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No. 92310-8
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Slert,

Appellant/Respondent.

Lewis County Superior Court County Superior Court

Cause No. 04-1-00043-7

The Honorable Judge James Lawler

Respondent's Second Supplemental Brief

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STATEMENT OF THE CASE

In 2012, the Court of Appeals reversed Kenneth Slert's murder conviction, finding violations of the right to a public trial and the right to be present. *State v. Slert*, 169 Wn. App. 766, 769-775, 282 P.3d 101 (2012) *review granted in part*, 176 Wn.2d 1031, 299 P.3d 20 (2013) (*Slert I*). The Supreme Court granted review only of the public trial issue and reversed the Court of Appeals. *State v. Slert*, 181 Wn.2d 598, 608-609, 334 P.3d 1088 (2014) (*Slert II*). The court declined to review the right-to-be-present issue. *Id.*; *see also* Order (filed 4/8/13); Petition for Review (filed 9/7/12).

The Supreme Court remanded the case for the Court of Appeals to determine "whether the violation of Slert's right to be present is harmless beyond a reasonable doubt." *Id.* On remand, the Court of Appeals concluded that the error was not harmless beyond a reasonable doubt. *State v. Slert*, 189 Wn. App. 821, 826-29, 358 P.3d 1234 (2015), *review granted*, 185 Wn.2d 1002, 366 P.3d 1244 (2016) (*Slert III*).

The state again petitioned for review, and the Supreme Court granted review to determine whether Mr. Slert's absence from the pretrial conference was harmless error. *See* Petition for Review, p. 1 (filed 9/24/16); Order Granting Review (entered 3/2/16). The parties' supplemental briefs addressed the issue of harmless error. Petitioner's Supplemental Brief (filed 4/1/16); Respondent's Supplemental Brief (filed 4/1/16).

Following oral argument, the Supreme Court requested supplemental briefing “regarding 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 Supplemental Briefing, entered 6/29/16.

ARGUMENT

I. THE SOLE ISSUE BEFORE THE SUPREME COURT IS WHETHER OR NOT THE VIOLATION OF MR. SLERT’S RIGHT TO BE PRESENT WAS HARMLESS BEYOND A REASONABLE DOUBT.

The only issue currently before the Supreme Court involves the prejudice from the violation of Mr. Slert’s constitutional right to be present. This is shown by the case’s procedural history and confirmed by the law of the case doctrine.

A. The procedural history of this case establishes that the sole issue on review involves analyzing the prejudice from the violation of Mr. Slert’s constitutional right.

The Supreme Court previously directed the Court of Appeals to determine “whether the violation of Slert’s right to be present is harmless beyond a reasonable doubt.” *Slert II*, 181 Wn.2d at 609. The Court of Appeals found that the error was not harmless. *Slert III*, 189 Wn. App. at 826-29. The Supreme Court then granted review on the issue of prejudice, and the parties briefed that issue. Petition for Review, p. 1 (filed 9/24/16); Order Granting Review (entered 3/2/16); Petitioner’s Supplemental Brief Regarding Harmless Error (filed 3/31/16); Respondent’s Supplemental Brief (filed 4/1/16).

Under these circumstances, the sole issue before the court involves the impact of the constitutional violation. The state has never contested Mr. Slert's right to seek review of the violation as a manifest error affecting a constitutional right. RAP 2.5(a)(3). *See* Brief of Respondent, Respondent's Supplemental Brief (filed October 3, 2011), Supplemental Response Brief (filed November 15, 2011), Petition for Review (filed September 6, 2012); State's Supplemental Brief (filed June 7, 2013); Respondent's Supplemental Brief re: Harmless Error (filed 12/2/14); State's Petition for Review (filed 9/24/15); Petitioner's Supplemental Brief Regarding Harmless Error (filed 3/31/16).

Neither party has briefed reviewability, RAP 2.5, or issues of waiver. Instead, the briefing has focused on prejudice. The sole issue before the court is whether or not the constitutional violation is harmless beyond a reasonable doubt. The Supreme Court should not address other issues.

B. The "law of the case" doctrine confirms that the Supreme Court should not address issues other than harmlessness.

Under the law of the case doctrine, "once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) (citing *Roberson v. Perez*, 156 Wash.2d 33, 41, 123 P.3d 844 (2005)). The doctrine "seeks to promote finality and efficiency in the judicial process." *Roberson*, 156 Wn.2d at 41.

Under the law of the case doctrine, the trial court violated Mr. Slert's constitutional right to be present. The Court of Appeals made that determination in *Slert I*, and the Supreme Court declined to review that holding. *Slert I*, 169 Wn. App. at 775; *Slert II*, 181 Wn.2d at 608-09; see Order (filed 4/8/13); Petition for Review (filed 9/7/12). In addition, the Supreme Court endorsed the Court of Appeals' decision finding a violation when it directed the lower court to consider only whether or not the error was harmless beyond a reasonable doubt. *Slert II*, 181 Wn.2d at 609.

The present case involves a "subsequent stage[] of the same litigation." *Schwab*, 163 Wn.2d at 672. Thus, the prior decision "must be followed." *Id.*

Although there are two discretionary exceptions to the law of the case doctrine, neither applies here. The two historically recognized exceptions are codified in RAP 2.5(c)(2), which provides: "[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." *Id.*, RAP 2.5(c)(2). This language provides appellate courts two limited avenues for reconsidering a prior decision.

First, the rule allows an appellate court to "reconsider a prior decision in the same case where that decision is 'clearly erroneous, ... the erroneous decision would work a manifest injustice to one party,' and no corresponding injustice would result to the other party if the erroneous hold-

ing were set aside.” *Schwab*, 163 Wn.2d at 672 (alteration in *Schwab*) (quoting *Roberson*, 156 Wash.2d at 42). Second, the rule “allows a prior appellate holding in the same case to be reconsidered where there has been an intervening change in the law.” *Id.*, at 672-73.

The first exception does not apply here. The prior decision is not “clearly erroneous.” The case is controlled by *Irby*, which found a violation of the right to be present under nearly identical facts. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).¹ Here, as in *Irby*, the court excused prospective jurors for cause based on their answers to a case-specific and sworn questionnaire.² RP 5; *Id.*, at 882. In this case, the trial judge took this action in chambers without Mr. Slert present. RP 5. The same occurred in *Irby*, except in that case the prospective jurors were excused after the judge and the parties exchanged emails regarding jurors’ questionnaire answers. *Id.*, at 878-879. In both cases, defense counsel did not object, and apparently acquiesced in the procedure. *Id.*; RP 5.

However, here, as in *Irby*, the “decision-making was clearly a part of the jury selection process, a part that [Mr. Slert] did not agree to miss.” *Irby*, 170 Wn.2d at 882. The *Irby* court held that such procedures violate

¹In *Irby*, as here, the appellate courts reviewed the error despite defense counsel’s apparent acquiescence in the email procedure conducted in the defendant’s absence and the lack of any contemporaneous objection.

²Jury selection is a critical stage, “during which the defendant has a constitutional right to be present.” *Gomez v. United States*, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989). It includes the dismissal of jurors for cause on the basis of a case-specific questionnaire. *Irby*, 170 Wn.2d at 882.

the defendant's right to be present. The court reversed the defendant's conviction and remanded for a new trial, even though defense counsel had acquiesced to the email procedure. *Id.*, at 885-886. *Irby* controls Mr. Slert's case.

The other prongs of the first exception also preclude its application here. The courts' prior decisions in this case do not "work a manifest injustice"³ against the state: Mr. Slert does not escape criminal liability; instead, he will be subject to trial on the same charges. Furthermore, "injustice would result to [Mr. Slert] if the [prior] holding were set aside." *Schwab*, 163 Wn.2d at 672. Consistent with the Supreme Court's remand order in *Slert II* and its grant of review in the current case, he has focused his briefing on the state's inability to prove harmlessness beyond a reasonable doubt. *See Slert II*, 181 Wn.2d at 609; Petition for Review, p. 1 (filed 9/24/16); Order Granting Review (entered 3/2/16). Revisiting the violation at this late stage and without additional briefing would be unjust. *Schwab*, 163 Wn.2d at 672.

The second exception to the law of the case doctrine also does not apply. There has been no "intervening change in the law" calling into question the initial determination that Mr. Slert's rights were violated. *Schwab*, 163 Wn.2d at 672-73. *Irby* has not been overruled. Furthermore, as discussed below, the *Jones* case does not change the law regarding

³ *Schwab*, 163 Wn.2d at 672 (quoting *Roberson*, 156 Wash.2d at 42).

waiver of constitutional rights, but instead applies existing law to the specific facts of that case.

The trial court violated Mr. Slert's right to be present at a critical stage of his trial. *Slert I*, 169 Wn. App. at 769-775; *Slert*, 181 Wn.2d at 608-609. Pursuant to this court's order, the sole issue addressed by the Court of Appeals on remand was whether or not that violation was harmless beyond a reasonable doubt. *Slert III*, 189 Wn. App. at 826-29. The state petitioned for review of that issue, and the Supreme Court granted review of that issue. See Petition for Review, p. 1 (filed 9/24/16); Order Granting Review (entered 3/2/16).

The law of the case doctrine prohibits the Supreme Court from revisiting the violation itself: the prior decisions "must be followed." *Schwab*, 163 Wn.2d at 672. No exception to the doctrine applies. *Id.*, at 672-73. Mr. Slert's state and federal constitutional right to be present was violated by the *in camera* dismissal of jurors for cause based on case-specific reasons. *Irby*, 170 Wn.2d at 885-87. Accordingly, the Supreme Court should affirm the Court of Appeals and remand Mr. Slert's case for a new trial. *Id.*

II. THE *JONES* DECISION HAS NO IMPACT ON MR. SLERT'S CASE, AND THE *JONES* COURT'S ANALYSIS DOES NOT SUGGEST THAT MR. SLERT MADE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

In *Jones*, the Supreme Court found a waiver of any constitutional right to be present when the clerk randomly drew alternate jurors. *Jones*,

185 Wn.2d at _____. The *Jones* court took pains to delineate the specific facts of that case and how they impacted the court's finding of waiver. The issue of choosing alternate jurors "came up early and often" at trial. *Id.*, at _____. These discussions occurred before, during, and after the presentation of evidence. *Id.*, at _____. The trial judge repeatedly told the defendant that it was his choice how alternates would be selected, and gave breaks so he could talk to his attorney. *Id.*, at _____. The court followed the defendant's preference for selecting alternates. *Id.*, at _____. Even after all these opportunities to influence the procedure, defendant made no objection when he learned that alternates had been selected in his absence, and did not raise the issue during five days of jury deliberations. *Id.*, at _____.

The defendant's numerous opportunities for input and his failure to object at a time when the error could be fixed were appropriately held against him. *Id.* The circumstances gave rise to a fair conclusion that he understood his rights, asserted them (by selecting the procedure to be used), and knowingly, voluntarily, and intelligently waived his right to be present by failing to raise an objection. *Id.*

The *Jones* court's decision does not affect Mr. Slert's case for three reasons.

First, as noted in the preceding section, the sole issue on review here is whether or not the violation of Mr. Slert's constitutional rights was harmless beyond a reasonable doubt. Having found a waiver, the *Jones* court did not reach the issue of harmless error. Because *Jones* does not

address the sole issue before this court, *Jones* has no applicability here.

See Jones, 185 Wn.2d at ____.⁴

Second, waiver is not at issue in Mr. Slert's case. Mr. Slert's right-to-be-present issue involves a manifest error affecting a constitutional right, and thus may be reviewed for the first time on appeal under RAP 2.5(a)(3), even absent an objection in the trial court. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).⁵ In addition, the state did not argue waiver in the Court of Appeals and did not raise waiver in its petition to this court. *See* Petition for Review, p. 1 (filed 9/24/16). By failing to raise or argue the issue, the state has itself waived any claim that Mr. Slert waived this constitutional error by failing to object. *See, e.g., State v. Williams*, 158 Wn.2d 904, 908 n. 1, 148 P.3d 993 (2006) (declining to address issue raised for the first time in supplemental briefing).

Third, even under *Jones*, Mr. Slert did not waive his "fundamental right to be present at all critical stages." *Irby*, 170 Wn.2d at 880, 884-85.

Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019,

⁴ The Court of Appeals in *Jones* found any error harmless beyond a reasonable doubt. *State v. Jones*, 175 Wn. App. 87, 107-08, 303 P.3d 1084 (2013), *aff'd in part, rev'd in part*, 185 Wn.2d 412 (2016). However, the Supreme Court found that the defendant had waived any error, and thus the court did not reach the issue of harmless error. *Jones*, 185 Wn.2d at ____.

⁵ To raise a manifest error, an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *Lamar*, 180 Wn.2d at 583. An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010). In this case, the trial court knew that Mr. Slert was not present during this phase of jury selection, and could have corrected the error by conducting a hearing in open court or by inviting Mr. Slert into chambers for the discussion.

82 L.Ed. 1461 (1938). Waiver of a constitutional right must clearly consist of “an intentional relinquishment or abandonment of a known right or privilege.” *Zerbst*, 304 U.S. at 464. The “heavy burden” of proving a valid waiver of constitutional rights rests with the government. *Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). A valid waiver is one that is “voluntary, knowing, and intelligent.” *Id.*

At first glance, certain language in *Jones* may appear to tip this burden on its head. In *Jones*, the majority held that the defendant waived his right to be present “by failing to raise a timely objection.” *Jones*, 185 Wn.2d at ____.

But the specific facts of *Jones* were critical to the court’s decision. It is clear from the court’s opinion that it did not intend to overturn well-established rules regarding the waiver of constitutional rights. Nor did the *Jones* court intend to announce a new rule vitiating RAP 2.5(a)(3).⁶

Indeed, the *Jones* court itself based its ruling “on the specific facts presented by the record...” *Id.*, at _____. As the court noted, “[t]he question of how the alternate jurors would be designated came up early and often in the Pierce County proceedings.” *Id.*, at _____. The trial judge invited the attorneys to discuss it among themselves and specifically to “[c]hat with Mr. Jones, see what he prefers.” The court made it clear that “defense really controls on that. It's either random, or it's the last four.”

⁶ The rule allows an appellant to raise a manifest error affecting a constitutional right, even absent an objection in the trial court. The *Jones* court did not discuss RAP 2.5(a)(3).

Id., at ____ (quoting transcript, citations omitted). The trial court revisited the issue and

reiterate[ed] that the “defense drives the bus on this.” In response to questions raised by Jones' attorney, the court noted that “[t]he box is back there in the corner. It's really not—it's ... spinning and the numbers are all in there if we still have 16 [jurors].”

Ultimately, Jones chose the random drawing as his preferred method for designating alternates.

Id., at ____ (quoting transcript, citations omitted). The trial judge later explained the process in response to a juror's question:

It will be random. The box to be spun looks a little like an old fashioned bingo, but it's wooden. [The judicial assistant] has all 16 of your juror numbers, and after all of the closing arguments she will tell me which four numbers have been selected at random.

Id., at ____ (quoting transcript, citations omitted). In keeping with this description of the process, the court announced (following closing arguments) that four jurors had been randomly selected as alternates during a break. *Id.*, at ____ . Defense counsel did not raise an objection, either at the time the alternates were announced or during the subsequent five days of deliberation. *Id.*, at ____ .

Under these facts, the *Jones* court decided that the defendant had “ample opportunity to object in time to completely cure the error.” *Id.*, at ____ . As the quotations from the record show, the trial court in *Jones* allowed the defense full control of the procedure to be followed, and took affirmative steps to follow the defendant's wishes. *Id.*, at ____ . The defendant did not avail himself of multiple opportunities to have the random drawing conducted in his presence.

By contrast, Mr. Slert was not affirmatively given opportunities to shape the procedure by which the court dismissed jurors. The court did not invite him to decide whether the questionnaire would first be reviewed in open court or in chambers. RP 5. Nor did Mr. Slert have the opportunity to object when the court reviewed the questionnaires and dismissed four jurors. He was not even in the courtroom while counsel met with the judge in chambers. RP 5. When proceedings recommenced, he learned of the *in camera* meeting and the dismissals for the first time. RP 5.

Furthermore, although the *Jones* court initially “[a]ssum[ed] (without deciding) that the drawing was a critical stage,” it later announced that drawing alternates in the presence of the defendant “is not constitutionally required.” *Id.*, at _____. In other words, *Jones* rested, at least in part, on a determination that the random drawing of alternates is *not* a critical stage.⁷ This makes sense, because “a defendant does not have a right to be present when his or her ‘presence would be useless, or the benefit but a shadow.’” *Irby*, 170 Wn.2d at 881 (quoting *Snyder*, 291 U.S. at 106-07). The defendant’s presence at a random drawing of alternates has no reasonably substantial relationship “to the fullness of [his] opportunity to defend against the charge.” *Id.* (quoting *Snyder*, 291 U.S. at 105-06).⁸

⁷ Under the federal constitution, a critical stage is one in which the defendant’s presence “has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Irby*, 170 Wn.2d at 881 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)).

⁸ Although such a proceeding might constitute a critical stage under the state constitution because of a potential effect on the defendant’s “substantial rights,” *Irby*, 170 Wn.2d at 885
(Continued)

Here, by contrast, Mr. Slert was unquestionably absent from a critical stage under both the state and federal constitutions. *Irby*, 170 Wn.2d at 880-885. Mr. Slert's participation might have affected the composition of the jury. His absence denied him the opportunity "to give advice or suggestion or even to supersede his lawyers altogether." *Id.*, at 883 (quoting *Snyder*, 291 U.S. at 106). As the *Irby* court noted,

[r]easonable and dispassionate minds may look at the same evidence and reach a different result. Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in [Mr. Slert's] absence had no effect on the verdict.

Id., 170 Wn.2d at 886-87.

Mr. Slert was absent from a critical stage. Unlike the trial judge in *Jones*, the trial judge here did not affirmatively give the defense the opportunity to shape the proceedings; nor did Mr. Slert have the opportunity to object before the jurors were dismissed. His conviction must be reversed and the case remanded for a new trial. *Irby*, 170 Wn.2d at 885-887.

CONCLUSION

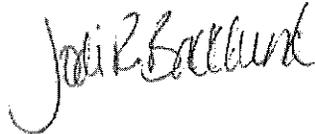
The sole issue before the Supreme Court is whether or not the violation of Mr. Slert's right to be present was harmless beyond a reasonable doubt. Furthermore, even if the court considers the issue of waiver for the first time at this late stage, Mr. Slert did not make a knowing, intelligent,

(citation omitted), the *Jones* court did not address the state constitutional right to be present. *Jones*, 185 Wn.2d at ____.

and voluntary waiver of his right to be present. The *Jones* court's decision finding waiver under the specific facts of that case does not suggest that Mr. Slert waived his right to be present, or that the violation cannot be raised for the first time on review under RAP 2.5(a)(3).

Respectfully submitted on July 19, 2016.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Supplemental Brief electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 19, 2016.



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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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