No. 89321-7

COA No. 41902-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross-Respondent,

v.

MARTIN ARTHUR JONES,

Respondent/Cross-Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki L. Hogan

ANSWER AND CROSS-PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Respondent/Cross-Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ISSUE IN STATE'S PETITION FOR REVIEW

Did this Court's decision in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012), compel the Court of Appeals' decision that the selection of the alternate jurors in a closed courtroom violated Mr. Jones' constitutionally protected right under the United States and Washington Constitutions to a public trial?

B. ISSUES IN MR. JONES' CROSS-PETITION

1. The Sixth Amendment as well as article I, section 22 guarantees a defendant the right to be present during jury selection. Here, the trial court selected the four alternate jurors from the entire panel of 16 jurors in private in the absence of counsel, Mr. Jones, or the public. Is a significant question of law raised which should be determined by this Court where the trial court violated Mr. Jones' right to be present during the selection of the alternate jurors , thus necessitating reversal of his conviction?

2. Does the Court of Appeals' conclusion that Mr. Jones' right to be present during selection of the alternate jurors was not violated directly conflict with this Court's decision in *State v. Irby,* 170 Wn.2d 874, 246 P.3d 796 (2011)?

3. The Fourteenth Amendment to the United States Constitution guarantees a criminal defendant a fair trial. Admission of an identification that is the result of an impermissibly suggestive single photo identification violates due process. The Court of Appeals agreed the photo identification was suggestive but found it otherwise reliable. Is significant question of law presented under the United States and Washington Constitutions where the trooper's subsequent identification of Mr. Jones was not otherwise reliable, which therefore violated his constitutionally protected right to due process?

4. As a part of the right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution, the defendant has the right to present relevant, admissible evidence and cross-examine witnesses. Here, the trial court excluded Trooper Greene's observation of a person who did not match the identification of Mr. Jones just prior to the shooting, which would have tested Trooper Johnson's subsequent identification of Mr. Jones. Is a significant issue raised under the United States and Washington Constitutions where the trial court's order excluding this relevant evidence prevented Mr. Jones from presenting a defense, thus entitling him to reversal of his convictions?

5. Did the trial court's order excluding testimony from Chris Sewell, a WSP supervisor, who was critical of the WSP investigation, also prevent Mr. Jones from presenting a defense, also requiring reversal of his convictions?

C. STATEMENT OF THE CASE

A thorough recitation of the relevant facts can found in the Court of Appeals opinion. *State v. Jones*, 175 Wn.App. 87, 91-95, 303 P.3d 1084 (2013).

D. ARGUMENT ON WHY REVIEW OF THE STATE'S PETITION SHOULD BE DENIED

THE COURT OF APPEALS DECISION IS A CORRECT APPLICATION OF THE EXPERIENCE AND LOGIC TEST ESTABLISHED IN *SUBLETT*

Pursuant to *Sublett, supra*, the appellate courts first determine whether a closure that triggers the public trial right occurred by asking if, under considerations of experience and logic, "the core values of the public trial right are implicated." *Sublett,* 176 Wn.2d at 73 (lead opinion). If the court determines there was a closure, the court then looks to whether the trial court properly conducted a *Bone-Club* analysis before closing the courtroom. *State v. Paumier,* 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); *State v. Wise,* 176 Wn.2d 1, 12, 288 P.3d

1113 (2012), *citing State v. Bone-Club,* 128 Wn.2d 254, 906 P.2d 325 (1995). If the trial court failed to engage in the *Bone-Club* analysis, then a "per se prejudicial" public trial violation has occurred "even where the defendant failed to object at trial." *Wise,* 176 Wn.2d at 18.

Here, in a well-reasoned unanimous decision written by Justice Wiggins, sitting *pro tem* in the Court of Appeals, the Court ruled that under the "experience" prong of the *Sublett* test, selection of alternate jurors is typically part of *voir dire* which has traditionally been conducted in open court, citing *State v. Momah,* 167 Wn.2d 140, 148, 217 P.3d 321 (2009); *In re Personal Restraint of Orange,* 152 Wn.2d 795, 804, 100 P.3d 291 (2004).[1] *Jones,* 175 Wn.App. at 97-101.

Under the "logic" prong:

> The issue is not that the drawing in this case was a result of manipulation or chicanery on the part of the court staff member who performed the task, but that the drawing

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[1] The State contends that the courtroom was not closed during the clerk's selection of the alternate jurors. Petition at 13-14. The State has consistently ignored a critical point. In the motion for a new trial based upon the trial court's selection of the alternate jurors during a break in private, Mr. Jones also objected to the process on the basis that it was conducted when the courtroom was closed:

> Not only was the defendant not present, and we would allege that this is a very critical part of the trial, *but also in terms of the courtroom not being open to the public.*

RP 4110 (emphasis added). The State never objected to this assertion at trial, did not claim the courtroom was open, or otherwise dispute this statement. The State cannot now claim the courtroom was never closed when it arguably conceded at trial that it was.

> could have been. Where such a drawing occurs during a court recess off the record, the defendant and the public lack the assurance of a truly random drawing that they would have if the drawing were performed in open court on the record. This lack of assurance raises serious questions regarding the overall fairness of the trial, and indicates that court personnel should be reminded of the importance of their duties. Accordingly, we conclude that considerations of logic "implicate the core values the public trial right serves." *Sublett,* 176 Wn.2d at 72, 292 P.3d 715.

Jones, 175 Wn.App. at 102.

Finally, it was undisputed that the trial court did not engage in the *Bone-Club* analysis, thus the remedy was reversal of Mr. Jones' convictions and remand for a new trial. *Id.* at 103-04.

The State does not contend that *Sublett* was wrongly decided or that the experience and logic test is not the proper test. Instead, the State argues that the trial court clerk's act of drawing the names of the alternate jurors was merely an administrative task that did not implicate the right to a public trial. Petition at 8-10.

The Court based its decision on a historical analysis regarding the selection of alternate jurors:

> Although selecting alternate jurors has not received a great deal of attention in Washington, our courts' historical and current practices indicate that alternate juror selection is largely performed at the same time and in the same way as voir dire, and thus occurs on the record in a courtroom that is open to the public.

> Therefore, the experience of alternate jury selection in this state has been one that traditionally the public has been able to witness.

Jones, 175 Wn.App. at 97. Thus, the Court concluded: "Taken together, both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." *Id.* at 101.

The State does not address any of the Court's historical analysis, which very carefully establishes why the experience test requires the selection of alternate jurors occur in open court.

The State also failed to address the Court's logic prong. The State instead continued to argue this was merely an administrative task. Petition at 11-12. But the State conveniently ignores the Court's conclusion that the issue was not that the drawing was a result of manipulation or chicanery on the part of the court staff member who performed the task, but that the drawing could have been: there was simply no way to tell how the drawing was performed. *Jones*, 175 Wn.App. at 102. Thus it was critical that the drawing be done in open court. *Id.*

Finally, the State contends that the conclusion that the error constituted a structural error is not appropriate. This argument flies in the face of the consistent and long-standing decisions of this Court that the error is structural in nature and can never be harmless. *See e.g. State v. Easterling,* 157 Wn.2d 167, 181, 137 P. 3d 825 (2006) ("The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis"); *Bone-Club* 128 Wn.2d at 261-62 ("Prejudice is presumed where a violation of the public trial right occurs.").

The State fails to establish that the Court of Appeals erred or that there is a basis for this Court to accept review in light of the Court of Appeals correct application of *Sublett* to this matter. This Court should deny review.

E. ARGUMENT ON WHY REVIEW OF THE CROSS-PETITION SHOULD BE GRANTED

1. MR. JONES' CONSTITUTIONALLY PROTECED RIGHT TO BE PRESENT DURING THE SELECTION OF THE ALTERNATE JURORS WAS VIOLATED

A defendant has a fundamental right to be present at all critical stages of the proceedings. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *Irby,* 170 Wn.2d at 880-81.

Under art. I, § 22 of the Washington Constitution, a defendant has a broader right to be present than under the federal Constitution. *Irby,* 170 Wn.2d at 885 fn 6. Under the Washington Constitution, the right of the defendant to be present does not turn on whether the hearing is a "critical stage" of the proceedings, but instead whether the defendant's "substantial rights may be affected." *Id.* As opposed to the United States Constitution, this right is not conditioned on what the defendant might do at this hearing or whether his presence would have aided the defense. *Id.* at 885 fn. 6. The right turns only on whether his "substantial rights may be affected" at that stage of the trial. *Id.*

This Court has previously recognized that the jury selection process is a critical stage of the proceedings at which the defendant has a right to be present. *Irby*, 170 Wn.2d at 884-85.

The Court of Appeals decision that selection of alternate jurors was different than general *voir dire* directly conflicts with *Irby*. As such, this Court should grant review and reverse Mr. Jones' convictions for a violation of his to be present during a critical stage of the proceedings.

2. TROOPER JOHNSON'S IDENTIFICATION OF MR. JONES WAS OTHERWISE NOT RELIABLE VIOLATING MR. JONES' RIGHT TO DUE PROCESS

An accused person has the due process right to a fair trial, and this right includes the guarantee that the evidence used to convict him will meet elementary requirements of fairness and reliability in the ascertainment of guilt or innocence. *Chambers v. Mississippi,* 410 U.S. 284, 310, 93 S.Ct. 1038, 35 L.Ed.2d 297(1973). "[R]eliability [is] the lynchpin in determining admissibility of identification testimony" under a standard of fairness that is required under the Due Process Clause of the Fourteenth Amendment. *Manson v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

The trooper was an experienced state trooper, employed for 27 years, who should have known a single photo identification was improper, but he short-circuited the process by continuingly demanding to be shown a single photograph of Mr. Jones. Later, the trooper failed to tell the officers conducting the subsequent photo montage that he had previously identified Mr. Jones from his DOL photo. CP 1403; RP 1726. One of these officers stated he would not have shown Trooper Johnson the montage had he known the trooper had made a prior identification. RP 1726.

The inescapable conclusion to draw from these facts was that Trooper Johnson was predisposed to believe Mr. Jones was his assailant, thus his identification of Mr. Jones in the single photograph procedure was a *fait accompli*. As a consequence, the trooper's identification of Mr. Jones was not otherwise reliable.

This Court should accept review to determine that the photo identification process used here was not otherwise reliable and reverse Mr. Jones' convictions.

3. THE TRIAL COURT'S REFUSAL TO ADMIT RELEVANT EVIDENCE VIOLATED MR. JONES' RIGHT TO DUE PROCESS AND RIGHT TO A FAIR TRIAL

It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The right to present evidence in one's defense is a fundamental element of due process of law. *United States v. Whittington,* 783 F.2d 1210, 1218 (5th Cir., 1986), *citing Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Ellis,* 136 Wn.2d 498, 527, 963 P.2d 843 (1998). The right to present a defense includes the right to confront and cross-examine witnesses on relevant evidence to show bias, motive, or lack of credibility. *Davis v. Alaska,* 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Further, this right includes, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *accord Washington,* 388 U.S. at 19 ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts . . . [The accused] has the

right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

The Washington Constitution provides for a right to present material and relevant testimony. Art. I § 22; *State v. Roberts,* 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. *Id.*

The evidence sought to be admitted by the defendant need only be of "minimal relevance." *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

a. Trooper Greene's testimony was not "other suspects" but relevant evidence. The Court of Appeals made the same erroneous conclusion as the trial court, agreeing with the State that Mr. Jones was attempting to admit "other suspects" evidence. Trooper Greene's observation was not "other suspects" evidence but rather evidence that cast doubt upon the State's entirely circumstantial case.

The defense sought to admit Trooper Greene's observation of this other person simply to question the reliability of Trooper Johnson's identification and question the theory proffered by the State. *See State*

v. Lord, 128 Wn.App. 216, 223, 114 P.3d 1241 (2005), *aff'd*, 161 Wn.2d 276 (2007) ("[T]he State was not attempting to divert suspicion to a different victim or suspect; nor was the State trying to prove that the young men had seen Shannon rather than Tracy. Rather, the State used the photograph simply to question the reliability of the three young men, who thought they had seen Tracy Parker on the road the day after her murder, though it was only for 10 seconds and they were not even sure about the date."). The prosecution theory was that there was no other person who could have committed the crime - a theory that Mr. Jones was entitled to rebut once the prosecution relied upon it. This was particularly true given the identification given by Mr. Hill which conflicted with Trooper Johnson's identification and which the State did not want to admit in its case-in-chief because it did not fit its theory of the case.

This evidence was critical to Mr. Jones defense, and its exclusion rendered his defense impotent. The exclusion violated Mr. Jones' constitutionally protected right to present a defense. This Court should accept review and order Mr. Jones' convictions be reversed and the matter remanded for a new trial.

b. Chris Sewell's testimony was relevant impeaching the State's theory that the investigation was error-free. The trial court barred the defense from impeaching one of the WSP investigators with Mr. Sewell's email, which the investigator received among others. The trial court also barred any testimony from Mr. Sewell criticizing the WSP investigation. This evidence was relevant to Mr. Jones' defense and its exclusion violated his right to present a defense.

The evidence against Mr. Jones was almost entirely circumstantial except for the questionable identification by Trooper Johnson. The WSP investigated the shooting of a WSP trooper, an apparent conflict of interest. The apparent conflict was emphasized by the shoddy nature of the investigation as detailed by the critical email by Mr. Sewell, a supervisor at the WSP crime lab. Barring the defense from presenting any information from Mr. Sewell, either by questioning the lab employees about the email or presenting the testimony of Mr. Sewell, created the false impression with the jury that the investigation was flawless, when the reality was it was far from it. Mr. Jones' defense was based in part on pointing out the less than stellar investigation, thus casting doubt upon the opinion of the lab employees that Mr. Jones was the assailant of Trooper Johnson.

Barring this critical evidence effectively eviscerated his defense, thus violating his Sixth Amendment right to present a defense and cross-examine witnesses. This Court should accept review, rule that the exclusion of this evidence prevented Mr. Jones from presenting a defense, and reverse his convictions.

F. CONCLUSION

For the reasons stated, Mr. Jones asks this Court to deny the Sate's petition for review, thus remanding the matter back to the trial court for a new trial. Alternatively, Mr. Jones asks this Court to grant review of the issues raised in his cross-petition, reverse his convictions and remand for a new trial.

DATED this 28th day of October 2013.

Respectfully submitted,

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project - 91052
Attorneys for Respondent/Cross-Petitioner

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 89321-7**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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Answer and Cross-Petition for Review

Thomas M. Kummerow- WSBA #21518
Attorney for Respondent
Phone: (206) 587-2711
E-mail: tom@washapp.org

By
Maria Arranza Riley

Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org