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No. 92310-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

**STATE OF WASHINGTON,**

Petitioner,

vs.

**KENNETH SLERT,**

Respondent.

**Petitioner's Supplemental Brief  
Regarding Harmless Error**

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

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By:

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**I. ISSUES PRESENTED FOR REVIEW**

1. The parties and judge reviewed answers to jury questionnaires regarding juror bias from pretrial publicity in chambers on the day of trial, then the judge announced the agreed-upon dismissal of four jurors when they emerged. Was the defendant's absence for these jurors' dismissal harmless error?
2. To raise a possibility of prejudice, must a defendant do more than show that certain potential jurors were within the portion of the venire from which a jury was chosen, such as suggest some reason that those jurors were fit to serve?
3. Must the record contain direct evidence that an error was harmless for it to be proven harmless beyond a reasonable doubt, or may circumstantial evidence suffice?
4. When the record demonstrates that actual bias was the basis for a juror's dismissal, is harmless error demonstrated?

**II. STATEMENT OF THE CASE**

**A. SUMMARY AND PROCEDURAL POSTURE**

At Kenneth Slerf's murder trial (his third for the same offense), potential jurors filled out a questionnaire regarding bias from pretrial publicity. The judge, by agreement with counsel in chambers, dismissed four potential jurors based on their questionnaire answers. The Court of Appeals found that this violated the open-courts doctrine and the defendant's right to be present. *State v. Slerf (Slerf III)*, 169 Wn. App. 766, 775-779, 282 P.3d 101 (2012). This Court reversed on the open-courts issue, remanding for a harmless-error analysis

on the presence issue. *State v. Skert (Skert IV)*, 181 Wn.2d 598, 608, 612, 334 P.3d 1088 (2014) (opinions of Gonzalez, J and Wiggins, J.). On remand, two judges held that Skert had raised a possibility of prejudice and that the error was not harmless. *State v. Skert (Skert V)*, 189 Wn. App. 821, 822-31, 358 P.3d 1234 (2015). The third judge dissented on both points. *Id.* at 831-38. The State timely petitioned for review, and this Court accepted.

## **B. RELEVANT FACTS**

In October of 2000, Kenneth Skert was camping in Lewis County, Washington, when a man named John Benson drove into his campsite. Verbatim Report of Proceedings (VRP) (Nov. 18, 2009) at 17, 20, 58; VRP (Jan. 27, 2010) at 492. The two were strangers. VRP (Nov. 18, 2009) at 229. Benson invited Skert into his truck to share some whiskey. VRP (Jan. 27, 2010) at 492. The interaction did not go well; Skert eventually shot and killed Benson. *Id.* at 493-95, 513. Skert claimed that the killing was justified because Benson attacked him. *Id.* But, the physical evidence suggested an execution-style killing at close range, with one shot paralyzing Benson and a second shot fired with the gun touching Benson's head. VRP (Jan. 27, 2010) at 345, 349, 352-54, 363-64. Consistent with this evidence, Skert told a fellow

Inmate that he killed Benson because Benson had come on to him. VRP (trial) at 433, 478.

The State charged and convicted Slerf of second-degree murder, but the conviction was overturned because the trial court erred in rejecting one of Slerf's proposed self-defense instructions. *State v. Slerf (Slerf I)*, No. 31876-8-II, 128 Wn. App. 1069, 2005 WL 1870661 at \*1-4 (Aug. 9, 2005). Slerf was convicted again on remand; that conviction was overturned because the trial judge violated the appearance of fairness doctrine. *State v. Slerf (Slerf II)*, No. 36534-1-II, 149 Wn. App. 1043, 2009 WL 924893 at \*4-5 (Apr. 7, 2009).

In the lead-up to Slerf's third trial, Slerf's lawyer submitted a jury questionnaire designed to screen the venire for exposure to pretrial publicity. VRP (Jan. 6, 2010) at 3-4. The goal was to remove jurors who were prejudiced from hearing about Slerf's previous convictions for the same offense, without tainting the whole panel. *Id.* The parties adjusted the questionnaire's wording to obscure the fact that there had been prior trials. VRP (Jan. 21, 2010) at 2-4. Otherwise, it remained as proposed by the defense. *Id.* It pertained solely to bias from pretrial publicity. CP 359-61.

The prospective jurors filled out the questionnaire when they appeared for voir dire on the first day of trial. VRP

(Jan. 6, 2010) at 14; VRP (Jan. 25, 2010) at 5-6. The trial court and counsel for both parties reviewed the questionnaires, and the defendant was present to consult with his attorney for at least a portion of this review. See VRP (January 25, 2010) at 5-6; CP at 194.<sup>1</sup> At some point, counsel and the judge had an in-chambers conference. CP at 194. The court then went on the record to address some other matters, *id.*, during which the trial court announced the agreed-upon excusal of four jurors for cause:

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.

VRP (Jan. 25, 2010) at 3, 5; CP at 194. Defense counsel commented that those jurors were dismissed because they had knowledge of prior trials. VRP (Jan. 25, 2010) at 11.

Other than agreeing about these four jurors' dismissal, Slert's counsel noted that the parties had not yet discussed the voir-dire implications of the jury questionnaire. *Id.* at 10

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<sup>1</sup> 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.

("[W]e still haven't dealt with the responses to the questionnaire."). Defense counsel identified 15 additional potential jurors who had heard something about the case, but did not necessarily say they knew about the prior trials. *Id.* at 10-11. He requested in-chambers voir dire of these jurors. *Id.* The judge rejected this request, instead permitting individual voir dire in open court. VRP (Jan. 25, 2010) at 11-14. The parties conducted individual voir dire of these jurors, *id.* at 14-69, then general voir dire of the whole panel. *Id.* at 69-124.

The resulting jury heard the trial and convicted Slett for a third time. VRP (Feb. 2, 2010) at 977-79; VRP (Feb. 10, 2010) at 1-13 (sentencing).

Slett timely appealed, arguing that the in-chambers conference regarding the jury questionnaires violated his right to open courts and right to be present. The Court of Appeals agreed on both issues. *Slett III*, 169 Wn. App. 766, 775-779, 282 P.3d 101 (2012). It did not undertake a harmless-error analysis for the right-to-presence issue because the open-courts holding preempted it. *See id.* at 778-79 (holding that the open-courts error was structural, i.e., not subject to harmless-error analysis).

This Court granted review solely on the open-courts issue and, in a split opinion, reversed. *Slett IV*, 181 Wn.2d

598, 334 P.3d 1088 (2014). Four justices found that no closure of the courtroom occurred from the pre-voir-dire discussion of the jury questionnaires. *Id.* at 608 (opinion of Gonzalez, J.). One justice opined that Sfert was barred from raising his open-courts claim for the first time on appeal. *Id.* at 612 (Wiggins, J., concurring in result). The case was remanded to the Court of Appeals to consider whether the right-to-presence error was harmless. See ACORDS “Events” entry of Oct. 16, 2014, No. 87844-7.

In a published opinion on remand, a two-judge majority held that Sfert had raised a possibility of prejudice simply by citing *Irby*.<sup>2</sup> *Sfert V*, 189 Wn. App. at 825-26. The majority held that the error was not harmless “particularly because the jurors’ answers to the questionnaires have been destroyed, and we do not know the basis for their excusal,” *id.* at 828, and made no distinction between the hardship excusals in *Irby* and the bias excusals in this case, *id.* at 827-28. The majority distinguished *Miller*,<sup>3</sup> which found harmless error for a potential juror dismissed after witnessing pretrial matters, because in *Miller* the juror’s prejudice had been demonstrated. *Id.* at 830-31.

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<sup>2</sup> *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011).

<sup>3</sup> *State v. Miller*, 184 Wn. App. 637, 338 P. 3d 873 (2014), *rev. denied*, 182 Wn.2d 1024 (2015).

The dissent, in contrast, disagreed that Slert had raised any possibility of prejudice: *Irby* had not equated any absence of the defendant with prejudice. *Id.* at 832-35. Rather, in *Irby* it appeared that the reasons for the potential jurors' hardship excusal may have been invalid, where in this case the jurors were excused for bias. *Id.* at 835-36. Because the jurors were excused for their answers to a questionnaire solely about their bias from knowledge of prior trials, they had no chance to sit on the jury, and the error was harmless. *Id.* at 836-38.

The Court now reviews this split decision.

### III. ARGUMENT

The dismissal of jurors outside of Slert's presence in this case increased his trial's fairness and was harmless beyond a reasonable doubt. The Court should reverse the majority's decision below, which misinterpreted *Irby*, contravened *Miller*, refused to consider circumstantial evidence of harmlessness, and wrongly overturned Slert's third conviction of the same murder. The Court should affirm Slert's conviction and put an end to this litigation.

#### A. **IRBY DOES NOT ELIMINATE THE REQUIREMENT THAT THE DEFENDANT RAISE THE POSSIBILITY OF PREJUDICE IN RIGHT-TO-PRESENCE CASES.**

The majority below determined that the defendant raised the possibility of prejudice from right-to-presence error

simply by citing *Irby*. *Slert V*, 189 Wn. App. at 825-26. This contrasts with the usual rule in right-to-presence cases, in which the defense must first raise some possibility of prejudice, and then the State must disprove it beyond a reasonable doubt. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); accord *State v. Bourgeois*, 133 Wn.2d 389, 414, 945 P.2d 1120 (1997). *Irby* specifically adopted this test. *State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011). Thus, the majority interpreted *Irby* to abrogate the very test it purports to adopt. The Court should reject such reasoning.

In effect, the majority below misconstrues *Irby* solely as a *procedural* rule, to wit, if the defendant is not present for voir dire questioning, prejudice ensues. See *Slert V*, 189 Wn. App. at 825-26 (“[T]he alleged prejudice was the removal of some potential jurors in Slert’s absence.”). But the dissent correctly held that, even after *Irby*, the defendant must raise some *substantive* possibility of prejudice (i.e., that the jurors were somehow fit to serve on the jury), before the State must disprove the error beyond a reasonable doubt. See *id.* at 833-35, 837-38. The latter is consistent with *Irby*, which examines the extent to which the seemingly unsubstantiated hardship excusals in that case might have been invalidated by

questioning.<sup>4</sup> *Irby*, 170 Wn.2d at 886. The Court should adopt the dissent's substantive interpretation of *Irby*.

The distinction matters in this case: all of the evidence in the record suggests that the jurors were excused because they were biased by their knowledge of Slert's prior trials. At no point in any of the briefing in this matter has the defense suggested why the four excused potential jurors in this case *should* have been on the jury. See Appellant's Opening Brief, No. 40333-1-II, at 63-65 (arguing error but not prejudice); Appellant's Reply Brief, No. 40333-1-II, at 32-33 (arguing error under *Irby*, but proffering no purported prejudice).

Slert fails to make such a showing because the dismissed jurors could not realistically have served on Slert's jury. The questionnaire's purpose was to screen out jurors who had heard that Slert was convicted at his prior trials for the same murder, which would be extremely prejudicial to Slert. VRP (Jan. 6, 2010) at 3-4. Slert's attorney consented to these four jurors' dismissal because their questionnaire answers showed that they had heard about Slert's prior trials. VRP (Jan. 25, 2010) at 3, 5, 11; CP at 194. In contrast, Slert's attorney wished to question other potential jurors' whose

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<sup>4</sup> For example, there was no evidence as to why the judge thought that "3 weeks is a long time" was reason enough to excuse one of the jurors, without anyone having asked the juror about his or her ability to serve for the length of the trial. See *Irby*, 170 Wn.2d at 878.

knowledge of the prior convictions was not apparent from the questionnaires. *Id.* at 10-11. Thus, the four dismissed jurors were so obviously prejudiced by their knowledge of Slerf's case that everyone knew, without further questioning, that they could not sit on the jury. Unlike in *Irby*, where the hardship dismissals were "soft" enough to raise a question of substantive prejudice, here Slerf has raised no possibility that the jurors at issue in this case could or should have served.

It is not as if this process was a secret to Slerf, who sat by his counsel's side during at least a portion of the review of questionnaires,<sup>5</sup> during the announcement of the four jurors' dismissal,<sup>6</sup> during his counsel's request for in-chambers voir dire of other jurors,<sup>7</sup> and during both the individual and general voir dire.<sup>8</sup> At no point did he object, raise concerns, or otherwise indicate that his attorney's actions were contrary to his interests—which is the whole point of the defendant's right to presence. Slerf's silence when his attorney argued for in-chambers voir dire suggests that he agreed with his attorney's efforts to secure him an unbiased jury in this manner. This state of affairs starkly contrasts with *Irby*, in

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<sup>5</sup> Please see footnote 1, above, for the explanation of why the record supports this conclusion.

<sup>6</sup> VRP (Jan. 25, 2010) at 3, 5; CP at 194.

<sup>7</sup> VRP (Jan. 25, 2010) at 10-11.

<sup>8</sup> *Id.* at 14-124.

which the email exchange before trial showed no evidence whatsoever of the defendant's input. *Irby*, 170 Wn.2d at 877-78, 884.

Consequently, the defense has not and cannot raise any claim that the four jurors substantively could have served, and thus has not raised a claim of prejudice based on Slerf's absence when they were excused. Because *Irby* requires such a showing, this Court should reverse the Court of Appeals and affirm Slerf's conviction.<sup>9</sup>

**B. DIRECT EVIDENCE IS NOT NECESSARY TO FIND AN ERROR HARMLESS BEYOND A REASONABLE DOUBT; CIRCUMSTANTIAL EVIDENCE MAY SUFFICE.**

The majority below held that the jurors' dismissal was not harmless largely because their questionnaire answers were not preserved, so there was no direct evidence that they were dismissed for bias. *Slerf V*, 189 Wn. App. at 828, 830. This reasoning employs the wrong legal standard: an appellate court may rely solely on circumstantial evidence to find something beyond a reasonable doubt. See *State v.*

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<sup>9</sup> This showing is easier for the defendant than that required in other jurisdictions' right-to-presence cases when the defendant did not object at trial. In the federal system, the defendant bears the burden of showing a prejudicial impact from his absence at a juror's dismissal, if his absence counts as error at all. Compare, e.g., *United States v. Reyes*, 764 F.3d 1184, 1190-91 (9th Cir. 2014) (no error) with *United States v. Thomas*, 724 F.3d 632, 646 (5th Cir. 2013) (defendant's burden) and *United States v. Tipton*, 90 F.3d 861, 875-76 (4th Cir. 1996) (defendant's burden); see also *People v. Bean*, 560 N.E.2d 258, 264-68 (1990) (Illinois) (defendant's burden); accord *People v. Oliver*, 972 N.E.2d 199, 202-04 (2012) (Illinois).

*Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008). The Court should articulate this point as precedent for claims raised for the first time on appeal, because there will often be no direct evidence of an issue not raised before the trial court.

The jurors' questionnaire answers concerning their exposure to pretrial publicity would be direct evidence of bias. See WPIC 5.01 (“[D]irect evidence’ refers to evidence that is given by a witness who has directly perceived something at issue.”). Other circumstantial evidence bears on the issue, however: whether other people thought the jurors were biased, the type of information by which they made that determination, the attitude of those people with regard to bias, and how credible their opinion of juror bias is. See *id.* (“[C]ircumstantial evidence’ refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue.”). Generally, “[t]he law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.” *Id.* The majority below required direct evidence of the jurors’ bias, in derogation of this principle.

The record in this case contains persuasive circumstantial evidence that the four dismissed jurors’ were

biased. By their conduct, the judge, prosecutor, and defense attorney all demonstrated a desire to secure the defendant a fair trial by unbiased jurors: the defense attorney proposed the questionnaire to weed out jurors tainted by pretrial publicity; the Court and prosecutor accepted it with minor changes furthering that purpose. The final questionnaire pertained solely to bias, and the jurors in question were dismissed based solely on their answers—the judge and defense counsel both commented on that point. Beyond that, the parties and the judge conducted individual voir dire of jurors who *may* have been biased, excusing only those jurors who actually showed bias from prior exposure. Their conscientiousness suggests that they acted similarly with the in-chambers dismissals. There is simply no reason to disbelieve the parties' or the judge's assertions on the subject. And if one has an abiding belief in the truth of the matter, one is satisfied beyond a reasonable doubt. WPIC 4.01. Based on this evidence, this Court should find the error harmless beyond a reasonable doubt and affirm Slett's conviction.

**C. WHEN SUFFICIENT BIAS IS DEMONSTRATED  
IN THE RECORD, DISMISSING A JUROR IN THE  
DEFENDANT'S ABSENCE IS HARMLESS  
BEYOND A REASONABLE DOUBT.**

In addition to using the wrong legal standard, the majority's decision was inconsistent with *State v. Miller*, 184

Wn. App. 637, 338 P. 3d 873 (2014), *rev. denied*, 182 Wn.2d 1024 (2015). In *Miller*, a potential juror was in the courtroom during pretrial proceedings. *Id.* at 640. The Court discovered this while the defendant was absent and excused the potential juror. *Id.* The error was harmless because the potential prejudice to the parties of having that person on the jury was too great. *Id.* at 647. In other words, because the record demonstrated juror bias, the dismissal was harmless.

The majority below acknowledged that “[t]he record demonstrates that the jurors were excused ‘for cause,’ that Slerf’s counsel agreed to their excusal, and that the jurors were likely excused because of knowledge of previous proceedings in Slerf’s case.” *Slerf V*, 189 Wn. App. at 828. Yet, the majority discounts this evidence of bias because it speculates that, had more voir dire questioning occurred, the bias might have seemed less bad. In fact, the majority interprets *Irby* to *require* such speculation. This analysis misses the mark for three reasons.

First, it is inconsistent with *Miller*’s approach to *Irby*. In *Miller*, further voir dire questioning might well have shown that the juror was not biased despite sitting in the courtroom for the pretrial matters. For example, the juror might not have been paying attention, or might have been deaf or hard of

hearing, and so not have witnessed anything prejudicial. But, in the face of credible evidence of bias in the record, the *Miller* opinion does not engage in such speculation under *Irby*. *Miller*, 184 Wn. App. at 647. In contrast, the majority opinion below finds the evidence of bias in the record less weighty than its speculation, based on absolutely nothing in the record. Had Slett raised any possibility that the jurors were not biased and should have served, perhaps the speculation would be appropriate. *Cf. id.* (“Miller has not made any attempt to explain how juror 28 would have been allowed to remain on his jury under these circumstances.”). But, Slett raised no such possibility. The Court should hold that *Miller*’s approach is correct: when evidence of bias appears in the record, the defendant must raise the possibility of prejudice to prevail.

Second, *Irby* does not require speculation unless called for by the record. There, the judge concluded without any questioning of the juror that “3 weeks is a long time,” and so a home-schooler should be dismissed. *See Irby*, 170 Wn.2d at 878. This conclusion does not necessarily follow, so voir-dire questioning about hardship was appropriate. *Id.* at 886. Here, in contrast, it was clear why a juror exposed to publicity about the case would be prejudiced: Slett had been convicted twice before of the same murder, which had been

reported. The point of the questionnaire was to locate those jurors who were prejudiced because they knew this. Consequently, the majority's speculation was misplaced; *Irby* does not require it.

Third and finally, the majority below was wrong on the facts. The majority speculates that more voir dire of the jurors dismissed in chambers might have yielded a different result. On the record here, that speculation makes no sense: defense counsel specifically identified those jurors whom he wished to voir dire individually. To believe that he acquiesced in the in-chambers dismissal of jurors whom he wished to rehabilitate, instead of employing the individual voir dire he already planned to conduct, one must believe defense counsel was an idiot. He was no idiot. The Court should affirm Slert's conviction based on what actually *happened* in this case—that Slert got a fair jury panel and fair trial—instead of remanding on the theoretical possibility that he did not.

#### IV. CONCLUSION

In Kenneth Slert's third murder trial, the judge and the parties agreed in chambers that four jurors be dismissed for cause based on their answers to a pretrial-publicity questionnaire. The defense attorney noted that these jurors knew about Slert's prior trials (at which Slert had been

convicted of the same murder). The panel below held that the defendant's absence during the dismissal was not harmless error—misinterpreting *State v. Irby*, discounting another published case, employing the wrong legal standard, and misconstruing the record. This Court should reverse the Court of Appeals, find the error harmless, and affirm Slert's conviction.

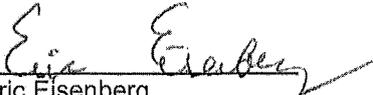
RESPECTFULLY submitted this 31 of March, 2016.

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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 March 31, 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 March 31, 2016 in Chehalis, WA,

  
Eric Eisenberg

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Good afternoon,

Please find attached for filing the Petitioner's (State's) Supplemental Brief regarding harmless error. The extended title of the brief is designed to distinguish it from either of the supplemental briefs filed the last time this matter was in the Supreme Court. If for whatever reason the attachment does not come through, please alert me, and I will resend it. Thank you!

Best,

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