was asked about the area where Mr. Slert was camping confirmed that the campsite was in secluded area. No other people were seen in the vicinity during the day-long investigation. RP (11/18/09) 35-36, 121; RP (11/20/09) 41, 57.

On the morning after the shooting, Mr. Slert was handcuffed by Ranger Nehring around 10:50 am. RP (11/18/09) 18, 28. He remained in handcuffs as he was brought to the scene, where he remained while the officers investigated. He was still cuffed when he was put into McCroskey's car at 3:30 pm. RP (11/18/09) 105, 191.

Rangers Langley and Kirschner drove Mr. Slert up to his campsite to await the arrival of the sheriff's department and EMTs. RP (11/20/09) 17-21. At that time, Benson's body was on the ground near the entrance to Mr. Slert's tent, covered with a tarp. RP (11/20/09) 17. After an ambulance arrived, an EMT (accompanied by Ranger Langley) walked up to the body, checked for signs of life, and returned in a straight line to the perimeter. RP (11/18/09) 229-230; RP (11/20/09) 18-19.

When Deputy Shannon arrived, she secured the scene using yellow police tape. RP (11/18/09) 230. She then waited until Detectives Wetzold and Brown arrived. Without first obtaining a search warrant, Wetzold and other officers entered the campsite and searched the tent. They seized items, including some that were inside the tent and some that were in the area just outside the tent. RP (11/18/09) 102, 208; RP (11/20/09) 65.

The court excluded evidence seized from within the tent, but allowed the officers to testify to what they saw inside the tent while they stood immediately outside. RP (11/20/09) 194-199. The court found that Mr. Slert lacked any legitimate expectation of privacy in the area outside his tent, and refused to suppress any evidence obtained from the warrantless search of the campsite. RP (11/20/09) 195; Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP.

- E. The judge excused four potential jurors during a pretrial conference held in chambers, before the commencement of *voir dire*.

Prior to jury selection, the judge noted the following:

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.

This consultation, as well as the decision to excuse these four jurors, apparently took place during the “[p]retrial conference [which] was held in chambers.” Clerk’s Minutes (1/25/10) p. 1, Supp. CP.

During *voir dire*, Juror 24 indicated that he’d worked for the forest service in 2000, in the same area where Benson had died. RP 41. Juror 24 heard about Benson’s death at work, and may have discussed it with Officer Tokach, whom he knew well and considered a friend. RP 42-47. He also read about the incident, and may even have read internal forest service documents about the case on a computer at work. RP 42-45. He remembered thinking the story was “suspect” and that something wasn’t right about it. RP 42-43. He said that it “seemed fishy” at the time that the shooting was being called an accident. RP 45-47.

Juror 24 also said that he didn’t think he’d formed opinions about the case, but that hearing evidence could trigger memories, and by then it

would be too late to remove him as a juror. RP 43-45. He also told the court that that it would not be fair for him to be on the jury, and twice reiterated this position later during jury selection. RP 45-47, 79, 90. Even so, the court denied Mr. Slert's challenge for cause. RP 49. Mr. Slert used a peremptory challenge to remove Juror 24, and ultimately exhausted his peremptory challenges. Clerk's Minutes (1/25/10), Supp. CP.

F. At trial, the prosecutor introduced Mr. Slert's statements and other evidence that the court had refused to suppress.

At trial, the evidence against Mr. Slert consisted primarily of his own statements, supplemented by evidence from his campsite.

Ranger Nehring testified about his initial encounter with Mr. Slert on a forest service road. RP 177. He described Mr. Slert's first statements - that a stranger had come to the campsite, that they'd talked, drank, and scuffled, that the man got him into a chokehold, and that Mr. Slert drew his weapon and shot him in the throat. RP 179, 217. Mr. Slert answered questions about which gun he'd used, and about why the gun was fully loaded (he'd been afraid that more intruders might come to his camp). RP 184-186. When asked why it had taken him so long to report the death, Mr. Slert replied that he was upset and too drunk to drive. RP 180-181. He also confirmed that he'd had a drink that morning before driving down to find help. RP 181.

Ranger Kirschner relayed the statements Mr. Slert made during the drive back to the campsite. According to Kirschner, Mr. Slert said that a person came into his campsite, and that they drank and talked politics. Both became angry and the man grabbed Mr. Slert and was choking him. Mr. Slert said that he felt like he might die. RP 237. Kirschner also told the jury that Mr. Slert seemed intoxicated and smelled of alcohol. RP 228.

Detective Wetzold relayed the statements he'd obtained from Mr. Slert at the campsite, including the statement that he'd shot Benson a second time because he was "still moving." RP 495. He also provided details from the unrecorded jail interview, which happened that evening prior to Mr. Slert's taped statement. RP 509-510. According to Wetzold, Mr. Slert told them that Benson was bent over at the entrance to the tent when he shot Benson the first time. RP 510, 513. When he stepped over Benson after the first shot, Benson grabbed him and so Mr. Slert shot him again. RP 513. Mr. Slert initially said that he hadn't touched Benson's body, but then explained that he could have gotten blood on him when he kneeled next to him after the second shot. RP 511.

The prosecution also introduced Mr. Slert's recorded statement, (and a transcript of the statement). Exhibit 59, 132, Supp. CP.

G. The court limited Mr. Slert's cross-examination of convicted felon Douglas Schwenk and of Sheriff McCroskey.

The state used the testimony of Douglas Schwenk, an inmate who claimed that Mr. Slert had confessed to murdering Benson. RP 423-482. Schwenk was in custody with Mr. Slert while Mr. Slert was waiting for his second trial. RP 431-433. Schwenk was facing charges of Attempting to Elude a Pursuing Police Vehicle, Resisting Arrest, and Assault in the Third Degree. RP 434, 444. He was facing a sentence that he understood to be 90 months.³ RP 452. After he made a deal with the prosecution to testify against Mr. Slert, he was released with credit for time served. RP 434. According to Schwenk, Mr. Slert told him that he killed Benson in cold blood, because he "wanted the sick f***er dead." RP 433.

Through cross-examination, Mr. Slert sought to expose Schwenk as someone who was willing to lie and go to great lengths whenever it might benefit him. RP 442. The trial judge limited Mr. Slert's cross-examination of Schwenk in three areas. First, Schwenk had over 9 points, and the state had notified him that it would seek an exceptional sentence on his pending charges. Mr. Slert wanted to explore how standard ranges are determined, what Schwenk's standard range would have been, and Schwenk's understanding that his offender score (which was greater than

9 points) would automatically provide a basis for an exceptional sentence. RP 425-430, 444-452. The court prevented Mr. Slert from asking any details about Schwenk's criminal history, offender score, or standard range. RP 448-449.

Second, when Mr. Slert asked Schwenk if he'd ever gone by another name, or signed legal documents using a different name, the prosecutor objected on the basis that the question "call[ed] for collateral evidence." RP 436-437. Schwenk had filed a federal lawsuit⁴, alleging that he was actually a woman, wrongly incarcerated as a man, and that a guard had tried to rape him. In the lawsuit, he'd listed his a.k.a. as "Crystal Marie". RP 439, 442. The court ruled that Mr. Slert could ask no further questions relating to the lawsuit. RP 439-441.

Third, the court prevented cross-examination about Schwenk's firing of defense attorneys in an effort to get himself a better deal, about his repeated waivers of speedy trial to try and obtain a more favorable plea bargain, and about his filing of a complaint against his arresting officer in an effort to obtain leverage in his case. RP 453-455.

³Although each felony charge carried a maximum of 60 months in prison, Mr. Schwenk apparently expected to receive consecutive sentences. RP 445-446, 448, 452.

⁴ The lawsuit was later dismissed. RP 439.

The trial court also limited Mr. Slert's cross-examination of Sheriff McCroskey. McCroskey testified about the two-hour car ride to the jail. RP 616, 618, 620. He told the jury that Mr. Slert did not claim self-defense during their conversation. He also relayed Mr. Slert's statements about killing himself, running away, or having a standoff with police. RP 617. 633-634. The defense sought to cross-examine McCroskey about whether he'd secretly recorded Mr. Slert's statements, but the court prevented inquiry after McCroskey denied having made any recording. RP 624-631.

H. Mr. Slert presented evidence of his mental health problems.

Mr. Slert presented the testimony of Dr. Winters, a psychiatrist who had evaluated him at a Veteran's Administration hospital. Dr. Winters had diagnosed Mr. Slert with panic disorder, dysthymia, and anxiety. RP 826-850. Dr. Winters told the jury that Mr. Slert's anxiety interferes with his ability to reason things out and to remain calm under pressure. RP 832-833. He described Mr. Slert as someone who tends to react impulsively and irrationally. RP 833. He also testified that Mr. Slert would perceive a threat "more than usual," meaning (for example) that he might "feel[] threatened by a gesture which most people might not consider particularly threatening." RP 843. His combination of mental illnesses would distort his perception of threats, and cause him to overreact. RP 843-844.

Psychologist Dr. Trowbridge confirmed these conclusions. After reviewing Mr. Slert's records and administering tests, he described Mr. Slert as anxious, hypervigilant, easily frightened, and possessed of a poor memory. RP 852-866. He testified that Mr. Slert's mental health problems would likely cause him to be "more suspicious, more easily frightened, more fearful, just more anxious about [his] bodily integrity and worried something's going to happen to [him] that won't be good." RP 860-861. Like Dr. Winters, he testified that a person with Mr. Slert's condition would usually

perceive threats as being more dire than a normal person would perceive them under the same circumstances. They would be more fearful, more frightened, than a normal person would under the same circumstances... They're just anxious, fearful people who often see threat out there in their life...
RP 861.

He indicated that this person would "magnify" a threat he faced. RP 861.

- I. Defense counsel did not propose instructions on the lesser-included offense of manslaughter, or any other instructions that allowed the jury to take into account Mr. Slert's mental health issues, and the prosecutor exploited this fact in closing.

The court instructed the jury on the lawful use of force in self-defense or in resistance of a felony. Court's Instructions Nos. 7-19, Supp. CP. Defense counsel did not propose instructions on the lesser-included offenses of Manslaughter in the First or Second Degree. Nor did he offer any other instructions that would allow the jury to take into account Mr.

Slert's mental health issues when evaluating his reaction to the threat posed by Benson. Defendant's Proposed Jury Instructions, Supp. CP.

During closing arguments, the prosecutor exploited the tension between Mr. Slert's self-defense claim and his mental illness:

[The self-defense instruction] says reasonably believed...And sure, some medical condition that you're jumpy or you're anxious, you might believe that... but it's got to be reasonable... Look at [instruction] number two, "The slayer reasonably believed that there was imminent danger of such harm being accomplished." In other words ...he has to have reasonably believed that there was imminent danger that [Benson] was going to inflict death on him or great personal injury. [H]e has to actually believe that but it has to be reasonable. And then you have the third prong where, the "Slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer..." In other words, that would also mean not only would the defendant have had to reasonably believe that there was imminent danger that Mr. Benson was going to kill him or inflict great personal injury, he has to react with such force and means that a reasonable – reasonably prudent person would use....At that point... the defendant couldn't reasonably believe that there was imminent danger to himself of death or great bodily harm, personal injury, but he also can't – he has to use the force necessary that a reasonably prudent person, and that's a reasonably prudent person, that's not someone who, you know, you have a panic attack or anxiety, it's a reasonable prudent person would use that amount of force... In other words, again, if you have some condition that causes you to be jittery or jumpy, the law doesn't say that's a defense. It's a reasonably prudent person.
RP 895-896.

The prosecutor later reiterated that "the defendant could not have reasonably believed he was in imminent danger of being killed or

suffering great personal injury and he certainly didn't use a reasonable amount of force in any event." RP 907.

The prosecution returned to this theme during rebuttal closing:

This entire case then resolves around the issue of self-defense. Now, I'm not going to go into everything on this, but I will leave you with this: In instructions 7, 8, 9, and 10, the word "reasonable" appears eight times. Go back and read those instructions carefully because your version of what's reasonable is what you have to apply to the actions of that defendant over there.

...

There is no defense instruction in here for, gee, it's a defense to shooting some guy in the head that I was depressed or suffering from anxiety or overly fearful. You're not going to find that in here. You're going to find the word reasonable, and you 12 jurors, you decide what is reasonable and what isn't. RP 968, 970-971.

- J. Mr. Slert was convicted and sentenced to 280 months in prison, and he appealed.

The jury returned a guilty verdict, with a firearm special verdict. Verdict Form, Verdict Form Special, Supp. CP. At sentencing, defense counsel did not raise any arguments relating to Mr. Slert's mental health or his failed self-defense claim. RP (2/10/10) 2-14. Instead, defense counsel made only a very brief argument, offering sympathy to the victim's family and then suggesting that the court need not impose a sentence at the high end of the standard range:

The legislature enacted the sentencing guidelines and gave The Court a wide range of sentencing options here, some 97-month span. The Court heard the trial. The Court knows what the previous two courts did. But I'm not sure there is a basis in this

case to simply automatically go right to the high end and say, you know, 280 months, that's it, that's all, because the legislature has said that second degree murder which requires intent as this jury found in this case can get as low as 123 months. And the firearm, the fact that it was done with a firearm, is already accounted in the 60 months. So I don't know what there is about this case that makes it so automatically a high end.
RP (2/10/10) 7-8.

The court sentenced Mr. Slert to the high end of the standard range, imposing a total of 280 months in prison. Mr. Slert timely appealed.
CP 4-12, 13.

ARGUMENT

I. SUMMARY OF ARGUMENT

Kenneth Slert was convicted of Murder in the Second Degree following a third jury trial. The evidence against him consisted almost entirely of his own statements, many of which were obtained in violation of his Fifth Amendment privilege against self-incrimination after a detective failed to scrupulously honor Mr. Slert's invocation of his right to remain silent, as well as evidence unlawfully seized following a warrantless search of his car, tent, and campsite.

At trial, Mr. Slert was deprived of the effective assistance of counsel. First, his attorney neglected to seek exclusion of his statements under the *corpus delicti* rule, even though the prosecutor failed to introduce independent evidence establishing the elements of second-degree murder. Second, defense counsel failed to make all available constitutional arguments for suppression of evidence. Third, his attorney failed to propose appropriate instructions that would have allowed the jury to assess Mr. Slert's culpability in light of expert testimony showing that mental illness affected his ability to accurately assess and reasonably respond to threats. Fourth, defense counsel failed to make available arguments in favor of a sentence below the high end of the standard range, and Mr. Slert was sentenced to the top of the range.

In addition to erroneously denying Mr. Slert's motions to suppress, the trial court (1) violated his right to an open and public trial and his right to be present by excusing jurors during an *in camera* hearing, (2) violated his right to confront witnesses by restricting cross-examination, and (3) infringed his state constitutional right to an impartial jury by erroneously denying a challenge for cause and thereby forcing him to exhaust his peremptory challenges.

Mr. Slert has once again been convicted following a trial that was demonstrably unfair. Accordingly, his conviction must be reversed, the evidence suppressed, and the case remanded for a new trial, with instructions to correct the errors addressed in this brief.

II. THE TRIAL COURT SHOULD HAVE SUPPRESSED EVIDENCE OBTAINED IN VIOLATION OF MR. SLERT'S FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES AND HIS RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7.

A. Standard of Review

The validity of a warrantless search or seizure is reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.*

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, the appellant "must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant's] rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate

review.” *State v. McFarland*, 127 Wash.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wash.App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁵

B. The state and federal constitutions generally prohibit searches and seizures conducted without the authority of a search warrant.

The Fourth Amendment to the federal constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.⁶ Similarly, Article I, Section 7 of the Washington state constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const.

Article I, Section 7.⁷

⁵ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

⁶ The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

⁷ It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part

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Under both provisions, searches and seizures conducted without the authority of a search warrant “are *per se* unreasonable...subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

The state bears a heavy burden to show a search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

C. The prosecution failed to establish that Mr. Slert voluntarily consented to a search of his car.

Consent is one exception to the warrant requirement. *State v. Reichenbach*, 153 Wash.2d 126, 131-32, 101 P.3d 80 (2004). To admit evidence under the consent exception, the prosecution must establish that

Gunwall analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

consent was voluntarily given and that the officers did not exceed the scope of the consent. *Id.* The voluntariness of consent is a question of fact based on the totality of the circumstances. *Id.*, at 132. Factors to be considered include whether *Miranda* warnings were given, the degree of education, intelligence, experience, and sobriety of the person giving consent, whether the consenting person was advised of the right not to consent, and the conduct of the police. *Id.*; *U.S. v. Sanders*, 424 F.3d 768, 773 (8th Cir. 2005). Other factors may also be relevant depending on the totality of the circumstances, including any physical restraint on the person alleged to have consented, and whether the consent was obtained in a public or a secluded place. *Sanders*, at 773; *State v. Garcia*, 140 Wash.App. 609, 625-26, 166 P.3d 848 (2007).

In this case, the prosecution did not establish that Mr. Slert freely and voluntarily consented to a search of his car. First, Ranger Nehring had not provided *Miranda* warnings prior to seeking Mr. Slert's consent. RP (11/18/09) 21, 31; RP (11/20/09) 8-9. Second, Mr. Slert had mental health issues and a below-average IQ, had no criminal history, and had recently consumed alcohol. RP 228, 826-831, 840, 855-856; CP 1, 5. Third, nothing indicates that Mr. Slert was aware of his right to refuse consent. RP (11/18/09) 21, 31; RP (11/20/09) 8-9. Fourth, Mr. Slert was detained in

a very secluded area, and Nehring had taken him into custody and cuffed him. RP (11/18/09) 21, 28, 30, 33-36, 121; RP (11/20/09) 41, 57.

Under these circumstances, consent was not freely given.

Reichenbach, supra. Accordingly, Mr. Slert's conviction must be reversed and the evidence from his car suppressed.⁸ *Id.*

D. The warrantless search of Mr. Slert's campsite violated both the state and federal constitutions, because the police unlawfully intruded on the curtilage of Mr. Slert's dwelling.

Under both the state and federal constitutions, "the closer officers come to intrusion into a dwelling, the greater the constitutional protection." *State v. Chrisman*, 100 Wash.2d 814, 820, 676 P.2d 419 (1984) (citing *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). This is especially true in Washington, because the state constitution

explicitly protects the 'home.' ...[T]he home receives heightened constitutional protection [and is] a highly private place... In no area is a citizen more entitled to his [or her] privacy than in his or her home.

State v. Young, 123 Wash.2d 173, 184-185, 867 P.2d 593 (1994).

⁸ Although defense counsel did not make this argument in the trial court, the issue may be raised as a manifest error affecting Mr. Slert's rights under the Fourth Amendment and Wash. Const. Article I, Section 7. RAP 2.5(a)(3). In the alternative, counsel's failure to make the argument may be addressed as part of Mr. Slert's ineffective assistance claim, set forth elsewhere in this brief.

Residents also have a reasonable expectation of privacy in the curtilage (the area contiguous with a home). *State v. Jesson*, 142 Wash.App. 852, 858-859, 177 P.3d 139, *review denied*, 164 Wash.2d 1016, 195 P.3d 88 (2008). Police may not intrude into the curtilage without legitimate business, and they must stay within areas that are impliedly open to the public⁹ and conduct themselves in the manner of a reasonably respectful citizen. *Id.*

1. When used for camping, a tent lawfully erected on public lands is a dwelling with a curtilage.

The Fourth Amendment “protects people, not places.” *Katz*, at 351. Anything that a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Id.* Protection under the Fourth Amendment attaches whenever a person manifests a subjective expectation of privacy that society is willing to recognize as reasonable. *Bond v. United States*, 529 U.S. 334, 338-339, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000).

A person may have an objectively reasonable expectation of privacy in a lawfully erected tent, whether on private property or public

⁹ Whether a portion of the curtilage is impliedly open to the public depends on the totality of the circumstances. An access route is impliedly open to the public absent a clear indication that the owner does not expect uninvited visitors. *Jesson*, at 858-859.

lands.¹⁰ *LaDuke v. Nelson*, 762 F.2d 1318, 1326 n. 11, 1332 n. 19 (9th Cir.1985); *U.S. v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993); *see also* Doyle Baker, *Search and Seizure: Reasonable Expectation of Privacy in Tent or Campsite* 66 A.L.R.5th 373 (1999); *U.S. v. Sandoval*, 200 F.3d 659, 660-661 (9th Cir. 2000); *People v. Hughston*, 168 Cal. App. 4th 1062, 1068-1071 (2008); *People v. Schafer*, 946 P.2d 938, 944-945 (Colo. 1997); *Alward v. State*, 912 P.2d 243, 249 (Nev. 1996) *overruled on other grounds by Rosky v. State*, 111 P.3d 690 (Nev. 2005). A tent used for camping is thus equivalent to a home: “[a] dwelling place, whether flimsy or firm, permanent or transient, is its inhabitant's unquestionable zone of privacy under the Fourth Amendment, for in his [or her] dwelling a citizen unquestionably is entitled to a reasonable expectation of privacy.” *Kelley v. State*, 245 S.E.2d 872, 875 (Ga. Ct. App. 1978).

Because a lawfully erected tent used for camping constitutes a dwelling, the area surrounding the tent may qualify as protected curtilage. *Kelley*, at 875; *see also Olson v. State*, 303 S.E.2d 309, 311 (Ga. Ct. App. 1983). The state bears the burden of establishing that an area searched is outside the curtilage of a residence. *U.S. v. Johnson*, 256 F.3d 895, 901 (9th Cir. 2001). Questions relating to the curtilage

¹⁰ In Washington, a trespasser's tent receives no such protection. *State v. Pentecost*, 64 Wash.App. 656, 659-660, 825 P.2d 365 (1992); *State v. Cleator*, 71 Wash.App. 217, 220-
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should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by... We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a “correct” answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration— whether the area in question is so intimately tied to the home itself that it should be placed under the home’s “umbrella” of Fourth Amendment protection.

U.S. v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987).

A homeowner need not “take overt steps signaling [sic] that an area of the curtilage is private.” *State v. Hoke*, 72 Wash.App. 869, 877, 866 P.2d 670 (1994). Whether an area is located within a dwelling’s curtilage is a question of law, reviewed *de novo*. *U.S. v. Davis*, 530 F.3d 1069, 1077 (9th Cir. 2008).

2. The trial court failed to examine the *Dunn* factors, failed to enter appropriate findings, failed to determine what areas were within the curtilage of Mr. Slert’s campsite, and failed to address the legality of the officers’ intrusion into the campsite.

In this case, Mr. Slert’s tent was lawfully erected under the National Forest Service guidelines for dispersed camping. Suppression Hearing Exhibit 3; Finding No. 1.A.12, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP. Accordingly, it

222, 857 P.2d 306 (1993).

qualified as a dwelling, and was entitled to protection under the Fourth Amendment and Article I, Section 7. *LaDuke, supra; Gooch, supra*. Both the trial court and the Court of Appeals (in its previous decisions) recognized Mr. Slert's tent as a dwelling. Conclusion No. 2.2, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP; *State v. Slert*, No. 31876-8-II (Slert I), p. 3-4; *State v. Slert*, No. 36534-1-II (Slert II), p. 7 (see Mandates with Opinions, Supp. CP).

The trial court found, as a matter of law, that the tent was not surrounded by any curtilage, and that Mr. Slert had "had no legitimate expectation of privacy in any area outside of his tent." Conclusions Nos. 2.3, 2.4, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP. This finding was incorrect for three reasons.

First, the trial court did not examine the four factors identified by the Supreme Court in *Dunn* to determine what areas fall within a dwelling's curtilage. RP (11/20/09) 194-199; Findings Nos. 1.A.10-1.A.15, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP; *see Dunn*, at 301 (requiring examination of an area's proximity to a dwelling, its location inside or outside of an enclosure surrounding the home, the uses to which the area is put, and any steps taken to prevent observation of the area by passersby). Nor did the court make any findings relating to the *Dunn* factors.

Second, the court relied solely on the general characteristics of “dispersed site camping” to determine the extent of the curtilage and the legitimacy of Mr. Slert’s expectation of privacy. The court noted that the campsite was not in a public campground, was not numbered, could not be reserved, and could not be paid for in advance. Finding No. 1.A.13, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP. The court also noted that Mr. Slert did not have a legal right to exclude others from the campsite. Finding No. 1.A.15, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP. This focus on the general characteristics of “dispersed site camping” was inappropriate, and did not allow the court to properly determine the extent of the curtilage.

Third, although a “legitimate expectation of privacy” is relevant to determinations made under the Fourth Amendment, such expectations are irrelevant under the state constitution. Instead, Wash. Const. Article I, Section 7 protects against government intrusion into “those privacy interests that people in Washington have traditionally held as well as privacy interests they should be entitled to hold.” *State v. Jackson*, 150 Wash.2d 251, 276, 76 P.3d 217 (2003). If people in Washington have traditionally held a privacy interest in the curtilage of their temporary

dwellings, or if they should be entitled to hold such a privacy interest, then the curtilage of Mr. Slert's tent is likewise protected.

Not only did the court fail to ascertain which parts of the campsite fell within the tent's curtilage, the court also failed to make other necessary findings that would support admission of the evidence. For example, the court failed to determine which areas of the curtilage were impliedly open to the public, whether the officers conducted themselves in the manner of a reasonably respectful citizen, or whether any exception to the warrant requirement justified the repeated incursions into *the curtilage*. *RP (11/20/09) 194-199*; Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP. In the absence of such findings, the prosecution is presumed to have failed to sustain its burden of proof. *See, e.g., State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997) (In the absence of a finding on a factual issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue); *State v. Byrd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002) (same).

Because the court failed to examine the *Dunn* factors and failed to make appropriate findings regarding the extent of the curtilage and the

actions of the officers, the evidence from the campsite must be suppressed.¹¹ *Dunn, supra; LaDuke, supra; Gooch, supra.*

E. The officers violated Mr. Slert's rights under Article I, Section 7 by detaining him for nearly five hours without arresting him.¹²

Article I, Section 7 applies to detentions that fall short of formal arrest. *State v. Martinez*, 135 Wash.App. 174, 180, 143 P.3d 855 (2006). A seizure occurs following an officer's display of authority whenever a reasonable person would not feel free to leave or otherwise disregard the officer's request.¹³ *State v. Beito*, 147 Wash.App. 504, 509, 195 P.3d 1023 (2008). An investigatory detention is unlawful unless the state shows that the officers' actions were (1) justified at their inception, and (2) reasonably related in scope to the circumstances which justified the interference in the first place. *State v. Rankin*, 151 Wash.2d 689, 704, 92

¹¹ In the alternative, the case must be remanded for entry of findings. Upon remand, the trial court must address the *Dunn* factors, determine the extent of the curtilage, establish which parts of the curtilage were open to the public, decide whether the officers conducted themselves in the manner of a reasonably respectful citizen, and consider whether the state established an exception to the warrant requirement justifying entry into the curtilage. *See, e.g., U.S. v. Depew*, 210 F.3d 1061, 1067 (9th Cir. 2000) (remanding case for lower court "to determine whether the agents were within the curtilage.")

¹² Although defense counsel failed to make this argument in the trial court, the issue raises a manifest error affecting Mr. Slert's privacy rights under Wash. Const. Article I, Section 7. RAP 2.5(a)(3). In the alternative, counsel's failure constitutes deficient performance and is addressed as part of Mr. Slert's ineffective assistance claim, set forth elsewhere in this brief.

¹³ To justify a warrantless seizure, the police must be able to point to specific and articulable facts giving rise to an objectively reasonable belief that the person seized is engaged in

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P.3d 202 (2004). The reasonableness of the detention depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. *State v. Dorey*, 145 Wash.App. 423, 434, 186 P.3d 363 (2008).

Under the Fourth Amendment, courts consider three factors "in determining whether intrusion upon a suspect's liberty is so substantial that its reasonableness is dependent upon probable cause and hence cannot be supported by suspicion alone: (1) the purpose of the [detention], (2) the amount of physical intrusion upon the suspect's liberty, and (3) the length of time the suspect is detained." *State v. Belieu*, 112 Wash.2d 587, 595, 773 P.2d 46 (1989).

When detaining an individual for investigative purposes, the police must use the least intrusive means available, and the detention "must be limited as to [its] length." *Belieu*, at 599; *Dorey*, at 434. The length of an investigatory detention can, by itself, render the detention unconstitutional. *U.S. v. Place*, 462 U.S. 696, 709, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). The Supreme Court has said that

[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the

criminal activity or is armed and presently dangerous. *State v. Xiong*, 164 Wash.2d 506, 514, 191 P.3d 1278 (2008).

length of the detention, we take into account whether the police diligently pursue their investigation.

Id.; see also *State v. Williams*, 102 Wn.2d 733, 741-742, 689 P.2d 1065 (1984). In *Place*, the U.S. Supreme Court held that a 90-minute seizure of luggage was *per se* unreasonable. In *Williams*, the Washington Supreme Court held that a 35-minute detention “appear[ed] to approach excessiveness.” *Id.*, at 741.

The Fourth Amendment permits an intrusive or lengthy detention to be analyzed as an arrest; such a detention may be upheld if supported by probable cause. See, e.g., *Belieu* at 595. However, the Washington constitution does not allow such a result. Under Washington law, a lengthy or intrusive detention unaccompanied by formal arrest violates Article I, Section 7, regardless of whether or not the police have probable cause. This is so because the right to privacy protected by the state constitution does not tolerate legal fictions. Thus a search is not properly incident to arrest unless preceded by an actual custodial arrest:

Because a search cannot occur without “authority of law,” and the search incident exception to the warrant requirement is a narrow one, we conclude that the state constitution requires an actual custodial arrest before a search occurs. Otherwise, the search is in fact conducted without an arrest, and thus without authority of law existing at the time of the search. ...[I]t is the arrest, not probable cause to arrest, that constitutes the necessary authority of law for a search incident to arrest.

State v. O'Neill, 148 Wash.2d 564, 585-586, 62 P.3d 489 (2003).

This is in contrast to the federal rule, which permits the search to precede the arrest. *U.S. v. Powell*, 483 F.3d 836, 838-842 (D.C. Cir. 2007) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980)). Similarly, a vehicle stop made for pretextual reasons is illegal, even though objectively justified by a traffic violation:

[T]he problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason.

State v. Ladson, 138 Wash.2d 343, 351, 979 P.2d 833, 838 (1999).

By contrast, the federal constitution allows pretextual traffic stops. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

An indefinite or long-term detention prior to arrest violates Article I, Section 7. In this case, Mr. Slert was handcuffed and detained for nearly five hours before he was taken away from the scene. This lengthy detention included approximately 30 minutes where he flagged down Nehring (around 10:40 a.m.), the time it took to be transported back to the camping site, roughly 120 minutes spent waiting at the campsite for EMTs and officers to arrive, and 120 minutes spent waiting while the officers

investigated the scene. RP (11/18/09) 18, 28, 33, 125, 130, 188, 240, 244; RP (11/20/09) 29. During the entire period he was handcuffed, guarded, accompanied while he relieved himself, and kept at the scene, all without being placed under arrest. RP (11/18/09) 240, 244. Even when Sheriff McCroskey secured Mr. Slert in his car at approximately 3:30 p.m. for the two-hour ride to the jail, he didn't know whether or not Mr. Slert had been arrested. RP (11/18/09) 125-127. After his arrival at the jail, Mr. Slert was kept in a holding cell for approximately four hours without being booked into the jail, and then reinterrogated by Detectives Wetzold and Brown. RP (11/18/09) 213-214, RP (11/20/09) 72-73.

Under these circumstances, the pre-arrest detention was too intense and too long to be permissible under Article I, Section 7. *Place, supra; Williams, supra*. Mr. Slert was universally acknowledged to be cooperative, and nothing suggested that he posed a threat to any of the officers or aid workers. RP (11/20/09) 8. He should not have been cuffed and detained pending the officers' arrival and subsequent investigation.

Accordingly, the state failed to meet its "heavy burden" of establishing (by clear and convincing evidence) that the initial seizure and detention were conducted with the authority of law required by the state constitution. *Garvin, at* 250. The officers violated Mr. Slert's state

constitutional right to privacy. Evidence obtained by exploiting this illegal detention must be suppressed. *Id.*

F. The trial court should have excluded evidence and statements tainted by the unconstitutional 5-hour detention and by the illegal search of Mr. Slert's campsite.

Evidence derived from an unconstitutional search or seizure must be suppressed as fruit of the poisonous tree. *U.S. v. Williams*, ___ F.3d ___, ___ (6th Cir. 2010) (citing *Wong Sun v. U.S.*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Exclusion is required unless the connection between illegal police conduct and the evidence is so attenuated as to dissipate the taint. *Id.* at ___. The test is whether the evidence was discovered by exploitation of the illegality, or instead by means sufficiently distinguishable to be purged of the primary taint. *Id.* A reviewing court must consider temporal proximity (between the illegality and discovery of the evidence), the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* (quoting *Browash v. Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)). The prosecution bears the burden of proving that tainted evidence is admissible. *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982).

In this case, the officers violated Mr. Slert's Fourth Amendment rights and his rights under Article I, Section 7, as outlined above, by

searching his campsite without a warrant and by unlawfully detaining him for 5 hours while they investigated Benson's death. This requires suppression of all evidence tainted by the illegal intrusions. *U.S. v. Williams, supra*. This includes not only the evidence unlawfully seized from the campsite and statements obtained from Mr. Slert during the prolonged illegal detention, but also any subsequently obtained evidence derived from the unlawfully obtained evidence, such as Mr. Slert's later statements (insofar as they were obtained by exploitation of the illegally obtained evidence and statements), forensic analysis of the evidence from the crime scene, autopsy results, and so forth. *U.S. v. Williams, supra*.

All evidence tainted by the illegal searches and seizures must be suppressed. *Id.* Mr. Slert's conviction must be reversed and the case remanded for a new trial. *Id.* If the prosecution cannot proceed without the suppressed evidence, the case must be dismissed with prejudice.

III. MR. SLERT WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865,

16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

- B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.”

Reichenbach, at 130 (citing *Strickland v. Washington*, 466 U.S. 668, 104

S.Ct. 2052, 80 L.Ed.2d 674 (1984)); *see also State v. Pittman*, 134 Wash.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, though it is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- C. Defense counsel provided ineffective assistance by failing to object to admission of Mr. Slert’s statements for violation of the *corpus delicti* rule.

The *corpus delicti*, or body of the crime, must be proved by evidence sufficient to establish the charged crime. *State v. Brockob*, 159

Wash.2d 311, 329, 150 P.3d 59 (2006). The rule requires the prosecution

to present evidence that is independent of the defendant's statement and that corroborates not just *a crime* but *the specific crime* with which the defendant has been charged... The State's evidence must

support an inference that *the crime with which the defendant was charged* was committed... [This standard] requires that the evidence support not only the inference that *a crime* was committed but also the inference that *a particular crime* was committed.

Brockob, at 329. The independent evidence must support each element of the charged crime. *Id.*; accord *State v. Dow*, 168 Wash.2d 243, 254, 227 P.3d 1278 (2010) (noting that the prosecution “must still prove every element of the crime charged by evidence independent of the defendant's statement”) (citing *Brockob* at 328).

Where the *corpus delicti* is not established by independent evidence, failure to object to admission of an accused person's statements constitutes ineffective assistance. *State v. C.D.W.*, 76 Wash.App. 761, 764-765, 887 P.2d 911 (1995). Under such circumstances, “the failure to raise the issue of the *corpus delicti* rule... cannot be characterized as a trial strategy;” instead, it is “simply an inexcusable omission on the part of defense counsel.” *C.D.W.*, at 764. Furthermore, such deficient performance necessarily prejudices the defendant: in the absence of sufficient independent evidence, the defendant's statements are excluded and the defendant is acquitted. *C.D.W.*, at 764-765.

Prior to *Brockob*, the *corpus delicti* of all homicides (including murder) was thought to require proof only of “(1) the fact of death and (2) a causal connection between the death and a criminal act.” See, e.g., *State*

v. Rooks, 130 Wash.App. 787, 802, 125 P.3d 192 (2005). Since *Brockob*, however, it is clear that the *corpus delicti* of murder is different from the *corpus delicti* of manslaughter. Under *Brockob*, the *corpus delicti* of Murder in the Second Degree requires independent proof of (1) the fact of death, and (2) a causal connection between the death and an act committed with intent to cause the death. *Brockob, supra*; RCW 9A.32.050.

Here, the independent evidence was insufficient to establish the *corpus delicti* of Murder in the Second Degree. Even when taken in a light most favorable to the state, the independent evidence only established that Benson died as a result of gunshot wounds. Under the independent evidence presented, the wounds could have been accidentally inflicted or even self-inflicted. Apart from Mr. Slert's own statements, nothing in the record allowed the jury to even infer that he intended to kill Benson.

Had defense counsel properly objected to the admission of Mr. Slert's statements, the state would have been unable to proceed with a charge of murder, and may not even have been able to go forward with a manslaughter charge. *Brockob, supra*. Counsel's failure to object deprived Mr. Slert of the effective assistance of counsel. *C.D.W., supra*. His convictions must be reversed and his case remanded for a new trial. *Id.*

D. Defense counsel provided ineffective assistance by failing to seek instructions on the lesser-included offenses of Manslaughter in the First and Second Degree.

Defense counsel's failure to seek instructions on an inferior degree offense or a lesser-included offense can deprive an accused of the effective assistance of counsel. *State v. Grier*, 150 Wash.App. 619, 635, 208 P.3d 1221 (2009) review granted at 167 Wash.2d 1017, 224 P.3d 773 (2010) (citing *Pittman, supra*, and *State v. Ward*, 125 Wash.App. 243, 104 P.3d 670 (2004)). Counsel's failure to request appropriate instructions on a lesser offense constitutes ineffective assistance if (1) the accused person is entitled to the instructions and (2) under the facts of the case, it was objectively unreasonable for defense counsel pursue an "all or nothing" strategy.¹⁴ *Grier*, at 635.

RCW 10.61.010 guarantees the "unqualified right" to have the jury pass on the inferior degree offense if there is "even the slightest evidence" that the accused person may have committed only that offense.

¹⁴ A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused person's own version of events. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000). For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to an inferior degree instruction under appropriate circumstances: "If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." *Fernandez-Medina*, at 460-461.

State v. Parker, 102 Wash.2d 161, 163-164, 683 P.2d 189 (1984), (quoting *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)). The appellate court views the evidence in a light most favorable to the accused person. *Fernandez-Medina*, at 456. The instruction should be given even if there is contradictory evidence, or if other defenses are presented. *Id.* The right to an appropriate lesser degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker*, at 164.

Defense counsel’s failure to request instructions on manslaughter deprived Mr. Slert of the effective assistance of counsel. Mr. Slert was entitled to the instructions, and it was objectively unreasonable to pursue an “all or nothing” strategy. *Grier*, at 635.

1. Mr. Slert was entitled to instructions on manslaughter.

An accused person is entitled to an instruction on a lesser-included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed.¹⁵ *State v. Nguyen*, 165 Wash.2d 428, 434, 197 P.3d 673 (2008). In evaluating whether a lesser-included instruction is appropriate, the trial judge takes the evidence in a light most favorable to

¹⁵ This two-part legal/factual test is often referred to as the *Workman* test. See *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978).

the defendant. *State v. Smith*, 154 Wash.App. 272, 278, 223 P.3d 1262 (2009) (*Smith I*) (citing *Fernandez-Medina*, at 461).

Under the legal prong of the *Workman* test, manslaughter is a lesser-included offense of second-degree murder. *State v. Berlin*, 133 Wash.2d 541, 947 P.2d 700 (1997). A person is guilty of Manslaughter in the First Degree when “[h]e recklessly causes the death of another person.” RCW 9A.32.060. A person commits Manslaughter in the Second Degree when (acting with criminal negligence) he causes the death of another. RCW 9A.32.070.

Mr. Slert was entitled to instructions on both degrees of manslaughter because the facts, when taken in a light most favorable to him, suggest that he was only guilty of the lesser offense. This is so because of the interplay between his self-defense claim (which required him to act in the manner of a reasonable person)¹⁶ and his combination of

¹⁶ Mr. Slert’s self-defense claim required the jury to assess the reasonableness of his perceptions, beliefs, and actions in nine separate contexts. First, the jury had to assess the reasonableness of Mr. Slert’s belief that Benson “intended to commit a felony or to inflict death or great personal injury.” Second, the jury was required to assess the reasonableness of his belief that there was “imminent danger of such harm being accomplished.” Third, the jury was required to determine whether or not he “employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to [him]...” Instruction No. 7, Court’s Instruction to the Jury, Supp. CP. Fourth, the jury had to determine if Mr. Slert “reasonably believed” he was at risk of an injury that “would produce severe pain and suffering if it were inflicted upon [him]...” No. 8, Court’s Instructions to the Jury, Supp. CP. Fifth, the jury had to assess whether or not Mr. Slert believed “in good faith and on reasonable grounds that he [was] in actual danger of great personal injury...” No. 9, Court’s Instructions to the Jury, Supp. CP. Sixth, the jury had to determine how the circumstances “reasonably appeared” to Mr. Slert at the time of the

Continued

mental illnesses (which caused him to perceive a threat as more terrifying than a reasonable person might).¹⁷ In fact, the prosecutor highlighted the tension between Mr. Slert's self-defense claim and his combination of mental illnesses in closing:

[I]t says reasonably believed... And sure, some medical condition that you're jumpy or you're anxious... but it's got to be reasonable... [H]e has to use the force necessary that a reasonably prudent person, and that's a reasonably prudent person, that's not someone who, you know, you have a panic attack or anxiety, it's a reasonable prudent person would use that amount of force... In other words, again, if you have some condition that causes you to be jittery or jumpy, the law doesn't say that's a defense. It's a reasonably prudent person.
RP 895-896.

The state returned to this theme in rebuttal closing:

This entire case then resolves around the issue of self-defense. Now, I'm not going to go into everything on this, but I will leave you with this: In instructions 7, 8, 9, and 10, the word "reasonable" appears eight times. Go back and read those instructions carefully because your version of what's reasonable is what you have to apply to the actions of that defendant over there.
RP 968.

incident. Seventh, the jury had to determine whether there appeared to exist any "reasonably effective alternative to the use of force." Eighth, the jury had to determine whether "the amount of force used was reasonable..." No. 10, Court's Instructions to the Jury, Supp. CP. Ninth, the jury had to determine whether or not Mr. Slert had "reasonable grounds for believing that he [was] being attacked..." Instruction No. 11, Supp. CP. A similar analysis was required to assess Mr. Slert's claim that he acted in the lawful resistance of a burglary or attempted burglary. Nos. 14-19, Court's Instructions to the Jury, Supp. CP.

¹⁷ Two expert witnesses testified that Mr. Slert's anxiety interfered with his ability to reason and to remain calm, and caused him to be hypervigilant and afraid, to magnify threats and to overreact. RP 826-861.

There is no defense instruction in here for, gee, it's a defense to shooting some guy in the head that I was depressed or suffering from anxiety or overly fearful. You're not going to find that in here. You're going to find the word reasonable, and you 12 jurors, you decide what is reasonable and what isn't.
RP 970-971.

Taking the facts in a light most favorable to Mr. Slert, the evidence established that he did not intend to kill Benson, but instead unreasonably shot him in self-defense. Given the testimony about Mr. Slert's alcohol use and mental health issues, the jury was entitled to find that he acted recklessly or with criminal negligence when he shot Benson, committing either first- or second-degree manslaughter. *See, e.g., State v. Warden*, 133 Wash.2d 559, 564, 947 P.2d 708 (1997) ("The jury could have rationally found that Warden [who suffered from PTSD] lacked the intent to kill, and yet find she acted recklessly or negligently in causing [the] death"); *State v. Jones*, 95 Wash.2d 616, 623, 628 P.2d 472, 476 (1981) (manslaughter instruction required because jury evaluating intoxicated defendant's self-defense claim could find that defendant "recklessly or negligently used more force than was necessary to repel the attack."¹⁸ Therefore, Mr. Slert

¹⁸ *See also State v. Hughes*, 106 Wash.2d 176, 721 P.2d 902 (1986). In *Hughes*, the Supreme Court rejected the doctrine of imperfect self-defense, but held that a person in Mr. Slert's position could be convicted of manslaughter: "If a defendant subjectively thinks that self-defense is necessary and if that belief is reasonable, his or her use of force may be justified. If a defendant is aware that his or her acts create a risk of serious harm, but unreasonably disregards that risk, then the defendant can be found guilty of manslaughter instead of murder. The trial court correctly refused to instruct the jury on the doctrine of imperfect self-defense." *Hughes*, at 188-91 (footnotes omitted).

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was entitled to instructions on the lesser-included offenses of manslaughter. *Nguyen*, at 434.

2. It was objectively unreasonable for defense counsel to pursue an “all or nothing” strategy.

It was objectively unreasonable for Mr. Slert’s attorney to pursue an acquittal without hedging against possible conviction. First, the state’s evidence was strong. It was undisputed that Mr. Slert shot Benson, and there was compelling evidence that the second shot occurred with Benson largely immobilized on the ground. Even if the jury found that Mr. Slert acted reasonably in firing the first shot, the likelihood of an outright acquittal was limited, given the evidence relating to the second shot.

Second, the disparity in penalties was extreme. Had Mr. Slert been convicted of manslaughter instead of murder, his standard range would have been only 21-27 months incarceration (for second-degree manslaughter) or 78-102 months (for first-degree manslaughter). As convicted, his standard range was 123-220 months, and he received a base sentence of 220 months.¹⁹ *See* Sentencing Guidelines Commission, *Adult Sentencing Manual* 2000, Section III, pp. 134, 135, 137.

¹⁹ All prison terms are presented without the additional 60-month firearm enhancement.

Under the evidence presented, the jury might well have acquitted Mr. Slert of intentional murder and convicted him of manslaughter. Accordingly, as in *Grier, Ward, and Pittman*, defense counsel's failure to pursue the lesser-included offense was objectively unreasonable and prejudiced Mr. Slert. Because he was denied his right to the effective assistance of counsel, his convictions must be reversed and the case remanded to the trial court for a new trial. *Grier, supra*.

- E. If Mr. Slert's suppression arguments are not available on review, defense counsel was ineffective for failing to seek suppression and/or to argue the correct grounds for suppression of evidence and statements.

A defense attorney's failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In *Reichenbach*, the Supreme Court reversed the defendant's conviction and dismissed his case because defense counsel failed to seek suppression of evidence. *Reichenbach, supra*. The Court examined the merits of the suppression issue, concluded that the evidence should have

been suppressed, and held that defense counsel was ineffective for failing to seek suppression. *Id.*

In this case, defense counsel brought some (but not all) of the available challenges to the admission of Mr. Slert's statements and the unlawfully obtained evidence. *See* Motion to Suppress Statements, Motion to Suppress Evidence, Memorandum of Authorities, Supp. CP. If any errors relating to the admission of Mr. Slert's statements and other unlawfully obtained evidence are not preserved for review, then Mr. Slert was denied the effective assistance of counsel.

First, no legitimate strategic or tactical reason supported the admission of any of Mr. Slert's statements, or any of the unlawfully seized evidence. Without the statements, the prosecution would have had little or no evidence suggesting that Mr. Slert shot Benson, or that he intended to kill him. Had the other evidence been suppressed, there could not have been a homicide prosecution.

Second, had defense counsel objected to the statements and evidence, arguing proper grounds for suppression, they would not have been admitted, as argued elsewhere in this brief.

Third, the result of the trial would have been different had the statements and evidence been excluded. Much of the evidence used to convict Mr. Slert came from his own statements. Suppression of the

statements would have prevented the prosecution from pursuing a murder conviction, because it would have lacked evidence that Mr. Slert shot Benson, or that he acted with intent to kill the other man. Likewise, suppression of the other evidence would have derailed the prosecution: without the corpse, autopsy results, and other physical evidence unlawfully obtained from the campsite, the state would not have been able to charge Mr. Slert with any offense relating to Benson's death.

Accordingly, if errors relating to the admission of Mr. Slert's statements and other evidence are not preserved for review, Mr. Slert was denied the effective assistance of counsel. *Saunders, supra*. His conviction must be reversed and the case remanded to the trial court for retrial. *Id.*

F. Defense counsel was ineffective for failing to argue Mr. Slert's mental health issues and failed self-defense claim in mitigation of his sentence.

A criminal defendant has a right to the effective assistance of counsel at sentencing. *Detrich v. Ryan*, ___ F.3d ___, ___ (9th Cir. 2010). This includes a duty to investigate and present evidence and argument relating to mitigating factors. *See, e.g., Becton v. Barnett*, 2 F.3d 1149 (4th Cir. 1993). In Washington, a sentencing judge may impose a prison term below the standard range if "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535. A

failed defense may also justify a lower sentence. *State v. Smith*, 124 Wash.App. 417, 441 n. 18, 102 P.3d 158) *aff'd*, 159 Wash.2d 778, 154 P.3d 873 (2007) (“*Smith II*”) (citing *State v. Whitfield*, 99 Wash.App. 331, 336-37, 994 P.2d 222 (1999)).

Here, defense counsel presented evidence at trial relating to Mr. Slert’s mental health issues, which included panic disorder, dysthymia, and anxiety. Two experts opined that Mr. Slert’s problems interfered with his ability to remain calm, distorted his thinking, caused him to magnify threats and to react to them impulsively and irrationally. RP 826-866. In addition, much of the trial focused on whether or not Mr. Slert used reasonable force in defending against Benson’s violence and attempt to commit a felony.

Having presented evidence of mental health problems at trial, defense counsel should have brought it to the court’s attention at sentencing, and explained how it related to Mr. Slert’s capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law. Furthermore, defense counsel should have argued in favor of a lower sentence based on Mr. Slert’s failed self-defense claim. *See Smith II, supra*.

Mr. Slert was denied the effective assistance of counsel at sentencing. Accordingly his sentence must be vacated and the case

remanded to the trial court for a new sentencing hearing. *Detrich, supra*;
Becton, supra.

IV. MR. SLERT'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO CONDUCT A *BONE-CLUB* ANALYSIS PRIOR TO HOLDING A CLOSED HEARING IN CHAMBERS.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, ___, 236 P.3d 858 (2010). Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *In re Detention of D.F.F.*, 144 Wash.App. 214, 218, 183 P.3d 302 (2008) *review granted*, 164 Wash.2d 1034, 197 P.3d 1185 (2008).

B. Criminal trials must be open and public.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 723, ___ L.Ed.2d ___ (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259.

The court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct. at 724-725. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at 261-262, 257; *see also State v. Strode*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

The right to a public trial includes jury selection. *Brightman*, at 515; *Presley*, *supra*. Where even a portion of jury selection is unnecessarily closed, reversal is automatic. *Strode*, at 231 and 236 (six justices concurring); *Presley*, *supra*; *State v. Paumier*, 155 Wash.App. 673, 683-685, 230 P.3d 212 (2010).

C. The trial judge violated Mr. Slert's First, Sixth, and Fourteenth Amendment right to an open and public trial by conducting closed proceedings in chambers.

In this case, the trial judge excused four jurors²⁰ based on their questionnaire answers "after consultation with counsel."²¹ RP 5. Neither

²⁰ One of the four belonged to the alternate jury panel, which was later excused as a whole. Clerk's Minutes (1/25/10), Supp. CP.

²¹ The Clerk's Minutes indicate that the decision was made with the agreement of counsel. This appears to be the clerk's interpretation of the trial judge's announcement. Clerk's Minutes (1/25/10) p. 1, Supp. CP.

the consultation nor the reasons for the court's decision was put on the record or otherwise made available to the public.²² Nor did the court consider the *Bone-Club* factors. RP 5. Nothing in the record explains why this portion of jury selection was closed, or whether alternatives to closure were available.

Because the trial court ignored the dictates of *Bone-Club* (and the U.S. Supreme Court's *Presley* decision), Mr. Slert's conviction must be reversed, and the case remanded for a new trial. *Id.*

V. THE TRIAL JUDGE VIOLATED MR. SLERT'S CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY EXCUSING JURORS IN HIS ABSENCE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler*, at ____.

B. An accused person has a constitutional right to be present at all critical stages of trial.

A criminal defendant has a constitutional right to be present at all critical stages of a criminal proceeding. *U.S. v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Pruitt*, 145 Wash.App. 784, 788, 797-799, 187 P.3d 326 (2008). This right stems from

²² The consultation and decision apparently took place during the “[p]retrial conference [which] was held in chambers.” Clerk’s Minutes (1/25/10) p. 1, Supp. CP.

the Sixth Amendment's confrontation clause and from the Fourteenth Amendment's due process clause. *Gagnon*, at 526. Although the core of this privilege concerns the right to be present during the presentation of evidence, due process also protects an accused person's right to be present whenever "whenever his [or her] presence has a relation, reasonably substantial, to the fulness [sic] of his [or her] opportunity to defend against the charge." *Id.* Accordingly, "the constitutional right to be present at one's own trial exists 'at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure.'" *U.S. v. Tureseo*, 566 F.3d 77, 83 (2d Cir. 2009) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)).

C. Mr. Slert's conviction must be reversed because the trial judge violated his Fourteenth Amendment right to be present at all critical stages of trial.

The right to be present encompasses jury selection. This allows the accused person "to give advice or suggestion or even to supersede his lawyers." *Synder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Furthermore, "[a]s Blackstone points out, 'how necessary it is that a prisoner ... should have a good opinion of his jury the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a

prejudice even without being able to assign a reason for his dislike.” *U.S. v. Gordon*, 829 F.2d 119, 124 (D.C. Cir. 1987) (quoting 4 W. Blackstone, *Commentaries on the Laws of England*, 353 (1765)).

In this case, Mr. Slert was denied his Fourteenth Amendment right to be present during a critical stage of the proceedings. Prior to the start of trial, the trial judge excused four jurors based on their answers to jury questionnaires “after consultation with counsel” in chambers. RP 5; Clerk’s Minutes (1/25/10) p. 1, Supp. CP.

The trial court’s decision affected the makeup—and hence the fairness—of the jury that presided over Mr. Slert’s fate. Excusing jurors based on answers to a written questionnaire is functionally equivalent to excusing them for answers given during *voir dire*. The court’s decision to excuse those jurors in Mr. Slert’s absence violated his Fourteenth Amendment right to be present. *Gordon, supra; Gagnon, supra*. His conviction must be reversed and the case remanded for a new trial. *Id.*

VI. THE TRIAL COURT VIOLATED MR. SLERT’S RIGHT TO CONFRONT WITNESSES BY RESTRICTING CROSS-EXAMINATION OF TWO PROSECUTION WITNESSES.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at ____*.

Although evidentiary rulings are ordinarily reviewed for an abuse of

discretion, “this discretion is narrower (due to constitutional concerns) where the court limits a defendant's right to cross-examine witnesses against him.” *Childers v. Floyd*, 608 F.3d 776, 791 (11th Cir. 2010).

- B. The Sixth and Fourteenth Amendments guarantee the right to confront witnesses.

A criminal defendant has a constitutional right to confront witnesses against him. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most important aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wash.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974). The purpose of cross-examination

is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citations omitted).

- C. Mr. Slert should have been allowed great latitude in cross-examining Schwenk.

Cross-examination is particularly important when a witness has substantial incentive to cooperate with the prosecution. *Childers*, at 791.

This “heightened need for full cross-examination” also arises where the witness is a “star” witness, providing an essential link in the prosecution’s case. *Id.* The U.S. Supreme Court has long recognized that

[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination...

On Lee v. United States, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed. 1270 (1952).

In this case, the prosecutor’s use of the informant Schwenk raised “serious questions of credibility.” *On Lee*, at 757. Despite this, the trial judge limited Mr. Slert’s cross-examination of Schwenk. RP 437-443, 453-455, 473. This was error.

Schwenk was a “star” witness under *Childers*: he claimed to have heard Mr. Slert confess to murder, and his testimony was the only direct evidence suggesting that Mr. Slert intentionally killed Benson and was not acting in self-defense. In addition, Schwenk was a witness with substantial incentive to cooperate with the prosecution, because he received a significant reduction in his sentence in return for his testimony. RP 434-435, 443-446, 450-455, 437-472. Accordingly, Schwenk was a witness whose credibility should have been subject to heightened scrutiny through broad cross-examination. *Childers*, at 791.

Instead, however, the trial court unreasonably limited Mr. Slert's cross-examination on three critical points. First, the court improperly prevented Mr. Slert from exploring Schwenk's understanding of the benefit he received in return for his testimony. The court refused to allow cross-examination relating to Schwenk's offender score, his standard range, and the likelihood of an exceptional sentence. RP 443-455.

Second, the court erroneously prevented Mr. Slert from revealing the lengths to which Schwenk went to improve his plea bargain. This included repeatedly waiving his right to speedy trial and continually asking to have his court-appointed lawyers removed. RP 443-445.

Third, the court prevented Mr. Slert from exposing Schwenk as an opportunist who would go to great lengths for his own benefit. Specifically, the court restricted cross-examination about Schwenk's federal lawsuit (brought under the name "Crystal Maire") in which Schwenk claimed to be a woman wrongfully incarcerated in an all-male prison and sought damages for being raped by a male guard. RP 436-443.

Because the trial judge improperly restricted cross-examination of a critical state witness, Mr. Slert's conviction must be reversed and the case remanded for a new trial. *Childers, supra*.

D. Mr. Slert should have been allowed to cross-examine McCroskey regarding whether or not he'd illegally recorded their conversation.

Mr. Slert sought to test the “perception, memory and credibility” of McCroskey, the former elected sheriff, by cross-examining him about a recording he'd allegedly made while transporting Mr. Slert from the scene to the jail. RP 624-631; *Darden*, at 620. McCroskey denied the existence of the illegally-made recording. However, the trial court refused to allow Mr. Slert to inquire about whether or not he recalled discussing such a recording with the elected prosecutor and chief criminal deputy. RP 654. Instead, the court held that McCroskey could not be asked about the recording because its existence was “collateral.” RP 628.

While it is true that “a witness cannot be impeached on an issue collateral to the issues being tried,” the existence of the recording was hardly a collateral matter. *State v. Fankhouser*, 133 Wash.App. 689, 693, 138 P.3d 140 (2006). An issue is collateral if it is not admissible independently of the impeachment purpose: “a witness may be impeached on only those facts directly admissible as relevant to the trial issue.” *Id.*

Mr. Slert's position was that McCroskey had covertly recorded their conversation during the car ride and then suppressed the recording. The existence of a secret recording and McCroskey's subsequent suppression of the evidence was relevant not only to the substance of

McCroskey's testimony—Mr. Slert's alleged confession—but also to demonstrate McCroskey's bias. The facts Mr. Slert sought to elicit were therefore “directly admissible [and] relevant to the trial issue.” *Id.*

Mr. Slert had evidence corroborating his version of events, in the form of Mr. Arcuri's testimony. RP (11/20/09) 78-111. Although McCroskey and Arcuri disagreed, their disagreement was a subject for the jury to resolve.

The trial court should have allowed Mr. Slert to cross-examine McCroskey about the existence of the secret recording and his alleged suppression of that recording. *Id.* The trial court's restriction of this cross-examination violated Mr. Slert's right to confrontation. *Id.* His conviction must be reversed and the case remanded for a new trial, with instructions to allow the cross-examination should the issue arise on retrial. *Id.*

VII. THE TRIAL COURT VIOLATED MR. SLERT'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at ___*. A *Miranda* claim is an issue of law requiring *de novo* review. *State v. Daniels*, 160 Wash.2d 256, 261, 156 P.3d 905 (2007). Whether or not a person is in custody is a mixed question of law and fact subject to *de novo*

review. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

B. Custodial statements are presumed to have been obtained in violation of the Fifth and Fourteenth Amendment right to remain silent.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment.²³ U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Absent *Miranda* warnings, a suspect's statements during a custodial interrogation are presumed involuntary. *State v. Hickman*, ___ Wash.App. ___, ___, ___ P.3d ___ (2010).

To implement the privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694

²³ Similarly, Article I, Section 9 of the Washington State Constitution, provides that “No person shall be compelled in any case to give evidence against himself...” Wash. Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wash.2d 228, 235, 922 P.2d 1285 (1996).

(1966)); *State v. Nelson*, 108 Wash.App. 918, 924, 33 P.3d 419 (2001). Failure to provide the required warnings and obtain a waiver requires exclusion of any statements obtained. *Seibert*, at 608. It is “clearly established” that statements taken in the absence of counsel are inadmissible unless the government meets its heavy burden of showing that the suspect made a voluntary, knowing, and intelligent waiver of her or his rights. *Hart v. Attorney General of Florida*, 323 F.3d 884, 891-892 (C.A.11, 2003) (citing *Miranda*, at 475).

Custodial interrogation occurs whenever a person in custody is subjected to “either express questioning or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Thus *any* express questions posed to a person in custody must be preceded by *Miranda* warnings.²⁴ *Id.*

Whether or not a person is “in custody” for *Miranda* purposes rests upon “[t]wo discrete inquiries...: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” *Keohane*, at 112 (footnote

²⁴ The sole exception is for routine booking questions asked for record-keeping purposes. *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).

omitted). A reviewing court examines the totality of the circumstances and decides “whether a reasonable person in such circumstances would conclude after brief questioning that he or she would not be free to leave.” *U.S. v. Brobst*, 558 F.3d 982, 995 (C.A.9, 2009) (citation and internal quotation marks omitted). If a reasonable person would not feel at liberty to terminate the interrogation and leave, the circumstances are equivalent to formal arrest and the person is ‘in custody’ for *Miranda* purposes. *Keohane*, at 112.

Factors relevant to the ‘in custody’ determination include (1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual. *Brobst*, at 995. The use of handcuffs or retention of a suspect’s property will ordinarily establish that the suspect is in custody. *See, e.g., U.S. v. Martinez*, 462 F.3d 903, 909 (8th Cir. 2006) (use of handcuffs); *U.S. v. Chavira*, ___ F.3d ___, ___ (5th Cir. 2010) (retention of property).

C. The trial court should have suppressed Mr. Slert’s initial unwarned custodial statements to Rangers Nehring, Langley, and Kirschner.

Mr. Slert was in custody for *Miranda* purposes shortly after he flagged down Ranger Nehring. Nehring directed him not to move, and

ordered him to hold his hands out of his car window. Nehring seized his guns, and then ordered him out of his car. Once out of the car, Nehring took his knife from him, and, within minutes handcuffed him and took Mr. Slert into “protective custody.” RP (11/18/09) 18-21, 26-28, 30, 33-34.

Under these circumstances, a reasonable person would not have felt free to terminate the interaction. *Keohane, supra*. Mr. Slert was not administered *Miranda* warnings until he was transported away from the place he encountered Nehring; accordingly, the prosecution failed to overcome the presumption that his first few custodial statements were coerced in violation of his Fifth and Fourteenth Amendment privilege against self-incrimination. RP (11/18/09) 16-88, 223-224; RP (11/20/09) 4-41; *Seibert, supra*. Any statements Mr. Slert made to Rangers Nehring, Langley, and Kirschner (other than his initial noncustodial statement) must be suppressed. *Id.*

D. The trial court should have suppressed statements and evidence derived from the failure of the police to scrupulously honor Mr. Slert’s invocation of his right to remain silent.

1. Police must scrupulously honor an invocation of the right to remain silent.

If an accused person invokes her or his right to remain silent, the police must “scrupulously honor[.]” the request to cut off questioning.

Michigan v. Mosley, 423 U.S. 96, 104-106, 96 S.Ct. 321, 326-328, 46

L.Ed.2d 313 (1975). Where the request is not “scrupulously honored,” subsequent statements cannot be used at trial.²⁵ *Id*; see also *U.S. v. Lafferty*, 503 F.3d 293, 304-305 (3d Cir. 2007).

Courts examine four factors to determine whether or not a request to cut off questioning has been “scrupulously honored”: “(1) whether a significant amount of time lapsed between the suspect’s invocation of the right to remain silent and further questioning; (2) whether the same officer conducts the interrogation where the suspect invokes the right and the subsequent interrogation; (3) whether the suspect is given a fresh set of *Miranda* warnings before the subsequent interrogation; and (4) whether the subsequent interrogation concerns the same crime as the interrogation previously cut off by the suspect.” *Lafferty*, at 303 (citing *Mosley*, at 105-106).

2. Evidence must be suppressed when it is obtained by exploiting violations of an accused person’s Fifth and Fourteenth Amendment privilege against self-incrimination.

A failure to scrupulously honor invocation of the right to silence can also taint later interactions between the accused person and the police.

²⁵ This is referred to as a *Mosley* violation.

U.S. v. Tyler, 164 F.3d 150, 157-58 (3d Cir. 1998). This is true even if the suspect initiates the later communication.²⁶

At a minimum, the suspect must be administered *Miranda* warnings before subsequent statements can be lawfully obtained. Other factors used to determine the admissibility of later statements include (1) the amount of time that passed between the violation and the later statements, (2) the subject matter of the second conversation, and (3) whether the later interaction involved coercive or overbearing interrogation. *Tyler*, at 157-158 (citing *Campaneria v. Reid*, 891 F.2d 1014 (2d Cir.1989)). Neither the U.S. Supreme Court nor any published Washington decision has ever permitted the introduction of statements made after a failure to scrupulously honor a suspect's invocation of rights.²⁷

²⁶ See, e.g., *State v. Sargent*, 111 Wash.2d 641, 762 P.2d 1127 (1988), which addressed a confession that followed two days after custodial interrogation conducted without benefit of *Miranda* warnings: "[T]he fact that Sargent thought about his predicament for several days before calling Bloom [a probation officer] does not render the telephone call or the subsequent confession voluntary. The call and the confession were 'sparked' by Bloom's statements in the first interview... The passage of time and the opportunity for reflection do not render the confession voluntary if the reflection was prompted by an improper interrogation." *Sargent*, at 654.

²⁷ But see, e.g., *State v. Harvey*, 581 A.2d 483, 488 (N.J., 1990) (finding that taint eventually dissipated after officers initially failed to scrupulously honor suspect's invocation of his right to remain silent); *U.S. v. Bautista*, 145 F.3d 1140, 1150 (10th Cir. 1998) (taint between *Mosley* violation and second interrogation dissipated by intervening 6-day period).

3. Mr. Slert's invocation of his right to remain silent was not "scrupulously honored;" accordingly, his post-invocation statements must be suppressed.

In this case, Mr. Slert unequivocally invoked his right to remain silent. Suppression Hearing Exhibit 11, Supp. CP; Finding No. 1.A.9, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP; RP (11/18/09) 99-101, 127, 176, 197-202, 204. The trial court presiding over Mr. Slert's first trial found that this invocation was not "scrupulously honored." Attachment 1, State's Response to the Defendant Motion to Suppress Statemetns [sic] (CrR 3.5), Supp. CP. The court suppressed post-invocation statements made by Mr. Slert at the scene, but refused to suppress his subsequent statements; this decision was upheld by the Court of Appeals in Mr. Slert's first appeal. See *State v. Slert I*, Slip. Op. pp. 9-11; Mandate with Unpublished Opinion filed 9/19/2005.

Revisiting this issue prior to Mr. Slert's third trial, the judge reaffirmed that Mr. Slert's post-invocation statements at the scene would be excluded. However, the court ruled admissible Mr. Slert's statements to Sheriff McCroskey (during the drive to the jail), his statements to detectives (during interrogation at the jail), and his statements during a polygraph (the next day). Findings Nos. 1.B.11, 1.C.2-1.C.7, Order Nos. 4.1-4.5, Findings of Fact and Conclusions of Law and Order on Motion to

Suppress, Supp. CP. This decision was incorrect, because the trial judge failed to analyze the effect of the violation on Mr. Slert's subsequent statements.

Mr. Slert was not readministered *Miranda* warnings after Wetzold violated his right to remain silent; therefore, his later statements to McCroskey were inadmissible *per se*. *Tyler*, at 157-158. In addition, the car-ride conversation took place shortly after the *Mosley* violation, and focused on the same subject matter, with McCroskey asking clarifying questions. RP (11/18/09) 107-108, 127-128, 139, 141.

Accordingly, in addition to the dispositive factor (McCroskey's failure readminister *Miranda* warnings), two of the three factors identified in *Tyler* favor suppression. *Id.* Wetzold's improper questions, seeking an explanation for alleged inconsistencies between Mr. Slert's pre-invocation statements and the physical evidence, likely prompted Mr. Slert to explain the events to McCroskey in the car ride to the jail. It is irrelevant that Mr. Slert may have "initiated" the conversation with McCroskey, since this alleged "initiation" was caused by Wetzold's violation. *See, e.g., Sargent, supra.*²⁸ For all these reasons, Mr. Slert's statements to McCroskey—

²⁸ *Sargent* involved a simple failure to administer *Miranda* warnings. Its reasoning applies with even greater force to Mr. Slert's case, since he actually invoked his right to remain silent, which Wetzold ignored.

whether spontaneous or prompted by McCroskey's questions—should have been suppressed. *Tyler, supra; Sargent, supra.*

Following the car-ride conversation, Mr. Slert was interrogated at the Lewis County Jail. RP (11/18/09) 210. The jail interrogation followed a two-step format: a 78-minute unrecorded interview was followed by a tape-recorded interrogation. RP (11/20/09) 48-51. Both statements taken at the jail should have been suppressed.

First, the record established that the detectives did not readminister *Miranda* prior to the unrecorded portion of the interview.²⁹ At the suppression hearing, Detective Brown testified that Wetzold simply reminded Mr. Slert that his rights were still in effect before the unrecorded interview began.³⁰ RP (11/20/09) 49. Wetzold, by contrast, testified that he was not present when Detective Brown initiated the interview, and that he did not readminister *Miranda* rights at any time after his arrival. RP (11/18/09) 210-212.

Furthermore, the trial court did not specifically find that *Miranda* rights were readministered at the start of the unrecorded interview. Instead, without distinguishing between the 78-minute unrecorded

²⁹ The detectives did readminister *Miranda* rights prior to the recorded portion of the interview. RP (11/20/09) 49-50.

³⁰ This course of action was consistent with her erroneous understanding that Mr. Slert had NOT invoked his rights at the scene. RP (11/20/09) 71-73.

interview and the subsequent taped interview, the court found that the detectives asked him “if he wanted to provide a taped statement,” read him *Miranda* warnings, and then obtained his agreement to provide a taped statement. Findings Nos. 1.C.2 and 1.C.3, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP.

The absence of a specific finding on this issue suggests that the prosecution failed to meet its heavy burden of establishing a proper waiver. *See, e.g., State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997) (In the absence of a finding on a factual issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue); *State v. Byrd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002) (same). The absence of a finding in this case is particularly telling, since the readministration of warnings was essential to dissipate the taint of the earlier *Mosley* violation. *Tyler*, at 157-158.

Second, the court did not make a finding on the amount of time that passed between the *Mosley* violation and the jail interview.³¹ Nor did the court make a finding about the passage of time between the car-ride

³¹ The court did find that six hours passed between the time Mr. Slert invoked his rights and the commencement of the jail interview. Finding No. 1.C.2, Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP. Wetzold could not recall the time of the *Mosley* violation (although he'd apparently said that it had occurred between 2:00 and 3:30 p.m.) RP (11/18/09) 205.

conversation and the start of the jail interview. Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP.

Third, the jail interview involved the same subject matter as the *Mosley* violation. It also involved the same subject matter as the car-ride conversation with McCroskey. RP (11/18/09) 89-141, 175-222; RP (11/20/09) 41-77.

Fourth, the trial court did not make a finding as to whether the detectives acted in an overbearing or coercive manner. Findings of Fact and Conclusions of Law and Order on Motion to Suppress, Supp. CP. In the absence of such a finding, the state is presumed to have failed to sustain its burden. *Armenta, supra; Byrd, supra.*

Under all of these circumstances, Mr. Slert's statements at the jail should have been suppressed. *Tyler, at 157-158.* This applies not only to the initial unrecorded statement, but also to the recorded statement that followed, because the interrogation continued without a break, without a change of location, and without a change of personnel. Thus the recorded interview continued the *Mosley* violation initiated by Wetzold at the scene, exacerbated by McCroskey's car-ride conversation with Mr. Slert, and extended by the 78-minute unrecorded interview.³²

³² Furthermore, the tape-recorded interview was not insulated from the preceding unwarned interrogation, even absent an earlier *Mosley* violation. Thus, the recorded interview should

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It is not clear from the record whether or not statements made in connection with Mr. Slert's polygraph examination were introduced at trial. Such statements should have been suppressed, since they were inevitably tainted by the statements unlawfully obtained on the preceding day. *Sargent, supra*.

Wetzold's statement apparently continued to weigh heavily on Mr. Slert even after he was released, as evidenced by his telephone calls. During many conversations, Mr. Slert went over the facts repeatedly, trying to understand how his memories of what occurred could make sense in light of the physical evidence. RP 514-521, 529-531. It is irrelevant that he was not in custody, or that he "initiated" some of those telephone calls, because, as in *Sargent, supra*, they were prompted by the *Mosley* violation (and by the subsequent exploitation of that violation).

have been suppressed under the test enunciated in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

VIII. THE TRIAL JUDGE VIOLATED MR. SLERT'S STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL BY ERRONEOUSLY DENYING A CHALLENGE FOR CAUSE AND THEREBY FORCING HIM TO EXHAUST HIS PEREMPTORY CHALLENGES.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler*, at _____. A ruling on a challenge for cause is reviewed for abuse of discretion. *State v. Gonzales*, 111 Wash.App. 276, 278, 45 P.3d 205 (2002).

B. Erroneous failure to excuse a juror for cause violates an accused person's state constitutional right to a jury trial when the accused is forced to exhaust peremptory challenges.

Under federal law, an accused person who is forced to exhaust peremptory challenges to cure an erroneous denial of a challenge for cause is not entitled to a new trial unless convicted by a jury that includes a biased juror. U.S. Const. Amend. VI;³³ *State v. Fire*, 145 Wash.2d 152, 165, 34 P.3d 1218 (2001) (plurality) (citing *U.S. v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), and *State v. Roberts*, 142 Wash.2d 471, 14 P.3d 713 (2000)).

However, as with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the

³³ The Sixth Amendment to the U.S. Constitution is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

federal right. *See, e.g., City of Pasco v. Mace*, 98 Wash.2d 87, 97, 653 P.2d 618 (1982). Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 22 provides that “[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury...” The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

In *Fire, supra*, the court noted that the defendant had not provided a *Gunwall* analysis. The court reviewed its prior cases and determined that none compelled a departure from the federal standard. *Fire*, at 159-163 (plurality). The court did not *sua sponte* undertake a *Gunwall* analysis.

Since no published opinion has ever examined the issue under *Gunwall*, Mr. Slert provides the analysis here. Applying the *Gunwall* factors to this issue, an independent application of the state constitution requires reversal of Mr. Slert’s convictions.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury shall remain inviolate...” The strong, simple, direct, and mandatory language (“shall remain inviolate”) implies a high level of protection, and, in fact, the court has noted that the

language of the provision requires strict attention to the rights of individuals. *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711 (1989). In addition, Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury...” Again, the direct and mandatory language (“shall have the right”) implies a high level of protection. The existence of a separate section specifically referencing criminal prosecutions further emphasizes the importance of the right to a jury trial in criminal cases. Thus, the language of Article I, Section 21 and Article I, Section 22 favors the independent application of the state constitution advocated by Mr. Slert.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. The Federal Sixth Amendment and Wash. Const. Article I, Section 22 are similar in that both grant the “right to . . . an impartial jury.” But Wash. Const. Article I, Section 21, which declares “[t]he right of trial by jury shall remain inviolate” has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace* found the difference between the two constitutions significant, and determined that the state

constitution provides broader protection.³⁴ Thus, differences in the language between the state and federal constitutions also favor an independent application of the state constitution in this case.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21 “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, at 96. *See also State v. Schaaf*, 109 Wash.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wash.2d 135, 151, 75 P.3d 934 (2003). No Washington territorial cases address the situation presented here. The majority of other jurisdictions did not require reversal where an accused person was forced by an erroneous ruling to exhaust peremptory challenges. *See, e.g., State v. Winter*, 72 Iowa 627 (1887); *Ochs v. People*, 25 Ill.App. 379 (1887). *But see Hartnett v. State*, 42 Ohio St. 568 (1885) (reversal required when court erroneously denies challenge for cause and forces defendant to exhaust peremptory challenges). Accordingly, the third *Gunwall* factor does not support Mr. Slert’s argument.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire*

³⁴ The court held that under the state constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” This is in contrast to the more limited

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Prot. Dist. No. 5 v. City of Moses Lake, 150 Wash.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62). Pre-existing state law favors an independent application of the state constitutional right to a jury trial. After statehood and the adoption of the constitution, a long line of Washington cases departed from the rule developed in other states. This line of Washington cases held (or, in some cases, noted in *dicta*) that the erroneous denial of a challenge for cause was not cured when an accused person was forced to exhaust peremptory challenges in removing the challenged juror.³⁵ Pre-existing state law favors the interpretation urged by Mr. Slert.

The fifth *Gunwall* factor (structural differences in the two constitutions) always points toward pursuing an independent analysis, “because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State’s power.” *State v. Young*, 123 Wash.2d 173, 180, 867 P.2d 593 (1994).

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The protection afforded a

protections available under the federal constitution. *Pasco v. Mace*, at 99-100.

³⁵ See, e.g., *State v. Moody*, 7 Wash. 395, 35 P. 132 (1893); *State v. Rutten*, 13 Wash. 203, 43 P. 30 (1895); *State v. Stentz*, 30 Wash. 134, 70 P. 241 (1902); *State v. Muller*, 114 Wash. 660, 195 P. 1047 (1921); *McMahon v. Carlisle-Pennell Lumber Co.*, 135 Wash. 27, 236 P. 797 (1925); *State v. Patterson*, 183 Wash. 239, 48 P.2d 193 (1935); *Parnell*, *supra*. As the

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criminal defendant through peremptory challenges is a matter of state concern; there is no need for national uniformity on the issue. *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

Five of the six *Gunwall* factors favor an independent application of Article I, Sections 21 and 22 in this case. Other than factor 3 (common law and state constitutional history), the *Gunwall* factors establish that our state constitution provides greater protection to criminal defendants than does the federal constitution. The substance of the state constitutional protection can be inferred from the long line of cases³⁶ requiring reversal of a conviction whenever an accused person is erroneously forced to exhaust peremptory challenges removing a biased juror. *Moody, supra*; *Rutten, supra*; *Stentz, supra*; *Muller, supra*; *McMahon, supra*; *Patterson, supra*; *State v. Parnell*, 77 Wn.2d 503, 508, 463 P.2d 134 (1969), overruled in part on other grounds by *Fire, supra*. Although these cases were not based on the state constitutional right, they provide the context in which the right must be understood. Applying the reasoning and values set forth in those decisions, a conviction must be reversed whenever the

court noted in *Fire*, these cases did not themselves rest on an independent application of the state constitution. *Fire*, at 163-165 (plurality).

³⁶ See Note 31, relating to factor 4.

erroneous denial of a challenge for cause forces an accused person to exhaust peremptory challenges.

C. The trial court's failure to excuse Juror No. 24 violated Mr. Slert's state constitutional right to a jury trial by forcing him to exhaust peremptory challenges.

A potential juror should be excused for actual bias whenever the juror cannot "try the case impartially and without prejudice to the substantial rights of the party challenging that juror." RCW 4.44.170(2); *City of Cheney v. Grunewald*, 55 Wash.App. 807, 780 P.2d 1332 (1989). Any doubts regarding bias must be resolved against the juror. *U.S. v. Gonzalez*, at 1113; *State v. Cho*, 108 Wash.App 315, 329-330, 30 P.3d 496 (2001).

In this case, Juror 24 indicated that he'd worked for the forest service, that he'd reviewed and discussed information about the case that was not generally available, that he'd considered early reports of the shooting (characterizing it as accidental) as "suspect" and "fishy," that he was friends with one of the forest service officers involved in the investigation, that the testimony might trigger additional memories, and that it would be unfair for him to sit on the jury. RP 41-47, 79, 90. Despite this, the judge refused to excuse Juror 24 for cause. RP 49.

Under these circumstances, the judge should have excused Juror 24. *Grunewald, supra*; *Cho, supra*. The failure to excuse Juror 24 forced

Mr. Slert to exhaust his peremptory challenges during jury selection. Clerk's Minutes (1/25/10) p. 4, Supp. CP. He was therefore unable to use his final peremptory challenge on any of the twelve jurors who were seated on the jury.³⁷

The trial judge's erroneous refusal to excuse Juror 24 forced Mr. Slert to exhaust his peremptory challenges and violated his state constitutional right to a jury trial. Wash. Const. Article I, Sections 21 and 22. His conviction must be reversed and the case remanded to the superior court for a new trial.


³⁷ This also affected his ability to challenge the two alternate jurors, one of whom ended up deciding the case. Clerk's Minutes (1/25/10) p. 4, Supp. CP.

CONCLUSION

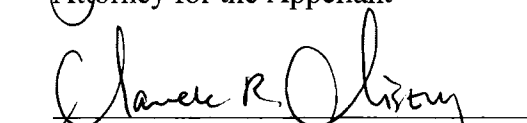
For the foregoing reasons, Mr. Slert's conviction must be reversed and the case remanded with instructions to suppress his statements and any evidence unlawfully obtained. In the alternative, if his conviction is not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on September 22, 2010.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

STATE OF WASHINGTON
BY
DEPUTY

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

and to:


Lewis County Prosecutor
360 NW North St.
Chehalis, WA 98532

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 22, 2010.

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 September 22, 2010.



John R. Backlund, WSBA No. 22917
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