SUPREME COURT NO. 92580-1
COA NO. 72101-1-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD TURPIN,

Petitioner.



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

The Honorable Dean S. Lum, Judge

# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Donald Turpin asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

## B. COURT OF APPEALS DECISION

Turpin requests review of the published decision in State v. Donald Turpin, Court of Appeals No. 72101-1-I (slip op. filed Oct. 26, 2015), attached as appendix A.

## C. ISSUE PRESENTED FOR REVIEW

Whether the constitutional right to a public trial attaches to the removal of a sitting juror?

## D. STATEMENT OF THE CASE

The State charged Turpin with four offenses associated with the removal of copper from the Sound Transit light rail interstitial. CP 1-15, 50-52. The case proceeded to trial before a jury. After the close of evidence, the judge and the attorneys had an on-the-record discussion regarding the remaining schedule for the day. 1RP[1] 1078-82. The judge said he would instruct the jury, send them to lunch early, and then have them come back at 1:10 so that proceedings could start at 1:15. 1RP

[1] The verbatim report of proceedings is referenced as follows: 1RP - 11 consecutively paginated volumes consisting of 5/6/14, 5/7/14 (before Judge Lum), 5/12/14, 5/13/14, 5/14/14, 5/15/14, 5/19/14 (part one), 5/19/14 (part two), 5/20/14, 5/21/14, 5/22/14, 6/13/14; 2RP 5/7/14 (before Judge Rogers).

1081-82. The jury returned to the courtroom and the court instructed the jury on the law. 1RP 1082-1104. The judge announced both sides had rested, they would be taking an early lunch, and the attorneys would give closing arguments at 1:15. 1RP 1083, 1103-04. The jury was released for lunch. 1RP 1104. The judge then told the attorneys that he would see them after lunch. 1RP 1104. The lunch recess was taken from 11:27 a.m. to 1:22 p.m. 1RP 1104.

The clerk's minutes show the following occurred "off record:" "Due to illness, Juror 3 is excused from further consideration of this cause. The Court instructs the Bailiff to excuse Juror 3." CP 217.

After the recess, when court was back in session on the record, the court told the jury "Juror Number 3 got sick, you probably know that, and so we've excused Juror Number 3." 1RP 1105; CP 217. The alternate juror took Juror 3's place. 1RP 1105. The attorneys gave closing arguments. 1RP 1105-1142. The jury retired for deliberations. 1RP 1142. The jury, minus the excused juror, returned guilty verdicts and found several aggravating factors. CP 62-67. The court sentenced Turpin to a total of 149 months confinement. CP 182.

On appeal, Turpin argued the trial court violated his right to a public trial by excusing the juror during a court recess off the record. manner. Brief of Appellant at 3-10; Reply Brief at 1-14. Turpin also

argued that if the record was insufficient to determine whether a closure occurred, then the case should be remanded to supplement the record. See Motion To Remand To Reconstruct Record, To Appoint Counsel On Remand, And To Stay Appeal Pending Reconstruction Efforts (filed March 19, 2015); Reply Brief at 8-10.

The Court of Appeals held the right to a public trial does not attach to the removal of a sitting juror on the ground of sickness and therefore did not reach the issue of record supplementation. Slip op. at 1, 10.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### 1. WHETHER THE EXCUSAL OF AN EMPANELED JUROR DUE TO ILLNESS IMPLICATES THE RIGHT TO A PUBLIC TRIAL IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Criminal defendants have the right to a public trial. Presley v. Georgia, 558 U.S. 209, 212-13, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012); U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). In this case, a sitting juror was excused from service when the court was in recess and off the record. The Court of Appeal held this removal did not trigger the public trial right

under the experience and logic test. That is a significant question of constitutional law warranting review under RAP 13.4(b)(3).

**a. The experience prong is satisfied.**

Appellate courts employ the experience and logic test to determine whether a proceeding implicates the public trial right. State v. Smith, 181 Wn.2d 508, 514-15, 334 P.3d 1049 (2014) (citing State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012)). The first part of the test, the experience prong, asks whether the process has historically been open to the public. Sublett, 176 Wn.2d at 73. The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. The "guiding principle" is whether openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. Smith, 181 Wn.2d at 514-15.

Experience shows sitting jurors are excused from service on the record in open court when the court is in session. See State v. Gauthier, 189 Wn. App. 30, 354 P.3d 900, 907 (2015) (no public trial violation where the court dismissed a juror who was observed sleeping on the record); State v. Jorden, 103 Wn. App. 221, 225-26, 11 P.3d 866 (2000) (court released sleepy, inattentive juror after hearing on the record in open court), review denied, 143 Wn.2d 1015, 22 P.3d 803 (2001); State v.

Rafay, 168 Wn. App. 734, 817-21, 285 P.3d 83 (2012) (court released distracted juror after hearing on the record in open court), review denied, 176 Wn.2d 1023, 299 P.3d 1171 (2013); State v. Elmore, 155 Wn.2d 758, 764-66, 123 P.3d 72 (2005) (court released deliberating juror after hearing on the record in open court); State v. Depaz, 165 Wn.2d 842, 846-51, 204 P.3d 217 (2009) (same). The Court of Appeals did not cite a single case where an empaneled juror was released outside of open court.

More particularly, there are cases showing the excusal of a sitting juror for health-related reasons, and the discussion surrounding it, have been made in open court on the record. See State v. Lane, 40 Wn.2d 734, 735, 246 P.2d 474 (1952); State v. Hansen, 69 Wn. App. 750, 758-59, 762, 850 P.2d 571 (1993). The Court of Appeals did not cite a single case where an empaneled juror was released outside of open court on the purported ground of illness.

The Court of Appeals looked to cases that drew a line between what it labeled "pure administrative excusals" and other juror disqualifications during *the jury selection process*. Slip op. at 6-7. But no court has ever previously held the removal of an empaneled juror — one who is already undergone jury selection and been selected to try the case— amounts to nothing more than an administrative excusal that need not be open to public scrutiny. Further, the Court of Appeals' analysis

muddles the experience and logic prongs. The experience prong simply asks whether the process has historically been open to the public, not whether the process is appropriately labeled "administrative." Sublett, 176 Wn.2d at 73.

The Court of Appeals also emphasized excusal of juror is a discretionary decision. Slip op. at 7. Discretionary decisions are no more shielded from public scrutiny than non-discretionary ones. For example, the manner in which potential jurors are questioned is a discretionary matter, but that does not mean the public trial right is not implicated. See, e.g., Wise, 176 Wn.2d at 7, 13-15, 18 (trial court violated right to public trial by questioning prospective jurors in chambers; no determination that judge's questions were improper or that any jurors were wrongly excused thereafter). Whether cases should be severed or dismissed is a discretionary decision, but the proceeding in which that decision takes place is subject to the public trial guarantee. See Easterling, 157 Wn.2d at 179-82 (right to public trial violated where the trial court entertained a co-defendant's motions for severance and dismissal in a closed courtroom without justifying the closure; no determination that trial court abused its discretion in deciding the motion). The Court of Appeals' reliance on the discretionary nature of a judicial act demonstrates a misunderstanding of the public trial right analysis.

**b. The logic prong is satisfied.**

Under the logic prong, we look to the "values served by open courts" and "must consider whether openness will 'enhance[ ]both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" Sublett, 176 Wn.2d at 74-75 (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). Such fairness is enhanced where "the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012).

Public access to a proceeding where a sitting juror is removed plays a significant positive role in the functioning of that particular process. Public oversight helps ensure that a juror will not be removed for improper or inadequate reasons. Whether to remove a sitting juror — one slated to deliberate on the defendant's fate after having passed through the voir dire process — is a weighty decision. Public scrutiny through contemporaneous oversight encourages an appropriate exercise of discretion on the matter. See Wise, 176 Wn.2d at 6 (the public nature of trials is a check on the judicial system, providing for accountability and

transparency). Public access thus deters the removal of a juror who is not actually unfit to serve under RCW 2.36.110[2] and provides assurance that the judicial process takes place without the taint of irregularity or bias.

The Court of Appeals' reliance on State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013) to reach a contrary conclusion is misplaced. In Wilson, the public trial right was not triggered when the bailiff excused two prospective jurors for illness-related reasons before voir dire began in the courtroom. Wilson, 174 Wn. App. at 331. Unlike Wilson, Turpin's case involves the removal of an empaneled juror by a judge. That juror had already gone through the rigor of the full jury selection process, including voir dire. That juror was slated to deliberate on Turpin's fate, having been excused only after all the evidence was taken. See 1RP 139 (jurors 13 and 14 were the designated alternates); 1RP 1105 (timing of excusal). Removal of a potential juror for "administrative" reasons during the jury selection process is qualitatively different from removing an empaneled juror already selected to sit on the jury. Having overseen the selection of jurors to fairly try a case, the public justifiably expects that one or more of those jurors will not be subsequently removed without

[2] RCW 2.36.110 provides: "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."

continued public oversight. To hold otherwise allows the suspicion of irregularity to enter through the back door where it could not enter through the front. It is anomalous to hold the process of selecting a jury to try the case needs to be open to the public, but the removal of a juror that has been selected need not be.

In characterizing the removal of the sitting juror as a "purely administrative" matter, the Court of Appeals resurrects the now-discredited line of cases that draw a distinction between "purely ministerial or legal issues" and those that require resolution of disputed facts. See slip op. at 10 n. 33 (citing State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008)). This Court repudiated that analytical approach in Sublett: "We decline to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on the other." Sublett, 176 Wn.2d at 72. Such a distinction does "not adequately serve to protect defendants' and the public's right to an open trial." Id.

"'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers, . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Wise, 176 Wn.2d at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). This is no less

true when it comes to the removal of an empaneled juror. The values driving the public trial right attach to the excusal of sitting jurors for any reason, including an illness-related reason. Indeed, public scrutiny ensures that the ground for excusal is justified and real. Openness ensures that the factual basis for the excusal is not kept secret, but made known to the public. A trial court is capable of deviating from established procedure in removing a juror for unfitness. A court could summarily remove a juror for unfitness where no ground for unfitness is present. The check of public scrutiny plays an important role here.

*Before* a trial court closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club[3] on the record. Wise, 176 Wn.2d at 12. The Court of Appeals, however, believed there was no possibility of chicanery or manipulation because the judge went on the record, after the fact, to announce to the remaining jurors when court was back in session that the juror had been removed. Slip op. at 9. The implication is that so long as a court puts what happened in secret on the record at a later time, then there is no public trial violation.

A rule that a *later* recitation of what occurred in private suffices to protect the public trial right would eviscerate the requirement that a Bone-Club analysis take place *before* a closure occurs. Appellate courts have

[3] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

repeatedly found a violation of the public trial right where the record subsequently showed what happened in private. See, e.g., Wise, 176 Wn.2d at 7-8 (public trial violation where prospective jurors questioned in chambers where "[t]he questioning in chambers was recorded and transcribed just like the portion of voir dire done in the open courtroom."); State v. Jones, 175 Wn. App. 87, 95-96, 103-04, 303 P.3d 1084 (2013) (public trial violation where alternate jurors chosen during recess and names of alternate jurors subsequently announced in open court); State v. Leyerle, 158 Wn. App. 474, 477-78, 486, 242 P.3d 921 (2010) (public trial violation where prospective juror challenged for cause in chambers and then court announced in open court that juror was excused).

The Supreme Court recognizes "[t]here is a strong presumption that courts are to be open at all stages of the trial." Sublett, 176 Wn.2d at 70. The Court of Appeals quoted the proposition but nowhere applies it. Slip op. at 3. Is the presumption an empty one, suitable only for lip service but not meaningful application? Experience and logic dictate that the right to public trial implicates the removal of a sitting juror on the asserted ground of illness or any other reason.

## F. CONCLUSION

For the reasons stated, Turpin requests that this Court grant review.

DATED this 25th day of November 2015.

Respectfully submitted,

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# APPENDIX A

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

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| STATE OF WASHINGTON, Respondent, v. DONALD HOWARD TURPIN, Appellant. | ) | No. 72101-1-I<br>PUBLISHED OPINION<br>FILED: October 26, 2015 |

VERELLEN, J. — This appeal presents the question whether the public trial right is implicated when a trial judge excuses a juror who reports as ill while court is not in session. Donald Turpin fails to show the excusal for illness constituted a process that has historically been open to the public, and public access does not play a significant role in that administrative process. Because neither prong of the experience and logic test is satisfied, Turpin's public trial right is not implicated. Accordingly, we affirm.

## FACTS

The State charged Donald Turpin with burglary in the second degree, theft in the first degree, trafficking in stolen property in the first degree, and leading organized crime. At the close of evidence, the court instructed the jury and announced that closing arguments would begin after a recess for lunch. The lunch recess lasted approximately two hours. Once the jurors returned, the court stated, "Ladies and gentlemen, Juror Number 3 got sick, you probably know that, and so we've excused

Juror Number 3. Could our alternate juror please take your materials and please have a seat right there? You're on the jury now."[1]

The clerk's minutes note that the juror's excusal occurred off the record:

11:27:40 Recess

Off Record:

Due to illness, Juror 3 is excused from further consideration of this cause. The Court instructs the Bailiff to excuse Juror 3.

On Record:

1:22:54 Jury present.

The court having excused Juror 3, Juror 14 will take Juror 3's place.[2]

Turpin did not object to the sick juror's excusal or to the replacement with the alternate juror. The jury ultimately found Turpin guilty as charged.

Turpin appeals and seeks to "reconstruct" the record to prove a courtroom closure occurred.

ANALYSIS

Turpin argues the court violated his public trial right when it excused the sick juror off the record. But we conclude the court's excusal of the juror did not implicate Turpin's public trial right.

An alleged violation of the right to a public trial presents a question of law that this court reviews de novo.[3] Both our federal and state constitutions guarantee a

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[1] Report of Proceedings (RP) (May 21, 2014) at 1105.

[2] Clerk's Papers (CP) at 217.

[3] State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012).

criminal defendant's right to a public trial.[4] Article I, section 10 of the Washington Constitution provides an additional guaranty of open court proceedings. "Justice in all cases shall be administered openly, and without unnecessary delay."[5] There is a strong presumption that courts are to be open at all stages of trial.[6]

A party who proposes closure of a proceeding must show "an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest."[7] In State v. Bone-Club, our Supreme Court set forth a five-factor test courts must use to evaluate the constitutionality of a proposed closure.[8]

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[4] Id. (citing WASH. CONST. art. I, § 22; U.S. CONST. amend. VI).

[5] WASH. CONST. art. I, § 10.

[6] State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

[7] State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).

[8] 128 Wn.2d 254, 906 P.2d 325 (1995). The Supreme Court held that trial courts must consider the following factors on the record:

> "1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose."

Id. at 258-59 (alteration in original) (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

Our Supreme Court has held that a public trial claim may be raised for the first time on appeal and that a violation is generally structural error warranting a new trial.[9]

"But not every interaction between the court, counsel, and defendants will implicate the right to a public trial or constitute a closure if closed to the public."[10] Before deciding if the court violated Turpin's right to a public trial, we must determine if the process at issue "implicates the public trial right, thereby constituting a closure at all."[11] In State v. Sublett, our Supreme Court adopted the experience and logic test articulated by the United States Supreme Court to determine if a particular process must remain open to the public absent a Bone-Club analysis.[12]

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question."[13]

The guiding principle is "whether openness will 'enhance[ ] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'"[14] If the answer to both questions is "yes," the public trial right attaches, and

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[9] State v. Njonge, 181 Wn.2d 546, 554, 334 P.3d 1068, cert. denied, 135 S. Ct. 880, 190 L. Ed. 2d 711 (2014).

[10] Sublett, 176 Wn.2d at 71.

[11] Id.

[12] 176 Wn.2d 58, 73, 292 P.3d 715 (2012) (rejecting the distinction between legal and ministerial proceedings and adversarial and factual proceedings to determine whether the proceeding at issue implicates the public trial right) (citing Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

[13] Id. (citation omitted) (quoting Press-Enter., 478 U.S. at 8).

[14] Id. at 75. (alteration in original) (quoting Press-Enter. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

the superior court must apply the Bone-Club factors to evaluate whether a proposed closure is constitutional.[15]

The public trial right analysis has evolved significantly over the last few years. In 2014, our Supreme Court utilized a three-step inquiry to analyze public trial right claims.[16] Applying the threshold experience and logic test, a court first focuses on the process at issue to determine whether the public trial right is implicated.[17] Second, the court asks whether a closure occurred.[18] Third, the court examines whether the closure was justified.[19] If the court concludes after applying the experience and logic test that the right to a public trial does not apply to the process, it need not reach the second and third steps in the analysis.[20]

*Experience*

Here, the process at issue is the administrative process of excusing jurors who report as ill while court is not in session. Washington cases demonstrate that the "experience" regarding the overall process of excusing sitting jurors and prospective jurors draws a distinction between purely administrative decisions and decisions based on challenges for cause.

In State v. Wilson, Division Two of this court held that Wilson failed to show the excusal of two jurors who were physically ill before voir dire began in the courtroom was

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[15] 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).

[16] State v. Smith, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014).

[17] Id.

[18] Id.

[19] Id.

[20] Id. at 519.

improper or constituted a process that has historically been open to the general public.[21] The Wilson court determined that "both the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, provided such juror excusals do not amount to for-cause excusals or preemptory challenges traditionally exercised during voir dire in the courtroom."[22] Because the trial court had broad discretion to excuse prospective jurors upon a showing of undue hardship or any reason deemed sufficient by the court pursuant to RCW 2.36.100(1), Wilson failed to satisfy the experience prong of the experience and logic test.[23]

Other cases also recognize the distinction between pure administrative excusals and other juror disqualifications.[24] The basic distinction between purely administrative excusals and other disqualifications is consistent with RCW 2.36.110 and CrR 6.5 standards. "RCW 2.36.110 and CrR 6.5 place a *continuous obligation* on the trial court

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[21] 174 Wn. App. 328, 345, 298 P.3d 148 (2013).

[22] Id. at 344 (footnote omitted).

[23] Id. at 346. RCW 2.36.100(1) provides: "Except for a person who is not qualified for jury service under RCW 2.36.070, no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary."

[24] See State v. Russell, No. 85996-5, 2015 WL 4943899, at *5 (Wash. Aug. 20, 2015) ("Determining whether a juror is able to serve at a particular *time* or for a particular *duration* (as in hardship and administrative excusals) is qualitatively different from challenging a juror's ability to serve as a neutral factfinder in a particular *case* (as in peremptory and for-cause challenges)."); State v. Love, 183 Wn.2d 598, 606, 354 P.3d 841 (2015) ("Unlike administrative or hardship excusals, for cause and peremptory challenges can raise questions about a juror's neutrality and a party's motivation for excusing the juror that implicate the core purpose of the right; and questioning jurors in open court is critical to protect that right.").

to excuse any juror who is unfit and unable to perform the duties of a juror."[25] RCW 2.36.110 states, "It *shall* be the duty of a judge to excuse from further jury service any juror, *who in the opinion of the judge*, has manifested unfitness as a juror by reason of . . . any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."[26] Similarly, CrR 6.5 directs that if "at any time before submission of the case to the jury a juror is found unable to perform the duties[,] the court shall order the juror discharged."

Although no cases directly address midtrial off-the-record excusals of jurors who report as ill, the general "experience" with excusing ill jurors is to allow the trial court to make such purely administrative decisions off the record. Notably here, the juror's illness came to light during a lunch recess while court was not in session. The court's broad discretion to administer the process of dealing with an ill juror necessarily includes making contemporaneous decisions about whether to excuse that juror.

Turpin fails to show the excusal of the juror who reported as ill while the court was not in session constituted a process that has historically been open to the public. Accordingly, he fails to satisfy the experience prong of the Sublett test.

*Logic*

Turpin also fails to satisfy the logic prong of the test. He has not shown that "public access plays a significant positive role in the functioning of" the process of

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[25] State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000) (emphasis added) (trial court's removal of a juror on grounds that her fitness as a juror had been compromised, without further questioning of the juror, was not an abuse of discretion); see also State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005) ("Washington and other courts have granted broad discretion to the trial judge in conducting an investigation of jury problems.").

[26] (Emphasis added.)

excusing a juror who reports as ill when court is not in session.[27] There are few alternatives when a juror becomes ill during a court recess. Turpin concedes that the court has the authority to allow an ill juror to receive medical attention, go to the hospital, or visit a doctor and that the court can make that decision off the record.

Turpin argues that the court must defer making any "formal" decision whether to legally excuse a juror until court has resumed. But delaying such a decision is not a significant positive role in the functioning of that process. On the contrary, it would play a negative role to compel the court to artificially delay making a decision whether to excuse an ill juror until court is back in session. An excusal for illness off the record does not implicate the basic fairness of Turpin's trial or the appearance of fairness essential to public confidence, especially when, as here, the court promptly announced its decision in open court as soon as court was back in session.

Turpin relies upon State v. Jones, where Division Two of this court held that the random drawing of alternate jurors by the court clerk during a recess at the close of evidence constituted a courtroom closure that implicated Jones's public trial right.[28] In analyzing the logic prong, the Jones court focused on two of the purposes of the public trial right: "basic fairness to the defendant and reminding the trial court of the importance of its functions."[29] The court concluded those purposes were implicated because the off-the-record selection by the court clerk lacked safeguards against manipulation and chicanery:

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[27] Sublett, 176 Wn.2d at 73 (quoting Press-Enter. Co., 478 U.S. at 8).

[28] 175 Wn. App. 87, 91, 303 P.3d 1084 (2013).

[29] Id. at 101-02.

> 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 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."[30]

But the concerns of possible manipulation and chicanery in Jones are not present here. The record reflects that the juror's off-the-record excusal was promptly memorialized in the clerk's minutes shortly after the jury returned to their seats after lunch. And the court contemporaneously went on the record to expressly acknowledge "Juror Number 3 got sick, *you probably know that*, and so we've excused Juror Number 3."[31] Thus, both the clerk's minutes and the record negated any concerns about secrecy and informed the public of what had occurred.

Once the court determined Juror 3 was physically unfit to serve, the logical and practical course of action was to excuse Juror 3 and seat the alternate juror. Consistent with Wilson, Juror 3's off-the-record excusal for illness, rather than for cause or misconduct, was not "'a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.'"[32] Instead, it was a purely administrative process unrelated to the substantive facts of Turpin's case, which did not

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[30] Id. (quoting Sublett, 176 Wn.2d at 72).

[31] RP (May 21, 2014) at 1105 (emphasis added).

[32] Wilson, 174 Wn. App. at 346 (quoting Sublett, 176 Wn.2d at 77).

invoke any of the "concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness."[33]

We need not address whether disqualification of a sitting juror on other grounds would implicate the public trial right. As to illness revealed while court is not in session, the public trial right is not implicated.

We need not address Turpin's argument about closure nor his motion to reconstruct the record as it relates to closure.

Affirmed.

WE CONCUR:

[33] Smith, 181 Wn.2d at 518; see State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) ("A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.).

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON/DSHS<br><br>Respondent,<br><br>v.<br><br>DONALD TURPIN,<br><br>Petitioner. | ) | SUPREME COURT NO. _____<br>COA NO. 72101-1-I |

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF NOVEMBER, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DONALD TURPIN
DOC NO. 261459
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTAQNTINE WAY
ABERDEEN, WA 98520

**SIGNED** IN SEATTLE WASHINGTON, THIS 25TH DAY OF NOVEMBER, 2015.

X Patrick Mayovsky