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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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IN RE THE RESTRAINT OF:

ALEKSANDR PAVLIK,

Petitioner.

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AMENDED PERSONAL RESTRAINT PETITION

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Judgment in Spokane County Superior Court No. 08-1-01641-3  
The Hon. Jerome Leveque, Presiding

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**A. STATUS OF PETITIONER**

**1. *Introduction***

Petitioner Aleksandr Pavlik applies for relief from restraint as defined in RAP 16.4(b) and files this amended Personal Restraint Petition.<sup>1</sup> Mr. Pavlik challenges a conviction for assault in the first degree with a firearm enhancement, entered after a jury trial in Spokane Superior Court No. 08-1-01641-3. Mr. Pavlik is incarcerated in the Washington State Penitentiary in Walla Walla (DOC No. 340785), where he is serving a sentence of 125 months. He has no other commitments to serve.

Mr. Pavlik's conviction was marred by improper instructions, particularly regarding self-defense, and be ineffective assistance of counsel, as well as a partial courtroom closure during jury selection.

**2. *Procedural Background***

By information filed on May 21, 2008, in Spokane County Superior Court No. 08-1-01641-3, the State charged Mr. Pavlik with attempted murder in the first degree and assault in the first degree, both while armed with a firearm. The charging date was May 19, 2008, and the alleged victim was Gabriel Leenders, Ex. 1. The case was tried to a jury between March 16-26,

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<sup>1</sup> Mr. Pavlik is abandoning a prior claim for relief based on his lack of awareness of the mandatory minimum sentence.

2010, the Hon. Jerome Leveque presiding. Mr. Pavlik was represented by Anna Nordtvedt of the Spokane County Public Defender, while the State was represented by DPA Rachel Sterrett.

The jury found Mr. Pavlik “not guilty” of the attempted murder charge, but guilty of the assault charge while armed with a firearm. Ex. 9. On May 26, 2010, Judge Leveque denied a motion for a new trial/arrest of judgment. Ex. 11. He then found facts sufficient to impose an exceptionally low sentence (based on failed self-defense),<sup>2</sup> and sentenced Mr. Pavlik to serve 125 months in prison (including a mandatory 60 month minimum sentence based on a firearm). Ex. 10 & 12.

Mr. Pavlik appealed from the judgment and was represented by Paul Wasson II. The Court of Appeals issued a partially published decision affirming the conviction (with one judge dissenting) on December 22, 2011. *State v. Pavlik*, 165 Wn. App. 645, 268 P.3d 986 (2011) (No. 29172-3-III). Ex. 13. Mr. Pavlik filed a timely motion for reconsideration, which was denied on February 9, 2012. Ex. 14. Mr. Pavlik petitioned for review, but the Supreme Court denied review on July 10, 2012 (No. 87147-7). Ex. 15. The mandate issued on July 26, 2012. Ex. 16.

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<sup>2</sup> Judge Leveque found that Mr. Leenders was “an idiotic willing participant.” RP 578.

On Mr. Pavlik's behalf, Mr. Wasson then filed a motion under CrR 7.8 in Spokane County Superior Court on October 8, 2012. He also filed a Personal Restraint Petition in this Court on October 31, 2012 (COA No. 31227-5-III). By order entered on December 10, 2012, Judge Leveque transferred the CrR 7.8 motion to this Court for consideration as a PRP, COA No. 31338-7-III, which was then consolidated under No. 31227-5-III. By order entered on May 6, 2013, the case was stayed and Mr. Pavlik was given permission to file an amended PRP.

Other than the matters referred to herein, Mr. Pavlik has not filed any other post-conviction motion or petition related to the judgment at issue. This amended PRP is timely, being filed within one year of the issuance of the mandate. RCW 10.73.090.

**B. STATEMENT OF GROUNDS FOR RELIEF**

**1. *Facts Upon Which Unlawful Restraint is Based***

**a. General Substantive Facts**

After midnight on May 19, 2008, Aleksandr Pavlik, a 24-year old refugee from the Ukraine, was driving home through Spokane after visiting

his girlfriend. RP 354-56.<sup>3</sup> Near Mission Park, he encountered two individuals, Gabriel Leenders and Bradley Smith, on bicycles.

Leenders and Smith had been drinking high alcohol content beer, and decided to go out riding their bikes, without helmets, lights or reflectors, in the middle of the night. RP77, 94-97, 110-11, 121-23, 188.<sup>4</sup> Claiming not to know the rules of the road, they blocked the roadway, and Mr. Pavlik could not pass them. RP 99, 1112, 124-25, 357-58. When Mr. Pavlik stopped, Smith began arguing with Pavlik, and picked up his bicycle over his head, and as if challenging Mr. Pavlik to fight with him. On the other side of the car, Mr. Leenders began opening the passenger door and reached inside. RP 81-82, 100, 358.<sup>5</sup> Mr. Pavlik warned them he was armed, and drove off, but Smith threw his bicycle at the car, causing a loud bang. RP 358-49.<sup>6</sup> Possible damage to the car was later documented by the police. RP 195-97.

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<sup>3</sup> The trial transcripts will be filed under separate cover.

<sup>4</sup> Mr. Leenders had a .14 blood alcohol level when his blood was drawn at the hospital at 1:29 a.m., less than a half an hour after he was shot. RP 272, 417-18. Although a drug screening took place, the treating physician claimed no knowledge of the results. RP 276.

<sup>5</sup> Leenders admitted only that he grabbed the passenger door and tried to open it. RP 99.

<sup>6</sup> Both Mr. Leenders and Mr. Smith denied that Smith threw his bike at Mr. Pavlik's car. RP 100, 125.

As Pavlik drove off, a college student walking in the area with friends, Kelly Scharber, saw two bicyclists pursuing a car, which ultimately stopped near Mission Park. RP 280-81. Mr. Pavlik went to his trunk and acted like he retrieved a firearm, although he had it on his person the entire time, apparently thinking that the action of looking like he was retrieving it would scare off Leenders and Smith. RP 359-6-, 375-76. Leenders and Smith, however, continued to approach him, yelling at him, according to Mr. Scharber, "What are you going to do with that, bitch." RP 280. Mr. Pavlik recalled: "They were approaching me there, they were yelling something if that's a gun I'm gonna have to shoot them or they're going to kill me." RP 360.

Fearful of their alarming behavior, Mr. Pavlik fired a warning shot. RP 360. Mr. Scharber, one of the college students, said that shot was fired down and to the side towards the two men. RP 280. Leenders and Smith described the shot as being fired at them. RP 86 (Smith tells Leenders, "Isn't that the car that just shot at us"); RP 100-01 (Leenders says the gun was pointed at him, and fired, and claims that he felt something hit his cheek, like a ricocheted grain of sand); RP 250 (Smith told Cpl. Storment that he felt

"was certain he fired it toward them . . . He did describe his belief that he felt heat.").<sup>7</sup>

After the shot, Leenders admitted he was "mad" at the situation and, because he has "never been afraid of guns," he kept riding toward Pavlik, and said "something along the lines of 'you better kill me.'" RP 85. Pavlik drove off quickly. RP 360. Leenders and Smith then went to the parking lot of Mission Park, where Eugene Clemens saw them arguing, yelling and being very loud. RP 344-53.<sup>8</sup>

Mr. Pavlik was concerned that he fired off a shot within city limits, and decided to drive near the scene of the shots to wait for the police so he could tell his side of the story. He pulled into the Mission Park parking lot, but did not see Smith and Leenders. Had he seen them, he would have driven away. RP 361-63. He turned around in the lot and parked his car near the entrance to the park, facing out, as far to the north as he could be without entering the street. RP 132.

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<sup>7</sup> See also RP 116 (Leenders tells Smith that it was a "bullet flying by", admitted to establish "the mind-set of individuals who were spoken.").

<sup>8</sup> Clements and his girlfriend, Tyesha Allen, testified that they did not hear what Leenders and Smith were yelling about, RP 345, 361, but according to Officer Dahle, they heard one of the males yell at them: "If you are going to run us over, why not shoot us?" Ex.18.

Pavlik testified that as he was sitting in the car, Leenders and Smith appeared "from nowhere," and told him they called the police. RP 363. Leenders ran up to his open window, and started punching him multiple times, trying to reach for the gun, telling him that he was going to shoot him. He saw Smith circling behind his car, and feared he was going to enter through the other door. RP 363-65.

Spokane Police Department Officer Stephen Arredondo was in the area, and saw Leenders at Pavlik's window. He saw Leenders reach in through the driver's window and start to punch Mr. Pavlik. RP 133-34. Leenders' "whole body from the half was in . . . from about chest up he was leaning inside the open window." RP 141.

Fearful of dying and of "[t]hem killing me," RP 365, Mr. Pavlik fired one shot at Mr. Leenders, aiming for his shoulder. RP 365-66. However, because Leenders was leaning into the car, the bullet passed through his lung and liver. RP 271-72, 366.

Leenders and Smith, in contrast, claimed that Pavlik drove up close to them. RP 86,117, 251. Leenders testified that he walked toward Pavlik to tell him that it was a good idea for him to leave, and then saw Pavlik pull a gun. Leenders said he reached inside to grab it to prevent being shot and

might have struck him one time when the gun went off, but then punched Mr. Pavlik four or five more times after being shot. RP 88-89, 104, 108. Smith told Cpl. Storment that Leenders went to the car window because he “was upset and wanted to know this guy’s problem was,” RP 251, and that Pavlik then fired a shot into Leenders’ chest. RP 252. Leenders stated during a defense interview that after the shooting, he and Smith went to the park and “slammed a couple of beers,” RP 432, denying he drank previously. RP 335, 427.

b. **The Exclusion of Defense Hearsay and the Admission of Prosecution Hearsay**

Mr. Pavlik cooperated fully with the officers on the scene. RP 220. Shortly after the shooting, he told the officers: “You saw it, it was self-defense.” Then, when another officer arrived, Mr. Pavlik stated: “It was self-defense, he was punching me. Relax, guys, I have a concealed pistol license.” Then he yelled, “You saw him punch me in the face. I shot in self-defense.” RP 11. Granting a State’s motion in limine, the trial court ruled that Mr. Pavlik’s excited utterances at the scene would be excluded as “self-serving” hearsay. RP 34-36. The exclusion of this statement formed the heart of the divided Court of Appeals decision on the direct appeal. *State v. Pavlik, supra.*

When responding to the State's hearsay motion, Ms. Nordtvedt stated that she had not researched the issue thoroughly. Judge Leveque questioned her, and stated "You knew it was coming. Come on, this is -- ." RP 25. Ms. Nordtvedt replied: "No, I didn't have time to do a full scale research project. I know that there are cases that say, that talk about what excited utterances are and what the foundation needs are but I don't have a specific case at this moment, no." RP 25.

Ms. Nordtvedt's trial memo actually contained no analysis of excited utterances. Ex. 2. This was important not only because she was unprepared to respond to the State's motions, but she did not move in limine against the admission of hearsay by the State's witnesses. Thus, during the course of the trial, the following hearsay statements were admitted:

- \* Cpl. Zac Storment's complete narrative of his interview with Bradley Smith at the scene, which included Smith's complete recitation of his version of the day's events and the confrontations with Pavlik. RP 245-252 (all admitted as excited utterances, over objection).
- \* Leenders' testimony that when Mr. Pavlik drove into the park, Smith said "Isn't that the car that just shot at us." RP 86 (no objection).
- \* Smith's testimony that Leenders said to him that "it was a bullet flying [or going] by." RP 116 (admitted over objection for "effect on listener").

- \* Officer Arredondo's testimony that Smith yelled out that his friend had been shot and asking that the police help him, and then Smith "screaming frantically 'help him, he's going to die.'" RP 135-36 (no objection).
- \* Officer David Daddato's testimony that Smith picked up Leenders and started "yelling that he had been shot." RP 225 (no objection), and "he's been shot, he needs an ambulance." RP 225 (admitted over objection for "effect on hearer").
- \* Officer Kurt Henson's testimony that after he took the gun from the car seat, Sgt. Walker told him to put the gun back where he found it. RP 236 (no objection).
- \* Mr. Scharber's testimony that Leenders and Smith complained that the car had almost hit them. RP 282, 284 (one time admitted over hearsay objection, no objection second time).
- \* College student Christopher Santucci's testimony that one of the bicyclists came up to his group after the warning shot, and said "that guy in the car almost hit my friend and we got into it a little bit and it was like, okay, that sucks." RP 299 (no objection).
- \* Santucci's testimony that after the shooting, he heard screaming, "God, he shot my friend, and kinda calling out like help, help, help." RP 300 (no objection).

c. **Evidence in Police Reports Not Properly Brought Out by the Defense**

Mr. Leenders told a number of stories about what had taken place. However, at trial, Mr. Leenders denied that he was fearful of speaking to the police because he did not want to be charged with "carjacking." RP 105.

In fact, Det. Chet Gilmore's report documents that when he interviewed Mr. Leenders, Leenders told him that "he was afraid that he would be arrested for some type of attempted carjacking because he opened the suspect's passenger side door to tell him to leave but that is all he was doing." Ex. 17 at 8.<sup>9</sup>

Mr. Leenders testified that when Pavlik fired the first shot, he yelled "something along the lines of 'you better kill me.'" RP 85. However, Det. Gilmore's report states that Leenders told him: "If that's a gun, you're going to have to shoot me and kill me 'cause I'm going to kill you if that's a gun." Ex.17 at 9. Ms. Nordtvedt did not impeach Mr. Leenders with his prior inconsistent statement.

Ms. Nordtvedt called Det. Gilmore as defense witness. He testified how he interviewed Mr. Leenders at the hospital at 12:30 p.m. on May 20<sup>th</sup>. When Ms. Nordtvedt attempted to bring out Leenders' hesitation to speak with Gilmore because he was afraid of being charged with a crime, the State

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<sup>9</sup> Later in the report, Leenders denied actually opening the door:

Leenders then tried to open the suspect's passenger door by pulling up on the handle so that he could tell him again to leave. He said he pulled on the handle. The door did not come open. . .

Ex. 17 at 8. Ms. Nordtvedt had tried to impeach Mr. Leenders with a prior inconsistent statement about seeing the dome light come on, RP 99, but it appears from Det. Gilmore's report that he was saying that he thought that Mr. Pavlik had cracked open his door because the dome light came on. Ex. 17 at 8.

objected on the grounds that the questioning was leading. The court sustained the objections and also sustained an objection to the question whether Leenders had said he was “pissed” at Mr. Pavlik (a subject that had not come out in Leenders’ testimony). RP 329-30.

Once the court sustained the objections, Ms. Nordtvedt moved on, and did not ask open-ended questions (i.e. she did not ask, “What did Mr. Leenders say as to why he did not want to speak with you?”). Moreover, she never asked Gilmore about Leender’s admission that he threatened to kill Mr. Pavlik.

d. New Witness Shea McKeon

Officer Arrendondo came upon the scene as Mr. Leenders was already at Mr. Pavlik’s window. RP 133. Mr. Clemens and Ms. Allen had already left the area by this time. RP 347-48, 352. The college students were not in the parking lot at the time of the shooting and were down the street. RP 285-87, 299-300. Thus, there were no independent witnesses to the beginning of the final confrontation between Leenders and Mr. Pavlik.

In July 2012, through Mr. Wasson and an investigator, Mr. Pavlik placed an ad in the *Spokesman Review*, looking for witnesses to the incident. Ex. 19. Ultimately, Mr. Wasson and the investigator spoke to Shea McKeon,

another college student, who was in Mission Park at the time of the incident. After seeing the first two incidents (the bike throwing and the warning shot), Mr. McKeon saw the bicyclists ride into the parking lot, yelling at another driver. However, Mr. McKeon then he saw the bicyclists continue on west, disappearing from his sight. McKeon subsequently saw Mr. Pavlik's car drive to the parking lot and stop. *The bicyclists were not present at this time.* Then, a minute or so later, Mr. McKeon saw the bicyclists come back for another confrontation. Ex. 19 & 20. He saw one bicyclist circling the car, looking like he was going to try to enter the passenger side. He then saw the other cyclist "suddenly launch[] himself in through the driver's window. . . . it looked like he was trying to rip the driver's head off." Ex. 20. He heard the shot and saw the bicyclist inside the driver's window fall to the ground. Ex. 19 & 20.

e. **Conflict of Interest**

Ms. Nordtvedt works for the Spokane County Public Defender. When Mr. Leenders was charged and convicted for VUCSA (Spokane Cty. Sup. Ct. No. 06-1-04713-3), he was also represented by an attorney from Ms. Nordtvedt's office, Steven Marsalis. Ex. 22, 36. Over the next few years, when Mr. Leenders failed to make any payments on his legal-financial

obligations, and a series of warrants issued for his arrest, he continued to be represented by attorneys from Ms. Nordtvedt's office. In March 2009, while Mr. Pavlik's case was pending trial, attorney Doug Boe represented Mr. Leenders in his violation hearing. Ex. 22, 36. After Pavlik's trial, but before sentencing, Mr. Leenders missed court and a warrant issued for his arrest. When he was arrested on the warrant and went to court, in November 2010, his attorney was John Rodgers, the head of Ms. Nordtvedt's office. Ex. 22, 36. Thus, Mr. Leenders was represented by attorneys from Ms. Nordtvedt's office, before, during and after Mr. Pavlik's trial.

Mr. Pavlik did not know or waive a conflict of interest. Ex. 34. Moreover, Mr. Boe directly represented Mr. Pavlik in this case -- he spoke to Mr. Pavlik in the jail and assigned Ms. Nordtvedt to the case. Ex. 23 (redacted to exclude attorney-client privileged material).

f. Evidence of Leenders' and Smith's Backgrounds

Prior to testimony, the State filed motions to prevent the defense from bringing up prior convictions of Smith and Leenders and their prior drug or alcohol use. Ex. 3, RP 37-46. Ms. Nordtvedt agreed to these motions, stating

that if Leenders and Smith had convictions for prior crimes of dishonesty,<sup>10</sup> they were too remote to be admissible. Ms. Nordtvedt noted that she knew that Leenders had recently been arrested by Officer Daddato: "I don't have any information on that case but it was a misdemeanor assault." RP 46. She did not think it would be admissible unless "the door is opened." RP 46.<sup>11</sup>

As for alcohol use, Ms. Nordtvedt wanted her expert, Dr. Robert Julien, to be able to testify about "the way that people act when they are twice the legal limit." RP 41. However, the court ruled:

Unless the defendant can show that this individual when drinking to that level is always aggressive and making unwise decisions in an aggressive context, seeking out people to punch out and making just bad judgment, unless that can draw it in I don't see any further inquiry on that. I mean if you've got somebody that said every time I go with this guy, once he gets three beers in him it's Katy, bar the door. You know, he'd chase down a rhinoceros and punch him out, you're not going to get there.

RP 42-43.

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<sup>10</sup> In an email on the eve of trial, the prosecutor disclosed Mr. Leenders had adult convictions for taking a motor vehicle (1993), dangerous weapon (1993), controlled substance (2007), fourth degree assault (2007) and DWLS (1997, 1998, 1998 and 2003). The State said Leenders had juvenile adjudications for: three counts of burglary 2 (1990) and attempt to elude (1991). The State also noted that Mr. Smith had juvenile adjudications for attempted residential burglary (1993) and burglary 2 (1997). Ex. 25.

<sup>11</sup> Counsel believes that the State obtained and disclosed the report from this incident, SPD No. 09-402542, at some point after this colloquy. It is not clear if the report was disclosed before or after Mr. Leenders testified.

While Ms. Nordtvedt and her office had done some basic investigation of the backgrounds of Leenders and Smith (and knew enough to know that he had recently been charged with assault),<sup>12</sup> her office did not get copies of judgments and dockets of some of Mr. Leenders' recent cases until after he testified (and after Ms. Nordtvedt) agreed that she was not going to bring up the past history. Ex. 26 & 29.

Subsequent investigation and Public Records Act requests, however, revealed Mr. Leenders and Mr. Smith had a far more extensive contacts with the criminal justice system than disclosed. To begin with, the State's rendition of Mr. Leenders' history did not include his juvenile adjudications for indecent liberties and arson. Ex. 27. More importantly, Mr. Leenders and Mr. Smith had numerous other contacts with the Spokane police in the few years before the incident and trial. Much of this information was in the

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<sup>12</sup> Counsel believes that the disclosure of the assault report in SPD No. 09-402542 took place after the judge ruled (with Ms. Nordtvedt's acquiescence), that the defense could not bring up the evidence. After disclosure, Ms. Nordtvedt did not seek to reopen that issue. It is not clear if Ms. Nordtvedt knew that the new dv charge (N3301) was dismissed on 3/4/10, on the eve of Leenders' testimony at Pavlik's trial, Ex. 29, a fact that raises the specter of a benefit being provided to Mr. Leenders in exchange for his testimony.

Counsel also believes that Ms. Nordtvedt did have some knowledge of the civil restraining orders to which Mr. Leenders was a party, and that she had knowledge of the fact that certain crimes were charged. It is not clear the extent of her knowledge, however.

possession of the Spokane Police Department,<sup>13</sup> the main investigating agency in this case.

i. *Contacts Related to Dishonesty*

- \* SPD No. 06-290578 (Ex. 28 at 121-31) 9/21/06 VUCSA case. Leenders gets into an accident and leaves scene, asking friends to cover for him. Police contact him and he lies about his name, falsely stating his name was "Chris Jacobs." When arrested, police find drugs in his possession.
- \* SPD No. 08-053095 (Ex. 28 at 339-64) 2/24/08 DUI case. Leenders blows .14.13, and then denies that he was driving at all or that he drank anything other than water.
- \* SPD No. 06-251583 (Ex. 28 at 110-14) 9/21/06 reckless driving, officer sees Leenders drive motorcycle at speeds over 100 mph, but Leenders denies he was the one who was driving.
- \* SPD No. 06-343435 (Ex. 28 at 138-43) 11/11/06, Leenders claims girlfriend (Barbara Erol-Ross) and other robbed him at gunpoint; police concluded he was not being truthful and seemed to be trying to report a robbery to build an alibi for violating a restraining order.
- \* SPD No. 06-272787 (Ex. 28 at 115-19) 9/6/06, Leenders reports domestic violence by Ms. Erol-Ross, but then gives police series of conflicting stories, and admits he lied on prior occasions; police conclude his professed injuries were self-inflicted.

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<sup>13</sup> Copies of pertinent reports, obtained through recent PRA requests, and court records can be found in Ex. 28-32.

- \* SPD No. 07-055615 (Ex. 28 at 278-85) 2/28/07, Leenders reports domestic violence by girlfriend, Fawnya Moon, but then denies prior reports and claims dog had caused his injuries.
- \* SPD No. 08-110932 (Ex. 28 at 290-97) 4/19/08, Leenders lies during investigation of property damage.
- \* SPD No. 06-57241 (Ex. 28 at 161-86) 2/24/06, Leenders lies during dv investigation.
- \* SPD No. 09-51325 (Ex. 32) 2/16/09, hit and run case against Smith, where Smith initially denied driving or knowing anything about an accident, but then admitted he may have “tapped” a car by accident and had been drinking.

ii. *Assaultive Behavior Tied to Substance Abuse*

When Mr. Leenders drank, in fact, he made “unwise decisions” and was aggressive:

- \* SPD No. 09-402542 (Ex. 28 at 389-400) 11/28/09, assault arrest of Leender includes allegations of threats to kill, lots of yelling, officer notes Leenders’ excessive use of alcohol.<sup>14</sup>
- \* SPD No. 08-110932 (Ex. 28 at 290-97) 4/19/08, allegations that Leenders was argumentative at party, and broke a car window with a brick.

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<sup>14</sup> As noted, counsel believes the State disclosed after Ms. Nordtvedt conceded its inadmissibility.

- \* SPD No. 06-57241 (Ex. 28 at 161-86) 2/24/06, Leenders drinking, and then assaults Barbara Erol-Rosa, causing her injuries with broken glass.

**iii. *Suicide Incidents/Lack of Respect for Life***

Mr. Leenders tried to commit suicide twice. SPD Nos. 02-348457 & 02-392923 (Ex. 28 at 1-15). In 2006, before Mr. Leenders reported that his girlfriend, Tanya Webb, tried to commit suicide, he waited 2 ½ hours before calling for help, after finding her passed out. SPD No. 06-340410, Ex. 28 at 132-37.

**iv. *Guns and Alcohol***

On May 18-19, 2008, when he was consuming alcohol with Mr. Smith, Mr. Leenders was under court order from four different recent cases that banned him from consuming *any* alcohol. Spokane Municipal Court Nos. B0070858, B0067331, B466898 & DV0600224. Ex.29. The dockets of some of these cases show that Ms. Nordtvedt's paralegal, Holly Devereux (listed as "Devroe"), obtained copies of some of the dockets of these cases on March 18, 2010, two days after Ms. Nordtvedt conceded that she would not introduce any of Leenders' prior history and one day after Leenders testified.

If Mr. Leenders and Mr. Smith were trying to take Mr. Pavlik's gun away from him, they would have been guilty of both state and federal felonies

under RCW 9A.04.040 and 18 U.S.C. § 922, because of their prior felony and domestic violence convictions.<sup>15</sup> Mr. Leenders' Department of Corrections' files, obtained through a PRA request, Ex 30, reveals that Leenders told his CCO that he "hated" guns.<sup>16</sup>

v. *Pending Matters*

As noted above, either at the time of their confrontation with Mr. Pavlik or at the time of trial, both Mr. Leenders and Mr. Smith were under some sort of court supervision:

Leenders – Spokane Municipal Court Nos. B0070858 (DUI) , B0067331 (dv assault), B466898 (dv assault and malicious mischief) & DV0600224 (restraining order) and Spokane County Sup. Ct. No. 06-1-04713-4 (VUCSA). Ex. 29.<sup>17</sup>

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<sup>15</sup> The felony history was disclosed to Mr. Pavlik's counsel.

<sup>16</sup> When filling out a personal information form for DOC, Mr. Leenders stated that he began abusing alcohol when he was 12-13 years old, had a substance abuse problem, including hallucinogens, that he had been suicidal, but denied he had ever seen a mental health professional or that substance abuse had caused him any problems in the past year (apparently not considering his arrest for VUCSA as a problem). Ex. 30.

<sup>17</sup> Between the time of the shooting and the trial, Mr. Leenders had also been charged and convicted of a number of DWLS counts including Spokane Municipal Court N002107 (and possibly Lincoln County No. C14614), and had been to court (and jail) on several other occasions for various probation violation hearings and new convictions. Spokane Municipal Court Nos. B466898, DV0600224, B67331, B070858; Spokane Superior Court No. 06-1-04713-4. His new domestic violence charge (N00003301) was dismissed on March 3, 2010 because of "lack of evidence" and "lack of witness." Ex. 22 & 29.

Smith -- Spokane County District Court No. P00080437 (theft SOC) ; Spokane Municipal Court No. B00079495 (hit and run SOC). Ex. 31.

Both Leenders and Smith<sup>18</sup> had a series of unfiled possible criminal charges hanging over their heads:<sup>19</sup>

Leenders – SPD No. 09-214920 (6/29/09, dog theft)  
SPD No. 08-136054 (5/4/08, car theft)  
SPD No. No. 08-110932 (4/19/08, property damage)  
SPD No. 07-374794 (12/29/07, theft)

Ex. 28 at 269-73, 290-97, 328-34, 365-72.

Smith – SPD No. 09-333599 (9/30/09, telephone harassment)  
SPD No. 09-330482 (9/27/09, telephone harassment and malicious mischief)

Ex. 32

#### vi. *Connection of the Parties*

While Ms. Nordtvedt did tell the judge that she knew that Mr. Leenders was recently charged with assault and that Officer Daddato (the second officer on the scene in Mr. Pavlik's case) was involved in that case (SPD No. 09-402542, Ex. 28 at 389-400), RP 46, there were other

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<sup>18</sup> Smith's theft charge in Spokane District Court No. P00080437, took place on January 3, 2008 (before the shooting), but not filed until November 26, 2008 (after the shooting), so it was pending at the time of the shooting. Ex. 31. The State has not disclosed the police report for this case and it should be ordered to provide it.

<sup>19</sup> This is not to say that any of these would be sufficient to prove guilt -- simply that these were unfiled allegations of criminal conduct hanging over Mr. Leenders' and Mr. Smith's heads.

interconnections between the officers involved in the Pavlik case and the

State's witnesses:

- \* SPD No. 07-371108 (Ex. 28 at 255-68) (12/25/08, Officers Daddato and Officer Kurt Henson arrest Fawnya Moon for assaulting Leenders)<sup>20</sup>
- \* SPD No. 08-123118 (Ex. 28 at 314-23) (4/30/08, Officers Arrendondo, Henson and Deanna Schmidt arrest Moon for NCO violation with Leenders after being called to scene of group fight).<sup>21</sup>
- \* SPD No. 06-57241 (Ex. 28 at 161-86) (2/24/06, Officer Maurio Juarez arrests Leenders for assault)<sup>22</sup>
- \* SPD No. 03-12446 (Ex. 28 at 16-23) (1/12/03, Cpl. Storment involved in arrest of Anthony Schelin, ex-boyfriend of Leenders' girlfriend, Tanya Webb)<sup>23</sup>

The reports also document that someone named "Bradley" or "Brad" was hanging out with Mr. Leenders on various occasions when he had police contact in the months leading up to the shooting. SPD No. 08-123495 (5/1/08) (stolen dog); SPD No. 08-110932 (4/19/08) (brick through window);

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<sup>20</sup> Officer Henson was the officer who removed and returned the gun to Mr. Pavlik's car seat. RP 231-39

<sup>21</sup> As noted, Officer Arrendondo saw Leenders attack Mr. Pavlik. Officer Schmidt helped secure the scene. RP 312-16.

<sup>22</sup> Officer Juarez was one of the investigating officers at the shooting scene. RP 402-12.

<sup>23</sup> Cpl. Storment testified about the narrative given by Smith at the scene. RP 245-252.

SPD No. 08-1116 (1/1/08) ( Smith serves protection order on Moon). Ex. 28  
at 290-97, 299-313, 324-27

vii. *Abuse of the Law*

In addition to the reports listed above, both Mr. Leenders and Mr. Smith are the subject of dozens of other police reports of fairly minor incidents, but all showing a pattern of abuse of the law and "tit-for-tat" police reports:

- \* SPD No. 09-240218, 7/19/09 (Smith reports ex-wife to police for not letting him see child), Ex. 32.
- \* SPD No. 09-236458, 7/15/09 (Leenders reports burglary and missing dog, found next day), Ex. 28 at 373-78.
- \* SPD No. 09-214920, 6/19/09 (Moon reports her dog missing, accuses Leenders because he turns up with it), Ex. 28 at 365-72.
- \* SPD No. 08-188751, 6/27/08 (Leenders reports someone stole his drugs out of vehicle as he was about to go camping (a month after being shot)), Ex. 28 at 335-38.
- \* SPD No. 08-123495, 5/1/08 (Leenders accuses girlfriend Tami Smith of taking his dog to the pound, a few weeks after Smith accuses him of throwing brick through window), Ex. 28 at 324-27.
- \* SPD No. 08-1116, 1/2/08 (NCO violation against Moon after she called police because Leenders was

knocking on her door. She owns house, but was excluded by order), Ex. 28 at 299-313.

- \* Sup. Ct. No. 07-2058472, 12/31/07 (Leenders tries to get restraining order against Moon, but case dismissed when he does not show up), Ex. 28 at 195-228.<sup>24</sup>
- \* SPD No. 07-374901, 12/31/07 (Leenders calls police on Moon for leaving note taped to door when she came to get stuff from home), Ex. 28 at 274-77.
- \* SPD No. 07-357694, 12/10/07 (Leenders claims Moon assaulted him; tells officer he was not hurt, but he was arrested a few months ago for DV and "he doesn't want anything to happen to him again."), Ex. 28 at 247-50.
- \* SPD No. 07-351504, 12/04/07 (Leenders reports window of car broken out), Ex. 28 at 243-46.
- \* SPD No. 06-360907, 11/29/06 (Leenders and Moon report his prior girlfriend, Barbara Erol-Rosa, making harassing calls to Moon), Ex. 28 at 144-47.
- \* SPD No. 06-277480, 9/9/06 (Smith and girlfriend riding bikes with no helmets/lights; Smith angry with getting ticket), Ex. 32.<sup>25</sup>
- \* SPD No. 06-184017, 6/22/06 (Leenders violates NCO with Erol-Rosa), Ex. 28 at 89-93.
- \* SPD No. 06-057241, 6/18/06 (Leenders breaks into Erol-Rosa's apartment), Ex. 28 at 180-82.

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<sup>24</sup> Counsel believes Ms. Nordtvedt knew of the restraining order.

<sup>25</sup> This report could have been used to impeach Mr. Smith about his lack of knowledge (or that he could not care less) about the laws related to cycling.

- \* SPD No. 06-174508, 6/13/06 (Leenders charged with NCO violation at Erol-Rosa's apartment when police respond to report of Erol-Rosa fighting with other tenants), Ex. 28 at 74-88.
- \* SPD No. 05-248270, 8/5/05 (Leenders reports theft of oxycontin from truck, blames old landlord, Gina Torrez), Ex. 28 at 56-69.
- \* SPD No. 05-81626, 3/15/05 (Torrez is victim of assault by Erol-Rosa), Ex. 28 at 65-73.
- \* SPD No. 05-039182, 2/5/05 (Leenders accuses 77 year old landlord William Palfrey of assaulting him with a crowbar; landlord denies it), Ex. 28 at 60-64.
- \* SPD No. 05-24317, 1/23/05 (Leenders accuses Erol-Rosa of assaulting him; she claims he assaulted her), Ex. 28 at 39-55.
- \* SPD No. 04-443525, 12/30/04 (Leenders calls police about his girlfriend, Jennifer Thomas, to say no assault occurred - wanted to call first), Ex. 28 at 46-48.
- \* SPD No. 04-434209, 12/21/04 (Leenders' landlord, Mr. Palfrey, calls to report he was evicting Mr. Leenders because his girlfriend knocked over and damaged the spare toilet), Ex. 28 at 42-45.
- \* SPD No. 04-286667, 8/26/04 (Leenders blames landlord for letting dog loose), Ex. 28 at 38-41.

**g. Bench Conferences**

Throughout the trial, the judge would call the attorneys to the bench for various bench (or sidebar) conferences. Some, but not all, of these

conferences were reported -- a microphone would pick up the conversations and convey them to the court reporter who was wearing headphones. Ex. 33, 34. No one else in the courtroom could hear what was going on. Ex. 33,34. Mr. Pavlik was not invited to the bench conferences and just assumed that this was how it was done. Ex. 34.

Many of the bench conferences involved legal issues. RP 98, 149-51, 166, 218-19, 248, 317-18, 322-24, 430-31, 473-74. Because others were not reported, it is not known what took place (although one suspects from context that these may have involved scheduling). RP 128, 145, 177, 203, 239, 308, 340, 389, 444. When legal rulings were made during a bench conference, the rulings were not then announced in open court and placed on the record.

There were no objections made to the bench conferences, and Mr. Pavlik's attorney on appeal, Mr. Wasson, did not raise any issues related to these conferences on appeal.

Mr. Wasson also did not order the transcripts of jury selection for the appeal. These transcripts were not prepared until recently, and are now submitted under separate cover. While most of jury selection took place in open court, all challenges for cause and hardship exclusions took place at a bench conference. RP (3/16/10) 103-05.

**h. Instructions**

Ms. Nordtvedt proposed self-defense instructions only for the crime of attempted homicide, and did not propose instructions for self-defense to the assault count under WPIC 17.02 and 17.04. Ex. 7. These instructions required a finding that the defendant feared that the person injured intended to inflict death or “great personal injury.” Ex. 7. Counsel also proposed an “act on appearances” instruction that tracked former WPIC 16.07. This instruction provided that a person could act on appearances “if that person believes in good faith and on reasonable grounds that he and/or another is in actual danger of *great bodily harm*.” Ex. 7 (emphasis added). The trial court ultimately gave this instruction (with the addition of “and/or first degree assault) without exception. Instruction No. 22, Ex.8.

“Great bodily harm” was defined in Instruction No. 17:

Great bodily harm means bodily injury that creates a probability of death, or that causes significant permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

Ex 8. This standard differed from the “great personal injury” definition given in Instruction No. 21 as “an injury that the actor reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if inflicted upon either the actor or another person.” Ex. 8.

At the end of the trial, when the trial court and the parties began to discuss the instructions, Ms. Nordtvedt noted that the self-defense instructions needed to include the fact that self-defense was a defense to first degree assault. RP 451-52.<sup>26</sup> Judge Leveque then changed two paragraphs of Instruction No. 20 to read “attempted murder [or attempted homicide] and/or first degree assault.” Inst. No. 20, Ex. 8; RP III 452-54. Instruction No. 20, however, was never fully corrected and the second paragraph in that instruction only applied to the attempted homicide charge. Ex. 8; RP 468. Thus, the jury was never given an instruction that allowed it to evaluate when an assault would be justifiable.

After the instructions were read to the jury, Ms. Nordtvedt noticed that Instruction No. 22 (the act on appearances instruction) had not been changed. There was discussion at a bench conference, and, the court corrected the instruction (adding assault in addition to attempted homicide) and re-read it to the jury. RP 473-75. There was no discussion of the “great bodily harm” language.

The self-defense instructions that were ultimately given in this case were modeled on WPIC 16.02 and RCW 9A.16.050 related to self-defense

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<sup>26</sup> Judge Leveque was expecting trial counsel to propose such instructions. RP 452.

to homicide. With the exception of inserting "assault" into some portions of Inst. No. 20 and 22, Ms. Nordtvedt did not except to them. She did not propose instructions modeled on RCW 9A.16.020, which would have allowed for self-defense if Mr. Pavlik was *about to be injured* while preventing an offense against his person or a malicious interference with his property.

Counsel did not propose instructions, or except to the failure to give instructions, related to the use of self-defense to protect oneself from the commission of a felony. WPIC 16.03. Counsel did not propose, or except to the failure to give, the bracketed portion of WPIC 16.02 that states: "[or others whom the defendant reasonably believed were acting in concert with the person slain]." Counsel also did not propose a jury unanimity instruction for the assault count, or fail to except to the lack of such an instruction, under *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

No exceptions were made below regarding the requirement of jury unanimity for the special verdict. Inst. No. 27, Ex. 8. This instruction stated generally: "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms." Inst. No. 27. While the instruction went on to make it clear the jury needed to be unanimous to enter a "yes"

special verdict, Instruction No. 27 did not tell the jurors that if they were not unanimous, they should answer “no.”<sup>27</sup> Instructions Nos. 4 & 26 also contained general unanimity requirements, and did not distinguish between the substantive charges and the special verdict. Ex. 8

i. Appeal

On appeal, Mr. Wasson challenged (1) the exclusion of Mr. Pavlik’s excited utterances, (2) the giving of the “first aggressor” instruction, and (3) the denial of the motion for new trial and/or arrest of judgment. Mr. Wasson did not order the jury selection transcripts and did not raise any other issues related to the jury instructions.

2. *No Other Remedies*

Mr. Pavlik tried to seek relief in the trial court by means of a CrR 7.8 motion. This motion was transferred to this Court for consideration as a Personal Restraint Petition. Accordingly, Mr. Pavlik has no other remedies available to him and any other remedies would be inadequate.

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<sup>27</sup> Oddly, the trial court gave a series of other instructions related to a “special verdict” related to whether Mr. Pavlik was armed with a deadly weapon. Inst. Nos. 18, 19, 28 & 29, Ex. 8. However, the actual special verdict forms referred to whether Mr. Pavlik was armed with a “firearm,” Ex. 9, and thus it appears that the “deadly weapon” instructions were superfluous and not tied to the actual verdict forms.

3. *Argument Why Restraint is Unlawful*<sup>28</sup>

As explained below, and in the accompanying Opening Brief, Mr. Pavlik's restraint is unlawful under RAP 16.4(c)(2), (3), (5) and (7) for the following reasons:<sup>29</sup>

a. The Bench Conference During Jury Selection Was Unconstitutional

All discussion about challenges for cause and hardship exemptions took place at a reported bench conference between counsel and the judge. RP (3/16/10) 103-05. Neither Mr. Pavlik nor anyone else in the courtroom (except for the court reporter using headphones) were present at the bench conference and did not know what was taking place. Ex. 33, 34. None of the information was then later placed on the record in open court.

Because challenges for cause and hardship exemptions are core portions of jury selection that traditionally have been open to the public, and because there was no on-the-record justification for closing this portion of

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<sup>28</sup> Mr. Pavlik is filing a brief along with this Personal Restraint Petition. RAP 16.7 & 16.10(a)(1). Accordingly, he will set out here the legal reasons why his restraint is unlawful, but will more fully explain these grounds in the opening brief. For two issues -- bench conferences during trial and the requirement of unanimity for the special verdict -- all legal analysis will remain in this petition.

<sup>29</sup> Mr. Pavlik is not longer pursuing, as a constitutional violation, in this amended petition the claim he made in the original PRP that he was not aware of the mandatory minimum sentence. He also is submitting a declaration that corrects a reference in his original declaration about a 911 call that is incorrect. Ex. 35.

jury selection under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), the bench conference constituted a partial closure of jury selection. This closure violated U.S. Const. amends. 1, 6 & 14, Wash. Const. art. 1, § 10 & 22. Moreover, Mr. Pavlik's right to be present at all critical stages of the trial, guaranteed by U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22, was violated by his exclusion from the bench conference regarding challenges for cause and hardship exclusions. *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). This error is structural and presumed prejudicial and reversible, *State v. Wise*, 176 Wn.2d 1, 18, 288 P.3d 1113 (2012); *In re Morris*, 176 Wn.2d 157, 166-68, 288 P.3d 1140 (2012).

b. **The Bench Conferences Related to Legal Issues During Trial Were Unconstitutional**

There were nine bench conferences during trial related to legal issues that were reported and eight that were not. Not only was Mr. Pavlik not present during these conferences, but the public was also excluded. The trial court did not conduct a *Bone-Club* analysis for these bench conferences. None of the rulings that were announced at the bench conferences were then announced in open court. This procedure violated Mr. Pavlik's right to be present at all critical portions of the trial, U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22; *State v. Irby, supra*, as well as the right to an open

courtroom and a public trial, and the error is presumed prejudicial. U.S. Const. amends. 1, 6 & 14, Wash. Const. art. 1, § 10 & 22.<sup>30</sup>

c. The Jury Instructions Related to Self-Defense Were Defective

Trial counsel failed to propose proper self-defense instructions. The record is clear that Ms. Nordtvedt did not initially contemplate proposing instructions for the assault count, and only belatedly attempted to correct the error. Accordingly, the final set of instructions related to self-defense were seriously deficient for numerous reasons:

1. Although at the last moment, the court corrected portions of Instructions Nos. 20 & 22 to add in the assault charge, Instruction No. 20 was never fully corrected and the second paragraph of that instruction, which set the standard for the use of force, only referred to the charge of attempted homicide. Ex. 8. Thus, the jury never received any instructions setting out the “elements” of self-defense as it related to the crime of assault.

2. Ms. Nordtvedt proposed former WPIC 16.07, which ultimately was given to the jury as Instruction No. 22, Ex. 8. Ms. Nordtvedt’s proposed

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<sup>30</sup> While the Supreme Court has upheld the exclusion of the defendant and the public from bench or chambers’ conferences where only legal matters were discussed, *In re Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998); *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the Supreme Court recently took review of this issue, presumably to be reconsidered in light of recent closure precedent. *State v. Smith*, No. 85809-8, *rev. granted* 176 Wn.2d 1031, 299 P.3d 20 (4/8/13).

version of the instruction was based on an outdated pattern instruction, which told the jurors that Mr. Pavlik could “act on appearances” only if he feared “great bodily harm.” This standard was more severe than the statutory language in RCW 9A.16.050 which uses “great personal injury.” *Compare* Instruction No. 17 (defining “great bodily harm” to mean “bodily injury that creates a probability of death, or that causes significant permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ”) *with* Instruction No. 21 (“great personal injury” is an injury “would produce severe pain and suffering if inflicted upon either the actor or another person.”). Ex. 8. The higher burden of “great bodily harm” lowered the State’s burden of proof.

3. Ms. Nordtvedt did not propose (and the trial court did not give) an instruction that included the bracketed portion of WPIC 16.02 that Mr. Pavlik was entitled to use self-defense based on the actions not just of Mr. Leenders, but of “others whom the defendant reasonably believed were acting in concert with the person slain.” This error was prejudicial because Mr. Pavlik was reasonably afraid not just of Mr. Leenders, but also of Mr. Smith who was acting in concert with Leenders.

4. Ms. Nordtvedt did not propose self-defense instructions based on RCW 9A.16.020, WPIC 17.02 and WPIC 17.04, which apply to non-homicide cases. These instructions would have allowed for self-defense for the assault count if Mr. Pavlik was “*about to be injured . . .* in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property.” RCW 9A.16.020. If the jurors were instructed on self-defense for assault at all, the standard given to them was the higher standard used in homicide cases – that Mr. Pavlik had to fear that Leenders was going to inflict great personal injury on him. Inst. No. 20 (or even the high standard of “great bodily harm” in Inst. No. 22). This error significantly lowered the State’s burden of proof.

5. Ms. Nordtvedt did not propose (and the trial court did not give) an instruction under WPIC 16.03, which would allow for self-defense to be used while resisting the commission of felony.

6. Ms. Nordtvedt’s failure to propose proper instructions, or except to the trial court’s failure to give these instructions, was not tactical, and clearly the result of oversight. Accordingly, she was ineffective under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22, and *Strickland v.*

*Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

Moreover, because the absence of self-defense is an element of the offense, the State was unconstitutionally relieved of its burden of proof in violation of due process under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 3. Finally, given the acquittal for attempted murder, the failure to give proper self-defense instructions was not “harmless” and Mr. Pavlik can make out a showing of prejudice.

d. **The Instructions Failed to Insure Jury Unanimity**

Mr. Pavlik’s fired two shots – one was the warning shot, the other struck Mr. Leenders after he attacked Pavlik. Mr. Leenders and Mr. Smith claimed that the warning shot was aimed at them; that the bullet went flying by and that Smith felt “heat” from the bullet. RP 86, 100-01,116, 250. Thus, it is possible that some jurors, who may have voted to acquit Mr. Pavlik of assault based on the actual shooting of Mr. Leenders, may have voted to convict Mr. Pavlik of assault for this first shot. Other jurors may have concluded that the first shot did not constitute a first degree assault, but (particularly in the absence of adequate self-defense instructions) voted to convict based on the second shot that injured Leenders).

Yet, no instruction was proposed or given that required that the jurors be unanimous as to which shooting constituted the assault – the first or second shot. Under such circumstances, Mr. Pavlik’s right to jury unanimity (and unanimity of a substantial majority of jurors) was violated under *State v. Petrich, supra*, Wash. Const. art. 1, § 21 & 22, and U.S. Const. amends. 6 & 14. Ms. Nordtveidt was also ineffective under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22 and *Strickland* for not proposing a jury unanimity instruction or excepting to the failure to give one. This error was prejudicial under the facts of this case, and a basis for relief.

e. **The Special Verdict Instructions Improperly Required Unanimity to Answer “No”**

Inst. No. 27 (in conjunction with Instructions Nos. 4 & 26) told the jurors that they needed to be unanimous when filling out the special verdict form, and failed to inform them either that a “no” verdict need not be unanimous or that if they could not reach a verdict they should not fill out the special verdict form. However, at the time of the incident in this case, Washington did not require unanimity before a jury could issue a “no” verdict for a firearm enhancement, and an instruction that required unanimity was

seen as coercive. *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003); *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010).

While the Supreme Court issued a decision in June of 2012 that overruled *Goldberg* and *Bashaw*, *State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012), this decision cannot retroactively be applied to Mr. Pavlik without violating his due process rights under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 3. *State v. Gore*, 101 Wn.2d 481, 489, 681 P.2d 227 (1984); *Bowie v. Columbia*, 378 U.S. 347, 353-54, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).<sup>31</sup>

Here, when the State brought Mr. Pavlik to trial and subjected him to a procedure that, if the jury agreed, would add five years to his sentence, RCW 9.94A.533, Mr. Pavlik had a right to the sentencing scheme in force at that time - the rule of non-unanimity as declared by *Goldberg*. To apply a change in the law, a change that has the effect of pressuring hold-out jurors to find for the State, to Mr. Pavlik's case would violate due process of law, protected by U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 3.

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<sup>31</sup> See also RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."); *In re Carrier*, 173 Wn.2d 791, 808-01, 272 P.3d 209 (2012) (retroactively applying change sentencing laws violates due process if affects vested rights).

Even under *Nunez*, the jurors should have been instructed that if they could not reach a verdict and were not unanimous, they should leave the special verdict form blank. *Nunez*, 174 Wn.2d at 719, citing *State v. Brett*, 126 Wn.2d 136, 173, 892 P.2d 29 (1995). Inst. No. 27 did not leave the jurors this option and thus was erroneous even under *Nunez*.

Mr. Pavlik's lawyers failed to challenge Inst. No. 27 at trial and on appeal. The failure to raise the issue on appeal is particularly prejudicial because, at the time of the litigation of Mr. Pavlik's appeal, the issue would have resulted in reversal under *Bashaw* (*Nunez* came out after this Court issued its decision). Thus, both lawyers were ineffective under U.S. Const. amend. 5, 6, & 14 and Wash. Const. art.1, §§ 3 & 22. The Court should vacate the firearm enhancement.

f. **Mr. Pavlik Was Prejudiced by the Lack of Information at Trial About Leenders' and Smith's Backgrounds**

The jury may have thought that Mr. Leenders and Mr. Smith were merely a couple of guys who had too much to drink when they encountered Mr. Pavlik. The jury did not know the full backgrounds of either man. Yet, such information, easily obtainable either from the Spokane Police Department through PRA requests or from searches of court files, would have

shown that (a) both men repeatedly lied to the police to further their own self-interests, (b) that Leenders was often violent when he drank, (c) that both men were biased because of the pendency of various charges and court supervision hanging over their heads at the time of the incident and trial (including provisions of “no alcohol”), (d) that they were barred from firearm possession, (e) that Leenders was suicidal and had little regard for human life, (f) that Leenders had often manipulated the legal system in “tit-for-tat” complaints, (g) that Mr. Smith knew the problems with riding a bike without lights or a helmet, (h) that the police were familiar with Leenders because of past contacts and (i) that Smith and Leenders had close connections related to other criminal charges.

Accordingly, to the extent the information was in the hands of a cooperating police agency (such as the Spokane Police Department), under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), and *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995), the State had an obligation to disclose the information to the defense. The failure to disclose this material information about Mr. Leenders’ and Mr. Smith’s background violated Mr. Pavlik’s due process rights under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 3 and adversely effected his right

to confront witnesses under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22.

Mr. Pavlik's attorney, Ms. Nordtvedt, was ineffective for not uncovering this information herself. Her lack of investigation and improper concession at trial that she could not bring up anything but a witness' prior convictions under ER 609 reveals a lack of understanding of the Confrontation Clauses of U.S. Const. amend. 6 and Wash. Const. art. 1, § 22. She was ineffective under *Strickland*, U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22.

Had the jury known even portions of the information that has been uncovered, it is probable that at least one juror would have voted to acquit him of assault. Mr. Pavlik was therefore prejudiced.

**g. Newly Discovered Evidence**

Mr. McKeon was a neutral witness who saw Mr. Pavlik come to the park when Leenders and Smith were not in sight. He saw Pavlik park the car and only then did Leenders and Smith appear. Ex. 20 & 21. Mr. McKeon would have been a critical witness, the only neutral witness to the beginning of the final confrontation who would have made it clear that Mr. Pavlik did not drive up to Mr. Leenders and Mr. Smith.

Mr. McKeon's testimony is clearly material and has not previously been presented. "In the interest of justice" the new evidence requires vacating the conviction. RAP 16.4(c)(3). Because Mr. McKeon was the only neutral witness to see whether or not Mr. Pavlik drove up to Leenders and Smith, or whether they were absent when he arrived at the parking lot, Mr. Pavlik can show prejudice. To the extent that with due diligence, Mr. McKeon could have been located earlier, Ms. Nordtvedt did not use due diligence and thus was constitutionally ineffective (as noted below). Accordingly, Mr. Pavlik qualifies for relief under RAP 16.4(c)(3).

**h. The Exclusion of Mr. Pavlik's Excited Utterances Was Not Harmless, Particularly in Light of the Trial Court's Erroneous Admission of the State's Hearsay**

On appeal, this Court previously held that the exclusion of Mr. Pavlik's statements to the police that he was acting in self-defense was "at worst harmless error." Ex. 13, Slip Op. at 6. The majority opinion centered on Mr. Pavlik's "peculiar" decision not to drive home, but rather to "drive up" to the bicyclists. Moreover, the Court speculated that if the evidence had been admitted, the prosecutor would have used it to show premeditation. Slip Op. at 13-14 & n 8. Judge Sweeney dissented and would have reversed. Slip Op. at 18-23 (Sweeney, J., dissenting).

Normally, issues raised on direct appeal are not reviewed in collateral petitions unless the ends of justice would be served by reexamining the issue. *In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). Mr. Pavlik asks that the Court reconsider the prior determination that the error was harmless, and also to determine he was prejudiced by the admission of hearsay evidence against him.

The Court's original decision was predicated on an incomplete presentation of the facts, without knowledge of the evidence that Mr. Leenders (1) threatened to kill Mr. Pavlik and (2) believed that he might be charged with carjacking for opening the car door. Moreover, with Mr. McKeon's declarations, it is clear that Mr. Pavlik did not drive up to Leenders and Smith.

Mr. Pavlik's argument in his appeal to this Court also did not include argument about the effect of the hearsay that the State offered. Yet, while Mr. Pavlik could not bring up his statements at the scene, the State was allowed to bring up hearsay statement after hearsay statement of its witnesses, including a complete narrative that Mr. Smith gave to Cpl. Storment at the scene. *See, supra*, § B(1)(b). This latter narrative was not properly admitted

as an excited utterance under ER 803(a)(2), and it was error to admit it as such.

Moreover, the admission of the State's hearsay made the exclusion of Mr. Pavlik's statements "less harmless." The presentation of the evidence was stilted in the State's favor. The State's witnesses were seen as sympathetic, and the State was able to bolster Smith's and Leenders' weak testimony. In this light, the exclusion of Mr. Pavlik's excited utterances cannot be harmless and the Court should reconsider its earlier ruling in this regard.

As for the possibility that the statements would have helped the prosecution, Slip Op. at 13-14 n. 8, reconsideration of this holding is required under the recent case of *State v. Coristine*, \_\_\_ Wn.2d \_\_\_, 300 P.3d 400 (No. 86145-5, 5/9/13), which requires deference to a defendant's strategic decisions. The failure to respect Mr. Pavlik's tactical decision to offer his excited utterance violated due process, his right to counsel, and right to present a defense, under U.S. Const. amends. 5, 6, & 14, and Wash. Const. art. 1, §§ 3 & 22.

This Court should reconsider the hearsay issues, and grant relief.

i. Ms. Nordtvedt Was Ineffective

Mr. Pavlik did not receive effective assistance of counsel under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22, because:

1. Ms. Nordtvedt had an actual conflict of interest, because attorneys in her office represented Mr. Leenders in a VUCSA case at the same time as she represented Mr. Pavlik; because one of Mr. Leenders attorneys (Mr. Boe) represented Mr. Pavlik before Ms. Nordtvedt was assigned; and because evidence related to the VUCSA case -- Leenders' use of a fake name and his continued supervision and failures to appear -- would have been admissible at trial.

2. Ms. Nordtvedt did not prepare for trial properly. She did not familiarize herself ahead of time with the rules of evidence related to hearsay and excited utterances; and she did not make any motions in limine related to the State's proffered hearsay.

3. Ms. Nordtvedt failed to propose proper instructions, and did not except to the failure of the court to give improper instructions. She proposed an outdated version of WPIC 16.07, that improperly used the term "great bodily harm" -- an error this Court has determined to be per se ineffective. *State v. Rodriguez*, 121 Wn. App. 180, 185, 87 P.3d 1201

(2004). She failed to propose any instructions under RCW 9A.16.020, and thus the jury was only given self-defense instructions for homicide (or attempted homicide). She failed even to insure that when the Court made corrections to the self-defense instructions, it corrected the second paragraph of Inst. No. 20, so that the jurors would have the yardstick by which to apply self-defense to assault. Ms. Nordtvedt failed to propose WPIC 16.03, related to defense against a felony, and she failed propose the bracketed portion of WPIC 16.02 to allow for self-defense based on Mr. Smith's actions in concert with Mr. Leenders' actions. Ms. Nordtvedt failed to except to Instruction No. 27's language that required jury unanimity even to answer "no" on the special verdict form. Finally, she failed to propose (and did not except to the failure) to give a jury unanimity instruction for the assault count.

4. Ms. Nordtvedt failed introduce evidence in her possession that would have bolstered Mr. Pavlik's defense. She failed to tie up the impeachment of Mr. Leenders by asking non-leading questions to Det. Gilmore to elicit that Leenders was fearful of speaking to the police because he thought he might be accused of carjacking (his words) because he opened Mr. Pavlik's door. Then she failed to bring up evidence of a prior

inconsistent statement from Leenders that he threatened to kill Mr. Pavlik during their second confrontation.

5. Ms. Nordtvedt improperly conceded, without having done the investigation first, that Mr. Leenders' and Mr. Smith's prior bad acts and contacts with police were inadmissible, whereas this evidence would have been admissible, under ER 608, U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22, to show bias, a motives to lie, violence while intoxicated, mental illness, lack of regard for human life, a lack of regard for legal rules, and deception, particularly when intoxicated.

6. Ms. Nordtvedt failed to investigate the case properly by (a) not seeking out new witnesses, not in the police reports, who saw Leenders and Smith attack Mr. Pavlik (such as Mr. McKeon), (b) not making Public Records Act requests or litigating discovery demands to find out the backgrounds of Mr. Leenders and Mr. Smith, (c) not checking some court files until after Leenders and Smith testified, and (d) not discovering all of the evidence in Ex. 22, 27, 28, 29, 30, 31 & 32.

Because Mr. Pavlik's self-defense claim was strong – particularly in light of the evidence not brought out at trial that Leenders admitted threatening to kill Mr. Pavlik and admitted being fearful of being charged

with carjacking because he opened Mr. Pavlik's door – Mr. Pavlik can make out the necessary prejudice to gain relief under *Strickland*.

**j. Mr. Wasson was Ineffective**

There were a series of record-based issues that Mr. Pavlik's attorney on appeal, Mr. Wasson, could have raised and failed to do so. Mr. Pavlik had a right to effective assistance of counsel on appeal under the Due Process Clauses U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, §§ 3 and the right to appeal under Wash. Const. art. 1, § 22. *Evitts v. Lucey*, 469 U.S. 387, 396, 100 S. Ct. 830, 83 L.Ed.2d 821 (1985); *In re Morris*, 176 Wn.2d 157, 166-68, 288 P.3d 1140 (2012).

Here, Mr. Wasson failed to raise issues related to:

1. The bench conference where challenges for cause and hardship exclusions were discussed. § B(3)(a), *supra*. In fact, Mr. Wasson did not order the transcript for jury selection.
2. The bench conferences related to legal issues throughout the trial. § B(3)(b), *supra*.
3. The defective self-defense instructions discussed in § B(3)(c), *supra*.

4. The lack of a jury unanimity instruction for guilt, but requirement of unanimity for the special verdict. §§ B(3)(d) & (e), *supra*.

5. The admission of the State's hearsay evidence at trial (including Smith's narrative to Cpl. Storment), and the failure to make an argument as to how the admission of the State's hearsay prejudiced Mr. Pavlik's arguments on appeal. § B(3)(h), *supra*.

Because of some of the issues would have been per se grounds for reversal on direct appeal, such as the partial closure of jury selection and instructional issues, the Court should use the direct appeal standard of prejudice, and vacate the conviction. *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

### C. REQUEST FOR RELIEF

Mr. Pavlik is under restraint as set out in RAP 16.4(b) and the restraint is unlawful under RAP 16.4(c)(2), (3), (5) & (7). Some of the issues are per se reversible without the need for a reference hearing (such as the instructional issues and partial closure of jury selection). As for any disputed facts, the Court should transfer the petition to the superior court for a reference hearing with full discovery. To the extent that the State has additional evidence in its possession (or in the possession of cooperating law

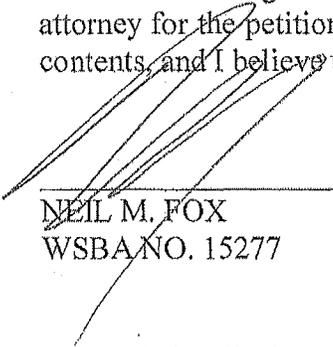
enforcement agencies) related to Mr. Leenders or Mr. Smith (or any other exculpatory evidence), the State should disclose it.

Ultimately, the Court should vacate the judgment, and order a new trial (or vacate the special verdict and remand for resentencing).

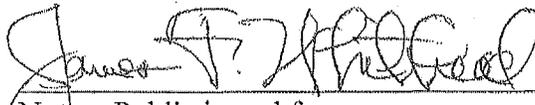
**D. OATH**

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF KING )

After being first duly sworn, on oath, I depose and say: That I am the attorney for the petitioner, that I have read the amended petition, know its contents, and I believe the amended petition is true.

  
\_\_\_\_\_  
NEIL M. FOX  
WSBA NO. 15277

Subscribed and sworn to before me this 1st day of July, 2013.

  
\_\_\_\_\_  
Notary Public in and for  
the State of Washington,  
residing at Seattle

