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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 40333-1-II)

byh

STATE OF WASHINGTON,

Petitioner,

vs.

KENNETH SLERT,

Respondent.

**Petitioner's Supplemental Brief
Regarding Law of the Case and *Jones***

On review from the Court of Appeals, Division Two,
And the Superior Court of Lewis County

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I. ISSUE ON WHICH COURT SOUGHT BRIEFING

1. What is the effect on this matter, if any, of the law of the case doctrine and *State v. Jones*, 185 Wn.2d 412, ___P.3d___ (2016)? Order for Supp. Briefing (June 29, 2016).

II. RELEVANT FACTS AND PROCEDURAL POSTURE

A. RELEVANT FACTS

Please see the State's previously filed Supplemental Brief Regarding Harmless Error for the relevant trial facts.

B. PROCEDURAL POSTURE

At oral argument, the Court questioned both parties about *State v. Jones*, 185 Wn.2d 412, ___P.3d___ (2016), which issued after the parties' briefing but before oral argument. The State argued that *Jones* was persuasive in the harmless error context: the lack of objection to the dismissal of jurors outside of the defendant's presence indicated a lack of prejudice. One justice asked whether *Jones's* waiver rationale was also applicable; another justice inquired whether the law of the case doctrine precluded *Jones's* application to this case. The Court sought additional briefing on these subjects.

III. ARGUMENT

Summary: *Jones* is applicable to this case as a matter of course for purposes of harmless error. RAP 10.8. On the waiver issue, *Jones* is not barred by law of the case and may be raised sua sponte by the Court. The Court should raise the issue of waiver and affirm Mr. Slet's conviction.

A. JONES IS CLEARLY APPLICABLE TO THE EXTENT IT IS PERSUASIVE IN THE HARMLESS ERROR CONTEXT.

Jones is clearly applicable to this case to the extent that it supports the State's harmless error argument. A litigant is entitled to the benefit of new legal authority to the extent relevant to issues raised. RAP 10.8. And *Jones* is relevant: it emphasizes that the failure to object, despite ample opportunity to correct or address any error, is evidence of a lack of prejudice. *Jones*, 185 Wn.2d at 426-27. ("[T]he failure to raise a timely objection strongly indicates that the party did not perceive any prejudicial error until after receiving an unfavorable verdict.").

Here, the defendant was present with counsel for much of the discussion and use of the jury questionnaires in voir dire, including discussion of the four jurors' dismissal. At no point did he or counsel express any concerns about the procedure. Had either done so, the dismissed jurors could have recalled or a new panel convened to cure any error. The

lack of objection speaks to a lack of prejudice, especially because this voir dire procedure was designed to protect Mr. Slett's right to an impartial jury. Thus, regardless of the Court's decision on the waiver / law of the case issue, it should use *Jones* to reverse the Court of Appeals' harmless error decision and affirm the conviction below.

B. JONES'S WAIVER RATIONALE IS NOT BARRED BY THE LAW OF THE CASE; THE COURT MAY RAISE AND RELY ON IT.

The Court can also employ *Jones's* waiver rationale, which is not barred by the law of the case because waiver has never been addressed in this appeal. Therefore, the Court can and should raise waiver as a dispositive issue.

a. The law of the case doctrine does not apply.

The law of the case doctrine provides that an appellate court will not revisit issues previously litigated in the same case.¹ WASH. APP. PRAC. DESKBOOK §17.9 (3d. ed. 2011). But, the doctrine does not apply when the specific legal question at hand was not previously addressed. *Roberson v. Perez*, 119 Wn. App. 928, 932, 83 P.3d 1026 (2004); *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 258, 948 P.2d 858

¹ In limited circumstances, the Court will readdress a prior appellate ruling despite this doctrine. RAP 2.5(c); *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988). It need not do so here because the doctrine does not apply. If the Court holds to the contrary, it should nevertheless hold that the Court of Appeals' finding of error, rather than waiver, was clearly erroneous and would work a manifest injustice to the State because of the circumstances set forth in section III.C.

(1997); *Columbia Steel Co. v. State*, 34 Wn.2d 700, 706, 209 P.2d 482 (1949). In each of those cases, the issue previously litigated was close, but not identical, to one the Court concluded it could address. See *Roberson*, 119 Wn. App. at 932 (existence of cause of action vs. whether it applied on the facts); *Holst*, 89 Wn. App. at 258 (duties of agent vs. fact of agency); *Columbia Steel Co.*, 34 Wn.2d at 706 (propriety of tax vs. remedy if tax not authorized). Thus, the prior appellate decisions in this case on harmless or invited error do not bar consideration of a waiver theory.

This is true because none of the appellate decisions in this matter has addressed waiver. The jury questionnaires and dismissal of jurors first came up as an open-courts and right-to-presence challenge in the Court of Appeals, to which the State argued no error, lack of prejudice, and invited error. See Respondent's Br., No. 40333-1-II, pp. 30-34 (Jan. 27, 2011; Respondent's Suppl. Br., No. 40333-1-II, pp. 7-10 (Oct. 3, 2011); Respondent's Suppl. Response Br., No. 40333-1-II, pp. 4-13 (Nov. 15, 2011). The Court of Appeals addressed only open-courts and right-to-presence error and invited error. *State v. Slett (Slett III)*, 169 Wn. App. 766, 774-79, 282 P.3d 101 (2012). The State sought review on no error, invited error, and harmless error. State's Pet. For Review, No. 87844-7

(Sept. 7, 2012); State's Suppl. Br., No. 87844-7 (June 7, 2013); State's Response to Amici Curiae, No. 87844-7 (Oct. 2, 2013). This Court granted review solely on the open-courts issue and split 4-4-1: four justices found no public trial implications for the closure, four justices disagreed, and one justice opined, under RAP 2.5(a)(3), that Slert could not raise the open-courts error for the first time on appeal. *State v. Slert (Slert IV)*, 181 Wn.2d 598, 334 P.3d 1088 (2014). The issue on remand to the Court of Appeals was harmless error alone. State's Suppl. Br. Re: Harmless Error, No. 40333-1 (Dec. 3, 2014); *State v. Slert (Slert V)*, 189 Wn. App. 821, 358 P.3d 1234 (2015). Likewise, the present petition for review concerned harmless error only, until now. State's Pet. for Review, No. 92310-8 (Sept. 30, 2015); Pet.'s Suppl. Br. Re: Harmless Error, No. 92310-8 (March 31, 2016).

As a result, waiver never came up in the prior proceedings.² The closest thing was one justice's open-courts RAP 2.5(a)(3) discussion, which is a distinct issue from

² The Court may wonder why waiver was not addressed, if Mr. Slert raised his challenges for the first time on appeal. When this appeal began in 2011, the presence and open-courts challenges were intertwined and governed by identical legal standards. See *State v. Sublett*, 156 Wn. App. 160, 181, 231 P.3d 231 (Div. 2 2010), *overruled on this grounds*, 176 Wn.2d 58 at 71-72 (2012). Failure to object in the open-courts arena does not constitute waiver. *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). Rather, the State made harmless- and invited error arguments, consistent with the jurisprudence at the time. See *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009).

right-to-presence waiver, and on which no holding emerged. Because no prior appellate court in this case addressed waiver, the law of the case doctrine does not apply. *Roberson*, 119 Wn. App. at 932.

b. The Court may raise and rely on waiver.

In the absence of the law of the case as a bar, the only question is whether this Court may raise the waiver issue sua sponte. It certainly can.

This Court may decide an issue not raised in the briefing below or petition for review if it provides a basis on which to affirm the trial court's decision and is supported by the record. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003). This includes issues raised sua sponte by the Court. See RAP 13.7(b) (allowing the court to raise issues by its own order); RAP 12.1(b) (same). Furthermore, the Court may waive the scope of review and reach any issue necessary to secure a fair decision of the case. See RAP 7.3; RAP 1.2(c); *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124, 864 P.2d 1382 (1994); *Kruse v. Hemp*, 121 Wn.2d 715, 721, 853 P.2d 1373 (1993).

The Court usually expands the scope of review only when the parties have had an opportunity to address the issue. One way in which to do so is to call for further briefing, as the Court has done here. RAP 12.1(b). Another is when

the briefing on a related, distinct issue has adequately developed the record. *Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989). In one such case, this Court expanded the scope of review specifically to address a waiver issue. *Shoreline Cmty. College Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 402-03, 842 P.2d 938 (1992).

In short, there is plenty of precedent for the Court raising a decisive issue sua sponte. Your Honors provided the parties an opportunity for briefing as a safeguard, RAP 12.1(b), and the prior briefing on harmless and invited error sufficiently developed the record for the decision, *cf. Falk*, 113 Wn.2d at 659. It is even the same type of issue previously raised sua sponte by the Court. *Shoreline Cmty College*, 120 Wn.2d at 402-03. The Court should raise waiver as an issue and affirm Mr. Slett's conviction under *Jones*.

C. ANY ERROR HERE WAS WAIVED UNDER JONES.

Under *Jones's* analysis, Mr. Slett waived any right-to-presence error. In *Jones*, the Court and parties discussed the manner in which alternate jurors would be chosen in the defendant's presence during pretrial motions, seeking the defense's input on how the procedure should be handled. *Jones*, 185 Wn.2d at 416. During the trial, the Court explained the manner in which alternates would be chosen while the

defendant and his attorney were present. *Id.* at 417. The Court selected alternate jurors in the planned manner outside of the defendant's presence during a break, and no one expressed any "surprise, confusion, or objections" at the time or during the trial. *Id.* at 418-20. Instead, after the jury returned a verdict of guilty, the defendant sought a new trial, alleging that the alternate-selection procedure violated his right to be present. *Id.*

The Court held that Jones could have cured the error by making a timely objection to the procedure: the drawing could have been redone in his presence, the dismissed alternates recalled, and deliberations begun anew. *Id.* at 426-27. The lack of objection indicated that the defendant had not perceived any prejudice; rather, he had gambled on a favorable verdict and raised the issue only after conviction. *Id.*

Jones is similar to this case in all important respects. As in *Jones*, the parties and Court here discussed the jury questionnaires in Mr. Slerf's presence at pretrial hearings, including Mr. Slerf's attorney's request for in-chambers voir dire. VRP (Jan. 6, 2010) at 3-4; VRP (Jan. 21, 2010) at 2-4. As in *Jones*, the issue came up again at trial in Mr. Slerf's presence: Mr. Slerf was present to discuss issues surrounding the questionnaires with his counsel on the first day of trial,

before the jurors finished filling them out. See VRP (Jan. 6, 2010) at 14; VRP (Jan. 25, 2010) at 5-6; CP at 194.³ The judge announced in Mr. Slert's presence that four jurors had been dismissed based on their answers, with which action Mr. Slert's attorney agreed. See VRP (Jan. 25, 2010) at 3, 5 (consultation); CP at 194 (agreement). Again as in *Jones*, there was no expression of objection, surprise, or alarm at this announcement. Quite the opposite: Mr. Slert's attorney discussed this dismissal of jurors himself and the further use of the questionnaires, seeking in-chambers voir dire. VRP (Jan. 25, 2010) at 10-14. Mr. Slert was present with counsel for this exchange, individual voir dire, and general voir dire. *Id.* at 14-124. At no time during voir dire or the trial did Mr. Slert or his attorney raise any question regarding the dismissal of these four jurors, who could have been recalled for further questioning to cure any alleged error.⁴ *Cf. Jones* 185 Wn.2d at 426-27.

³ The defendant was present as of 9:30 a.m. that morning, when the prospective panel was still going through the questionnaires. VRP (Jan. 25, 2010) at 5-6. The Court did not announce the four tainted jurors' excusal until 10:49 a.m. CP at 194. The judge said that they had reviewed the questionnaire answers by then. VRP (Jan. 25, 2010) at 5. Thus, it appears that the defendant was present for at least some of the intervening hour and twenty minutes, while the jurors finished responding to the questionnaires and counsel reviewed them.

⁴ Nor is there any indication in the record that Mr. Slert disagreed with his counsel's actions. Such disagreement would undercut any waiver argument, but is isn't present here. See *State v. Love*, 183 Wn.2d 598, 608 n.3, 354 P.3d 841 (2015) (recognizing the defendant's attempt to question his lawyer's jury-selection practices).

Instead, as in *Jones*, Mr. Slert waited until after conviction, challenging the procedure for the first time on appeal. This suggests that neither he nor his attorney perceived any prejudice from the procedure at the time. *Cf. id.* The inference is even more compelling here than in *Jones*: whereas the *Jones* procedure was random, the procedure here was consciously designed with defense input to protect Mr. Slert's rights. Because Mr. Slert's counsel participated in obtaining these jurors' dismissal *for Mr. Slert's benefit*, Mr. Slert's lack of objection shows that he agreed that the procedure benefitted him—at least, he did until after the jury found him guilty. His late-raised claim reflects the same strategic gamble disapproved in *Jones*, and should be equally rejected. *Jones*, 185 Wn.2d at 426-27. The Court should reverse the Court of Appeals and affirm Mr. Slert's conviction.

IV. CONCLUSION

The Court may apply *State v. Jones* in the harmless error context without any special consideration. *Jones's* waiver rationale is not barred by law of the case because it was not previously addressed in this appeal, but requires the Court to approve its being raised now. The Court can and should raise the issue of waiver, find that Mr. Slert's waived

his right-to-presence claim under *Jones*, and affirm Mr. Slert's conviction.

RESPECTFULLY submitted this 19 of July, 2016.

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by: 
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I swear under penalty of perjury under the laws of the State of Washington that on July 19, 2016, I served a copy of this Supplemental Brief upon Mr. Slert's attorneys, Jodi Backlund and Manek Mistry, at the following email address: backlundmistry@gmail.com, pursuant to our two offices' agreement to allow electronic service of appellate materials.

Signed on July 19, 2016 in Chehalis, WA,


Eric Eisenberg

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And please find attached for filing the State's Supplemental Brief in the same case (State v. Slert, No. 92310-8) on the same issue. Thank you!

Best,

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I have attached for filing our Second Supplemental Brief in the case of State v. Kenneth Slert, cause number above.

Thank you.

Jodi Backlund

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