

NO. 82665-0

IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON

Petitioner

v.

TERRANCE J. IRBY,

Respondent.

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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SKAGIT COUNTY PROSECUTING ATTORNEY  
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015  
Senior Deputy Prosecuting Attorney  
Office Identification #91059

Courthouse Annex  
605 South Third St.  
Mount Vernon, WA 98273  
(360) 336-9460

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## **I. ISSUES**

1. Should this Court require that a defendant prove prejudice for a claimed violation of the defendant's right to presence for a proceeding at which a defendant's presence would not affect his ability to defend against the charges?

2. Is an e-mail exchange between the court and counsel regarding excusing potential jurors a proceeding which would affect a defendant's ability to defend against the charges?

3. Where the defendant requested not to be present during the completion of a jury questionnaire and counsel agreed to excuse potential jurors in an e-mail exchange with the trial court was any error in violation of the defendant's right to presence harmless?

## **II. FACTS**

Terrance Irby was convicted by a jury on January 25, 2007, of murder and burglary for the bludgeoning death of James Rock at his home. CP 1181-2, 1185, 1188.

Given the murder charge, the trial and jury selection process was extensive and involved a questionnaire.

Days before an earlier trial date, the parties had discussed the jury selection process. 10/27/06 RP 2-4, 45. The court decided to

have the jury to complete the questionnaire the morning of trial and then give counsel until the afternoon to review the questionnaires before the jury returned. 10/27/06 RP 3. Irby told the trial court that he did not wish to be present for swearing in of the jurors and completion of the questionnaires. 10/27/06 RP 45.

MR. OSTLUND: I talked to Mr. Irby as far as Monday morning. When the jury questionnaires are handed out, explained that Your Honor will swear the jury, give them the questionnaires, tell them what to do with them, and tell them a time to come back and that's all that's going to be happening at that time. If that's all that is happening, I think he indicated he does not need to be here. Is that correct, Terry?

THE DEFENDANT: That's correct.

10/27/06 RP 45.

On October 30, 2006, the jury completed the questionnaires and later the parties discussed Irby's decision to appear in jail clothing in front of the jury. 10/30/06 RP 2-8. The trial court permitted Irby to appear in jail clothing and continued jury selection to the next morning. 10/30/06 RP 6, 12. The trial court noted that 5 jurors were excused by the Court Administrator because they had been told before appearing they would not need to serve for a long trial. 10/30/06 RP 6-7. There was no objection. 10/30/06 RP 7.

The next morning eighty jurors were in court ready to begin

the selection process. 10/31/06 RP 20. But the case was continued to accomplish DNA testing at defense request. 10/31/06 RP 2, 15-6.

On December 27, 2006, the parties again discussed the jury selection process prior to trial. 12/27/06 RP 14-16, 19-20, 29-31. The parties were to submit a questionnaire to the jury on Tuesday, January 2, 2007. 12/27/06 RP 30. Seventy to ninety jurors were to be called. 12/27/06 RP 15, 30.

The judge noted that as on the prior date, since the jurors were just going to be completing the questionnaires the first day and be sent home, questioning by counsel would start the next day. 12/27/06 RP 15, 30. The judge said that Irby, both his counsel and the prosecutor need not be present when the questionnaires were being completed. 12/27/06 RP 30. Irby had not been present at the presentation of questionnaires to the jury at the prior trial date. 12/27/06 RP 30. Defense counsel responded that he "thought that was a good procedure." 12/27/06 RP 30.

On January 2, 2007, 92 jurors reported. CP 1239. The jurors completed a questionnaire. CP 1234-6, 1239. Irby was not present. CP 1239. The questionnaire had questions about whether the jurors or family had been victims of crime and whether they had feelings

regarding murder that would prevent them from being fair and impartial. CP 1234-6.

After the responses were completed, the judge sent an e-mail to defense and the State asking if the parties would agree to excuse ten jurors. CP 1279-80, see Appendix A. Those juror numbers were 7<sup>1</sup>, 17, 23, 36, 42, 48, 49, 53, 59 and 77. The judge stated the reasons in the e-mail. Jurors 7, 23, 42 and 52 had already been approved by the court administrator to limit the period of service to one week. Juror 17<sup>2</sup> home schooled. Juror 77 had a business hardship. CP 1279-80. Jurors 36, 48, 49 and 53 had a parent who had been murdered. CP 1280.

The initial e-mail was sent by the trial court at 1:02 p.m. on January 2, 2007. CP 1280. At 1:53 p.m., Irby's counsel responded by e-mail agreeing to release the jurors at the court's discretion. By 1:59 p.m., the prosecutor responded agreeing to release all but three jurors. At 2:01 p.m. the judge sent an e-mail indicating they would release all but the three jurors objected to by the State. CP 1280.

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<sup>1</sup> The initial reference to Juror 3 in the initial e-mail was meant to be Juror 7. CP 1279-80

<sup>2</sup> The clerk's minutes reads: **\*\*\*Note \*\*** In chambers not on the record. Counsel stipulate to excusing the following jurors for cause: # 7, 17, 23, 42, 53, 59, 77. CP 1239. The clerk's minutes on the Judge's List of Jurors also indicates these seven jurors were excused by the court. CP 1273-7.

While Irby's counsel agreed to excuse all ten jurors, the State agreed to excuse all of the jurors except those who had a parent murdered, specifically jurors 36, 48 and 49. CP 1279. The following day, the State subsequently agreed to discharge Juror 36.<sup>3</sup> CP 1240, 1274, 1/3/07 RP p.m. 48.<sup>4</sup> Jurors 48 and 49 were never needed since the selection process only reached to juror number 37. CP 1274-5. Thus, none of the jurors whom Irby agreed to release heard the case.

Of the judge's initial e-mail only jurors numbered 7, 17, 23 and 36 were within the range of jurors from which final jury selection occurred. 1/4/09 RP voire dire II @ 230-1, CP 1273-7. Both parties had agreed to discharge jurors 7, 17 and 23 from the outset and juror 36 was discharged by agreement the following morning.

There was no motion made regarding Irby's presence when the trial court sent the e-mail or decided to excuse the jurors.

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<sup>3</sup> The transcript reads juror number 46, but this appears to be a typographical error since the clerk's minutes read juror number 36 at multiple locations. CP 1340, 1374-5. There is no discussion on the record about how or why juror 36 was excused for cause. 1/3/07 RP p.m. 48.

<sup>4</sup> There are two transcripts from January 3, 2007. The first is in the morning regarding Mr. Irby's choice not to wear civilian clothes and be in handcuffs. The State will refer to this as 1/3/07 RP a.m.. The second is the voire dire on the record which closes at the end of the day with a hearing after jurors were excused in which Irby requested a fresh red jail uniform every day. The State will refer to this as 1/3/07 RP p.m..

On January 3, 2007, the day began with Irby's request to appear in court in shackles as well as jail garb. 1/3/07 RP a.m. 2-9. On January 3, 2007, and January 4, 2007, jury selection occurred in the presence of Irby. 1/3/07 RP p.m. 2-3.

On January 25, 2007, Irby was convicted of Aggravated First Degree Murder, First Degree Felony Murder and First Degree Burglary. CP 1181-2, 1185, 1187, 1188.

On October 20, 2008, the Court of Appeals issued an unpublished opinion finding that Irby's right to be present had been violated by the trial court's actions in excusing seven jurors in the e-mail exchange between the trial court and counsel. The Court of Appeals denied a Motion for Reconsideration and the State filed a Petition for Review.

On July 8, 2009, Department II of this Court granted the Petition for Review.

### **III. ARGUMENT**

**1. Prejudice cannot be presumed for an alleged violation of a defendant's right to presence at a proceeding where the defendant's presence is not necessary.**

Irby waived his right to be present when the jurors completed a questionnaire. While no court proceedings were occurring, the trial

court sent an e-mail to defense counsel and prosecution seeking input about releasing seven potential jurors. Those potential jurors were excused with the agreement of Irby's counsel.

A defendant has the right under the Confrontation Clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment to be present at all critical stages of the trial.<sup>5</sup> State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007).

In the present case, the release of the potential jurors was not a critical stage at which the defendant's presence was required. Prejudice cannot be presumed for a proceeding where the defendant's presence is not necessary.

United States and Washington State Supreme Court decisions demonstrate the scope of the right to presence.

**i. United States Supreme Court and Federal cases.**

In Snyder v. Massachusetts, a defendant claimed that his failure to be present at a view of the scene by jurors violated his right to be present at trial. In evaluating the extent of the right to presence, the Snyder court set forth the following test.

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<sup>5</sup> See also Article 1, section 22 of the Washington Constitution that provides, in part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel ..."

We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment **to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.** Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts (Gaines v. Washington, supra, at page 85 of 277 U.S., 48 S.Ct. 468, 72 L.Ed. 793), and in prosecutions in the state courts is assured very often by the Constitutions of the states.

Snyder v. Massachusetts, 291 U.S. at 105-6 (emphasis added). This highlighted test from Snyder is the test Washington courts apply.

The court in Snyder went on to hold that the view of the scene by the jurors including comments by the trial judge did not violate the defendant's due process rights.<sup>6</sup>

In United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985), one of four defendants was drawing sketches of jurors during trial. The defense was concerned about jurors being prejudiced against the defendant. The judge conducted a chambers conference with the juror without the defendant. The Supreme Court

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<sup>6</sup> In so holding the court noted:

There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

held that attendance of the defendants or their counsel “at the in-camera discussion was not required to ensure fundamental fairness or a ‘reasonably substantial ... opportunity to defend against the charge.’” United States v. Gagnon, 470 U.S. at 527, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674, 90 A.L.R. 575 (1934) *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

One of the few published cases involving absence of a defendant at just the jury selection stage is U.S. v. Gordon, 829 F.2d 119 (C.A.D.C. 1987). In Gordon, the defendant was entirely absent from the entire jury selection process.

That Gordon's presence at voir dire was substantially related to his defense is indicated by the fact that he had no opportunity “to give advise or suggestion[s] ... to ... his lawyers.” Snyder, 291 U.S. at 106, 54 S.Ct. at 332. During voir dire, for example, “what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use to his defense” Boone v. United States, 483 A.2d 1135, 1137-38 (D.C.App.1984). See *also* United States v. Washington, 705 F.2d at 497.

A defendant's presence at jury selection is also necessary so that he may effectively exercise his peremptory challenges. Washington, 705 F.2d at 497. The process of peremptory challenges is essential to an impartial trial. Lewis v. United States, 146 U.S. at

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Snyder v. Massachusetts, 291 U.S. at 122.

378, 13 S.Ct. at 139. As 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." 4 W. Blackstone, Commentaries , quoted in, Lewis v. United States, 146 U.S. at 376, 13 S.Ct. at 138.

U.S. v. Gordon, 829 F.2d at 124.

In contrast to Gordon, Irby was not absent for any proceedings in court. Irby requested that he not be present when the jurors completed the questionnaires. The e-mail exchange regarding excusing the jurors occurred when there were no proceedings on the record. Irby was otherwise present throughout voir dire. Irby and his trial counsel could respond to the trial court's questions since they had the completed questionnaires and time to consult.

**ii. Washington case law.**

The Washington Courts apply the same tests as federal courts. In In Re Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994), the defendant claimed that he did not waive his presence at numerous unspecified in-chambers hearings and sidebar conferences. In Re Personal Restraint of Lord, 123 Wn.2d at 305-6.

The core of the constitutional right to be present is the right to be present when evidence is

being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 4 (1985) (per curiam). **Beyond that, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....’ ”** Gagnon, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)).

In Re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (94) (emphasis added) . The Lord court went on to indicate that prejudice cannot be presumed and that “Lord does not explain how his absence affected the outcome of any of the challenged proceedings or conferences, nor can we find any prejudice.” In Re Personal Restraint of Lord, 123 Wn.2d at 307 citing, Rushen v. Spain, 464 U.S. at 117-20.

In In Re Personal Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998), the defendant claimed the trial court erred by granting a continuance in his absence. The court held that defendant’s absence did not affect his opportunity to defend the charge since there was no presentation of evidence or considerations of admissibility of

evidence. In Re Personal Restraint of Benn, 134 Wn.2d at 920.<sup>7</sup> Benn attempted to argue that his absence constituted “structural error” which could never be held harmless. However, the Benn court held that the absence of the defendant can be “trial error” rather than “structural error” and thus is subject to harmless error analysis. Id at 921. Most crucially to the analysis in the present case, the Benn court noted that the same considerations as to the opportunity to defend the charge exist in a harmless error analysis.

The same factors which support the conclusion that the defendant had no right to be present at the hearing also compel us to conclude that, if any such right existed, his absence was harmless.

In Re Personal Restraint of Benn, 134 Wn.2d at 921.

The same situation exists here as in Benn. Irby’s absence from an empty court room when the e-mail exchange occurred did not affect his ability to defend against the charge and under a similar analysis any error was harmless.<sup>8</sup>

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<sup>7</sup> See also, State v. White, 74 Wn.2d 386, 444 P.2d 661 (1968) (passing out of jury orientation handbook did not amount to a stage in the proceedings at which the defendant’s presence is required).

<sup>8</sup> See also, In Re Personal Restraint of Woods, 154 Wn.2d 400, 114 P.3d 607 (2005) (defendant’s absence at chambers conference regarding juror misconduct and side bars not necessary to defend against charge), State v. Bremer, 98 Wn. App. 832, 991 P.2d 118 (2000) (absence at discussion of jury instructions did not have relation to the opportunity to defend against the charge), State v. Thorpe, 51 Wn. App. 582, 754 P.2d 1050 (1988) (defendant’s illness preventing him from

In State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007) held the right to presence “extends to jury voir dire, though the defendant’s presence at this stage is only required because it is substantially related to the defense and allows the defendant ‘to give advice or suggestion or even to supersede his lawyers.’” State v. Wilson, 141 Wn. App. at 604, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934) *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The Wilson court noted the core of the right is to be present when the evidence is presented. State v. Wilson, 141 Wn. App. at 603.

In State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007), the defendant was not present for an in-chambers conference regarding a seated juror. The court presented the question as whether the defendant “has demonstrated that his presence at the in-chambers conference bore a reasonably substantial relation to the fullness of his opportunity to defend against the charge, or whether a fair and just hearing was thwarted by his absence.” State v. Wilson, 141 Wn. App. at 604, *citing Snyder v. Massachusetts*, 291 U.S. 97,

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attending closing argument would not have advanced the argument of his counsel).

105-8, 54 S.Ct. 330, United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). The Wilson court concluded: “However, Mr. Wilson must demonstrate how his presence was necessary to secure his due process rights; **prejudice will not be presumed.**” State v. Wilson, 141 Wn. App. at 604 (emphasis added), *citing* In Re Personal Restraint of Lord, 123 Wn.2d 296, 307, 868 P.2d 835 (1994).

Lord, Benn and Wilson, provide that a defendant’s absence can be trial error and prejudice cannot be presumed.

The defendant’s presence is required when it is necessary to secure the defendant’s due process rights. Since there was no court proceeding, Irby’s fullness of his opportunity to defend against the charge was not affected and a fair and just hearing was not thwarted.

**2. Where Irby had requested not to be present when questionnaires were completed and where the parties agreed to excuse the jurors, there was no prejudice.**

As explained above, jury selection generally requires a defendant to be present. However, it is not within the constitutional core of presence of evidence presentation.<sup>9</sup> Here, there were no

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<sup>9</sup> The core of the constitutional right to be present is the right to be present when evidence is presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

court proceedings and no juror questioning when Irby's counsel agreed to excuse the jurors.

"The exclusion of a defendant from a ... proceeding should be considered in light of the whole record." United States v. Gagnon, 470 U.S. 522, 526-7, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). The defendant need not be present " 'when presence would be useless, or the benefit but a shadow.' " State v. Rice, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 106-07, 54 S.Ct. 330, 78 L.Ed. 674 (1934)).

The purpose of voir dire is to gain information, which enables parties to challenge jurors for cause or to use peremptory challenges. State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369, *rev. denied*, 104 Wn.2d 1013 (1985). "[T]he defendant should be permitted to examine prospective jurors carefully, 'and to an extent which will afford him every reasonable protection.'" Frederiksen, 40 Wn. App. at 752 (*quoting State v. Laureano*, 101 Wn.2d 745, 758, 682 P.2d 889 (1984) (alterations in original) (citations omitted)). But the trial court has wide latitude and the scope of voir dire is a matter of trial court discretion. State v. Robinson, 75 Wn.2d 230, 231, 450 P.2d 180 (1969); State v. Tharp, 42 Wn.2d 494, 256 P.2d 482 (1953).

Absent an abuse of discretion and a showing that the accused's rights have been substantially prejudiced thereby, the trial judge's ruling as to the scope and content of voir dire will not be disturbed on appeal.

State v. Frederiksen, 40 Wn. App. at 752-53.

Additionally, Irby's counsel was part of the discussion to excuse the jurors and agreed to do so. See U.S. v. Stratton, 649 F.2d 1066, 1080-81 (5th Cir.1981) (recognizing that defendant's attorney's presence is relevant to whether defendant was prejudiced by absence from proceeding), see also U.S. v. Walls, 577 F.2d 690 (9th Cir.), *cert. denied*, 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978); U.S. v. Toliver, 541 F.2d 958 (2d Cir. 1976). Trial counsel's decisions regarding how to proceed with voir dire are subject to the standard of review for effective assistance of trial counsel. State v. Donald, 68 Wn. App 543, 550, 844 P.2d 447 (1993).

Here, all of the seven jurors excused by the trial court were excused with the agreement of Irby's counsel. CP 1279. There was no indication that the trial court limited the amount of time to respond to the question. Defense counsel had time to contact Irby to consult him regarding excusing some of the jurors if they chose to do so.

The seven jurors were excused for significant reasons by the trial court. Four were excused because they were informed their

period of service was limited to one week. One had a business hardship. One home schooled a child. And one was excused by agreement because a parent had been murdered. The trial court was properly evaluating the ability of jurors to serve.<sup>10</sup>

Of the seven jurors released, in the end only three had the potential to sit on the jury due to the number of jurors. Of those three jurors, all had a time conflict for trial. Jurors 7 and 23 had received a commitment from the Court Administrator that their service was limited to one week and juror 17 home schooled a child.

In addition, Irby requested not to be present when the questionnaires were presented.

In the context of the record of the jury selection process, Irby's presence at the point when the trial court questioned counsel about excusing jurors was not a hearing at which Irby's presence had a relation, reasonably substantial, to the fullness of his opportunity to

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<sup>10</sup> Because "a juror's competency to serve impartially" is a credibility determination that the trial court is necessarily in the best position to make, this court applies a deferential standard of review and will reverse the trial court's determination only if the court has manifestly abused its discretion. State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987); Witt, 469 U.S. at 428-29, 105 S.Ct. 844; Brown, 132 Wn.2d at 601-02, 940 P.2d 546; Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007) ("Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."). State v. Yates, 161 Wn.2d 714, 743, 168 P.3d 359 (2007).

defend against the charge and there was no prejudice.

**3. Since the same considerations apply to evaluate whether a defendant's presence is required as in harmless error, the present case also was harmless error.**

The Court of Appeals suggested that the finding of a violation of the defendant's right to be present could have been harmless error. The State contends that the Court of Appeals should have considered that in evaluating whether the defendant's presence was required. In addition, the State specifically argued for harmless error in a motion for reconsideration which was denied without comment.

As mentioned above, the factors used to analyze whether there was a violation of a defendant's right to be present are the same factors in a harmless error analysis. In Re Personal Restraint of Benn, 134 Wn.2d at 921. The determination that the e-mails exchange was a critical stage of the proceedings necessarily required a court to consider whether the defendant's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

The determination necessarily requires a court to evaluate whether, if a person is not present at a "hearing" he would have

contributed to the proceedings. Thus if the person would not have contributed, the absence would be harmless error.

The Supreme Court has “adopted the general rule that a constitutional error does not automatically require reversal of a conviction ... and has recognized that most constitutional errors can be harmless.” Arizona v. Fulminante, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Automatic reversal due to a constitutional error is required only if this error was a “structural defect” that permeated “[t]he entire conduct of the trial from the beginning to end” or “affect[ed] the framework within which the trial proceeds.” Id. at 309-10, 111 S.Ct. 1246.<sup>11</sup>

A number of Washington cases cited previously herein have applied the harmless error analysis or considered it as a function of evaluating the defendant’s right to presence. Most of those cases have considered the error harmless. Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d (1983), In Re Personal Restraint of Woods, 154 Wn.2d 400, 114 P.3d 607 (2005), In Re Personal

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<sup>11</sup> The present case would also be subject to the standards for allowing a defense to raise a claim regarding an error affecting a constitutional right for the first time on appeal. Under RAP 2.5(a) and case law, the error must be “manifest” and a defendant must show how the alleged error actually affect the defendant’s rights at trial. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); State v.

Restraint of Pirtle, 136 Wn.2d 467, 483, 965 P.2d 593 (1998), In Re Personal Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998), In Re Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994), State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007).

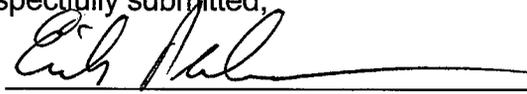
In addition to the absence of prejudice, this case presents a situation of harmless error as well.

#### IV. CONCLUSION

For the reasons set forth in this petition, this Court should reverse the decision of the Court of Appeals, find that the proceedings in the present case did not amount to a hearing at which the defendant's presence was required and remand the case to the Court of Appeals for consideration of others issue raised by the parties at the Court of Appeals but not decided. RAP 13.7(b).

DATED this 31st day of August, 2009.

Respectfully submitted,

By:   
ERIK PEDERSEN, WSBA#20015  
Senior Deputy Prosecuting Attorney  
Attorney for Petitioner, State of Washington  
Office Identification #91059

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McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995), State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

DECLARATION OF DELIVERY

I, Karen R. Wallace declare as follows:

I sent for delivery by; [  ] United States Postal Service; [  ] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, addressed as Neilsen, Broman & Koch, PLLC, 1908 East Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 31<sup>st</sup> day of August, 2009.

Karen R. Wallace

DECLARANT

# **APPENDIX A**

**JohnMMeyer**

**From:** JohnMMeyer  
**Sent:** Tuesday, January 02, 2007 2:01 PM  
**To:** JohnMMeyer; KeithTyne; Tom Seguine  
**Cc:** MelissaBeaton; Eric V. Stollwerck; Delilah M. George  
**Subject:** RE: Irby

05-1-276-9

Oops. 7 goes, not 3. OK?

John M. Meyer, Judge  
Skagit County Superior Court

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**From:** JohnMMeyer  
**Sent:** Tuesday, January 02, 2007 1:59 PM  
**To:** JohnMMeyer; KeithTyne; Tom Seguine  
**Cc:** MelissaBeaton; Eric V. Stollwerck; Delilah M. George  
**Subject:** RE: Irby

The State objects to letting 36, 48, and 49 go. I will have the others notified this afternoon so that they need not appear tomorrow. Thank you. JMM

John M. Meyer, Judge  
Skagit County Superior Court

2

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**From:** JohnMMeyer  
**Sent:** Tuesday, January 02, 2007 1:55 PM  
**To:** KeithTyne; Tom Seguine  
**Cc:** MelissaBeaton; Eric V. Stollwerck; Delilah M. George  
**Subject:** RE: Irby

If I let all 10 go, we still have 82. That should be plenty. Tom, O.K with you?

John M. Meyer, Judge  
Skagit County Superior Court

FILED  
SKAGIT COUNTY CLERK  
SKAGIT COUNTY, WA  
2007 JAN -4 PM 12:01

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**From:** KeithTyne  
**Sent:** Tuesday, January 02, 2007 1:53 PM  
**To:** JohnMMeyer; Tom Seguine  
**Cc:** MelissaBeaton; Eric V. Stollwerck; Delilah M. George  
**Subject:** RE: Irby

No objection from the defense to letting some or all go.

Keith

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**From:** JohnMMeyer  
**Sent:** Tuesday, January 02, 2007 1:02 PM  
**To:** KeithTyne; Tom Seguine  
**Cc:** MelissaBeaton; Eric V. Stollwerck; Delilah M. George  
**Subject:** Irby

I note that 3,23,42 and 59 were excused after one week by the Court Administrator.

1/2/2007

17 home schools, and 3 weeks is a long time.  
77 has a business hardship.  
36, 48, 49 and 53 had a parent murdered.

Any thoughts? If we're going to let any go, I'd like to do it today.

John M. Meyer, Judge  
Skagit County Superior Court