

NO. 44366-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN HUMES,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

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BRIEF OF APPELLANT

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JARED B. STEED  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to propose an affirmative defense instruction to bail jumping.

2. The trial court denied appellant his constitutional right to a public trial.

Issues Pertaining to Assignments of Error

1. “Uncontrollable circumstances” is an affirmative defense to bail jumping. RCW 9A.76.170(2). Evidence at trial established appellant failed to come to court on the advice of defense counsel. Was counsel ineffective for failing to propose an “uncontrollable circumstances” instruction where the evidence supported such an instruction and where there is a reasonable probability the verdict would have been different had the jury been instructed on the affirmative defense?

2. The trial court took peremptory challenges by having the parties note on a chart which prospective juror they wanted to excuse. The peremptory challenges were made outside the hearing of those in the courtroom. The court announced the names of the excused prospective jurors, but did not state which party excused them. Three days later, the court filed the peremptory challenges chart. Where the trial court did not

analyze the Bone-Club<sup>1</sup> factors before conducting this portion of jury selection in private, did the court violate appellant's constitutional right to a public trial?

B. STATEMENT OF THE CASE

1. Bail Jumping

The State charged appellant Brian Humes with one count each of fourth degree assault and felony harassment for an incident that occurred between him and his ex-girlfriend on March 6, 2012. CP 1-2.

On May 8, 2012, Humes' did not appear at his omnibus hearing. 2RP 21-23, 71, 77. Based on Humes' absence, the State also charged Humes with one count of bail jumping. 1RP<sup>2</sup> 5.

At trial on all three charges, Humes' testified he was not present at the omnibus hearing scheduled for 8:45 a.m. 2RP 71, 77. However, Humes' explained "there's multiple reasons why I missed that court date." 2RP 80. Humes explained that his prior defense attorney had been "disqualified." 2RP 74. As a result, Humes was confused whether there was "a hearing that day [May 8<sup>th</sup>] or if – who my attorney was." 2RP 75.

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<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – December 17, 2012; 2RP – December 18, 19, and 20, 2012; 3RP – January 4, 2013; 4RP – January 18, 2013; 5RP – December 17, 2012 (jury selection).

Humes explained he text messaged his attorney at 9:01 a.m. and received no response. 2RP 72. Humes' attorney called him shortly thereafter. 2RP 72. During that telephone conversation, Humes explained he was on his way and would arrive at the courthouse in "about 20 minutes." 2RP 72. Counsel told Humes he "was already late for the court date [and] that a warrant had already been issued[.]" 2RP 72. Humes' attorney explained there would be a later court hearing to quash the warrant. 2RP 72. Humes explained that but for counsel telling him not to appear in court he "would absolutely have come." 2RP 73-75.

At trial, the prosecutor explained the procedure for issuing a warrant for failure to appear. The prosecutor testified the first role call for a criminal calendar happened "right at 9 a.m." 2RP 9. A second role call occurred "anywhere between 10:30 and 11[.]" 2RP 10. The prosecutor explained that "if somebody appears late but appears for your second later roll call, there's no warrant issued[.]" 2RP 10. If an individual misses the role calls but still appears before the warrant form is completed, no warrant would issue. 2RP 20-21. The prosecutor said a warrant issues only if a party misses both role calls and the docket is completed. 2RP 22.

The same procedure was followed for Humes. 2RP 21. Humes was not present when the gallery was polled at 9:07, and again at 9:40, on May 8.

2RP 21. Because Humes had not appeared by the time the docket was completed, a warrant was issued. 2RP 23-25.

A scheduling order setting a warrant quash date was entered on May 9. 2RP 34. The warrant was quashed on May 14. 2RP 33-34. Humes did not sign the quash order. 2RP 28-29. The prosecutor did not know whether Humes appeared at the warrant quash hearing. 2RP 35. Humes explained he did not tell the court why he missed the omnibus hearing when he appeared at the quash hearing. 2RP 80-81.

After hearing the above, a Pierce County jury found Humes guilty of bail jumping, but not guilty of fourth degree assault and felony harassment. 2RP 136; CP 93-95.

At sentencing, defense counsel acknowledged “the issue in the bail jump is in part my mistake.” 3RP 7, 9. Counsel explained he informed the prosecutor at 9:30 a.m. that “it does not appear” Humes would appear for the omnibus hearing. 3RP 5. Counsel believed a warrant would issue immediately rather than at the end of the docket. For that reason, when Humes said he could arrive within 20 to 30 minutes, counsel told him a warrant had already issued. 3RP 6.

The trial court sentenced Humes to three months of electronic home monitoring. 3RP 13-14; CP 103-115. Humes’ successfully completed his term. CP 143. Humes’ timely appeals. CP 118-132.

2. Jury Selection

After swearing in the venire, the trial court announced the charges against Humes, and explained the process of jury selection. CP 149-53; 5RP 21-22. The trial court asked prospective jurors if personal experiences would cause any of them to doubt whether they could remain fair and impartial on a case involving domestic violence, assault, and bail jumping. 5RP 21-22. In open court, the judge asked the potential jurors to explain their concerns about remaining fair and impartial in a case of this type and they did so. 5RP 22-33. Several jurors affirmed they did not believe they could be fair and impartial to both sides. 5RP 22-27. After further questioning, the trial court excused four jurors for stated concerns about impartiality. 5RP 57-58, 77.

After further questioning by both parties, the court explained the peremptory challenge process:

The lawyers are going to start to exercise their peremptory challenges, and they do it outside of your hearing. So, what they will do is basically generate a list for me, and I will go over the list in a few minutes with the lawyers, and then we will tell you who's sitting on this jury. While they're doing that, we are going to pretty much be, as the military calls it, at ease.

5RP 78.

An unrecorded "pause in proceedings" discussion between counsel and the court then occurred. 5RP 78. The trial court did not first consider

the Bone-Club factors before deciding the live peremptory challenge process should be shielded from public sight and hearing. Neither party objected to this portion of jury selection.

After the “pause in proceedings,” the court explained, “[I] will call your number and tell you what seat you are sitting in over here.” 5RP 78. The court then called out 13 juror numbers and excused the remaining jurors so they could return to Jury Administration. 5RP 79. Neither the prosecutor nor defense counsel had anything to add after the jury was selected. The “pause in proceedings,” was not recorded. Three days later, the court filed a chart showing which party excused which prospective juror. CP 145, 146-48.

C. ARGUMENT

1. HUMÈS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO REQUEST AN “UNCONTROLLABLE CIRCUMSTANCES” INSTRUCTION AS A DEFENSE TO BAIL JUMPING.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is established if: (1) counsel’s performance was deficient, and (2) the deficient performance prejudiced the defendant. Thomas, 109 Wn.2d at 225-26 (adopting two-prong test from Strickland v.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Humes' counsel was ineffective for failing to propose an "uncontrollable circumstances" instruction as an affirmative defense to bail jumping. Reversal is required because there is a reasonable probability the jury would have acquitted Humes if properly instructed on the defense."

a. Counsel was Deficient.

It is an affirmative defense to the crime of bail jumping that "uncontrollable circumstances" prevented a defendant from appearing. RCW 9A.76.170(2). The defendant must not have contributed to the circumstances in "reckless disregard of the requirement to appear or surrender," and the defendant must have "appeared or surrendered as soon as such circumstances ceased to exist." RCW 9A.76.170(2). "Uncontrollable circumstances" are defined as:

[A]n act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an

automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4).

The examples of man-made circumstances listed in the statute are not exhaustive. See State v. Fredrick, 123 Wn. App. 347, 352, 97 P.3d 47, (2004) (recognizing uncontrolled circumstances may be established by statutory definition or “other similar barrier[s]” to attendance). Given that defense counsel is presumed to provide effective assistance and to know the applicable law,<sup>3</sup> it is not surprising that being wrongly told by your attorney not to appear at court because it is “too late” is not specifically listed as an uncontrollable circumstance.

There is no Washington case addressing whether an attorney’s erroneous advice not to appear qualifies as an uncontrollable circumstance in a bail jumping case. The Ninth Circuit, however, has held the failure to appear at an immigration hearing due to erroneous advice of counsel constitutes an exceptional circumstance beyond the control of the alien. Monjaraz-Munoz v. I.N.S., 327 F.3d 892, 896 (9th Cir. 2003). In that case, Monjaraz was ordered deported in absentia after he did not appear at his deportation hearing. On appeal, Monjaraz claimed he was advised by his

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<sup>3</sup> Strickland, 466 U.S. at 689.

attorney to cross the border into Mexico and then quickly re-enter the United States the day before the hearing. He was not allowed to re-enter the United States upon his attempted return, which caused him to miss his deportation hearing. Monjaraz-Munoz, 327 F.3d at 894-95.

Monjaraz argued his attorney's ineffective assistance of counsel qualified as an "exceptional circumstance" excusing his absence from the hearing. Monjaraz-Munoz, 327 F.3d at 894-95. Under federal law, an in absentia removal order will be rescinded if the alien demonstrates he failed to appear because of "exceptional circumstances," defined by immigration statute as "circumstances (such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not less compelling circumstances) beyond the control of the alien." Monjaraz-Munoz, 327 F.3d at 896; 8 USC § 1229a(e)(1).

The Ninth Circuit reasoned once an alien exercises his statutory right to retain counsel in a deportation proceeding, "it is reasonable that an alien would give effective control of his or her case to retained counsel. Because of this, if an alien fails to appear because of his actual and reasonable reliance on counsel's erroneous advice, we conclude that it can constitute a circumstance beyond the alien's control." Monjaraz-Munoz, 327 F.3d at 896.

Like Monjaraz-Munoz, the record shows Humes relied on defense counsel's erroneous advice not to appear. Humes acknowledged he was not at court when the calendar began at 8:45 because he was confused whether there was "a hearing that day or if – who my attorney was." 2RP 75. Humes explained he text messaged his attorney at 9:01 and received no response. 2RP 72. When his attorney finally called, Humes explained he was on his way and would arrive at the courthouse in "about 20 minutes." 2RP 72. Counsel told Humes he "was already late for the court date [and] that a warrant had already been issued[.]" 2RP 72.

In fact, had Humes appeared in time for the second calendar role call – "anywhere between 10:30 and 11," – an arrest warrant would not have issued. 2RP 10. Defense counsel acknowledged as much during closing: "He [Humes] followed my advice. I apologize to you, Mr. Humes, for that mis-advice." 2RP 117. Humes' explained he would "absolutely have come," to court but for counsel's advice. 2RP 73-75.

Had Humes contributed to the creation of the circumstance "in reckless disregard of the requirement to appear," the affirmative would not apply. RCW 9A.76.170(2). Humes did not act in reckless disregard. "A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such

substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.” RCW 9A.08.010(1)(c).

Humes’ lateness arising from an initial mistake about whether there was a court hearing that day may have been negligent, but confusion does not qualify as a reckless disregard of the need to appear. Left to his own devices, Humes’ would have come to court. Humes failed to appear only after being advised by his attorney that it was too late. Humes reasonably relied on that advice because, as a layperson, he could not have known when it was “too late” to appear. Indeed, when questioned why he did not disregard his attorney’s advice, Humes explained: “I’m not an attorney. I – you know, I was following your advice.” 2RP 72.

Humes must also show he appeared as soon as the uncontrollable circumstance ceased to exist. RCW 9A.76.170(2). Defense counsel told Humes they would quash the warrant during a later court date. 2RP 72. In fact, the warrant was quashed within a week. 2RP 33-34. Although the prosecutor noted Humes did not sign the order quashing the warrant, the State failed to show Humes did not appear at the hearing. 2RP 35. At that point, the uncontrollable circumstance consisting of counsel’s erroneous advice ended. Under these circumstances, Humes satisfied the statutory requirement to appear as soon as the impediment to appearance ceased to exist.

In accordance with this evidence, Humes' theory was that he was not guilty of bail jumping because he would have appeared in court but for defense counsel's advice to the contrary. 2RP 116-17. Humes was "entitled to have the jury fully instructed on the defense theory of the case,"<sup>4</sup> if he established evidence of uncontrollable circumstances by a preponderance of the evidence. State v. Jeffrey, 77 Wn. App. 222, 225, 889 P.2d 956 (1995). As discussed above, Humes presented sufficient evidence entitling him to such an instruction.

Because Humes presented sufficient evidence to warrant an "uncontrollable circumstances" instruction, it should have been proposed by his trial attorney. Effective assistance of counsel includes a request for pertinent instructions supported by the evidence. State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681 (1999), rev. denied, 139 Wn.2d 1027 (2000). Counsel's failure to propose an "uncontrollable circumstances" instruction fell below the standard expected for effective representation. There was no reasonable trial strategy for not requesting the instruction. Counsel was aware of the bail jumping charge, the circumstances of Humes' absence, and the defense theory of the case. Counsel simply neglected to request the affirmative defense instruction permitted by statute. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the

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<sup>4</sup> State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

b. Counsel's Deficient Performance Prejudiced Humes

Counsel's failure to request an "uncontrollable circumstances" instruction was prejudicial. As evidenced by acquittals on the assault and felony harassment charges, the jury found Humes credible. Humes plainly testified he would have appeared for court but for counsel's telling him not to. 2RP 73-75. There is a reasonable probability jurors would have believed Humes and determined counsel's advice constituted circumstances beyond Humes' control.

By failing to request an uncontrollable circumstances instruction, Humes was prevented from fully arguing his theory of the case. Indeed, counsel's failure to request the instruction rendered the jury powerless to acquit if it concluded Humes failed to appear after receiving proper notice. The full extent of this prejudice became apparent during closing argument when the prosecutor argued Humes' theory was not a defense to bail jumping:

"You heard his testimony that he [Humes] got confused. He was late. He then texted and called and was told that a warrant was out, and so he never showed up. Doesn't matter.

That is not a defense to bail jumping. The Court informs you on the law. If that was a defense, you would have been told that's a defense. It's not."

2RP 96.

The prosecutor continued in rebuttal:

"At some point, you have to man up and take responsibility for your own actions. Okay? It is not a defense attorney's responsibility to babysit a defendant and hold his hand and bring him to court every time he has a court hearing. It is the defendant's responsibility. Defense attorney gets up here and tries to apologize for it. Nowhere in those instructions does it say it's his responsibility. It is the sole responsibility of the defendant."

2RP 126-27.

The prosecutor's comments encompassed the only disputed issue regarding the bail jumping charge: whether counsel's advice constituted an "uncontrollable circumstances" defense to bail jumping. Absent an instruction telling the jury there was an affirmative defense to bail jumping, the prosecutor's comments carried "'an aura of special reliability and trustworthiness.'" State v. Demery, 144 Wn.2d 753, 762-63, 30 P.3d 1278 (2001) (quoting United States v. Espinosa, 827 F.2d 604, 613 (9<sup>th</sup> Cir. 1987), cert. denied, 485 U.S. 968 (1988)).

There is a reasonable probability the outcome would be different but for defense counsel's conduct. Humes' constitutional right to effective assistance counsel was violated.

2. THE TRIAL COURT VIOLATED HUMES' RIGHT TO A PUBLIC TRIAL BY TAKING PEREMPTORY CHALLENGES IN PRIVATE.

The trial court took peremptory challenges of prospective jurors at sidebar. Because exercising peremptory challenges is part of voir dire, and because the trial court failed to apply the Bone-Club<sup>5</sup> factors, the court violated Humes' constitutional right to a public trial.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. There is a strong presumption courts must be open at all stages of the trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Whether a trial court has violated the defendant's public trial right violation is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a court can close any part of a trial, it must first apply the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004).

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<sup>5</sup> Bone-Club, 128 Wn.2d at 906.

Violation of this right is presumed prejudicial even when not preserved by objection. State v. Wise, 176 Wn.2d 1, 16, 288 P.3d 1113 (2012).

“The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I). Washington courts have repeatedly held that jury voir dire conducted in private violates the right to public trial. See, e.g., Wise, 176 Wn.2d at 15; State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008), rev. denied, 176 Wn.2d 1031 (2013).

In Humes’ case, the parties exercised peremptory challenges in the jury’s presence but outside of their hearing and off the record. 5RP 78-79. The trial court did not first consider the Bone-Club factors before deciding the live peremptory challenge process should be shielded from public sight and hearing.

This Court must first determine whether a criminal defendant’s public trial right applies to the exercise of peremptory challenges. To decide whether a particular process must be open, this Court uses the “experience and logic” test formulated by the United States Supreme

Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II). Sublett, 176 Wn.2d at 73.

State v. Jones<sup>6</sup> is illuminating in this regard. In that case, during a trial recess, the court clerk randomly pulled names of four sitting jurors from a rotating cylinder to determine which would be alternates. The court announced the names of the four alternate jurors following closing arguments and excused these jurors. Jones, 175 Wn. App. at 95. The alternate juror drawing happened off the record and outside of the trial proceedings. Jones, 175 Wn. App. at 96.

Jones challenged this process on appeal. Following Sublett, the court concluded that the Washington experience of alternate juror selection is connected to voir dire. Alternate juror selection, the court held, must be open to the public. Jones, 175 Wn. App. at 101.

As for the logic prong, the court wrote, “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.” Jones, 175 Wn. App. at 102. The court found that two of the purposes for the public trial right – basic fairness to the defendant

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<sup>6</sup> State v. Jones 175 Wn. App. 87, 303 P.3d 1084, petition for review pending, No. 89321-7 (2013).

and reminding the trial court of the importance of its functions – were implicated. Id. The court held the secret random drawing raised important questions about “the overall fairness of the trial, and indicates that court personnel should be reminded of the importance of their duties.” Id. The court therefore concluded that under the experience and logic test, a closure occurred. Id.

Finally, the court held that because the trial court did not apply the Bone-Club factors, it violated Jones’ public trial right. Because such error is presumed prejudicial, a new trial was required. Id. at 1192-93.

Applying the Jones reasoning to Humes’ case dictates the same result. Under the “experience” prong, the court asks whether the process has historically been open to the press and general public. Sublett, 176 Wn.2d at 73. Washington’s experience of providing for and exercising peremptory challenges is one “connected to the voir dire process for jury selection.” See White v. Territory, 3 Wash. Terr. 397, 406, 19 P. 37 (1888) (“Our system provides for examination of persons called into the jury-box as to their qualifications to serve as such. The evidence is heard by the court, and the question of fact is decided by the court.”); State v. Rutten, 13 Wash. 203, 204, 43 P. 30 (1895) (discussing remedy if trial court wrongfully compelled accused to exhaust peremptory challenges on prospective jurors who should have been dismissed for cause); State v.

Rivera, 108 Wn. App. 645, 649-50, 32 P.3d 292 (2001). (“[P]eremptory challenge is a part of our common law heritage, and one that was already venerable in Blackstone's time.”), rev. denied, 146 Wn.2d 1006 (2002), overruled on other grounds, Sublett, 176 Wn.2d at 71-72.

The exercise of peremptory challenges, like “for cause” challenges, is a traditional component of voir dire to which public trial rights attach. Wise, 176 Wn.2d at 11; State v. Wilson, 174 Wn. App. 328, 342-343, 298 P.3d 148 (2013).

Under the logic prong, courts consider the values served by open court proceedings, and ask “whether public access plays a significant positive role in the functioning of the particular process in question.” Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise, 478 U.S. at 8). Open proceedings serve to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the defendant and the importance of their duties, to encourage witnesses to come forward, and to discourage perjury. Brightman, 155 Wn.2d at 514.

Just as did the secret random alternate juror selection in Jones, the secret peremptory challenge process used at Humes’ trial involved the first two purposes. The public lacked the assurance that Humes and the excused prospective jurors were treated fairly. As well, requiring the parties to voice their peremptory challenges in public at the time they are

made reminds them of the importance of the process and its effect on the panel chosen to sit in judgment.

Peremptory challenges permit the parties to strike prospective jurors “who are not challengeable for cause but in whom the parties may perceive bias or hostility—thereby eliminating extremes of partiality on both sides—and to assure the parties that the jury will decide on the basis of the evidence at trial and not otherwise.” Rivera, 108 Wn. App. at 649-50 (citing United States v. Annigoni, 96 F.3d 1132, 1137 (9th Cir. 1996), overruled on other grounds, Rivera v. Illinois, 556 U.S. 148, 161-62, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009)). Regardless whether there are objections that require making a record, a transparent peremptory challenge process guards against arbitrary use of challenges for nefarious reasons that are not necessarily race or gender-based, such as age or educational level.

The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. “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.” Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4,

104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

Under the “experience and logic” test, therefore, the secret ballot method of exercising peremptory jurors in Humes’ case implicated his right to a public trial and constituted an unlawful closure.

Humes anticipates the State may assert the proceeding was not closed because it occurred in the open courtroom. This reasoning ignores the purposes of the public trial right.

Though the courtroom itself remained open, the proceedings were not. Jurors were allowed to remain in the courtroom while the peremptory challenges were exercised, which demonstrates they were done in a way that those present would not be able to overhear. Indeed, the trial court noted, “the lawyers are going to start to exercise their peremptory challenges, and they do it outside of your hearing.” 5RP 78. A proceeding the public can see but not hear adds nothing to its fairness. If the participants can communicate in code, by whispering, or under the cone of silence, the “public” nature of the proceeding is rendered a farce.

Furthermore, a closure occurs even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) (“if a side-bar conference was used to

dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview.”), rev. granted, 176 Wn.2d 1031 (2013); State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (closure occurs when a juror is privately questioned in an inaccessible location); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure even though courtroom remained open to public). Members of the public are no more able to approach the bench and listen to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical effect is the same — the public is denied the opportunity to scrutinize events.

The State will also likely argue this Court should follow State v. Love,<sup>7</sup> which held exercising peremptory challenges outside the public view does not violate the right to public trial. This decision is poorly reasoned.

With respect to the experience prong, the Love court noted the absence of evidence that peremptory challenges were historically made in

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<sup>7</sup> 176 Wn. App. 911, 309 P.3d 1209, 1214, petition for review pending, No. 89619-4 (2013).

open court. Love, 309 P.3d at 1213. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, before Bone-Club, there were likely many common, but unconstitutional, practices that ended with issuance of that decision.

The Love court cites to one case, State v. Thomas,<sup>8</sup> as "strong evidence that peremptory challenges can be conducted in private." Love, 309 P.3d at 1213. Thomas rejected the argument that Kitsap County's use of secret peremptory challenges violated the defendant's right to a public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact Thomas challenged the practice suggests it was atypical even at the time. Until Love, Thomas had never been cited in a published Washington opinion for its holding regarding the secret exercise of peremptory challenges. Calling Thomas "strong evidence" is a misleading overstatement.

Regarding logic, the Love court could think of no way in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead a written record of the challenges sufficed. Love, 309

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<sup>8</sup> 16 Wn. App. 1, 553 P.2d 1357 (1976).

P.3d at 1214. The court failed, however, to mention or consider the increased risk of discrimination against protected classes of jurors resulting from non-disclosure.

The court also held the written record protected the public's interest in peremptory challenges. Love, 309 Wn. App. at 1214. It appears from the court's description the parties used a chart similar to the one filed in Humes' trial. Love, 309 Wn. App. at 1211 n.1.

But the later filing of a written document from which the source of peremptory challenges might be deciphered is not an adequate substitute for simultaneous public oversight. See State v. Sadler, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008) ("Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest."), rev. denied, 176 Wn.2d 1032 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73.

While members of the public could discern after the fact which prospective jurors had been removed and by whom (assuming they knew to look in the court file), the public could not tell at the time the challenges were made which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying race and gender as protected classes); see

also State v. Saintcalle, 178 Wn.2d 34, 41-42, 69, 85-88, 118-19, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

The mere opportunity to find out, sometime after the process, which side eliminated which jurors cannot satisfy the right to a public trial. Members of the public would have to know the chart documenting peremptory challenges had been filed *and* that it was subject to public viewing. Moreover, even if members of the public could recall which juror number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. This is not realistic.

The trial court did not consider the Bone-Club factors before conducting the private jury selection process at issue here. A trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The error violated Humes' public trial right, which requires automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14.

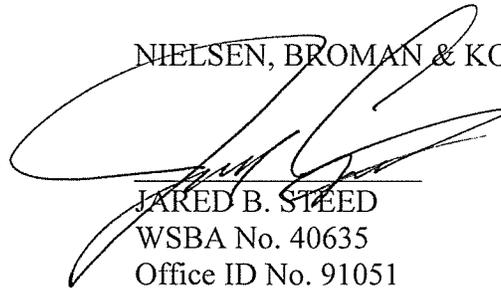
D. CONCLUSION

For the reasons discussed above, this Court should reverse Humes' conviction and remand for a new trial.

DATED this 2<sup>nd</sup> day of January, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 44366-0-II
	)	
BRIAN HUMES,	)	
	)	
Appellant.	)	

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**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 2<sup>ND</sup> DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRIAN HUMES  
7820 43<sup>RD</sup> ST CT NW  
GIG HARBOR, WA 98335

SIGNED IN SEATTLE WASHINGTON, THIS 2<sup>ND</sup> DAY OF JANUARY 2014.

x *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

## January 02, 2014 - 2:35 PM

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Court of Appeals Case Number: 44366-0

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