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A. STATE'S RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

The trial court did not violate the Appellant's constitutional right to a public trial by conducting a portion of the pretrial motion hearings and a portion of the voir dire in chambers, on the morning of trial.

1. STATE'S REPOSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The Appellant wrongly characterizes the hearings in chambers as "closed." Where there is no motion to close a hearing to the public, and no order to close the hearing to the public, there is no duty to balance the competing interests on the record, and hence no constitutional error. In addition, the failure of the trial judge to explicitly analyze the *Bone-Club* factors is not dispositive because the Appellant "invited" the alleged constitutional error. Finally, the Appellant is not entitled to a new trial based on the public's right to open justice because she does not have standing to assert this right.

B. STATEMENT OF THE CASE

Patricia Heath was charged in Pacific County, Washington, with two counts of possession of a firearm in the second degree. CP 10-12. A jury trial was set for August 8, 2007, at 9:00 a.m. 4RP 2-18.

Pursuant to a Pacific County local court rule, a moving party must note motions in a timely manner to ensure that all hearings and motions

may be heard at least 14 days prior to the date of trial, other than short pretrial motions which may be heard between 9:00 a.m. and 9:15 a.m. on the day of the trial. LCrR 2(C).¹ On August 7, 2007, one day prior to trial, Ms. Heath filed 16 motions in limine. CP 13-20. Although these motions were not stamped "received" until after 5:00 p.m. on August the 7th, the court indicated on the record that they had in fact been received by fax at 8:35 a.m. that same day. 3RP 2.

The court convened on the afternoon of August 7, 2007, at 4:25 p.m. for the purposes of hearing these motions. Id. The state objected as to untimeliness of the motions. 3RP 3. The Court spent some time hearing arguments on these motions, as well as one motion in limine put forth by the State, i.e., the Order Allowing Plaintiff to File an Amended Information. The Court also entered Findings of Fact and Conclusions of Law pertaining to the CrR 3.5 hearing. 3RP 2-35. The Court was not able to conclude the pretrial motion hearings on August 7th, and asked the parties to report to chambers at 8:15 a.m. the following morning to take up the remaining unresolved issues. 3RP 34. The Court noted that it faced time constraints in getting the jury situated. Id.² Ms. Heath did not object

¹ See Appendix A.

² The Pacific County Superior Court has only a single court room available for trials; the Court also has a jury room and the judge's chambers available for use during jury trials; but of these facilities, only the judge's chambers is wired for sound recording. It also should be noted that a portion of the Pacific County law library is located in the

to the Court's hearing the rest of the pretrial motions in chambers the following morning. Id. In response to the Court's request that the parties show up early, defense counsel Thomas Keehan responded, "Certainly. No problem." 3RP 35.

No one present in the courtroom objected to the remaining pretrial issues being addressed in chambers. 3RP 34-35. At no time did the Court make any ruling, nor did it enter any order, that the hearing on the remaining pretrial matters would be closed to any members of the public, to Ms. Heath's family members, or to the press. 3 RP 34-35.

The Court reconvened the pretrial motion hearings in chambers the following morning prior to the start of trial. 5RP 2. During these hearings, the court covered the following matters: the admissibility of certain evidence; a defense motion to exclude witnesses; the question of whether an alternate juror would be needed; the procedure to be used for voir dire; the manner in which the amended information would be read to the jury; the witnesses that would be called to testify; and the wording of the reasonable doubt definition to be contained in the Court's introductory instruction to the Jury. 5RP 2-36. At no time during the hearing of these pretrial matters did the court announce or order that the proceedings were closed to members of the public. Id.

judge's chambers. By common practice, legal materials in the judge's chambers have been open to the public.

Upon conclusion of the pretrial matters, the Court reconvened in the court room and proceeded with voir dire. 4RP 2. The court began by asking a number of general questions directed to the jury panel. 4RP 13-18. Juror Number 8 responded affirmatively to the following questions:

"Have any of you heard – question one, have any of you heard of this case before? It's State of Washington v. Patricia A. Heath." 4RP 13.

"Do any of you know the Defendant, Ms. Patricia Heath?" 4RP 14.

"Michael Heath of East Raymond, Valley, husband of Ms. Patricia Heath." 4RP 15

"Is there anyone in the jury panel who has talked with anyone who claimed to have had information about the charges that are now before the Court?" 4RP 16

"Has anyone ever expressed to any of you an opinion as to the guilt or innocence of the Defendant?" 4RP 16.

"Is there anything about the nature of this case or otherwise that would cause you to start into the trial with any bias or prejudice one way or the other?" 4RP 16.

After Juror Number 8 answered in the affirmative to the last question, the court instructed him as follows:

"Number 8, I'm - - we're going to go ahead and interview you - - I'm just going to put you down on the list right now and interview you in chambers, so the attorneys will not be asking you any questions except in chambers." 4RP 16

There was no motion by any party at any time to close any portion of the hearings to spectators; and, indeed, the trial court never ordered that such questioning in chambers would be closed to members of the public. 4RP 16

Later, when it was the State's turn to ask questions of the panel, the deputy prosecutor, David Bustamante, moved to interview Juror Number 8 in chambers, to which defense counsel, Thomas Keehan, responded, "No objection." 4RP 18.

The Court asked Juror Number 8 to step into chambers, but never announced that the questioning of this juror was closed to spectators, family members, or the media. 4RP 19.

Once in chambers, this juror disclosed that his daughter worked with Ms. Heath at McDonalds and that he was aware of the facts of the case. 4RP 19-20. Defense counsel asked Juror Number 8 what details of the case he was aware of. 4RP 20-21. During the examination, Juror Number 8 disclosed that he believed that the police had acted illegally in their dealings with Ms. Heath. 4RP 21-23. Juror Number 8 was

eventually excused for cause. 4RP 23. The portions of the proceedings which were held in chambers were recorded and made a part of the official court record of the case.

At the conclusion of the trial, Ms. Heath was found guilty of two counts of unlawful possession of a firearm in the second degree.

C. ARGUMENT

1. THE TRIAL COURT DID NOT VIOLATE HEATH'S RIGHT TO A PUBLIC TRIAL BECAUSE NO PORTION OF HER TRIAL WAS CLOSED TO THE PUBLIC.

Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. Similarly, article I, section 10 provides that "[j]ustice in all cases shall be administered openly...." These rights extend to jury selection, an important part of the criminal trial process. In re Pers. Restraint of Orange, Wn.2d 795, 804, 100 P.3d 291 (2004). A defendant who asserts a violation of these rights has no burden to show prejudice, but he does have a burden to show that a violation occurred. State v. Momah, 141 Wash. App. 705, 711-12, 171 P.3d 1064 (2007).

Here, as in Momah, there is absolutely nothing in the record to indicate that the portions of the hearings which were held in chambers were closed to any members of the public. This is an important characteristic which distinguishes Ms. Heath's case from the line of cases

upon which the Appellant relies. Appellant's Brief at 4-7. In particular, Bone-Club, Orange, and Brightman all involve extensive limitations on public access to court proceedings.

In State v. Bone-Club, 128 Wash. 2d 254, 256, 906 P.2d 325 (1995), the trial court effectively closed the hearings to certain members of the public by announcing, "All those sitting in the back, would you please excuse yourselves at this time." Momah at 712-13, citing State v. Bone-Club at 261.

Similarly, in In re Personal Restraint of Orange, 152 Wash. 2d 795, 802, 100 P.3d 291 (2004), the trial court issued the following order on the record: "I am ruling no family members, no spectators will be permitted in this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic]. That's my ruling."

Finally, in State v. Brightman, 155 Wash. 2d 506, 511, 122 P.3d 150 (2005), the court, in a pretrial hearing, instructed the parties to "tell the friends, relatives, and acquaintances of the victim and the defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that." Once again, the plain language of this ruling made clear that a portion of the proceedings were closed to certain members of the public. All of these cases involved explicit "closure" of the courtroom. It is an open question whether less

egregious limitations are proscribed. In this vein, Ms. Heath cites State v. Duckett, 141 Wn. App. 797, 807 n.2, 173 P.3d 948 (2007) for the proposition that it is the State that bears the burden of proving that a closure did not occur. However, The holding of Division Three of the Court of Appeals in Duckett clearly contradicts the holding in Momah, which was decided by Division One of the Court of Appeals; and Division Two of the Court of Appeals has never directly ruled on this issue.

To complicate the matter further, in State v. Frawley, 140 Wn.App. 713, 167 P.3d 593 (2007), Division Three held that all in-chambers hearings are *per se* closed to the public. But in Momah, Division One explicitly rejected that holding. Momah at 715. The State submits that the facts of Ms. Heath's case are more similar to Momah than to Duckett or Frawley.³ This is true because in the Heath case, as in Momah, the defendant affirmatively assented to the *in camera* proceedings and because the circumstances clearly indicated that the court's intention in conducting the *in camera* proceedings was something other than excluding spectators from attendance. Furthermore, Division Two should reject the rationale of both Duckett and Frawley, which together create an unwarranted extension of the Bone-Club holding to situations in which no

³ In Frawley an entire day of voir dire was conducted in chambers, apparently out of a concern for protecting the privacy of members of the jury panel.

closure order was ever issued, and in which the defendant not only did not object to hearings being conducted in chambers, but benefitted from them.

The circumstances of the pretrial hearings and the questioning of Juror Number 8 indicate that there was no intention on the part of the court to exclude members of the public or the press from attending the proceedings. The pretrial hearings were begun on the afternoon before the trial in open court. They were initially open to the public, and anyone who was in the court room when the court announced that the pretrial hearings would reconvene in his chambers the following day would have known about it and would have had the opportunity to attend had they so desired. Neither the defendant nor any member of the public objected to the hearings being reconvened in chambers. All proceedings were recorded and made a part of the official court record; thus, the news media was in no way prevented from learning what transpired at the hearings by virtue of their being conducted in chambers.

The circumstances surrounding the questioning of Juror Number 8 also reveal no intention on the part of the court to exclude members of the public from his examination. The jury panel had been asked a series of questions designed to determine whether anyone had any prior knowledge of the facts of the case that might prevent them from rendering an impartial verdict. Juror Number 8 answered "yes" to six of these

questions. An analysis of the types of questions that Juror 8 answered shows that they were not of a nature to be a source of embarrassment to Juror Number 8, but rather, were of a nature designed to reveal the juror's knowledge of the facts of the case and any possible bias or prejudice resulting therefrom. For example, Juror Number 8 indicated, by his responses, that he had talked to someone who had information regarding the specific charges before the court. 4RP 16. He also indicated that someone had expressed to him an opinion regarding the guilt or innocence of the defendant. 4RP 16. Finally, he indicated that, if selected, he would likely be going into the trial with some bias or prejudice. 4RP 16.

Given with these responses, it was obvious that permitting Juror Number 8 to discuss his responses in greater detail in the presence of the entire jury panel would run the risk of causing a mistrial. The court's concern was to probe these responses further outside the presence of the jury panel, but not necessarily outside the presence of the public at large. Because there was no specific directive that the non-jury members of the audience were barred from attending, there can be no presumption that the voir dire of this single juror was closed to the public.

2. THE DUTY TO BALANCE THE COMPETING INTERESTS ON THE RECORD IS TRIGGERED WHEN A PARTY MOVES TO CLOSE THE HEARING TO THE PUBLIC. SINCE THERE WAS NO CLOSURE MOTION BY ANY PARTY, THERE WAS NO DUTY TO PERFORM THE *BONE-CLUB* ANALYSIS.

It is the motion to close a hearing that triggers the obligation to perform the weighing procedure. State v. Bone-Club, 128 Wash.2d at 261. The reviewing court must then look at the plain language of the closure request and order to determine whether closure in fact occurred. Momah at 708, footnote 11, citing In re Orange, 152 Wash.2d at 808, Bone-Club, 128 Wash 2d at 261; and State v. Brightman, 155 Wash.2d 506. "The denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court *meant to exclude persons from the courtroom.*" United States v. Al Smadi, 15 F.3d 153, 155 (10th Cir., 1994) [Italics added].

In In re Orange, the Court noted that, before measuring the closure order in the present case against the "five-step closure test," it is necessary to determine whether the closure that was ordered in the present case is distinguishable in any significant way from the closure that was ordered in Bone-Club. In re Orange, 152 Wash.2d at 807. The Bone-Club court ordered a temporary, full closure of a pretrial suppression hearing, according to the analysis in Orange; temporary because it was only for the testimony of one witness, and full because all spectators were excluded. Id. In contrast, the Orange trial court ordered a permanent, full closure of voir dire because all spectators were explicitly excluded from the

courtroom throughout the entire jury selection process. Id. at 807-808. In the Heath case, there was no request to exclude anyone from either the pretrial motion hearings or the voir dire of Juror Number 8. Nor did the trial court prevent anyone besides the other members of the jury panel from being present during the pretrial hearings or the questioning of Juror Number 8. Therefore the "closure" was neither full nor partial and not permanent; the only effect of the "plain language" of the court's order was to prevent other jury panel members from hearing what Juror Number 8 had to say regarding his knowledge of the facts of the case and any opinions he may have had regarding its merits.

3. A DEFENDANT MAY NOT ACQUIESCE, BY WORDS OR CONDUCT, TO *IN CAMERA* PRETRIAL HEARINGS AND TO THE QUESTIONING OF JURORS IN CHAMBERS, AND THEN CLAIM ON APPEAL THAT SUCH QUESTIONING VIOLATED HER CONSTITUTIONAL RIGHTS.

A defendant who invites error—even constitutional error—may not claim on appeal that he is entitled to a new trial on account of the error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); State v. Smith, 122 Wn. App.294, 299, 93 P.3d 206 (2004). The doctrine of invited error applies regardless of whether counsel intentionally or inadvertently encouraged the error. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58

P.3d 273 (2002). The invited error rule recognizes that "[t]o hold otherwise [i.e., to entertain an error that was invited] would put a premium on defendants misleading trial courts." State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

A defendant who is merely silent in the face of manifest constitutional error does not "invite" the error. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). But a defendant who "affirmatively assents" to error may invite it. For example, it has been suggested that, for purposes of applying the doctrine of invited error, there is a distinction between "whether defense counsel merely failed to except to the giving of the instruction, or whether he *affirmatively assented* to the instruction or proposed one with similar language." State v. LeFaber, 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J. dissenting—italics added). See People v. Thompson, 50 Cal.3d 134, 785 P.2d 857 (1990) (failure to object to private voir dire not reviewable where procedure was for defendant's benefit and the defendant participated without objection).

Under the facts of this case, Ms. Heath acquiesced in words and deeds to the *in camera* procedure used by the trial court. Her defense counsel affirmatively indicated "no objection" to the proposed questioning of Juror Number 8 in chambers and subsequently took an active role in questioning Juror Number 8; and Ms. Heath clearly benefitted from the *in*

camera procedure, since it is highly likely from the responses of Juror Number 8, that further questionings of this juror in the presence of the rest of the panel might have deprived Ms. Heath of her right to a fair trial. Because she acquiesced, participated, and benefitted, she should not now be able to claim error.

Under RAP 2.5(a), an error is waived if not preserved below. An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not raised before the trial court. Scott, 110 Wn.2d at 688. The question, thus, is whether public trial claims are always "manifest."

In several recent cases, the Washington Supreme Court has reviewed public trial claims for the first time on appeal. For example, in State v. Bone-Club, the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective in order to protect future investigations. Bone-Club, at 256-57. In Brightman, the trial court ordered, *sua sponte*, that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. Brightman, 155 Wn.2d at 511. Likewise in Orange,

the trial court summarily ordered the defendant's family and friends excluded from all voir dire proceedings. And in State v. Easterling, 157 Wash.2d 167, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions. Easterling, 157 Wn.2d at 172-73. In each of these cases, the constitutional violation was clear; it was "manifest." Yet, in none of these cases did the defendant benefit from the procedure utilized by the court. Thus, none of these cases precludes application of the invited error doctrine.

Additionally, the Washington Supreme Court has previously held that a defendant who fails to object to partial closure of the courtroom waives any claim that the trial court violated the state constitution. State v. Collins, 50 Wn.2d 740, 748, 314 P.2d 660 (1957). In Collins, the trial court locked the courtroom door due to overcrowding. The defendant did not object, but raised the issue on appeal. The Court held:

Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter. Keddington v. State, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may very well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided).

Collins, at 748. *In camera* screening of a single juror and the hearing of routine motions in limine and other housekeeping matters are more like

the highly discretionary decision in Collins, where failure to object was a bar to consideration of the issue on appeal. Thus, Bone-Club simply illustrates that a violation of the right to public trial *can* be manifest error, not that any such violation *is always* manifest error.

The United States Supreme Court and a majority of other jurisdictions prohibit defendants from raising the public trial claim for the first time on appeal. See Peretz v. United States, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L.Ed. 2d 808 (1991), citing Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960)). See also, e.g., Wright v. State, 340 So.2d 74, 79-80 (Ala. 1976); People v. Bradford, 14 Cal. 4th 1005, 60 Cal.Rptr. 2d 255, 929 P.2d 544, 570 (1997); Commonwealth v. Wells, 360 Mass. 846, 274 N.E. 2d 452, 453 (1971); People v. Marathon, 97 A.D.2d 650, 469 N.Y.S. 2d 178, 179 (N.Y. App.Div.1983); Dixon v. State, 191 So.2d 94, 96 (Fla. 2d DCA 1966); State v. Butterfield, 784 P.2d 153, 157 (Utah 1989).

It is particularly important that defendants be encouraged to assert their right to a public trial, and that they not lead the court astray, because the position taken by a defendant in a criminal case can also impact the public's right to access in the trial courts. Thus, a defendant should not be rewarded with a new trial where she has willingly participated in a hearing that is later characterized as an unconstitutional closure of the courtroom.

4. THE PUBLIC'S RIGHT TO OPEN JUSTICE SURVIVES A DEFENDANT'S WAIVER OF HER PERSONAL RIGHT TO A PUBLIC TRIAL. HOWEVER, A DEFENDANT MAY NOT OBTAIN A NEW TRIAL BASED ON THE PUBLIC'S RIGHT— ESPECIALLY AFTER SHE WAIVED HER PERSONAL RIGHT— BECAUSE SHE DOES NOT HAVE STANDING TO ASSERT THE PUBLIC'S RIGHT.

A defendant's waiver of her personal right does not bar the press or public from asserting its rights, whether by motion, writ of mandamus, or other such procedure. In other words, the public or press can assert Article I, section 10 rights even where the defendant asks for a closed proceeding.

The issue is whether the defendant's waiver of her personal right at the trial court level prevents her from asserting the public's right in an appellate court. This question should be answered, "Yes." There are at least two reasons why a defendant should not be able to waive her personal right at trial, yet assert the public's right on appeal.

First, a defendant does not have standing to assert the rights— constitutional or otherwise—of others.⁴ Rakas v. Illinois, 439 U.S. 128, 138, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978) (search and seizure); State v. Walker, 136 Wn. 2d 678, 685, 965 P.2d 1079 (1988) (failure of police officers to obtain husband's consent to search marital residence did not invalidate search as to wife); In re Benn, 134 Wn. 2d 868, 909, 952 P.2d

⁴ The defendants in Easterling, Orange, Brightman, and Bone-Club asserted on appeal their personal right to a public trial and, thus, the issue of standing was not addressed.

116 (1998) (failure to challenge search of the jail cell of another inmate was not ineffective assistance of counsel); State v. Jones, 68 Wn. App. 843, 847, 845 P.2d 1358, review denied, 122 Wn.2d 1018, 863 P.2d 1352 (1993) (one cannot assert the Fourth Amendment rights of another); State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213 (violation of Fifth Amendment rights may not be asserted by a co-defendant), review denied, 110 Wn.2d 1032 (1988).

A defendant in effect must request automatic standing to assert the rights of the public. Automatic standing has been debated in the search and seizure context. See State v. Kypreos, 110 Wn. App. 612, 39 P.3d 371 (2002). Proponents of automatic standing typically claim that if a defendant cannot assert the rights of others, then wrongful searches will not be addressed, police misconduct will not be curtailed, and illegal evidence will be admitted in courts.

But even if persuasive in the search and seizure context, automatic standing would be counterproductive in the public trial context. On the one hand, if a defendant asserts her personal right to a public trial, she can vindicate that right on appeal. On the other hand, if she does not assert the right, and if she encourages the trial court to violate the public's right (as Ms. Heath did) then she gets a "golden parachute" even though she acquiesced in, and subscribed to, the violation.

In effect, automatic standing in the public trial context would provide an incentive for defendants to encourage trial judges to close courtrooms—or to remain silent when the courtroom is closed—in the hope that they could take advantage of the closure on appeal. Thus automatic standing would lead to more violations of article I, section 10 rather than fewer violations. By contrast, in the search and seizure context, a defendant does not participate in, or control, the decision of police to conduct a search, so she cannot, in effect *cause* a Fourth Amendment violation. So, whatever the merits of automatic standing in the search and seizure context, those merits will have the opposite effect as applied to the open administration of justice.

Second, as a matter of fundamental fairness, a defendant who leads the trial court to violate the public's right to the open administration of justice should not get a windfall on appeal by asserting the very right she helped to violate in the trial court, especially where her interests are enhanced and the public's right to open court proceedings is diminished. For these reasons, an appellant should not be permitted to assert the public's rights under article I, section 10.

D. CONCLUSION

The Respondent respectfully asks this Court to hold that, in a constitutional challenge based upon an alleged violation of the right to a public trial, it is the burden of the defendant to show that the trial court closed her trial. In this case there was no motion to close and no order to close the proceedings, hence, no duty to balance the competing interests, or to analyze the so-called Bone-Club factors, on the record. The failure of the Court, or of any of the parties, to mention the public or press in arriving at the decision to hold portions of the proceedings in chambers implies that there was no intention to exclude them from said proceedings. Therefore, the Court should find that Heath has not demonstrated a violation of her public trial rights under the facts of this case. The Respondent further asks the Court to hold that a defendant may not raise a "public trial" claim on appeal where she acquiesced in *in camera* pretrial hearings or *in camera* examination of jurors, actively participated in such hearings and examinations, and benefitted from the procedures in question. To the extent that the Appellant asserts that her own right to a public trial was violated, she should be barred from raising the issue for the first time on appeal. To the extent that the Appellant asserts the public

right to an open trial, the Court should hold that she lacks standing to assert this right on behalf of the public.

DATED this 23rd day of May, 2008.

Respectfully submitted,

DAVID J. BURKE
PACIFIC COUNTY PROSECUTING ATTORNEY

BY: David Bustamante
DAVID BUSTAMANTE, WSBA #30668
Attorney for the Respondent

APPENDIX A

LOCAL CRIMINAL RULES (LCrR)

(Effective September 1, 2000)

RULE 1: RIGHT TO AN ASSIGNMENT OF COUNSEL

Assignment of Counsel. Appointment of counsel for indigent defendants shall be made by the Court at the preliminary appearance. The Clerk shall notify the appointed attorney by providing him with a copy of the Order Assigning Lawyer. The Prosecuting Attorney shall promptly provide defendant or defense counsel with a copy of the Information or other charging document.

RULE 2: PROCEDURES PRIOR TO TRIAL

A. Hearings Requiring An Interpreter. The Court Administrator's Office shall be responsible for arranging for an interpreter for indigent defendants in criminal proceedings, **upon the request of court appointed counsel or the Prosecutor's Office.** It shall be the responsibility of the indigent party's counsel to notify the Court Administrator's Office of any hearings scheduled that require an interpreter or any hearings **stricken** that require an interpreter. **Failure to do so may result in sanctions,** including, but not limited to, imposition of monetary penalties against the party not in compliance with this rule.

B. Omnibus/Pretrial Hearing. At arraignment the Court will set a time and date for an omnibus/pretrial hearing under CrR 4.5, generally for the second or third motion day following the date of arraignment. The State shall provide the defense attorney with copies of all officer's reports and other information within five (5) days of receipt thereof. The parties and their representatives shall confer at least once **before** the omnibus/pretrial hearing as to any discovery problems or any possible settlements.

C. Motions. The moving party shall note motions in a timely manner so that all hearings and motions will be heard at least 14 days prior to the date of trial (other than short pretrial motions which may be completed between 9:00 a.m. and 9:15 a.m. on the day of trial). Failure to timely note motions for hearing in accordance with this rule may be deemed a waiver of the pretrial hearing on such motions. The Local Civil Rules relating to motions and hearings also apply in criminal cases.

D. Discovery Cut-off. All discovery shall be completed and provided to opposing counsel by 5:00 p.m. the Wednesday before the scheduled trial date. Information disclosed to opposing counsel after this date shall not be admissible except in extraordinary circumstances.

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

STATE OF WASHINGTON,)
)
Respondent.)
)
vs.)
)
PATRICIA HEATH,)
)
Petitioner.)
_____)

NO 36885-4-II
AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF PACIFIC)

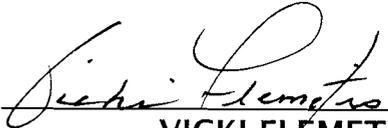
VICKI FLEMETIS, being first duly sworn on oath, deposes and says:

I am the Office Administrator for the Pacific County Prosecutor.

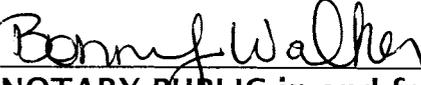
That on 5/27/, 2008, I mailed two copies of the State's Brief of Respondent to David B. Koch, Attorney for Appellant at the following address:

David B. Koch
Nielsen, Broman & Koch, PLLC
1908 East Madison
Seattle, WA 98122

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VICKI FLEMETIS

SUBSCRIBED & SWORN to before me this 27th day of
May, 2008.


NOTARY PUBLIC in and for the State
of Washington, residing at Raymond

Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362