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A. ARGUMENT IN REPLY

1. *The Supreme Court Has Not Held That Challenges for Cause and Hardship Exemptions Could be Decided in Closed Proceedings*

On direct appeal, Mr. Pavlik's prior counsel did not order the transcripts of jury selection and thus did not (and could not) raise any issues about courtroom closures during that portion of the trial. In the amended PRP, after obtaining the missing transcripts, Mr. Pavlik argues that the trial court's decision to address hardship exemptions and challenges for cause at a private sidebar conference violated the constitutional right to an open trial and the right to be present at all critical stages of the proceedings.¹

Not responding to the issues involving the right to be present (an analytically distinct argument from the right to open court proceedings), the State responds by arguing that the Supreme Court already decided the issue in *State v. Sublett*, 176 Wn2d 58, 292 P3.d 715 (2012) (plurality), and that sidebars do not involve the public trial right. *Response to Opening Brief* at 4-6.

¹ Mr. Pavlik has also raised an issue related to the discussion of legal issues at sidebar during the course of the evidentiary portion of the trial, noting that this issue had been accepted for review by the Supreme Court. *State v. Smith*, No. 85809-8. That issue is different than the issue involving the closure during jury selection.

Actually, the Supreme Court in *Sublett* never directly addressed issues related to a courtroom closure during jury selection. Rather, the issue in *Sublett* was: “Whether the trial court violated the right to a public trial by considering a jury question in camera?” *Sublett*, 176 Wn.2d at 70 (plurality). Thus, contrary to the State’s argument, *Sublett* did not approve of addressing hardship exemptions and challenges for cause during jury selection at sidebar.² Because the State misreads *Sublett*, the State’s briefing does not discuss, or attempt to distinguish, cases reversing judgments where core jury selection issues, such as for cause or hardship challenges, were decided in non-open proceedings, without the presence of the defendant. *See, e.g., State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011); *State v. Tingdale*, 117 Wn.2d 595, 817 P.2d 850 (1991); *Brady v. Fibreboard Corp.*, 71 Wn. App. 280, 857 P.2d 1094 (1993).

² Justice Madsen’s concurring opinion in *Sublett* cited to cases outside Washington allowing for sidebars under limited circumstances. *State v. Sublett*, 176 Wn.2d at 96-97 (Madsen, J., concurring). But even Justice Madsen’s description of these cases do not support the practice of routinely deciding hardship exemptions and challenges for cause in private. The State’s citation to p. 83 of *Sublett*, *Response to Personal Restraint Petition* (“*Response to PRP*”) at 12, is a mystery since that page addresses instructional issues.

The State is correct when it argues that sidebar conferences have traditionally been closed to the public.³ However, the proper inquiry is not whether sidebars are closed; rather, the issue is whether core jury selection processes such as challenges for cause and hardship exemptions have traditionally been addressed in closed proceedings, or whether, as argued by Mr. Pavlik, such issues should take place in open court. The State has no response to Mr. Pavlik's arguments that experience and logic reveal that such jury selection issues are supposed to take place in open court, not in closed proceedings.⁴

Accordingly, because the State does not meaningfully discuss the public trial right attached to jury selection, the State's arguments should be rejected. Mr. Pavlik's rights be present at an open and public trial and right

³ While the State believes that "the general reason for having side-bars is to prevent the public from hearing what is discussed at the side-bar," *Response to Opening Brief* at 5, the purpose of a sidebar is really "to allow counsel to raise concerns that may need to be taken up outside the jury's presence." *Sublett*, 176 Wn.2d at 140 (Stephens, J., concurring).

⁴ See also *State v. Beskurt*, 176 Wn.2d 441, 447, 293 P.3d 1159 (2013) (plurality) ("Nothing suggests the questionnaires substituted [for] actual oral voir dire. Rather, the answers provided during oral questioning prompted, if at all, the attorneys' for cause challenges, and the trial judge's decisions on those challenges all occurred in open court. The public had the opportunity to observe this dialogue. The sealing had absolutely no effect on this process."); *State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (plurality) (reversal where voir dire and challenges for cause were "registered" in chambers).

to effective assistance of counsel on appeal, guaranteed under U.S. Const. amends. 1, 5, 6 & 14, and Wash. Const. art. 1, §§ 5, 10 & 22, were violated.

2. *The Defective Self-Defense Instructions Were Never Addressed on Direct Appeal*

Acquitted of attempted first degree murder, Mr. Pavlik was convicted of first degree assault. However, the self-defense instructions related to the assault count were seriously flawed and used the wrong legal standards. See *Opening Brief of Petitioner* at 8-28. The State does not respond to any of the issues Mr. Pavlik raised regarding the defective self-defense instructions, and argues only that all issues about “jury instructions” were decided in the direct appeal. *Response to PRP* at 12-14.⁵

Contrary to the State’s argument, this Court did not address any issue related to the jury instructions other than a challenge to the “first aggressor” instruction. *State v. Pavlik*, COA No. 29172-3-III, Ex. 13 at 14-15. Mr. Pavlik is therefore not asking for this Court to re-hear any issue he previously

⁵ The State also provides a summary of the law regarding the instructions being the law of the case. *Response to Opening Brief* at 6-7. In light of RAP 2.5(a)(3) & 16.4(c)(2), and Mr. Pavlik’s various constitutional claims, it is not clear what the point is of the State’s response here.

raised.⁶ None of the issues raised in this PRP about the self-defense instructions were ever raised or discussed in the direct appeal.

The Supreme Court has consistently rejected the argument that a prisoner cannot raise constitutional issues in a PRP if these issues were not raised in the direct appeal. *See generally In re Adolph*, 170 Wn.2d 556, 563, 243 P.3d 540 (2010) (citing cases). Indeed, the Supreme Court has even held:

the mere fact that an issue was raised on appeal does not automatically bar review in a PRP. Rather, a court should dismiss a PRP only if the prior appeal was denied on the same ground and the ends of justice would not be served by reaching the merits of the subsequent PRP.

By "ground" we mean simply a distinct legal basis for granting relief. Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant.

In re Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986), *overruled on other grounds In re Nichols*, 171 Wn.2d 370, 375-76, 256 P.3d 1131 (2011).

Here, a challenge to whether there was sufficient evidence to give a first aggressor instruction (Instruction No. 23) is a distinct legal argument from the challenges made here to Instructions Nos. 20 and 22, and the failure to propose other key self-defense instructions. The gravamen of the current

⁶ The pertinent sections of Mr. Pavlik's opening brief from the appeal briefing are being filed as Exhibit 38.

claims is completely different, and, other than coming under the generic category of jury instructions, there is little overlap between them.⁷

The challenge made on direct appeal to the first aggressor instruction also did not involve a claim of ineffective assistance of counsel -- trial counsel's obvious lack of preparation regarding jury instructions.⁸ As for the State's rhetorical question, "[W]hy did the petitioner not raise these issues in his appeal?" *Response to PRP* at 14, that is, in fact, the question.

The answer is simply that appellate counsel was constitutionally ineffective. Both the Supreme Court and the Court of Appeals have reversed convictions on direct appeal where trial counsel proposed an instruction like the one trial counsel proposed here (Inst. No. 22 and "great bodily harm,"), *see State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009); *State v. Rodriguez*, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004), or failed to propose proper self-defense instructions (i.e., no instruction on multiple assailants; *see State*

⁷ *See In re Adolph*, 170 Wn.2d at 565 (prior challenge to sentencing does not bar new challenge to sentence based on new arguments about prior convictions). *Compare In re Lord*, 123 Wn.2d 296, 313, 868 P.2d 835 (1994) (refusing to consider ineffective assistance of counsel arguments made in PRP when court on direct appeal rejected ineffectiveness arguments), *writ granted Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999).

⁸ The State does not contest that trial counsel failed to propose proper instructions before trial and was, at the last moment, trying to propose language for self-defense and the assault count, even as the trial judge was reading the instructions to the jury. RP 451-52, 473-75.

v. *Harris*, 122 Wn. App. 547, 90 P.3d 1133 (2004)). Appellate counsel's failure to raise issues that would have resulted in reversal on direct appeal is sufficient prejudice to grant relief to Mr. Pavlik. See *In re Morris*, 176 Wn.2d 157, 167-68, 288 P.3d 1140 (2012) (plurality); *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

Because of defective self-defense instructions, the State's burden of proof was weakened, and Mr. Pavlik's rights to due process and effective assistance of counsel at trial and on appeal, under U.S. Const. amends. 5, 6 & 14, and Wash. Const. art. 1, §§ 3 & 22, were violated.

3. ***Ms. Nordtvedt Was Ineffective For Not Properly Tying Up Her Impeachment of Mr. Leenders***

Mr. Pavlik testified that, during their first encounter, Mr. Leenders actually opened his passenger door and entered his vehicle:

So in the meantime another person tried to get into my car through the other door and already almost had his hands on my seat so he opened the door completely.

RP 358. In his testimony, Mr. Leenders denied opening the door. RP 99.⁹ If Mr. Leenders had actually opened Mr. Pavlik's door, this would have represented a serious escalation of his (and Mr. Smith's) conflict with Mr. Pavlik. Opening the door at this early point would have made Mr. Pavlik's later fear more reasonable, when, at the parking lot, Leenders and Smith "appeared from nowhere," RP 363, and Leenders began assaulting Mr. Pavlik, while Smith came around from the rear, presumably again to open the passenger door of Mr. Pavlik's car.

Ms. Nordtvedt attempted to impeach Mr. Leenders with his prior inconsistent statements to Detective Gilmore, but Leenders denied telling the detective that the door opened and the dome light came on. RP 99. When Ms. Nordtvedt asked if Leenders was going to "carjack" Mr. Pavlik, the prosecutor objected as "argumentative" and the objection was sustained. Ms. Nordtvedt moved on to other subjects. RP 99-100. Then, when asked if he

⁹ The State refers to this matter in the following manner:

The first point is to accurately portray the testimony, something the petitioner does not do. The simple facts from the transcript indicate that Mr. Leenders did not open the petitioner's car door. RP 99. It is difficult to understand what sort of law the petitioner wished to practice.

Response to Opening Brief at 11. Preferring to ignore a conflict in the testimony, and assuming that Mr. Leenders' self-serving version of the facts was the only version in existence, the State resorts to innuendo and *ad hominem* attacks.

recalled not wanting to speak with Detective Gilmore because he told the detective he was fearful of being charged with attempted "carjacking," Leenders said "no." RP 105.

Ms. Nordtvedt called Det. Gilmore as a witness, but asked only leading questions about Leenders' expressed fear of being charged with carjacking. When the objections were sustained, Ms. Nordtvedt failed to ask a non-leading question to elicit the testimony. RP 329-30. However, Det. Gilmore's report documents that 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. Mr. Pavlik has argued that Ms. Nordtvedt was ineffective when she did not tie up her impeachment of Mr. Leenders by asking non-leading questions to Det. Gilmore as to what Mr. Leenders told him.¹⁰

The State responds as follows:

The petitioner has no evidence that the trial court would have allowed the somewhat unseemly questions even if the

¹⁰ Mr. Pavlik also argued that Ms. Nordtvedt was ineffective on other grounds as well, including both her proposal of the wrong instructions and her failure to bring out Mr. Leenders' statements to Det. Gilmore that he had threatened to kill Mr. Pavlik. Ex. 17 at 9 (Leenders admits he said, "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."). The State has not submitted any argument in response to these issues.

questions were phrased in the proper fashion. Simply because a defense counsel may want to use a certain response does not mean the trial court will automatically permit such.

Response to PRP at 5. In its brief, the State then argues that Exhibit 17 -- Det. Gilmore's report -- was not made under oath and "the trial court probably would not have allowed the statement in the first place as it simply statements made to the officer. There was no foundation available."

Response to Opening Brief at 11-12. The State also contends that continued questioning by defense counsel would make her out to be a "fool" in front of the jury by "continuing to hammer away at a witness," and that if Mr. Pavlik was afraid of being "carjacked," "the jury would have wondered even more strongly why the petitioner did not simply absent himself from the scene. The petitioner asserts that his self-defense claim was 'strong.' Obviously it was not strong or the jury would not have convicted him." *Response to Opening Brief* at 12.

It is difficult to know where how to reply to these arguments. Mr. Pavlik's self-defense claim was certainly "strong" in the sense that the jury acquitted him of attempted murder and the trial judge imposed an exceptionally low sentence because of the failed self-defense claim. The jury obviously convicted Mr. Pavlik of assault, but it had neither proper jury

instructions on self-defense (which the State does not dispute) nor all of the evidence before it. In any case, Mr. Pavlik, according to his testimony, *did* absent himself from contact with Leenders and Smith -- he said he drove to an area where Mr. Smith and Leenders were not (the parking lot), and, according to his testimony, they were the ones who injected themselves into the situation by appearing out of nowhere, surrounding Mr. Pavlik's car, with Leenders entering the car and repeatedly striking Mr. Pavlik.

Leenders' own consciousness of his exposure to prosecution for trying to "carjack" Mr. Pavlik¹¹ would certainly be pertinent (as evidence of bias) as would the fact that Leenders was lying to the jury when he denied telling Det. Gilmore he was afraid of being charged with carjacking. To be sure, Leenders' statements to Det. Gilmore were "unsworn" and were "simply statements made to the officer." *Response to Opening Brief* at 11-12. But, the foundation for their admission as prior inconsistent statements would have been easy to establish.¹² Det. Gilmore was already on the witness stand

¹¹ The terminology used -- "carjack" -- was Mr. Leenders' own choice of words, not counsel's. Why questions based on this terminology would be "unseemly," as the State suggests, is not clear. Did the prosecutor ask "unseemly" questions of Mr. Pavlik when she questioned him about what he told the detective? RP 376.

¹² The State's complaint about Ex. 17 being unsworn appears to be based on its concerns that Mr. Leenders made unsworn statements to Det. Gilmore, whose report is also unsworn. The State does not doubt the authenticity of Ex. 17 as being a true
(continued...)

and could have simply been asked, “When you contacted Mr. Leenders to see what he had to say about the incident, what did he say to you?”

A witness’ unsworn, out-of-court, prior inconsistent statement is admissible as impeachment. Such a statement is admissible under ER 607 and ER 613. It is also not hearsay because the prior inconsistent statement is not offered to prove the matter asserted. ER 801(c). *See Fraser v. Beutel*, 56 Wn. App. 725, 738, 785 P.2d 470 (1990). The statement can be admissible both to show the lack of credibility of a witness and to show his or her bias. *State v. Spencer*, 111 Wn. App. 401, 408-11, 45 P.3d 209 (2002).

There is no requirement that a prior inconsistent statement be sworn or under oath. While ER 801(d)(1)(i) contains an exclusion from hearsay for prior inconsistent statements under oath, this is not the exclusive mechanism for admitting prior inconsistent statements. For instance, in *Fraser v. Beutel*, *supra*, the prior inconsistent statement at issue involved a bartender who denied telling a woman named Deanna Romano the night of an accident that she had served a driver one beer. Ms. Romano then testified that she had a conversation with the bartender who told her that she had served the driver one beer. This Court held that the statement was properly admitted for

¹²(...continued)
copy of Det. Gilmore’s report.

impeachment. 56 Wn. App. at 738. There was no question but that the bartender's out-of-court statement was unsworn. *See also State v. Hancock*, 109 Wn.2d 760, 748 P.2d 611 (1988) (state allowed to impeach its own witness with prior inconsistent statements made to police officer); *State v. Spencer, supra* (prior unsworn statements that witness said she was threatened by police admissible for bias).

In the instant case, Mr. Leenders told Det. Gilmore that he was afraid to speak with him because "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. Leenders then denied making this statement. RP 99, 105. Mr. Pavlik was actually required to complete the impeachment by calling Det. Gilmore to testify that Leenders actually had made these statements. *See State v. Babich*, 68 Wn. App. 438, 443-46, 842 P.2d 1053 (1993) (explaining duty to tie up impeachment with extrinsic evidence of inconsistent statement). Such statements were not offered for the truth of the matter asserted, as Leenders was likely lying to Det. Gilmore when he said that the reason he opened Mr. Pavlik's passenger door was to tell him to leave. But Leenders' own consciousness of guilt in his conversation with Det. Gilmore was admissible

to show his bias and state of mind (under ER 803(a)(3)) -- i.e. that he *believed* that he had done something wrong) -- and was also admissible to show he was not credible in his denials. *State v. Spencer*, 111 Wn. App. at 408-11. After he denied making the statements, the foundation for admission of the prior inconsistent statements was satisfied by calling Det. Gilmore. ER 613(b).

Ms. Nordtvedt attempted to tie up the impeachment by calling Det. Gilmore, but once the prosecutor objected on the grounds that the questioning was leading, Ms. Nordtvedt simply failed to complete the impeachment by asking non-leading questions. It cannot be imagined by any stretch of the imagination that if Ms. Nordtvedt simply asked a non-leading question about what Leenders had told Det. Gilmore that the jurors would have thought she was “fool” by “hammering” away at Gilmore.¹³ Further, while it is not certain that the trial court would have allowed for the impeachment, if it had not, it would have been error under the above-noted cases. In any event, only a reference hearing could answer that question.

Accordingly, the State’s arguments should be rejected. Because Ms. Nordtvedt’s ineffectiveness deprived Mr. Pavlik of the ability to tie up the

¹³ Did the jury think the prosecutor was a “fool” when she “hammered” away at Mr. Pavlik during cross-examination?

impeachment of Mr. Leenders and get evidence before the jury of Mr. Leenders' consciousness that he tried to carjack Mr. Pavlik, not only was Mr. Pavlik denied his right to effective assistance of counsel, but this error violated his Confrontation Clause rights, all in violation of U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22.

4. *The Newly Discovered Evidence Was Not Merely Impeaching or Cumulative*

The State argues that Mr. McKeon's testimony would be impeaching or cumulative, that he could have been located with due diligence and that his testimony probably would not have changed the outcome of the trial. *Response to PRP* at 5-6.¹⁴ The State does support its argument with any references to the record.

While the State suggests that Mr. McKeon himself is biased, *Response to PRP* at 6,¹⁵ there is no evidence to support that conclusion. He

¹⁴ The State also argues that the trial court did not abuse its discretion in denying the motion for a new trial. *Response to PRP* at 6. However, the trial court never ruled on a motion for a new trial based upon Mr. McKeon's testimony, and simply transferred the case to this Court to be considered as a PRP. It is not clear what the State is talking about and the standard is not "abuse of discretion."

¹⁵ The State argues, "Apparently, the petitioner thought other witnesses were lying and biased." *Response to PRP* at 6. Yet, there is no reason to assume, as the State does, that Mr. Smith and Mr. Leenders were truthful and unbiased witnesses. Moreover, the State is fully able to investigate and interview Mr. McKeon. If it thinks that this witness was "influenced in some way unknown to the State," *id.*, the remedy is to have a reference hearing, not to reject Mr. McKeon's sworn declaration simply because
(continued...)

is, in fact, the only witness without a stake in the outcome of the case who saw who came to the parking lot first -- Mr. Pavlik or Mr. Leenders and Mr. Smith. Nothing about this testimony is cumulative or impeaching, but rather it is substantive evidence from someone without bias (unlike Leenders, Smith or Pavlik) as to who arrived first. Finally, the State offers no evidence that Mr. McKeon could have been located previously (or, if he could have been located, why Ms. Nordtvedt did not take any steps to try to locate witnesses other than those interviewed by the police). The State's bald assertion that the McKeon evidence does not justify granting a relief should not substitute for legal analysis.

Either because of ineffective assistance of counsel (in violation of U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22), or because of newly discovered evidence, the conviction should be vacated.

5. *The State Was Under the Obligation to Disclose Non-Conviction Information Related to Its Witnesses*

The State argues that non-conviction data related to Mr. Leenders and Mr. Smith was not discoverable, and that it is "questionable" to make a

¹⁵(...continued)
he has a version of the facts that differs from the versions advanced by Mr. Leenders and Mr. Smith.

Public Records Act request because such a “tactic” would “lead to the obtaining of improper, inadmissible, and private data.” *Response to Opening Brief* at 10 & n.1. This argument lacks merit.

To begin with, the information that the State’s cooperating law enforcement agency (Spokane Police Department) released pursuant to a PRA request is hardly “private.” The information about Mr. Leenders and Mr. Smith was no more “improper” or “private” than the police reports about Mr. Pavlik and this case. Because it was released under the PRA, the information was by definition “public” and not exempt from disclosure under RCW 42.56 *et seq.*

Nothing about this information is “improper.” This public information consists of police reports involving the State’s own witnesses, their repeated lies to the police, their deceptive conduct, pending criminal charges against them and pending probation matters. Contrary to the State’s arguments, whether this information is in its own hands or in the hands of its cooperating police agencies, the State has the obligation under the Due Process Clauses of U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 3 to disclose it. *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995).

Citing CrR 4.7(a)(1)(vi),¹⁶ the State argues that it has no obligation to disclose non-conviction data. *Response to Opening Brief* at 9-10. While this state rule is limited to conviction records, the State ignores CrR 4.7(a)(3), which requires disclosure of “any material or information within the prosecuting attorney’s knowledge which tends to negate defendant’s guilt as to the offense charged.” More importantly, CrR 4.7 does not contain within it the sole basis for a prosecutor’s obligation to disclose information -- the Due Process Clauses of U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 3, impose additional obligations above and beyond what is contained within the state criminal rule. *See Kyles v. Whitley, supra* (constitutional requirement for disclosure of material outside knowledge of prosecutors, in the hands of cooperating police agencies).

Contrary to the State’s narrow view of the limits of its disclosure obligations, the State violates its obligations under *Brady*; when it fails to disclose impeachment evidence. *See In re Stenson*, 174 Wn.2d 474, 486, 276 P.3d 286 (2012) (duty to disclose “encompasses impeachment evidence as

¹⁶ The State also cites “RCW 10.9 [sic]” in support of its argument that it is not permitted to disclose non-conviction information. *Response to PRP* at 9. If the State meant to cite to RCW 10.97.050, that statute actually allows for release of non-conviction information “to implement a statute, ordinance, executive order, or a court rule, decision, or order,” RCW 10.97.050(4), which would include release in response to a prosecutor’s obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

well as exculpatory evidence.”); *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009) (“*Brady* encompasses impeachment evidence, and evidence that would impeach a central prosecution witness is indisputably favorable to the accused”). Such evidence indisputably includes information beyond mere conviction history and includes a witness’ exposure to criminal charges, corrections files and any other information that would show dishonesty and past lying. *See, e.g., Benn v. Lambert*, 283 F.3d 1040, 1054-58 (9th Cir. 2002) (setting out categories of disclosure); *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (exculpatory evidence that informant had “a long history, known to state authorities, of violence, lying to police, and trying to pin his crimes on others”). *See also Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013) (recognizing impeachment value of mental health records).

Thus, there is no question but that the State must disclose arrest histories and other information of prior bad acts of its witnesses, even for cases that do not result in conviction. Such information is not “spurious,” *Response to PRP* at 15, but is admissible, not under ER 609, but under ER 608(b), in addition to the Confrontation Clauses of U.S. amends. 6 & 14 and Wash. Const. art. 1, § 22. *See United States v. Price*, 566 F.3d at 912-13 & n. 14 (arrests for thefts: “The prosecutor apparently also believed that he was

only required to turn over evidence of criminal *convictions* that he or his agent uncovered in Phillips' record. This is not so.") (emphasis in original);¹⁷ *United States v. Kohring*, 637 F.3d 895, 905-06 (9th Cir. 2011) (allegations of sexual improprieties and attempts to solicit perjury). While a trial court always retains the discretion to refuse admission of prior bad acts (just as it has the discretion to deny admission of a defendant's prior bad acts), *Price*, 566 F.3d at 913 n.13, this does not mean that the State is relieved of its disclosure obligations.

The State cites two cases in support of the proposition that it cannot "force" the Spokane Police Department to "release any data other than convictions." *Response to PRP* at 9, citing *State v. Cardenas*, 146 Wn.2d 400, 47 P.3d 127, corrected by 57 P.3d 1156 (2002); *State v. Kilgore*, 107 Wn. App. 160, 26 P.3d 308, *aff'd*, 147 Wn.2d 288, 53 P.3d 974 (2001). It is not clear what the State's argument is here. The State has the obligation to obtain *Brady* material from cooperating law enforcement agencies. *Kyles v. Whitley, supra*.¹⁸

¹⁷ While *Price* is a Ninth Circuit case, the Washington Supreme Court has cited *Price* with approval. *In re Stenson*, 174 Wn.2d at 487-88.

¹⁸ *Cardenas* held that the failure to disclose a pending charge was not prejudicial because evidence of the arrest would not have been admissible under ER 608. 146 Wn.2d at 413-14. However, the Court specifically noted: "The ER 608(b)
(continued...)"

Here, the State and its cooperating police agencies were in possession of a large quantity of information about Mr. Leenders and Mr. Smith that could have been used at trial to show their lack of credibility and bias -- evidence of pending unfiled charges and probation matters,¹⁹ and evidence of repeated lies to the police, as well as evidence of violent and irrational behavior when intoxicated.²⁰

Ms. Nordtvedt's tactical decision to agree not to bring up prior conviction history was made in a vacuum, without knowledge of the true

¹⁸(...continued)

prohibition against admitting evidence of prior conduct does not apply if the specific instances of conduct are offered to show witness bias. . . . Here, Cardenas does not argue that he was denied an opportunity to explore a witness' bias under the confrontation clause." *Id.* at 414 n.1. In contrast, Mr. Pavlik is arguing that the pending charges and probation matters hanging over the witness' heads would have shown their bias, and thus would have been admissible under the Confrontation Clause. As for *Kilgore*, the Court of Appeals only decided whether an arrest was admissible under ER 609, and did not address ER 608, and stands only for the proposition that a trial court has the discretion to curtail cross-examination. 107 Wn. App. at 185-87. In any case, neither *Cardenas* nor *Kilgore* addressed the line of cases, such as *State v. Gregory*, 158 Wn.2d 759, 798-799, 147 P.3d 1201 (2006), which have approved of witness' lies under ER 608(b).

¹⁹ While the State claims, without any evidence, that it had no "control" over Mr. Leenders, *Response to PRP* at 7-8, the issue is whether Mr. Leenders *believed* that the State had this control over him, where clearly he could easily be jailed for violating probation or his release conditions (such as by consuming alcohol on May 19, 2008). Under the Sixth Amendment's Confrontation Clause, it is the witness' subjective belief that his status as a probationer could result in incarceration if he does not cooperate (or make himself out to be the victim rather than the attempted carjacker) that is subject to cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)

²⁰ See RP 42-43 (trial judge bars some expert testimony unless defense could show Mr. Leenders is violent when he drank).

histories of Leenders and Smith, and thus her decision is not entitled to deference. While ultimately it would have been up to the trial judge to determine what evidence would actually be admitted, the trial judge here was never asked to rule on the issue, the State having suppressed the evidence.

Mr. Pavlik's right to due process of law, and to effective assistance of counsel, caused a violation of his right to confront witnesses, all in violation of U.S. Const. amends. 5, 6, & 14, and Wash. Const. art. 1, §§ 3 & 22. Ultimately, because there is a reasonable probability that one juror would have had reasonable doubt based upon the withheld evidence, relief is appropriate. *In re Stenson*, 174 Wn.2d at 493.

6. *The State Ignores the Effect of the Admission of Hearsay from its Witnesses*

Mr. Pavlik asked the Court to review again its divided opinion regarding the exclusion of his at-the-scene excited utterances. The State response is simply to make snide comments without legal analysis. *See, e.g., Response to PRP* at 4 (“The petitioner has presented no caselaw that indicates that a defendant can yell his defenses out of a car window after shooting an unarmed man.”). However, the same could be said for its witnesses -- “the State has presented no caselaw that indicates that someone can yell out his defenses to a police officer after he and his friend tried to carjack someone.”

Yet, this is essentially what took place here -- the State was allowed to place a complete narrative by Mr. Smith to an officer at the scene that bolstered his credibility while Mr. Pavlik was denied the equivalent rulings. The State has no response to this dissymmetry and makes no substantive arguments in response to Mr. Pavlik's PRP.

7. *The State Does Not Rebut the Conflict Argument*

The State's response on the issue of the conflict of interest is to say that Mr. Boe simply assigns cases and does not work actual cases. *Response to PRP* at 7. Of course, the evidence is that Mr. Boe did represent Mr. Leenders in an actual case -- the violation hearings for not complying with the terms of his sentence. Ex. 22 (Order Enforcing Sentence in 06-1-04713-4, entered 3/12/09). This was after he met with Mr. Pavlik about this very case. Moreover, it was not just Mr. Boe, but a series of other attorneys in Ms. Nordtvedt's office who represented Mr. Leenders both before and after the May 2008 incident. Mr. Pavlik does not, as suggested by the State, have to show that Ms. Nordtvedt personally represented Mr. Leenders -- RPC 1.10 provides for imputation of conflicts. Here, there certainly is enough evidence of a conflict to warrant a reference hearing. Ultimately, because of the

violation of the right to counsel, under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22, the conviction should be vacated.

8. *Jury Unanimity Was Violated*

Regarding this issue, the State argues: “It is apparent from the transcript that there is no certainty as to where the ‘warning shot’ was aimed or where the bullet from the ‘warning shot’ landed. There could be no jury unanimity problem considering only Mr. Leenders was shot.” *Response to Opening Brief* at 8. But the State cites to the definition of assault given to the jury, *Response to Opening Brief* at 8, which sets out alternate modes of committing assault which did not require anyone be shot, just that someone be placed in fear of a battery. A review of the record (which the State does not do) reveals that Mr. Leenders and Mr. Smith claimed that the warning shot was aimed at them, that Leenders said something hit his cheek, that the bullet went flying by, and that Smith felt “heat” from the bullet. RP 86, 100-01,116, 250. This would be sufficient under the definition of assault and cause a violation of Mr. Pavlik’s right to jury unanimity under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, §§ 21 & 22.

While the State raises the specter of waiver, a jury unanimity objection does not need to be made at trial. *State v. Holland*, 77 Wn. App.

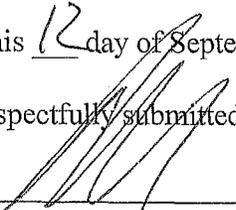
420, 424, 891 P.2d 49 (1995). As for the State's argument that Mr. Pavlik "has no explanation for why he did not raise his issues before now," *Response to Opening Brief* at 8, this argument makes no sense in light of Mr. Pavlik's argument that his trial counsel and appellate counsel were ineffective, in violation of U.S. Const. amends. 5, 6 & 14 and Wash. Const. art. 1, §§ 3 & 22. Here, the State unwittingly supports granting relief to Mr. Pavlik because these issues (as with so many other issues) should have been raised earlier.

B. CONCLUSION

For the foregoing reasons, and the reasons set out in prior briefing, this Court should vacate the conviction.

DATED this 12 day of September 2013.

Respectfully submitted,



NEIL M. FOX
WSBA NO. 15277
Attorney for Petitioner

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

CrR 4.7(a) provides in part:

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing: . . .

...

(vi) any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial. . . .

....

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged. . . .

ER 607 provides:

The credibility of a witness may be attacked by any party, including the party calling the witness.

ER 608(b) provides:

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the

discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

ER 609 provides:

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible

under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

ER 613 provides:

(a) Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny

the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

ER 801 provides in part:

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 803(a) provides in part:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

RAP 2.5(a) provides:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

RAP 16.4 provides:

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons: (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or (2) The conviction was obtained or the

sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or (3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or (5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or (6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or (7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

RPC 1.10 provides in part:

Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the

disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. . .

U.S. Const. amend. 1 provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. 5 provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. 6 provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FILED

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

IN RE THE RESTRAINT OF:
ALEKSANDR PAVLIK,
Petitioner.

CAUSE NO. 31227-5-III
(consol with 31338-7-III)

EXHIBIT 38

EXHIBIT 38
EXCERPTS FROM OPENING BRIEF IN
State v. Aleksandr Pavlik, COA No. 29172-3-III

RECEIVED
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PROSECUTOR Attorney - Appeals Division
Spokane County, WA

No. 291723

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEKSANDR PAVLIK,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR SPOKANE COUNTY
THE HONORABLE JEROME J. LEVEQUE

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Pavlik's constitutional right to present his defense by excluding statements he made regarding self-defense at the time of his arrest, under Respondent's argument that it was "self-serving" hearsay.
2. The "First Aggressor" Instruction, Court's No. 23, was given to the jury in the absence of evidentiary support and thus denied Mr. Pavlik a fair trial by limiting his ability to argue he acted in self-defense. (CP 129)
3. The trial court erred by denying Mr. Pavlik's motion for new trial and/or arrest of judgment.

Issues Pertaining to Assignments of Error

1. When the accused raises self-defense, the jury must be allowed all relevant testimony from all parties bearing on that issue. Did the trial court improperly restrict the defendant and his counsel from presenting all relevant testimony on the question of self-defense as excited utterances and state-of-mind evidence, by excluding said testimony under the self-serving hearsay ruling? (Pertaining to Assignments of Error Nos. 1-3)
2. The Court may instruct a jury that the defendant cannot claim self-defense if he provoked the conflict only if that instruction is supported by the evidence. Did the trial court improperly give a first aggressor

instruction thereby denying Mr. Pavlik the ability to argue he acted in self-defense? (Pertaining to Assignments of Error Nos. 1-3)

3. Should the trial court have granted the motion for new trial and/or arrest of judgment based on the insufficiency of the evidence as well as these inconsistent verdicts? (Pertaining to Assignments of Error Nos. 1-3)

II. STATEMENT OF THE CASE

Procedural History

The appellant, Aleksandr Pavlik, was originally charged by an Information filed in Spokane County Superior Court on May 21, 2008, with two (2) felony counts: Count I, attempted first degree murder, RCW 9A.32.030(1)(A), while armed with a firearm under RCW 9.94A.602 and 9.94A.533(3); and Count II, first degree assault, RCW 9A.36.011(1)(A), with a firearm (again) under RCW 9.94A.602 and 9.94A.533(3). Both counts alleged the same victim, i.e. Gabriel Leenders, as well as the same date, i.e. May 19, 2008. (CP 1-2)

Mr. Pavlik appeared for arraignment on June 3, 2008, on these charges (CP 1-7) before the pre-assigned Judge, the Honorable Jerome J. Leveque. (CP 18; RP 5-6) At no time during said first hearing was the appellant advised, in writing or orally, about the mandatory minimums

III. ARGUMENT

A. THE TRIAL COURT VIOLATED MR. PAVLIK'S CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE BY EXCLUDING STATEMENTS MADE REGARDING DEFENDING HIMSELF AT THE TIME OF HIS ARREST UNDER THE RESPONDENT'S ARGUMENT THAT IT WAS "SELF-SERVING" HEARSAY.

As set out above in the Statement of the Case section, supra, the Respondent submitted a separate brief at the time of the motions in limine hearing (RP 11-23; CP 46-51) to exclude certain statements made by the defendant, Mr. Pavlik at the time of his arrest and immediately thereafter. Specifically, the statements the Respondent wanted excluded were to the arresting officer, Stephen Arrendondo, and to the main investigating detective, Chet Gilmore, at the time of Mr. Pavlik's interview at the police station. (RP 11-12; CP 46-51) Specifically, the State wanted (and ultimately received) an Order excluding Mr. Pavlik's statement to Arrendondo "You saw it, it was self-defense," and to another officer at the scene, "It was self-defense, he was punching me," and to Detective Gilmore a short time later, "I was just defending myself. An officer saw me getting punched." Id. All these statements were essential to Mr. Pavlik's ability to tell the jury the full story about his self-defense. Not only were they not excludable as self-serving hearsay, instead those

statements were all admissible under exceptions to the hearsay rule. Their exclusion requires reversal of his first degree assault conviction.

a. The federal and state constitutions provide the accused the right to present a defense. The federal and state constitutions provide the accused the right to present a defense. The right is derived from (1) the guarantee of due process, which includes the opportunity to defend against the State's accusations; (2) the right to compulsory process, which ensures the right to present a defense; and (3) the right to confront the government's witnesses, which includes the right to meaningful cross-examination. U.S. Const. amends. VI, XIV; Const. Art. 1, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006); Davis v. Alaska, 415 U.S. 308, 314-15, 94 S.Ct. 1105, 39 L.Ed.2d 437 (1974); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Thus, a defendant must be permitted to introduce relevant, probative evidence. State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996). Relevancy is a low bar. "Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The three or four statements Mr. Pavlik made to officers at the scene were admissible on several grounds. First, they were excited

utterances. ER 803 (a)(2); State v. Powell, 126 Wn.2d 244, 259-61, 893 P.2d 615 (1995). Hearsay statements are admissible as excited utterances if they are related to a startling event and made while the declarant was under the influence of that event so that he does not have any opportunity to make a calculated statement based upon his self-interest.¹ ER 803 (a)(2); State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

Additionally, the statements were part of the res gestae of the crime. Powell, 126 Wn.2d at 263-64. The Powell Court found the trial court properly permitted witnesses to testify about what a murder victim said and did on the day she died to explain the hostilities between the victim and defendant prior to the murder. Id. See State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977) at 226 (quoting what victim said upon entering defendant's home); State v. Painter, 27 Wn. App. 708, 710, 620 P.2d 1001 (1980), rev. denied, 95 Wn.2d 1008 (1981) (defendant and witness testified as to what the murder victim said immediately prior to being shot).

Additionally, ER 803(a)(3) creates an exception to the hearsay rule for statements that describe the declarant's then-existing mental,

¹ ER 803(a)(2) reads:

- (a) The following are not excluded by the hearsay rule, even though the declarant is not available as a witness:...
- (2) A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

emotional or physical condition.² Mr. Pavlik's existing state of mind at that moment and the moments thereafter was that he was acting to defend himself and he should have been allowed to convey that to his jury. To do otherwise, as the respondent convinced the trial court to do here, is to stand logic and the defendant's right to a fair trial on its head. These statements are not the "self-serving" hearsay type contemplated by the rules and the case law. Even the case relied on by the State in its motion, State v. Finch, 137 Wn.2d 792, 824, 975 P.2d 967 (1999) is inopposite to the situation here in case sub judice. In Finch, that defendant told a friend after a shooting that he did not intend to kill the officer. That was clearly self-serving and not anything like the present case. This appellant was telling people at the scene that he was just defending himself, that the alleged victim was punching him and that he tried to aim for a non-vital spot so as to just get Leenders to back off. This case is clearly distinguishable from the Finch decision. This Court should reverse the motion in limine and order a new trial with all of Mr. Pavlik's statements

² ER 803(a)(3) creates a hearsay exception for then existing mental, emotional or physical condition:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's Will.

at the scene ordered admissible from any witness, police or otherwise, as excited utterances and descriptions of his then-existing mental, emotional, and/or physical condition.

B. THE "FIRST AGGRESSOR" INSTRUCTION, COURT'S NO. 23, WAS GIVEN IN THE ABSENCE OF EVIDENTIARY SUPPORT AND DENIED MR. PAVLIK A FAIR TRIAL BY LIMITING HIS ABILITY TO ARGUE HE ACTED IN SELF-DEFENSE. (CP 129)

Washington law permits a person who reasonably believes he is in danger of imminent bodily harm to defend himself, even with the use of deadly force, but a person who provokes an altercation may not claim self-defense unless he first withdraws from the combat. When instructing the jury concerning self-defense, the court may give an aggressor instruction only if there is evidence to show the defendant "started the fight," the improper use of an aggressor instruction effectively denies the defendant the ability to claim he acted in self-defense. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Here, the trial court denied Mr. Pavlik the ability to effectively present his defense where there was no evidence to support the giving of the first aggressor instruction, and his sole first degree assault conviction must be reversed.

a. Jury instructions on self-defense must clearly explain the correct legal standard, and an aggressor instruction is rarely justified. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.³ Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends VI, XIV; Const. Art. 1, §§ 3, 22. Where a defendant raises self-defense in a criminal prosecution in Washington, the State must prove the absence of self-defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983). The jury instructions must accurately inform the jury of the law of self-defense. State v. Le Faber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), abrogated on other grounds, State v. O'Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009); State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984). A jury

³ The Fourteenth Amendment states in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Article 1, Section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

Article 1, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel ... to testify in his own behalf, to meet the witnesses against him face to face, to have a compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury..."

instruction misstating the law of self-defense is presumed prejudicial. Le Faber, 128 Wn.2d at 900; McCullum, 98 Wn.2d at 487-88.

Under Washington law, a person who provokes an altercation may not claim self-defense unless he in good faith first withdraws from the conflict at a time and manner that informs the other person that he is withdrawing from further aggressive activity. Riley, 137 Wn.2d at 909. The aggressive act in question must be such that it entitles the victim to act in self-defense. Riley, 137 Wn.2d at 911-12. “[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force.” Id. at 912.

Instructions defining this concept, commonly referred to as aggressor instructions, may be given only in the limited circumstance that they are supported by credible evidence. Riley, 137 Wn.2d at 910 n.2; State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), rev. denied, 138 Wn.2d 1008 (1999). “Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such an instruction.” State v. Wasson, 54 Wn. App. 156, 161, 772 P.2d 1039, rev. denied, 113 Wn.2d 1014 (1989) (quoting State v. Arthur, 42 Wn. App.

120, 125 n. 1, 708 P.2d 1230 (1985)). Whether the State has produced sufficient evidence to support the giving of an aggressor instruction is a question of law reviewed de novo. State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008).

b. The State did not produce sufficient evidence to support the giving of Instruction 23. Over Mr. Pavlik's objection, the trial court instructed the jury that a person may not claim self-defense if he is the first aggressor.⁴ (CP 129; RP 469). Instruction 23 read:

No person may, by any intentional act reasonably likely to provoke a belligerent response[,] create a necessity for acting in self-defense or defense of another and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that [the] defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available.

(CP 129)

The Court may give an aggressor instruction where (1) there is evidence from which the jury could reasonably determine the defendant provoked the fight, (2) there is conflicting evidence as to whether the defendant provoked the fight, or (3) the evidence shows the defendant made the first move by drawing a weapon. Riley, 137 Wn.2d at 909-10;

⁴ This instruction was also one of the grounds upon which Mr. Pavlik moved for a new trial, infra. (CP 175-183; RP 539 ff)

Anderson, 144 Wn. App. At 89. The provoking act cannot be the act that constitutes the charge itself. Wasson, 54 Wn. App. At 159-60. Nor are words a belligerent act for purposes of that instruction. Riley, 137 Wn.2d at 909-10; Anderson, 144 Wn. App. At 89.

Mr. Pavlik testified that he was scared one of both of these men were going to attack him. (RP 363-365) He testified he was only trying to protect himself. Id. He only did what was necessary to protect himself and was in a place where had a right to be. See CP 131-Instruction No. 25, which imposed no duty on him to retreat from a public park.

First, it is important to remember that the aggressive act must be different from the assault itself. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, rev. denied, 115 Wn.2d 1010 (1990); Wasson, 54 Wn. App. At 159-60. Thus, the fact that Mr. Pavlik shot Leenders with a gun does not mean he was the aggressor.

Second, the provoking act must be an intentional act reasonably likely to provoke a belligerent response from the victim. Birnel, 89 Wn. App. at 473; Wasson, 54 Wn. App. at 159. Mr. Pavlik's action in returning to wait for the police to give his report was not reasonably likely to provoke violence. Additionally, Mr. Pavlik was within his rights by arming himself, and, in fact, was licensed. U.S. Const., Amend. II; Const.,

Art. 1, § 24; District of Columbia v. Heller, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); State v. Sieves, 168 Wn.2d 276 (2010).

Thus, in Wasson, this Court found a first aggressor instruction was not properly given. The defendant and his cousin were in a fight, and the alleged victim came outside after hearing the commotion, told the two to quiet down, and eventually fought with the defendant's cousin, knocking him to the ground. Wasson, 54 Wn. App. at 157. When the victim then "took several rapid steps" towards the defendant, the defendant shot him in the chest. Wasson, 54 Wn. App. at 157-58. Because the defendant did not initiate any act towards the victim until the final assault, there was no evidence he acted in order to provoke an assault. Id. at 159-60.

Also akin to this appellant's case is Birnel, where this Court also addressed the murder of an estranged spouse. There, the defendant had moved out of the family home, but he was sleeping at his wife's house one night because of a child's birthday party and was awakened by noises that caused him to suspect his wife was taking methamphetamine. Birnel, 89 Wn. App. at 462-63. The defendant went through his wife's purse, found drugs, and decided to confront her, waiting for her at the top of the stairs. Id. at 463. The two argued about her drug use and ability to pay the bills, as well as his action in going through her purse. Id. The wife then ran to

the kitchen and returned with a large knife. Id. The defendant claimed he fell over his wife and as he arose from the floor, she attacked him, and a fight over the knife ensued, during which the wife was fatally stabbed in the back. Id. at 463-64.

The defendant argued he acted in self-defense, whereas the State claimed he acted out of rage and should have known how his wife would react when he searched her purse without permission. Id. at 466, 473. This Court found the trial court erred by giving an aggressor instruction, as the defendant did nothing but wait for his wife at the top of the stairs and it was not reasonable to assume searching his wife's purse would provoke the attack. Id. at 473.

Similarly, the evidence in Mr. Pavlik's case does not support a first aggressor instruction. He was in a place where he had a right to be. It is not reasonable to expect someone to come up and punch you five times through your driver's window and reach for your gun!

Mr. Pavlik's first degree assault conviction must be reversed. The improper giving of the "first aggressor" instruction is a constitutional issue, and the State must demonstrate the error is harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473; Kidd, 57 Wn. App. at 101. Mr. Pavlik presented a strong case that he acted in self-defense, but the

prosecution did not have to disprove his self-defense claim in light of the erroneous jury instruction.

The first aggressor instruction deprived Mr. Pavlik of his ability to claim self-defense. Excluding that instruction, and in combination with Instruction No. 25 (CP 131), the jury would have understood that Mr. Pavlik was entitled to “stand his ground” in defending himself. Wasson, 54 Wn. App. at 160; State v. Brower, 43 Wn. App. 893, 902, 901 P.2d 12 (1986). The trial court erred by giving Instruction No. 23. See also this court’s opinion in State v. Stark, 158 Wn. App. 952, 244 P.2d 433 (2010). Appellant’s conviction herein must be reversed and dismissed, or, at a minimum, reversed and remanded for a new trial excluding the first aggressor instruction. Wasson, supra at 161.

C. THE TRIAL COURT ERRED BY DENYING MR. PAVLIK’S MOTION FOR NEW TRIAL AND/OR ARREST OF JUDGMENT.

Following the one guilty verdict on first degree assault, the appellant moved for a new trial and/or arrest of judgment on a variety of grounds. (CP 155-156; 173-178; 181-183) Said motion was denied. This was error.

Judgment should be arrested and charges dismissed due to insufficiency of proof of a material element of the crime charged. CrR

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

IN RE THE RESTRAINT OF:

ALEKSANDR PAVLIK,

Petitioner.

CAUSE NO. 31227-5-III
(consol with 31338-7-III)

CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare that on September 12, 2013, I deposited a copy of the attached Exhibit 38 into the United States mail, with proper first class postage attached, in an envelope addressed to:

Steven Tucker
Spokane County Prosecuting Attorney
Andrew J. Metts, Deputy
1100 W. Mallon
Spokane, WA, 99260-0270

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

9/12/2013 SEATTLE, WA
DATE AND PLACE

Alex Fast
ALEX FAST

FILED

AUG 14 2013

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DIVISION III

In re Personal Restraint)	
Petition of:)	
)	NO. 31227-5-III
ALEKSANDR PAVLIK,)	
)	CERTIFICATE OF MAILING
Petitioner.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on August 14, 2013, I mailed a true and correct copy of the Response to Personal Restraint Petition and Response to Opening Brief, addressed to:

Neil M. Fox
Attorney at Law
2003 Western Ave, Ste 330
Seattle WA 98121

And to:

Aleksandr Pavlik
DOC #340785
1313 North 13th Ave
Walla Walla WA 99362

8/14/2013
(Date)

Spokane, WA
(Place)

Kathleen Owens
(Signature)