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DIVISION II

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STATE OF WASHINGTON
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No. 36984-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DONNELL WAYNE PRICE,

Appellant.

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

The Honorable Frederick W. Fleming

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Donnell Price was charged with first degree murder with aggravating factors for the death of his girlfriend, Olga Carter. During jury *voir dire*, at a prospective juror's request, the trial court closed the courtroom and questioned the prospective juror. The trial court also allowed the admission at trial of a note written by Ms. Carter as a dying declaration discovered during a search of Mr. Price's residence where the murder occurred. Following a jury trial, Mr. Price was convicted as charged.

On appeal, Mr. Price contends the trial court violated his right to a public trial and the public's right to access to the courts when it closed the courtroom. Further, Mr. Price submits the trial court erred when it admitted Ms. Carter's note as it failed to meet the foundational requirements of a dying declaration.

B. ASSIGNMENTS OF ERROR

1. In violation of the right to a public trial secured by the Sixth Amendment of the United States Constitution and article I, sections 10 and 22 of the Washington Constitution, the trial court erred in closing jury *voir dire* proceedings.

2. Mr. Price's Sixth Amendment right to confrontation was violated by the trial court's admission of Ms. Carter's hearsay note as a dying declaration.

3. The trial court erred in ruling the note written by Ms. Carter constituted a dying declaration.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to a public trial is guaranteed by both the Sixth Amendment of the United States Constitution and article I, sections 10 and 22 of the Washington Constitution. The right provides the accused a public trial and also provides the public a right of access to trial proceedings. To protect the right, the trial court seeking to close all or part of a trial must weigh five requirements set forth by the Washington Supreme Court in *State v. Bone-Club*,[1] and enter specific findings justifying the closure order. A violation of the public trial right is a structural error. Where the trial judge conducted part of the voir dire in a closed proceeding without weighing the five *Bone-Club* factors, must this Court reverse the ensuing conviction for a violation of the right to a public trial?

2. The Sixth Amendment guarantees a defendant the right to confront and cross-examine the witnesses against them.

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

Admission of testimonial hearsay by an unavailable witness violates the defendant's right to confrontation where he has had no prior opportunity to cross-examine the witness. The victim's note was admitted by the trial court as a dying declaration. The note was testimonial in that it directly accused Mr. Price of killing the victim. Did the note's admission subsequently violate Mr. Price's right to confrontation requiring reversal of his conviction and remand for a new trial?

3. A hearsay statement of an unavailable witness may be admitted for the truth of the matter asserted if the statement constitutes a dying declaration. Under ER 804(b)(2), a hearsay statement constitutes a dying declaration where the declarant makes the statement believing her death was imminent and concerns the cause or circumstances of what the declarant believes to be her impending death. The trial court admitted a note written by Ms. Carter indicating Mr. Price shot her because he thought she was unfaithful as a dying declaration. Where the note failed to indicate when it was written and Ms. Carter did not speak with a hopeless expectation that death was near at hand, was the note erroneously admitted?

4. A defendant may forfeit his right to confrontation where the defendant kills the victim with the intent of making the victim unavailable to testify at trial. The evidence here established that Mr. Price killed the victim out of jealousy or because the victim called the police during their argument. Did the trial court err in finding Mr. Carter forfeited his right to confrontation?

D. STATEMENT OF THE CASE

In September 2006, Donnell Price and Olga Carter were in a dating relationship. RP 290. During their relationship, Ms. Carter would occasionally stay at Mr. Price's residence. RP 291. The relationship was at times stormy. RP 292.

On September 3, 2006, at approximately 5 a.m., Tacoma Police Officers were dispatched to Mr. Price's residence on several 911 calls indicating a domestic violence disturbance where a gun was involved. RP 190-200, 212-16, 302-04, 330-32. The first officers who arrived heard arguing inside the house. RP 223. At one point, the officers saw a man, later identified as Mr. Price, step out onto the porch. RP 225. The officers shined their flashlights on Mr. Price and identified themselves. RP 225-26. Mr. Price immediately reentered the residence and shut the door. RP 226. The officers thereafter heard a woman scream and after

approaching the house, broke down the door and entered. RP 227-31. A gunshot was quickly heard. RP 231. The officers retreated from the house and secured the perimeter of the house. RP 233, 314.

Approximately three hours later, Mr. Price peacefully surrendered to the police and was immediately arrested. RP 234, 319. Mr. Price was questioned about Ms. Carter's location and whether she needed medical help. RP 320. Mr. Price stated Ms. Carter was in the utility room and she needed medical assistance. RP 320. Ms. Carter was discovered in the utility room suffering from a gunshot wound. RP 397. Paramedics determined that Ms. Carter had died. RP 398-400, 716. The gun used to shoot Ms. Carter was found upstairs in Mr. Price's bedroom. RP 527, 810-13.

Mr. Price was charged with first degree murder and unlawful possession of a firearm in the second degree. CP 1-2. The State also alleged aggravating factors, which if found by the jury authorized the court to impose an exceptional sentence. CP 1. Following a jury trial, Mr. Price was convicted as charged with the jury finding one of the aggravating factors. CP 85-89. The court imposed a standard range sentence of 434 months and imposed an

additional 60 months for an exceptional sentence consecutive to the standard range sentence. CP 93-94.

E. ARGUMENT

1. IN VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF A PUBLIC TRIAL, THE TRIAL COURT ERRONEOUSLY CLOSED JURY VOIR DIRE WITHOUT CONDUCTING THE REQUISITE INQUIRY UNDER *BONE-CLUB*, A STRUCTURAL ERROR REQUIRING REVERSAL OF THE CONVICTION.[2]

During defense counsel's *voir dire* questioning, counsel asked Juror No. 31:

> MR. MAHONEY: Okay. Juror 31, where are you? On your questionnaire, sir, you indicated that you live nearby where this incident occurred.
>
> JUROR NO. 31: Right. I saw that when I noticed that it was the murder crime.
>
> MR. MAHONEY: Okay. And do you recall ever having seen Mr. Price in the neighborhood?
>
> JUROR NO. 31: No, sir.
>
> MR. MAHONEY: Okay. Is there anything – have you ever driven by the house he owns?
>
> JUROR NO. 31: Yes, sir. *Can we talk in back?*
>
> MR. MAHONEY: Pardon?

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[2] This issue is currently being decided by the Washington Supreme Court in the matters of *State v. Momah,* 141 Wn.App. 705, 171 P.3d 1064 (2007), *review granted,* 163 Wn.2d 1012 (2008), and *State v. Strode,* No. 80849-0, which were argued June 10, 2008.

> JUROR NO. 31: *Can we talk in back?* I would like to answer this –
>
> MR. HAMMOND (Prosecutor): Privately?
>
> JUROR NO. 31: Privately.
>
> THE COURT: All right.
>
> MR. MAHONEY: At what point in time did the Court wish to do that?
>
> THE COURT: Do you want to do it now?
>
> JUROR NO. 31: Sure.
>
> MR. MAHONEY: You're the boss.
>
> THE COURT: Let's do it at the end of the day.

8/15/07RP 55 (emphasis added).

Subsequently, at the close of *voir dire* for the day, the court stated:

> THE COURT: We will continue with the questioning as requested by 31, and that will be the last thing we do this evening. Everybody else is excused until tomorrow morning at 9:30. Leave your numbers on your bench.
>
> JUDICIAL ASSISTANT: Mr. Hammond, the party that's been sitting in, do you know who that is?
>
> MR. HAMMOND: The mother of the victim.
>
> JUDICIAL ASSISTANT: And she is not going to be testifying?
>
> MR. HAMMOND: No, she won't be.

> THE COURT: *I'm going to ask –*
>
> MR. HAMMOND: *Do you mind stepping out for this part?*
>
> . . .
>
> THE COURT: All right. We will just do it right here in the courtroom, . . .

8/15/07RP 73-75 (emphasis added).

The court and counsel continued the private questioning of Juror No. 31. At no time did the court conduct the five-part inquiry mandated by *State v. Bone-Club*, 128 Wn.2d at 258-59 prior to excusing a member of the public and closing the courtroom.

a. <u>The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings</u>. Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). "A trial is a public event. What transpires in the court room is public property." *State v. Coe*, 101 Wn.2d 364, 380,

679 P.2d 353 (1984), *quoting Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947).

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . " Article I, section 22 of the Washington Constitution also guarantees "[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial."

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." Const. art. I, § 10; *see also* U.S. Const. amends. 1, 6. The clear constitutional mandate in article I, section 10 entitles the public and the press to openly administered justice. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publications Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Federated Publications*, 94 Wn.2d at 58. In the federal constitution, the First Amendment's guarantees of free speech and a free press also protect the right of the public to

attend a trial. *Globe Newspaper*, 457 U.S. at 603-05; *Richmond Newspapers*, 448 U.S. at 580 (plurality).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." *Bone-Club*, 128 Wn.2d at 259.

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id, *quoting In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community concern or outrage concerning violent crimes. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those

standards will be made known. *Press-Enterprise I*, 464 U.S. at 508. Openness thus "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 501. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court.

> We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The right to a public trial includes the right to have public access to jury *voir dire*. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004); *accord State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

b. Washington courts must apply a five-part test when addressing a request for full or temporary exclusion of the public from a trial. In order to protect the accused's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Easterling*, 157 Wn.2d at 175. The five criteria are "*mandated* to protect a defendant's right to [a] public trial." *Orange*, 152 Wn.2d at 809 (emphasis in original).

The test requires:

> 1. The proponent of closure or sealing must make some showing [of a compelling state 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.

Bone-Club, 128 Wn.2d at 258-59.

The constitutional right to a public trial is not waived by counsel's failure to object. *Easterling*, 157 Wn.2d at 176 n.8 ("explicitly" holding "a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection."). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), *citing Press-Enterprise I*, 464 U.S. at 510. Moreover, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. *Id.*

c. The trial court did not apply the five-part *Bone-Club* test before closing the courtroom and questioning Juror No. 31. In *State v. Frawley*, 140 Wn.App. 713, 167 P.3d 713 (2007), Division Three of this Court reversed a first degree murder conviction because a trial court conducted part of jury *voir dire* in chambers. There was no discussion of the reasons for conducting individual *voir dire* in a closed courtroom in that case. *Id.* at 718, 720.

The defendant in *Frawley* waived his right to be present during *voir dire*, but did not affirmatively, intelligently, or voluntarily waive his right to a public trial. *Id.* at 720. The trial court "did not

go through the *Bone-Club* requirements on the record, nor did it enter specific findings justifying the closure." *Id.* at 721.

Frawley refused to determine on appeal whether the *Bone-Club* factors would have been met since the trial court had not done so. *Id.* The court ruled that it would be an inappropriate exercise of appellate review. *Id.* The Supreme Court also rejected requests to conduct the *Bone-Club* analysis for the first time on appeal in *Bone-Club* and *Brightman*. *Bone-Club*, 128 Wn.2d at 261; *State v. Brightman*, 155 Wn.2d 506, 518, 122 P.3d 150 (2005).

A similar error occurred in *State v. Duckett*, 141 Wn.App. 797, 173 P.3d 948 (2007). In a case involving multiple rape allegations, the court told prospective jurors that it would discuss privately issues regarding sexual abuse and media exposure. *Id.* at 801. The reviewing court ruled that any time the trial court closes portions of the proceedings to the public, including jury selection, its failure to engage in the necessary analysis is an error that cannot be cured by an appellate court's *post hoc* justifications. *Id.* at 804-05.

Similarly, in a decision from this Court, *State v. Erickson*, 146 Wn.App. 200, 189 P.3d 245 (2008), a case involving two counts of first degree child rape, the trial court conducted private

interviews with three prospective jurors after they indicated in a questionnaire their wish to be so questioned. *Id.* at 203-04. At the outset, this Court rejected the State's contention that the issue was waived by Erickson's failure to object to the procedure. *Id.* at 206 n. 2 ("Erickson did not ask the trial court to close the courtroom. He merely acquiesced to the trial court's proposal and Erickson's failure to object does not waive his right to public trial under article I, section 22."), *citing Brightman*, 155 Wn.2d at 417.

This Court in *Erickson* considered and rejected the reasoning in another recent Court of Appeals decision from Division One, *State v. Momah*, 141 Wn.App. 705, 171 P.3d 1064 (2007), *review granted*, 163 Wn.2d 1012 (2008). *Erickson*, 146 Wn.App. at 207, 209. In *Momah*, the trial court conducted individual questioning of certain jurors first in the judge's chambers and then in the jury room. *Momah*, 141 Wn.App. at 710-11. On appeal, the Court found no violation of the public-trial right because (1) Momah expressly requested the jurors be questioned individually and (2) notwithstanding the court's sequestering the jurors behind closed doors in chambers and subsequently the jury room, the Court determined there was no express closure order. *Id.* at 711-14.

This Court in *Erickson* disagreed with this analysis:

> Individual questioning of prospective jurors in a jury room acts as a closure because it is improbable that a member of the public would feel free and welcome to enter a jury room of his or her own accord. Also, removing the proceedings makes it difficult, if not impossible, for a criminal defendant's family or friends, or any other member of the public, to view the entirety of the jury selection process. Most courts have jury rooms and chambers adjacent to, but separate from, the courtroom.

Erickson, 146 Wn. App. at 209-10. This Court further observed, "Moreover, a person entering a courtroom and not finding the trial court, counsel, and the court reporter present might not discern that the trial was proceeding." *Id.* at 210 n. 7.

In the case at bar, the trial court conducted the continued questioning of Juror No. 31 in a closed courtroom, in response to the request by the juror to be questioned privately. 8/15/07RP 55. The defense did not seek this private conference, nor did the prosecution; rather, the court acquiesced to the juror's request for private questioning. 8/15/07RP 55. Although Mr. Price did not object to this procedure, in *Bone-Club* the Court made it clear that

> an opportunity to object holds no "practical meaning" unless the court informs potential objectors of the nature of the asserted interests. *Ishikawa*, 97 Wn.2d at 39. The motion to close, not Defendant's objection, triggered the trial court's duty to perform the weighing procedure.

128 Wn.2d at 261. This standard is consistent with the requirement that the waiver of a constitutional right be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461(1938).

It cannot be disputed that the trial court here neither informed Mr. Price of the nature of the right at stake nor even inquired as to whether he personally objected to the court's proposed procedure. More importantly there is no indication on the record that either Mr. Price or the public generally understood the nature of the rights at stake.

In any event, the presence of an objection to closed proceedings is merely one of five factors the trial court must consider before closing the proceedings. *Bone-Club* makes clear the motion to close and not an objection triggers the trial court's duty to engage in the analysis. If a party's acquiescence alone is sufficient to warrant closing of proceedings, the remaining *Ishikawa* factors are rendered meaningless in a substantial number of cases.

Prior to privately questioning Juror No. 31, the trial court did not identify a compelling interest as required by the first *Bone-Club* factor. No party sought private questioning of the juror. The trial

court did not discuss whether there was a serious and imminent threat that required private questioning of the juror. Contrary to the remaining *Bone-Club* factors, the trial court did not make any finding that the proposed closure was the least restrictive method available for protecting the unidentified interests potentially threatened. Having failed to identify any compelling interests at stake, the trial court did not weigh the public's right of access and the importance of a public trial against the need for closure.

Because there was no finding that the closure was necessary to serve a compelling interest, there was no finding that the closure was no longer than necessary to serve this unidentified interest. The trial court did not even identify the various interests in open proceedings. All interests must be identified for the court to engage in the meaningful weighing required by the constitution. *Orange*, 152 Wn.2d at 800

The Supreme Court has ruled unequivocally that jury selection is not exempt from public trial requirements. *Brightman*, 155 Wn.2d at 209; *Orange*, 152 Wn.2d at 804. The court may not conduct *voir dire* in private without first discussing the need to do so on the record and weighing the necessary *Bone-Club* factors. *Easterling*, 157 Wn.2d at 175; *Orange*, 152 Wn.2d at 804.

Here, the trial judge made no effort to comply with the constitutional prerequisites to conducting private proceedings before questioning the juror in private. Thus, the court violated the constitutional requirement of open court proceedings.

d. The court similarly violated the public's right of access. The requirements for protecting the public's right to open courtrooms "mirrors" the requirements used in criminal cases. *Easterling*, 157 Wn.2d at 175. The court may not close the courtroom without "first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Id*, *citing Bone-Club*, 128 Wn.2d at 258-59; and *Ishikawa*, 97 Wn.2d at 37; *see also Easterling*, 157 Wn.2d at 174-75 (trial court must "*resist a closure motion except under the most unusual circumstance.*") (emphasis in original).

A member of the public is not required to assert the public's right of access in order to preserve this issue for appeal. *Easterling*, 157 Wn.2d at 176 n.8. In *Easterling*, even though the issue was raised for the first time in the petition for review, the Supreme Court reversed a criminal conviction due to the trial court's closure of the courtroom during a pre-trial hearing that solely involved the co-defendant, whose case had previously been

severed from the defendant's. *Id.* at 174, 178, 180 n.11. In *Easterling*, there was no objection to the courtroom closure, yet the court's failure to articulate a sufficiently compelling reason for closing the hearing to the public violated both the public's and the defendant's rights to an open and public trial. *Id.* at 179.

> This decision to close a part of a criminal trial to the public runs afoul of the article I, section 10 guarantee of providing open access to criminal proceedings. It also runs contrary to this court's consistent position of strictly protecting the public's and the press's right to view the administration of justice. *Accord Eikenberry*, 121 Wn.2d 205; *Ishikawa*, 97 Wn.2d 30.

Easterling, 157 Wn.2d at 179.

Easterling held the public has a right to access court proceedings unless there is a compelling need for closure. Generic, and even reasonable, concerns for juror privacy do not trump the constitutional right of public proceedings. *Frawley*, 140 Wn.App. at 10.

Here, the trial court excluded a member of the public from the courtroom prior to closing the courtroom and questioning Juror No. 31, thus expressing violating the public's constitutional right to public proceedings.

e. Reversal is required. The remedy for a violation of the public's right of access is remand for a new trial. *Easterling*, 157 Wn.2d at 179-80. In *Easterling*, the court rejected the possibility that a courtroom closure may be *de minimus*, even for a limited closure applicable to a limited hearing for a separately charged co-defendant. 157 Wn.2d at 180 ("a majority of this court has never found a public trial right violation to be *de minimus*."); *accord, Erickson*, 146 Wn.App. at 211; *Duckett*, 141 Wn.App. at 809. The *Easterling* Court further emphasized, "[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." *Easterling*, 157 Wn.2d at 181; *Frawley*, 140 Wn.App. at 721.

The trial court's error in conducting private *voir dire* requires reversal of Mr. Price's conviction and remand for a new trial.

2. THE ADMISSION OF MS. CARTER'S NOTE AS A DYING DECLARATION VIOLATED MR. PRICE'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

When the police officers entered Mr. Price's residence after he had surrendered, on a kitchen table they discovered a note dated either "9/2" or "9/3," which stated:

To Aubrianna

> Mommy, mommy love. Mr. Price shot me dead. He thought I fooled around; a gun to my head.

8/13/07RP 95; RP 731, 737. The note was identified as having been written by Ms. Carter. RP 281, 297.

Prior to trial, the State *in limine* sought to admit the note as a dying declaration. 8/13/07RP 103. Mr. Price objected, arguing the note did not meet the foundational requirements of a dying declaration and that admission of the note would be violative of his right to confrontation. 8/13/07RP 104-06. The court found the note admissible, ruling:

> Well, the State, it's their strategy, however they want to follow it, but at this point I'm ruling that the dying declaration comes in.
>
> . . .
>
> For two reasons. One, even though it might be testimonial, it is an exception to *Crawford*, and I don't think it has to be proved beyond a reasonable doubt if they prove what they say they are going to do. The second aspect of it, the defense has forfeited their right to confrontation, if we get that far.

8/16/07RP 154-55. Subsequently at trial, the trial court admitted the note over Mr. Price's objection. RP 281.

Mr. Price contends admission of the note violated his right to confront Ms. Carter, and that he did not forfeit his right to confrontation when he killed Ms. Carter.

a. Admission of testimonial hearsay statements of an unavailable witness violate the defendant's right to confrontation. "'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." ER 801(c). "Hearsay is generally inadmissible because the statement is inherently untrustworthy: the declarant may not have been under oath at the time of the statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross-examined." *United States v. Reilly*, 33 F.3d 1396, 1409 (3d Cir. 1994) (quotation omitted).

The Confrontation Clause of the Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause allows admission of a witness's out-of-court testimonial statements against a criminal defendant if the witness is present at trial for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). If the witness is unavailable, the testimonial statements are admissible only if the defendant had a prior opportunity to cross-examine. *Id.*

In *Crawford*, the Supreme Court "introduced a fundamental re-conception of the Confrontation Clause." *United States v. Cromer*, 389 F.3d 662, 671 (6th Cir. 2004). *Crawford* held that testimonial, out-of-court statements offered against the accused to establish the truth of the matter asserted may only be admitted where the declarant is unavailable and where the defendant has had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. *Crawford*'s holding reaffirmed the importance of the Confrontation Clause, finding that "where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 61. Thus, under *Crawford*, when the prosecution seeks to introduce "testimonial" statements against a criminal defendant, the defendant generally will have a right to confront those witnesses.

In *Davis v. Washington*, the Supreme Court subsequently explained the meaning of the term "testimonial" in the context of statements made to the police, holding that a declarant's statements are testimonial if they relate to a past criminal occurrence relevant to a later criminal prosecution where there is no imminent threat of danger to the declarant. 547 U.S. 813, 126

S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224 (2006). Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *Id.*

b. The admission of Ms. Carter's note violated Mr. Price's right to confrontation. The State contended, and the trial court agreed, that under *Crawford*, a dying declaration does not violate the Confrontation Clause. 8/13/07RP 111, 8/16/07RP 154.

In *Crawford,* the Court devoted only a short paragraph to the dying declaration hearsay exception. The Court recognized that some dying declarations could be classified as testimonial, but in *dicta* stated that "although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are." *Crawford*, 541 U.S. at 56 n.6 (citations omitted). The Court withheld a definitive ruling on dying declarations: "we need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations." *Id.* The Court did indicate, however, that the dying declaration -- if it were considered still viable -- would only be allowed as an anomaly: "If this exception must be accepted on historical grounds, it is *sui generis*." *Id.*

Under *Crawford,* there is no rationale for dying declarations to be treated differently than any other testimonial statement. This is so especially since the historical underpinnings of the exception fail to justify it.

The dying declaration was not in existence at the time the Framers designed the Bill of Rights, but became an exception to the rule against hearsay in the early 18th Century. The principle underlying the exception was that the mind, fearing impending death, would act under a powerful sanction against lying as if it were under solemn oath to God at the time of reckoning. *See* Howard L. Smith, *Dying Declarations*, 3 Wis.L.Rev. 193, 203 (1925). Therefore, the declarations of a dying person were considered equivalent to the evidence of a living witness under oath before God, and inherently reliable. *Id.* In contrast, since enactment of the Sixth Amendment, "necessity," rather than reliability of the statement became paramount. *See United States v. Thevis*, 84 F.R.D. 57, 63 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir. 1982) ("the dying declaration is admitted, because of compelling need for the statement rather than any inherent trustworthiness"); *Mattox v. United States*, 146 U.S. 140, 152, 36 L.

Ed. 917, 13 S. Ct. 50 (1892) (discussing necessity of dying statement).[3]

Whether driven by reliability or necessity or both, admission of a testimonial dying declaration after *Crawford* goes against the sweeping prohibitions set forth in that case. First, justifying admission of a dying declaration because it possesses sufficient reliability to eliminate the need for cross examination is contrary to the core holding in *Crawford*:

> [w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. That is not what the Sixth Amendment prescribes.

Crawford, 541 U.S. at 61-62. Even if the reliability of a testimonial statement could be assessed by a court, or by other means other than cross-examination, dying declarations are not inherently reliable, but rather, suspect.

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[3] Several recent state court decisions addressing this issue have found that the dying declaration exception to the hearsay rule has survived *Crawford*. *See e.g. State v. Martin*, 695 N.W.2d 578 (Minn. 2005) (admission of a dying declaration into evidence does not violate the defendant's confrontation rights because such an exception existed at common law and was not repudiated by the Sixth Amendment); *People v. Monterroso*, 34 Cal. 4th 743, 22 Cal. Rptr. 3d 1, 101 P.3d 956 (2004) (finding that the dying declaration exception does not conflict with Crawford).

Numerous academic authorities criticize the reliability of "dying declarations" for persuasive reasons. A dying declaration may not be reliable because perception, memory, comprehension, and clarity of expression are likely to be impaired in a dying person. *See* Charles Neeson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv. L. Rev. 1357, 1374 (1985). [The experience of pain could affect the trustworthiness or accuracy of the declaration. See *Dying Declarations*, 46 Iowa L. Rev. 356, 376 (1961). Moreover, the original "guarantee" of reliability, threat of divine punishment, may simply not apply to non-religious people. The reliability argument fails.

Crawford requires both necessity (unavailability) and an opportunity for cross-examination (Sixth Amendment confrontation to test reliability). Under *Crawford*, in the case of a dying declaration, the presence of only one will not suffice. Inability to test Ms. Carter's statement through the constitutionally rooted crucible of cross-examination is fatal to application of the dying declaration exception to the hearsay rule in this case.

"[S]tatements are testimonial if they relate to a past criminal occurrence relevant to a later criminal prosecution where there is no imminent threat of danger to the declarant." *Davis,* 126 S. Ct. at

2273-74. *See also Crawford,* 541 U.S. at 51-52 ("statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"). Here, Ms. Carter's note was plainly testimonial. Although addressed to her daughter, the note clearly implicated Mr. Price in her murder. The note was designed to aid in the investigation of her death should she be murdered by Mr. Price. Ms. Carter had to reasonably believe that the note directly accusing Mr. Price of shooting her would be used by the police in investigating her death and later at a trial. Since Mr. Price was denied the opportunity to cross-examine Ms. Carter, the note should have been excluded. *Crawford,* 541 U.S. at 68-69.

c. Ms. Carter's note did not meet the foundational requirements of a dying declaration. The trial court admitted the note as a dying declaration.

The standard for the admission of a dying declaration is:

> the declarant should have believed that she was about to die, that she made the declaration under the belief that she would not recover, and that she did die of the illness from which she was suffering as the direct and proximate result of the original injury which the declaration tended to illustrate.

State v. Bridgham, 51 Wash. 18, 97 Pac. 1096 (1908).

> Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be "a settled hopeless expectation" (Willes, J. in Reg. v. Peel, 2 F. & F. 21, 22) that death is near at hand, and what is said must have been spoken in the hush of its impending presence. *Mattox v. United States*, 146 U.S. 140, 151; *Carver v. United States*, 160 U.S. 553; 164 U.S. 694; *Rex v. Perry*, [1909] 2 K.B. 697; *People v. Sarzano*, 212 N. Y. 231, 235; 106 N. E. 87; 3 *Wigmore on Evidence*, §§ 1440, 1441, 1442, collating the decisions. Despair of recovery may indeed be gathered from the circumstances if the facts support the inference. *Carver v. United States, supra*; Wigmore, *Evidence*, § 1442. There is no unyielding ritual of words to be spoken by the dying. Despair may even be gathered though the period of survival outruns the bounds of expectation. Wigmore, § 1441. What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom.

Shepard v. United States, 290 U.S. 96, 100, 54 S.Ct. 22, 78 L.Ed. 196 (1933).

In reported cases where hearsay has been admitted as a dying declaration, far more was provided showing the declarant reasonably believed he or she was facing imminent death than that before the trial court here. In *Bridgham, supra,* the victim was informed by a physician that her wound was mortal and that she would not live; she expressed the wish that her son look out for her other children; and she said her daughter's ashes were in a jar in

her trunk and she wanted them buried with her. 51 Wash. at 20. In *State v. Mooney*, the Washington Supreme Court held that a witness who heard the victim's statement "I can not make it, it's too tough" was competent to testify that he thought that the victim at the time believed that he was going to die and that he could not recover. 185 Wash. 681, 684, 56 P.2d 722 (1936). The fact that the victim did not die until some days later did not, according to the Court, render the statements inadmissible. *Id.* In *State v. Gallagher,* the victim's statement to a witness that "I am through, I just can't make it," and his statement to another witness a week or so later to the effect that he desired cremation and that his ashes be tossed into Puget Sound rendered the statement a dying declaration. 4 Wn.2d 437, 444-45 (1940). Finally, in *State v. Johnson,* after being stabbed and waiting for emergency assistance, the victim talked about Jesus and said he was "ready to go," satisfying the foundation for a dying declaration. 113 Wn.App. 482, 486, 54 P.3d 155 (2002).

Here, it is impossible to determine with any certainty even when the note was written. Although it contains the notation "9/2" or "9/3," there is nothing to state with any confidence the note was written on either of those days or some other date. Thus, it is

impossible to determine if it was written at a time when Ms. Carter reasonably believed she might die, whether she reasonably believed she was going to die at all, or was merely upset at Mr. Price during their early morning argument.

Further, the inference to be drawn from the evidence presented is that Mr. Price shot Ms. Carter only after observing the police officers and discovering she had called for help. Thus, there is a strong inference that Ms. Carter's statement was erroneous because Mr. Price did not shoot Ms. Carter for "fooling around," but because she had contacted the police during their argument.

Finally, the note indicated that Ms. Carter may have "feared" she was going to die, which is simply not enough for the foundation necessary for the note to be a dying declaration. The note failed to show Ms. Carter spoke "with the consciousness of a swift and certain doom." *Shepard*, 290 U.S. at 100. As gleaned from the cases cited above, substantially more than a fear of death is required. Thus, the note failed to meet the foundational requirements of a dying declaration, it was erroneously admitted and as such, violated Mr. Price's right to confrontation.

d. The trial court erred in finding Mr. Price forfeited his right to confront Ms. Carter. The trial court found that in killing Ms. Carter, Mr. Price forfeited his right to confrontation. 8/16/07RP 155.

In *Giles v. California*, the Supreme Court held the forfeiture by wrongdoing exception to the Confrontation Clause applies *only where the defendant acted with the intent of making the witness unavailable to testify at trial.* 554 U.S. ___, 128 S. Ct. 2678, 2686-88, 171 L.Ed.2d 488 (2008) (emphasis added). In *Giles*, the defendant was charged with murdering his girlfriend. Approximately three weeks prior to the murder, the victim told the police the defendant had threatened to kill her. Over objection, the trial court allowed this statement into evidence, holding appellant forfeited his right to confront the witness. The Supreme Court disagreed, holding the trial judge failed to make a finding that appellant committed the murder with the intent to make the witness unavailable. *Giles*, 128 S. Ct. at 2692.

In reaching this conclusion the Supreme Court refined the common law principle of "forfeiture by wrongdoing," stating it applied only where the defendant's conduct was "designed" to prevent testimony. *Giles*, 128 S. Ct. at 2683. The defendant,

therefore, must have "intended" to prevent testimony before applying the "forfeiture by wrongdoing" principle in order to admit statements without confrontation. *Id.* at 2686. Although the Court did not specify a particular procedure for determining whether the principle applies, in *dicta*, the Court appeared to cite with approval the practice of requiring an evidentiary hearing before admitting a witness' statement over the objection of an accused. *Id.* at 2691

In Washington, the Supreme Court has adopted a clear, cogent, and convincing standard for determining whether to apply the doctrine of forfeiture by wrongdoing. *State v. Mason*, 160 Wn.2d 910, 926-927, 162 P.3d 396 (2007) ("the trial court must decide whether the witness has been made unavailable by the wrongdoing of the accused based upon evidence that is clear, cogent, and convincing").

The trial court's analysis here fails under the *Giles* standard. Initially, the court did not state the standard of proof to which it held the State when it ruled the State had proved Mr. Price had forfeited his right to confrontation. The trial court did cite *Mason*, which clearly requires the State prove the forfeiture by clear, cogent, and convincing evidence. Even assuming this was the standard used by the trial court, it seems clear Mr. Price's intent when he killed

Ms. Carter was not to prevent her from testifying. Rather, Mr. Price's intent can be determined from the note Ms. Carter left behind, that he acted solely out of jealousy, or that he acted out of anger over her calling the police during their argument.

The State failed to prove by clear, cogent, and convincing evidence Mr. Price acted solely to prevent Ms. Carter from testifying. As a result, the trial court erred in determining Mr. Price forfeited his right to confrontation.

e. The error in admitting the note as a dying declaration was not harmless. An error admitting hearsay evidence in violation of the Confrontation Clause is not harmless error unless the State can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "Under that standard, an error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error." *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied,* 149 Wn.2d 1022 (2003).

The issue for the jury to decide here was whether Mr. Price was guilty of premeditating the death of Ms. Carter or whether her

death was the result of an accident or horrible mistake. The note written before her death was powerful evidence that she did not die as the result of a mistake or accident but because Mr. Price had either by his words or actions indicated he would kill her. All of the other evidence presented indicated only that Mr. Price was responsible for Ms. Carter's death, but was neutral on premeditation. Thus, admission of the note was not harmless in light of the importance of the note to the proof of premeditation.

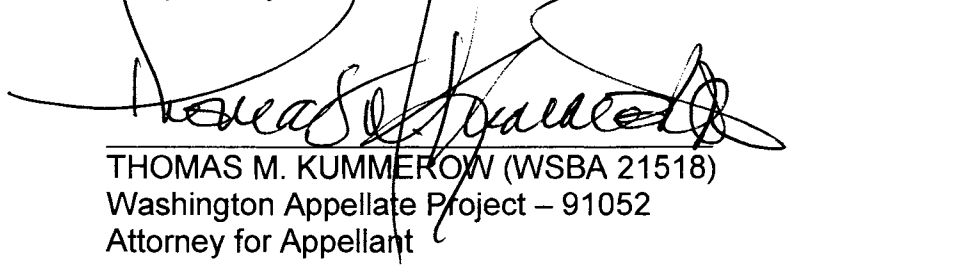
This Court must reverse Mr. Price's conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Price submits this Court must reverse his convictions and remand for a new trial.

DATED this 29th day of January 2009.

Respectfully submitted,



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

STATE OF WASHINGTON, RESPONDENT, v. DONNELL PRICE, APPELLANT.	)))))))))	NO. 36984-2-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JANUARY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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