

No. 40553-9-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF:

ROBIN SCHREIBER,

PETITIONER.

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____
DEPUTY

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

In his PRP, Mr. Schreiber raised several challenges to his Clark County conviction for Second Degree Murder while armed with a firearm and a “law enforcement officer” aggravating factor. Most of those claims were based on extra-record facts, which Schreiber properly set forth in sworn statements.

For example, Schreiber alleged that portions of jury selection and a hearing to determine whether two jurors had been exposed to prejudicial facts were conducted in violation of the right to an open and public trial. He alleged that the judge and at least one juror slept through portions of trial. He showed proof that the State’s forensic expert resigned after multiple incidents of fraud.

The State disputes most of Schreiber’s extra-record facts. However, the State incorrectly invites this Court to find that its extra-record evidence is more persuasive than Schreiber’s. This Court is not a fact-finding court. The State’s effort to convince this Court to adopt its facts is contrary to the court rules. In addition, it implicitly admits that Schreiber has made a *prima facie* showing of error. As a result, this reply focuses largely on the need for an evidentiary hearing to resolve the material disputed facts. In addition, this reply addresses the law governing those claims.

A. ARGUMENT

1. MR. SCHREIBER WAS DENIED HIS RIGHT TO A PUBLIC AND OPEN TRIAL.
2. MR. SCHREIBER WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT WHEN A JUROR WAS QUESTIONED IN CHAMBERS AND EXCUSED AND WHERE SCHREIBER WAS EXCLUDED FROM THE PROCEEDING.¹

Disputed Material Facts

The State agrees that jurors were given a questionnaire, which by its own terms indicated it was confidential and would be sealed. The State does not claim that the trial judge conducted a hearing or weighed any factors prior to deciding to conduct this portion of *voir dire* privately.

The State also agrees that the completed questionnaires are not in the court file. Apparently, the retired trial judge has exclusive control of those documents so they are not sealed in the court file, but are separately maintained somewhere by the court clerk. Nevertheless, Schreiber admits the State has presented extra-record facts disputing Schreiber's claim that the questionnaires were unavailable to members of the public.

These disputes should be resolved at an evidentiary hearing.

¹ Petitioner does not write separately on his right to be present other than to note that defense counsel's quick "yes," to the trial court's question of whether Schreiber waived his right to be present for the in chambers questioning of two jurors hardly constitutes a knowing, voluntary and intelligent waiver *by* Schreiber. Indeed, it appears from the transcript that it would have been impossible for counsel to advise Schreiber of his right before he waived it on Schreiber's behalf. In any event, if this Court directs the conduct of an evidentiary hearing, it should include this issue.

The State apparently additionally disputes whether Schreiber personally waived his right to a public and open trial with respect to the questionnaires based on its claim that defense counsel proposed the questionnaires, although it does not point to any facts suggesting that Schreiber was aware that the private questionnaires violated the right to an open and public trial or that he waived this personal right.

Nevertheless, this dispute should also be resolved at an evidentiary hearing.

The State disputes Schreiber's claim that there was a short time during jury selection when there was no room in the courtroom for spectators.

These factual disputes should also be resolved at the evidentiary hearing.

There are a number of material facts not in dispute. The State agrees that several jurors were questioned in chambers about their ability to serve as jurors based on the possibility that either or both saw Schreiber in handcuffs outside of the courtroom. The State does not dispute that the decision to question two jurors in chambers was not preceded by a closure hearing. However, the State apparently disputes the sub-part of Schreiber's that he did not waive his *right to be present* during the questioning of jurors in chambers. On the other hand, the State has not presented any facts

suggesting that Schreiber waived his right to a public and open trial for this hearing. Instead, the State focuses on the short length of the hearing to argue that there should be no legal redress for the constitutional violation.

Legal Disputes Regarding Closed Courtroom Cases

The State argues that the confidential questionnaires did not violate the right to an open and public trial. The State argues, if they did, Schreiber waived his right because his attorney proposed the questionnaires. The State also argues that any improper closures of the courtroom were so trivial that the constitutional protections do not extend to these situations.

Although these arguments are largely dependant on unresolved facts, Schreiber responds to the State's legal arguments below.

A de minimis exception does not exist under Washington law. The State attempts to graft the federal standard, which contains an exception for trivial closures, onto Washington law. Contrary to the State's argument, Washington courts have not adopted this exception.

In *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006), the State made the exact argument advanced here, which the Washington Supreme Court explicitly rejected:

The State would have us hold that no infringement on the right to public trial occurs when a closure is, as they contend this closure was, de minimis. In support of that position, the State cites to *Orange* in which a concurring and a dissenting justice posited that some unjustified courtroom closures may be so "trivial" that they would not implicate the right to a public trial. *Orange*, 152 Wash.2d

at 824-28, 100 P.3d 291. The State also points to *Peterson v. Williams*, 85 F.3d 39, 42 (2nd Cir.1996), a case in which a federal appeals court found that the inadvertent closure of a courtroom for a brief period of time was “too trivial” to constitute a constitutional violation. Although the State and Justice Madsen correctly note that other jurisdictions have determined that improper courtroom closures may not necessarily violate a defendant's public trial right, a majority of this court has never found a public trial right violation to be de minimis. Even if we were to indicate a tolerance for so called “trivial closures,” the closure here could not be placed in that category because it was deliberately ordered and was neither ministerial in nature nor trivial in result.

157 Wn.2d at 180-81. The State makes no argument to this Court why or how it should or can overrule a higher court.

However, *Easterling* is not the only Washington case rejecting a *de minimis* exception. The Washington Supreme Court affirmed this ruling in *Strode*:

The State's final argument is that even if the interviewing of prospective jurors in chambers is deemed an unjustified closure, the violation was insignificant and did not infringe the constitutional right to a public trial. Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. Trivial closures have been defined to be those that are brief and inadvertent. This court, however, has never found a public trial right violation to be trivial or de minimis.

State v. Strode, 167 Wn.2d 222, 230, 217 P.3d 310 (2009) (internal citations and punctuation removed). Once again, the State fails to acknowledge this language, much less provide any arguments why and how this court can overrule these decisions. The State is, of course, free to make

these arguments in a discretionary review motion to the Supreme Court. Here, they should acknowledge controlling precedent requires reversal.

Waiver Analysis. Contrary to the State's argument, Schreiber did not waive his right to an open and public trial by his attorney's failure to object or even by his attorney's role in proposing the confidential questionnaire. There are numerous appellate decisions, from both the Washington Court of Appeals and our Supreme Court, which hold the failure to object does not constitute a waiver. *See e.g., State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) ("We also note defendant's failure to object contemporaneously did not effect a waiver."); *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) ("Moreover, the defendant's failure to lodge a contemporaneous objection at trial did not effect a waiver of the public trial right."). The decision in *State v. Wise*, 148 Wn.App. 425, 200 P.3d 266 (2009), *rev. granted* 236 P.3d 207 (2010), is the only published decision to reach the opposite conclusion without distinguishing those decisions or explaining how it could purportedly overrule multiple higher court decisions. In any event, the *Wise* decision is contrary to the Washington Supreme Court's *subsequent* decisions in *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009) and *State v. Momah*, 167 Wash.2d 140, 154-55, 217 P.3d 321 (2009). As a result, it was impliedly overruled and has no force.

Just as importantly, the State's argument that Schreiber waived his right to an open trial because his attorney apparently proposed the confidential questionnaire fails to acknowledge Washington caselaw recognizing that the right to an open and public trial is personal to the defendant and, like the right to appeal, can only be knowingly, intelligently, and voluntarily waived.

The *Strode* court noted:

The right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner. *See City of Bellevue v. Acrey*, 103 Wash.2d 203, 207-08, 691 P.2d 957 (1984) (waiver of the jury trial right must be affirmative and unequivocal). A waiver of that right must be voluntary, knowing, and intelligent. *State v. Forza*, 70 Wash.2d 69, 422 P.2d 475 (1966). Additionally, a court must indulge every reasonable presumption against waiver of fundamental rights. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

167 Wn.2d at 229, n.3.

Waivers of fundamental rights are disfavored, *Hodges v. Easton*, 106 U.S. 408, 412 (1882), and must be knowing, intelligent and voluntary, *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The waiver of the right to a 12-person jury is constitutionally valid “on a showing of either (1) a personal statement from the defendant expressly agreeing to the waiver, or (2) an indication that the trial judge or

defense counsel has discussed the issue with the defendant prior to the attorney's own waiver” on behalf of the defendant. *Stegall*, 124 Wn.2d at 729.

In *Stegall*, our Supreme Court extended the rule announced in *Wicke* to the waiver of the right to a 12-person jury. 124 Wn.2d at 728-29. In *Stegall*, the issue of waiving the right to a 12-person jury suddenly arose during jury selection and appeared to be partially attributed to defense counsel's “own desire to avoid the embarrassment of proceeding with jury selection with a broken zipper on his fly.” *Stegall*, 124 Wn.2d at 731. The court observed that the record was devoid of any personal expression by the defendant or any other indication that his attorney had discussed the waiver with him prior to orally stipulating to proceed with fewer than 12 jurors. *Stegall*, 124 Wn.2d at 731.

Declaring the right to a 12-person jury to be an “integral part of a felony defendant's right to jury trial” under article I, section 21, the court held that the waiver of the right to a 12-person jury could be sufficiently demonstrated only upon a showing of a personal statement by the defendant or “an indication that the trial judge or defense counsel... discussed the issue with the defendant prior to the attorney's own waiver.” *Stegall*, 124 Wn.2d at 728-29.

In contrast to some of the material, disputed facts discussed previously, on this issue the State did not present any evidence that would

permit even an inference that Schreiber personally waived his right to a public and open trial—at any juncture. The State does not point to any colloquy with Schreiber where he is informed and indicates his intent to waive the right to a public trial. Likewise, the State does not point to any statements by Schreiber or even his counsel indicating Schreiber’s awareness of and desire to waive his right to a public and open trial.

As a result, if this Court does not remand these three claims for an evidentiary hearing encompassing all material facts, it should find that Schreiber did not personally waive his right to an open and public trial.

Structural Errors. Finally, the State argues that the use of confidential questionnaires does not constitute a structural error, citing *State v. Coleman*, 151 Wn.App. 614, 624, 214 P.3d 158 (2009). *Response*, p. 19. The State’s analysis overlooks the factual basis for the holding in *Coleman*. *Coleman* did not hold that the use of questionnaires was not a structural error as long as those questionnaires could be viewed by members of the public at some later date. To the contrary, *Coleman* turned on the fact that the questionnaires were only confidential for a temporary period of time. In *Coleman*, the questionnaires “were not sealed until several days after the jury was seated and sworn.” *Id.* at 624. In other words, the questionnaires were available to all members of the public contemporaneously with jury selection and for several additional days thereafter. The questionnaires were only sealed after jury selection. As a

result, the *Coleman* court held that the remedy for the temporary, post-jury selection violation was to unseal the questionnaires.

In this case, the questionnaires were not available for public inspection during jury selection. *Coleman* does not apply. As a result, the error remains structural and requires reversal.

Private Chambers Questioning: It appears that the facts relating to the private questioning of two jurors in chambers are not disputed, at least as far as the fact that the questioning was conducted in a closed setting and that no *Bone-Club* hearing preceded the closure. As a result, this Court can reverse based on this ground and would not need to order a hearing on the other contested closures.

The State attempts to defend this closure by arguing that because it involved an inquiry as to whether the two jurors saw Schreiber in handcuffs, it was done to protect his right to a fair trial. Of course, if that was the motivation by the court, the court's reasoning could and should have been part of the necessary pre-closure hearing.

More importantly, there was easily available, less restrictive alternative: question the juror separately in open court. If the Court had done so, it could have learned whether either juror was prejudiced as a result of seeing Schreiber in custody *without* violating his right to an open and public trial. Of course, the consideration of less restrictive alternatives is one of the basic requirements laid down in *Bone-Club*.

The State also tries to distinguish this private questioning of jurors regarding their ability to fairly judge the case as purely ministerial. It was not. Instead, the questions went directly to their ability to sit as jurors, which is best demonstrated by the fact that one of the jurors was excused for cause.

State v. Rivera, 108 Wn.App. 645, 32 P.3d 292 (2001), draws the proper distinction between ministerial and adversarial portions of a trial. A ministerial portion of a criminal trial does not concern any trial issue. In *Rivera*, a private hearing was conducted because one juror had concerns about another juror's hygiene.

The seating arrangement of jurors is wholly different than whether jurors are biased because of observations of the defendant made outside the courtroom. This Court can and should reverse based on this sub-part of the claim alone.

Finally, the State argues that this violation was *de minimis*, even going so far as to time the length of the closure. However, there is no case which holds that a court can be closed in violation of the constitution for a short period of time. The relevant test has nothing to do with time. Instead, the legal test focuses on the nature of the private proceeding. Whether a juror is biased because of exposure to prejudicial facts is certainly the type of inquiry protected by the constitution. In any event, as Schreiber previously noted, Washington law does not recognize a *de minimis*

exception. This Court should either reverse and remand for a new trial or should remand for an evidentiary hearing.

3. Mr. SCHREIBER WAS DENIED HIS RIGHTS TO A PUBLIC TRIAL, HIS RIGHT TO BE PRESENT, AND HIS RIGHT TO COUNSEL WHEN THE COURT INSTRUCTED THE BAILIFF TO HAVE A PRIVATE CONVERSATION WITH A JUROR RELATING TO THE FITNESS OF THE JUROR TO SERVE.

In his PRP, Schreiber alleged that the trial court directed the bailiff to speak privately to the juror in the jury room about the juror's ability to continue to serve. He supported this claim with several signed declarations.

The State indicates that it contests Schreiber's facts, but does not present any contrary statements from either the judge or the bailiff—the individuals whose actions form the factual basis of this claim. The State fails to do so despite the fact that it obtained declarations from these witnesses on other topics. Instead, the State simply argues that because the incident is not described in the transcript, Schreiber has not carried his burden. *In re Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992) (indicating that State must answer Petitioner's new facts with its own competent sworn evidence and the failure to do so means that no disputed facts exist and no hearing is necessary).

To the contrary, it is the State who has failed to answer Schreiber's competent extra-record facts with its own contesting facts.

Nevertheless, this Court should remand for an evidentiary hearing in

order to determine the nature of the comments in order to determine the resulting prejudice.

4. THE TESTIMONY OF A STATE CRIME LAB EMPLOYEE (ANN MARIE GORDON) VOUCHING FOR TEST RESULTS CONDUCTED BY ANOTHER EMPLOYEE WHO WAS NOT PRESENT AT TRIAL OR SUBJECT TO CROSS-EXAMINATION VIOLATED SCHREIBER'S RIGHT TO CONFRONTATION.
5. MR. SCHREIBER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL, WHEN APPELLATE COUNSEL FAILED TO ASSIGN ERROR TO THE VIOLATION OF SCHREIBER'S CONFRONTATION RIGHT.
7. NEWLY DISCOVERED EVIDENCE REGARDING THE CRIME LAB EMPLOYEE/WITNESS'S CHRONIC MIS- AND MALFEASANCE JUSTIFIES A NEW TRIAL

Undersigned counsel does not attempt to "smear" Ann Marie Gordon, a former Washington State Patrol Crime Laboratory employee. He instead, seeks the truth.

Both parties depended on Ms. Gordon's testimony. However, unlike a drunk driving case, in this case the defense sought to increase Schreiber's level of impairment, while the State sought to minimize it.

Schreiber has already written extensively about the confrontation violation. He notes that the issue of surrogate testimony by a crime lab employee is currently before the United States Supreme Court this Term. *Bullcoming v. New Mexico*, U.S. Supreme Court No. 09-10876. As a result, this reply focuses exclusively on the newly discovered evidence.

The State presents no defense of Ms. Gordon, other than to attempt to impugn defense counsel. The State offers no disputing facts to the many facts assembled regarding Ms. Gordon's chronic mis- and malfeasance. As a result, this Court should now treat all of Schreiber's post-conviction facts as true.

The State's only defense is that all of this information is only impeachment and cannot legally merit a new trial. *State v. Roche*, 114 Wn.App. 424, 59 P.3d 682 (2002), expressly holds otherwise:

Hoover's credibility has been totally devastated by his malfeasance. Not only did Hoover steal heroin from the crime lab, he also admitted that he regularly used heroin on the job. He repeatedly lied about his activities until he was finally confronted with the fact that he had been videotaped. Even then, he maintained that it all started when an officer asked him to purify heroin for a drug-dog training project, although he could not provide the name of the officer who allegedly made this request. Furthermore, Hoover's co-workers thought that his work seemed sloppy and even suspected, with some scientific basis to support their suspicions, that he might have been dry labbing some methamphetamine cases. These events are serious enough that a rational trier of fact could reasonably doubt Hoover's credibility regarding his testing of any alleged controlled substances, not just heroin, and regarding his preservation of the chain of custody during the relevant time period.

Id. at 437. Specifically, on the issue of whether this new information was merely impeachment, the Court held:

Moreover, the evidence of Hoover's malfeasance is more than "merely" impeaching; it is critical, with respect to Hoover's own credibility, the validity of his testing, and the chain of custody. *See State v. Savaria*, 82 Wash.App. 832, 838, 919 P.2d 1263 (1996) ("[I]mpeaching evidence can warrant a new trial if it devastates a witness's uncorroborated testimony establishing an element of the

offense. In such cases the new evidence is not merely impeaching, but critical.”).

In denying Roche's motion for a new trial, the court noted that the main issue at trial was whether Roche constructively possessed the substances found at his residence, not whether the substances were in fact methamphetamine. But Roche had no reason to challenge Hoover's testimony at his trial because evidence of Hoover's malfeasance had not yet come to light. As far as the defense bar knew at that time, Hoover was a respected and reputable chemist whose integrity and scientific methodology were above reproach. There can be no doubt, however, that if evidence of Hoover's theft of heroin, use of heroin at work, sloppy work habits, and the factually supportable suspicion of his fellow chemists that he was dry labbing had come to light during Roche's trial, the admissibility of the trial exhibits would have been vigorously challenged-and probably the exhibits would not have been admitted into evidence at all.

Id. at 438. The same is true here. Ms. Gordon's repeated misconduct, which has now come to light, devastates her credibility and likely makes her both her own test results, plus the results she vouched for, inadmissible.

In contrast, the decision by the Washington Supreme Court in *PRP of Stenson*, 150 Wn.2d 207, 76 P.3d 241(2002), is easily distinguished. In that case, Gentry pointed to two instances where a crime lab employee had offered testimony which was later held by court to not pass the *Frye* test. These opinions were on completely different scientific matters, which is why the Court called the new evidence immaterial.

Without Ms. Gordon's testimony, there is a reasonable likelihood that evidence critical to the State's efforts to defeat Schreiber's defense of extreme intoxication would not have been admitted. Just like in *Roche*, this

Court should reverse.

8. THE JUDGE AND A JUROR SLEPT THROUGH PORTIONS OF THE TRIAL. THIS COURT SHOULD REMAND FOR AN EVIDENTIARY HEARING. IF THE REFERENCE HEARING JUDGE DETERMINES THE TRIAL JUDGE SLEPT THROUGH ANY PORTION OF TRIAL, REVERSAL IS REQUIRED. IF A JUROR SLEPT THROUGH MATERIAL PORTIONS OF TRIAL, REVERSAL IS ALSO REQUIRED.
9. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO FULLY INVESTIGATE AND SEEK A MISTRIAL BASED ON THESE IRREGULARITIES.

The State has disputed both of these claims with competing declarations. The State defends both claims by arguing that it may have appeared to Schreiber that the judge or jurors were sleeping, but no one slept during trial. Schreiber maintains his position. This Court should remand these claims for an evidentiary hearing.

9. MR. SCHREIBER'S RIGHT TO CONFRONTATION WAS DENIED WHEN THE TRIAL COURT REFUSED TO PROVIDE SCHREIBER WITH THE PSYCHOLOGICAL RECORDS OF CORPORAL BOYNTON RELATED TO THIS CASE. THIS COURT SHOULD REVIEW THE DOCUMENTS PLACED UNDER SEAL AND REVISIT THIS ISSUE BECAUSE THE COURT INCORRECTLY UNDERSTOOD THE HARM STANDARD ON DIRECT REVIEW.

Mr. Schreiber will seek, by separate motion, to transmit the sealed records to this Court. Only by reviewing those records can this Court determine whether Schreiber was harmed by the failure to produce the records at trial.

10. THE EVIDENCE OF A “NEXUS” BETWEEN A FIREARM AND THE CRIME OF MURDER WAS INSUFFICIENT AS A MATTER OF LAW.
11. THE FIREARM ENHANCEMENT INSTRUCTIONS WERE AMBIGUOUS—PERMITTING JURORS TO CONVICT ON MUCH LESS EVIDENCE THAN WAS LEGALLY REQUIRED.
12. MR. SCHREIBER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN APPELLATE COUNSEL FAILED TO ASSIGN ERROR TO EITHER OF THE ABOVE CLAIMS.

A person is “armed” with a deadly weapon only if it is easily accessible and readily available for use *and* where there is a nexus between the defendant, the weapon, and the crime. *State v. Easterlin*, 159 Wn.2d 203, 208-09, 149 P.3d 366 (2006); *State v. Willis*, 153 Wn.2d 366, 373, 103 P.3d 1213 (2005). To apply the nexus requires analyzing “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245, 249 (2007).

The test for determining when a defendant is “armed” was set out by the court in *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In *Valdobinos*, the police found cocaine and an unloaded rifle under a bed in the defendant's home while searching for evidence of delivery and possession of cocaine. *Id.* at 273, 282. Following trial, the defendant was convicted of delivery of cocaine while armed with a deadly weapon. *Id.* at 274. On review, the Court held that a person is “armed” for the purpose of a deadly weapon enhancement if a weapon is easily accessible and readily

available for use, either for offensive or defensive purposes. *Id.* at 282. The Court determined that evidence of an unloaded rifle under the bed, without more, was insufficient to show that the defendant was “armed” for the purpose of a deadly weapon enhancement, and invalidated the portion of the defendant's sentence based on the enhancement. *Id.*

Subsequent cases have reaffirmed the holding in *Valdobinos* that the mere presence of a deadly weapon at the crime scene is insufficient to show that the defendant is “armed.” The Court of Appeals refined the analysis, requiring that there be a nexus between the defendant, the crime, and the weapon. In *State v. Mills*, 80 Wn.App. 231, 233, 907 P.2d 316 (1995), the police arrested the defendant outside his home for possession of methamphetamine and found a motel key while searching his car. After obtaining a warrant, the police searched the motel room to which the key belonged and found a gun along with narcotics. *Id.* The defendant was convicted and the court added a deadly weapon enhancement to his sentence. *Id.* The Court of Appeals reversed the deadly weapon enhancement, holding that the evidence must establish a nexus between the defendant and the deadly weapon in order to find that the defendant is “armed” for the purpose of a deadly weapon enhancement. *Id.* at 236-37.

Similarly, in *State v. Johnson*, 94 Wn.App. 882, 886-87, 974 P.2d 855 (1999), the Court of Appeals held that the State must prove a nexus between the defendant, the crime, and the weapon. In *Johnson*, when

conducting a search of defendant's apartment the police found the defendant in bed in the bedroom, half asleep. *Id.* at 888. The police discovered heroin and arrested the defendant. *Id.* at 887. Later, in response to questioning, the defendant told officers there was a gun in a coffee table drawer. *Id.* at 888. At the time of the statement, the defendant was handcuffed and the gun was five to six feet away from him. *Id.* The defendant was convicted and the jury found he was armed with a deadly weapon. *Id.* On appeal, the Court of Appeals held that a nexus between the crime and the weapon is required, pointing out that without such a nexus, courts run the risk of punishing a defendant under the deadly weapon enhancement for having a weapon unrelated to the crime. *Id.* at 895. The court reversed, finding that no nexus existed.

If this Court concludes that the evidence of a nexus between the defendant, the crime, and the gun was insufficient as a matter of law, then this Court should reverse and remand to the trial court with instructions to dismiss that allegation and to resentence Schreiber appropriately.

In defending the sufficiency of the evidence, the State ignores the commission of the crime, but instead argues that Schreiber's actions immediately preceding the crime sufficiently establish the requisite nexus, even if there was no evidence that the firearm facilitated the actual crime in any way. The State argues that because Schreiber displayed the gun twice before the crime, a sufficient nexus existed. However, as the above cases

demonstrate simply showing that Schreiber possessed a gun does not automatically establish that he had the gun for purposes of committing the crime.

While this may have established a nexus between the gun and Schreiber, it did not establish a nexus between the gun and commission of the crime. The State alleged that Schreiber intentionally killed the victim by driving his car at the victim. The presence of the gun in Schreiber's car did not more easily enable Schreiber to commit this crime, nor did it affect the actions of the victim. It was irrelevant to the crime and to the State's theory of how Schreiber accomplished the crime. The gun was present, but that is not enough. Schreiber was aware of the gun's presence, but that is also not enough. What was missing was any evidence showing how the gun contributed to the crime or was possessed by Schreiber in order to aid in the commission of the crime.

This Court should dismiss the firearm enhancement.

If this Court concludes that the evidence is sufficient, it should remand for an evidentiary hearing where jurors can be examined, not to impeach their verdict, but to demonstrate the reasonableness of a reasonable person misinterpreting the instruction.

13. MR. SCHREIBER WAS CONVICTED OF A LEGISLATIVELY UNAUTHORIZED AGGRAVATING FACTOR.
14. APPLYING THE “POLICE OFFICER” AGGRAVATOR TO MR. SCHREIBER, WHICH WAS LEGISLATIVELY AUTHORIZED AFTER THIS CRIME OCCURRED, VIOLATES THE CONSTITUTIONAL PROTECTION AGAINST EX POST FACTO LAWS.

These two closely related claims turn on the law. Consequently, no evidentiary hearing is needed.

The State does not dispute that, at the time of this crime (July 30, 2004), the “law enforcement officer who was performing his official duties” aggravating element was not legislatively authorized for any crime other than aggravated murder. However, the State argues that this makes no difference for two reasons. First, the State argues that the so-called “Blakely fix” legislation only made procedural changes by authorizing a jury trial—a change that can be applied retroactively. In addition, the State argues that because the courts had authorized the aggravating factor, it did not matter that the Legislature had not identified the “police officer” aggravator at the time of the charged crime in this case.

The State’s argument misses the point. Schreiber does not complain about procedure; *i.e.*, jury vs. judge trial. Instead, he argues that the Legislature must specifically define those facts which can result in an increased penalty. The Legislature could not define “Murder 1^o” as murder, plus any factor that the courts decide justifies the increased penalty.

Likewise, the Legislature cannot leave it to the “common law” to define aggravating factors increasing the maximum possible punishment.

The State’s argument turns on *Dobbert v. Florida*, 432 U.S. 282 (1977), which it argues involves “virtually identical circumstances.” *Dobbert* is easily distinguished because it involved, unlike the present case, a change in the statute that was not only procedural, it was ameliorative. 432 U.S. at 294. In *Dobbert*, the Florida death penalty law changed from the time of the crime to the time of defendant’s trial. Under the “new” statute, the jury recommended the sentence, but the judge was the final arbiter.² Under the “old” law, a jury’s “life” verdict could not be overridden by a judge. *Dobbert*’s jury returned a life recommendation, which was overridden by the judge. The United States Supreme Court upheld the sentence noting that there was no assurance the jury would have returned the same verdict if they were instructed their verdict was binding and not a recommendation. *Id.* at 294, n.7. Additionally, under the old statute a death sentence was “presumed.” Under the new statute, death could only be imposed (or upheld on appeal) if the facts were so clear and convincing that no reasonable person would vote for a life sentence. *Id.* at 295. In sum, the new statute employed procedural safeguards which benefitted defendants and which were not present under the old statute.

² *Dobbert* was pre-*Ring*.

Perhaps more importantly, none of the contested changes resulted in an increased penalty or the expansion of factors justifying a death sentence. *Id.* at 293.

This case, in sharp contrast, involves the application of a newly legislatively-authorized aggravating factor which increased the maximum possible punishment. A change in sentencing law violates the Constitution's prohibition against *ex post facto* punishments "if it is both retrospective and more onerous than the law in effect on the date of the offense." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). To fall within the *ex post facto* prohibition, a law must not only "apply to events occurring before its enactment," it "must disadvantage the offender affected by it," by altering the definition of criminal conduct or increasing the punishment for the crime. *Weaver*, 450 U.S. at 29.

However, capital cases can be instructive. Under a capital sentencing statute, the enactment of a new aggravating circumstance necessarily alters the "substantive formula" used to determine the applicable sentence, and substantially disadvantages those affected by the change. The addition of an aggravating circumstance to the statutory list renders eligible for the death penalty persons who were not so before and, even in those cases where other aggravating circumstances apply, increases the risk that a death sentence will be recommended by the jury and imposed

by the sentencing judge, since there is now an additional factor to be weighed against any mitigating circumstances. Such a change in the standard used to choose between life and death is substantive and detrimental and therefore its retrospective application violates the prohibition against *ex post facto* laws. See *Miller*, 482 U.S. at 431-36 (change in presumptive guidelines sentencing range was not procedural, clearly disadvantaged those affected by it, and its retrospective application was an *ex post facto* violation); *Bowen v. State*, 911 S.W.2d 555, 563-64 (Ark. 1995) (concluding, based on *Miller*, that retrospective application of a statutory aggravating circumstance was an *ex post facto* violation, because, as standards guiding selection of the punishment, such statutory provisions are substantive, not merely procedural, and although adding an aggravator “does not guarantee the harsher sentence, it may have a direct effect on the decision and thus result in a harsher sentence than might have been imposed were that aggravating circumstance not present”); *State v. Jordan*, 440 So. 2d 716, 718 (La. 1983) (addition of aggravating circumstance was a substantive change in the law, and its application to defendant was an *ex post facto* violation because, assuming *arguendo* that other aggravators did not apply, he was now exposed to the death penalty whereas at the time of the murder he was not so exposed); *State v. Correll*, 715 P.2d 721, 734-35 (Ariz. 1986) (addition of aggravating circumstance, which was one of three found by the trial court, was a substantive change).

Schreiber recognizes that this Court reached the opposite conclusion in *State v. Hylton*, 154 Wn.App. 945, 226 P.3d 246 (2010). Nevertheless, Schreiber asserts that *Hylton* was wrongly decided and should either be overruled or distinguished.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should:

1. determine whether an evidentiary hearing is required;
2. reverse and remand for a new trial and/or a new sentencing hearing.

DATED this 3rd day of January, 2011.

Respectfully Submitted:

/s/ Jeffrey E. Ellis

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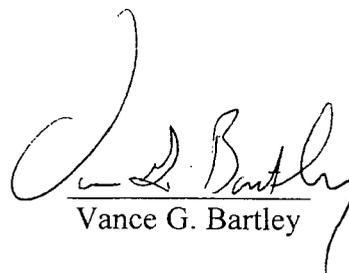
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CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Alsept & Ellis, LLC, certify that on January 3, 2011 I served the parties listed below with a copy of Appellant's Reply Brief as follows:

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Sec. WA Jan 3, 2011
Date and Place


Vance G. Bartley

11 JAN -4 PM 12:08
STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II