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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

TANER TARHAN,
Appellant.

AMICUS BRIEF OF
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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ORIGINAL

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A. INTRODUCTION

Juror questionnaires are routinely used in criminal trials. Questionnaires supplement oral voir dire. Questionnaires save time and allow the court and parties to ask more questions of prospective jurors. Questionnaires also identify issues requiring follow-up questioning. Questionnaires are plainly part of the jury selection process.

Jury selection is presumptively open.

Nevertheless, the State asks this Court to exempt questionnaires from the right to an open and public trial—at least while the trial is on-going—by arguing that the completion and review of questionnaires are not part of a trial. This Court recently rejected a similar argument in *State v. Irby,* 170 Wash.2d 874, 246 P.3d 796 (2011), when it held that the exercise of "for cause" challenges based only on questionnaires was a material part of jury selection. This Court should not adopt the State's suggested fiction.

A judge's decision to preclude public access to completed questionnaires is no different than the decision to remove spectators from the conduct of oral questioning. Questionnaires or parts of

questionnaires can sometimes be sealed. In some cases the privacy interests of jurors outweigh the right to a public trial. In some cases the parties believe privacy will lead to greater candor by prospective jurors. These are legitimate interests. However, a judge must hold a hearing *prior* to the decision to exempt the information from the public—no matter whether that information is written or spoken.

Making questionnaires available post-trial does not cure the error any more than releasing a post-trial transcript of "closed court" voir dire cures the error. It is also contrary to what jurors are told when they complete a "confidential" questionnaire—that their answers will never be revealed to the public. In addition, this Court has consistently rejected the post-hoc conduct of a *Bone-Club* hearing.

This Court should adopt a simple, consistent rule by holding that all parts of jury selection are presumptively open, but can be closed if the court *first* finds that the *Bone-Club* factors support closure. However, where the trial court fails to conduct that hearing before it makes a portion of jury selection inaccessible to the public, reversal is automatically required.

B. FACTS

WACDL relies on the statement of facts in the respective briefs of the parties, but seeks to emphasize the facts below.

According to the remarks of the trial court, the questionnaire was a combination of the two proposed versions. *See* CP 1319-32 (emails between trial court and parties regarding format and content of questionnaire). Both proposals told jurors their answers were part of jury selection. The defense proposed questionnaire states: "This questionnaire is designed to obtain from you information concerning your ability to be fair and impartial if you are selected as a juror in this case." CP 1311. The State's version states: "This questionnaire is designed to obtain information regarding your qualifications to sit as a juror in this case. By using a questionnaire, the jury selection process will be substantially shortened. Its purpose is to provide information to the court and the attorneys regarding your ability to sit as a fair and impartial juror in this case." CP 1372.

Both questionnaires state that the public will never be given access to this part of jury selection. The defense version states: "Your responses will be available only to the judge, the defendant

and the attorneys for both parties in this case, and will be destroyed if you are not selected. Even if you are selected your responses will be sealed in the permanent record and thus not available for public scrutiny." CP 1311. The State's version was shorter, but no different: "Your responses on the questionnaire will not be available to the public and will eliminate having to ask these questions in open court." CP 1372.

At no point were jurors told, in writing or orally, that the questionnaires might be made public after trial.

C. ARGUMENT

1. All Portions of Jury Selection Are Presumptively Open.

The openness of criminal trials has historically been recognized as an indispensable attribute of the Anglo-American legal system. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 569 (1980).

Voir dire is a part of trial and is presumptively open. *State v. Strode,* 167 Wn.2d 222, 217 P.3d 310 (2009) (rejecting State's argument that interviews of prospective jurors that took place in chambers occurred prior to the commencement of trial). *See also*

Presley v. Georgia, __ U.S. __, 130 S.Ct. 721 (2010) (rejecting Georgia's argument that the Sixth Amendment public trial guarantee did not extend to jury selection). Presumptively open proceedings can, of course, be closed. However, this Court has repeatedly and plainly articulated the guidelines that every trial court must follow before it closes a courtroom to the public, first in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and then in numerous subsequent cases. *See State v. Lomor,* 172 Wn.2d 85, 257 P.3d 624 (2011) (summarizing cases).

The State asks this Court to treat written questions and answers differently from oral questions and answers and to characterize questionnaires as something other than court records. The State attempts to justify this distinction two ways. First, the State contradicts what it told jurors in the questionnaires and now argues that questionnaires are not part of voir dire.

To the contrary, jury questionnaires perform a valuable function in the jury-selection process by expediting and assisting a court's voir dire. Colquitt, Joseph, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1 (2007). The purpose of

written questions is no different than oral questions: to gather information from the venire so that the court and the attorneys can adequately address challenges for cause and peremptory strikes. *See, e.g., Stevens v. State*, 770 N.E.2d 739, 751 (Ind. 2002) ("Jury questionnaires are a useful tool employed by courts to facilitate and expedite sound jury selection."); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 188 (Ohio 2002) (reasoning that "the purpose behind juror questionnaires is merely to expedite" voir dire, and therefore "questionnaires are part of the voir dire process.").

Because questionnaires are merely a part of the overall voir dire process, the use of questionnaires does not implicate a separate and distinct proceeding. Based on this reasoning, courts in other jurisdictions have applied the presumption of openness to juror questionnaires. *See, e.g., Stephens Media, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 221 P.3d 1240 (Nev. 2009) (holding that use of questionnaires is merely a part of the overall voir dire process, subject to public access and the same qualified limitations as applied to oral voir dire); *Forum Communications Co. v. Paulson,* 752 N.W.2d 177, 185 (N.D. 2008)

(concluding that a "written questionnaire serves as an alternative to oral disclosure of the same information in open court and is, therefore, synonymous with, and a part of, voir dire"); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 188-89 (Ohio 2002) (holding that "[c]onsistent with our reasoning, we note that virtually every court having occasion to address this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness" and concluding "that the First Amendment guarantees a presumptive right of access to juror questionnaires . . . ."); *Bellas v. Superior Court*, 102 Cal. Rptr. 2d 380, 387-88 (Cal. Ct. App. 2000) ("[A]part from the question of public access, . . . defendant and defense counsel had a separate and independent right both to know the content of the questionnaires and to preserve them in their confidential files."); *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994) ("True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source."); *Copley Press, Inc. v. San Diego County Superior Court*, 228 Cal. App. 3d 775 (1991)

(court shall provide public access to the questionnaire of an individual juror when the juror is called to the jury box for oral voir dire, but the public shall not have access to questionnaires of venire persons who are not called to the jury box since these questionnaires do not play any part in the voir dire); *In re Newsday, Inc. v. Goodman*, 159 A.D.2d 667, 669 (N.Y. App. Div. 1990) (noting "that the questionnaires completed by the petit jurors were an integral part of the voir dire proceeding" and observing that "the presumption of openness applies to all voir dire proceedings").

In *Irby*, this Court recently rejected the State's attempt to characterize the questionnaire process as separate and distinct from trial in the context of the constitutional right to be present. In that case, jurors were excused after the court and the parties reviewed and discussed questionnaires through the exchange of emails. Just as the State argues here, in *Irby* the State argued that the questionnaire process was not part of trial. This Court quickly and easily rejected that claimed distinction, noting that the questionnaire itself in *Irby* indicated that the questionnaire process was "part of the jury selection process," and "designed to elicit information with

respect to your qualifications to sit as a juror *in this case.*" *Irby*, 170 Wash.2d at 882 (emphasis in original). This Court should do the same in this case.

2. A Hearing Must Precede A Court Order Precluding Public Access to Either the Courtroom or to a Document.

This Court has not distinguished between public access to the courtroom and to documents in the court file. *Seattle Times Co. v. Ishikawa,* 97 Wash.2d 30, 36, 640 P.2d 716 (1982); *Dreiling v. Jain*, 151 Wash.2d 900, 908, 93 P.3d 861 (2004); *Tacoma News, Inc. v. Cayce*, 172 Wash.2d 58, 256 P.3d 1179 (2011) (excluding pretrial discovery documents that are never introduced in the case). In both cases, there is a presumption of openness which can be overcome in certain circumstances. In any case, a hearing must precede a closure or sealing order.

Questionnaires routinely seek personal information. The State argues that this is a reason to remove the portion of jury selection conducted with questionnaires from the right to an open and public trial. However, questions asked of jurors in court routinely seek personal information, too.

Once again, there is no reason to create a distinction between questions asked orally and those asked and answered in writing. Instead, this Court should adopt the same rule it has repeatedly affirmed for other portions of trial: a decision to limit public access must be preceded by a hearing where the court considers the *Bone-Club* factors. *See Strode, supra.*

This is easy. Questionnaires can include a paragraph that states in unambiguous language that they will become public records and, as an alternative to writing in sensitive personal data to a question, jurors can respond to the question by requesting a closed appearance before the judge with counsel and the accused present. The court can then evaluate that request.

For example, a questionnaire could state:

> Please answer the questions honestly and completely. This questionnaire is part of the public record of a public trial. If you feel that a question calls for sensitive personal information that should remain private, please say that in your answer. The court will consider your reasons for requesting such privacy.

The trial court should not offer a guarantee of protection from public disclosure of information contained in juror questionnaires. A blanket promise of protection from public disclosure of

information on jury questionnaires is not legally effectual where public access is mandated under the constitution. It is misleading in cases, like this one, where the State suggests that any violation of the right to a public hearing can be cured by making the questionnaire public after trial. *See, e.g.*, *Copley Press, Inc. v. Superior Court*, 278 Cal. Rptr. 443, 450 (Cal. Ct. App. 1991) ("[T]he venirepersons shall be expressly informed the questionnaires are public records. . . . [T]he superior court shall provide access to the questionnaires of individual jurors when the individual juror is called to the jury box for oral voir dire. Public access shall not be provided to questionnaires filled out by venire persons who are not called to the jury box.").

Questionnaires, like oral voir dire, sometimes seek highly personal information. WACDL recognizes that the reticence of private citizens to serve on juries is exacerbated by the need to disclose, if not in questionnaires then during the oral questioning phase of jury selection, intimate details of their lives. Not infrequently public service compels jurors to recall their darkest

moments, which they may have struggled for years to forget, and then be required to recount them in public.

The otherwise understandable desire to preserve juror privacy conflicts with the constitutional mandate requiring public access to most information about the private lives of potential jurors. This conflict is exacerbated by the apparently common practice of accompanying questionnaires with words of comfort promising eternal confidentiality for the completed questionnaires, as was done in this case. However, no comprehensive offer of protection from public disclosure of information communicated on juror questionnaires is legally effectual where public access is mandated by the federal and state constitutions.

It is not good policy to lie to jurors.

Unsealing questionnaires after trial (and presumably without notice to jurors) conflicts with the promises made when jurors reveal private matters. It is much better to discuss with jurors the competing rights of privacy and public access to all parts of a trial and for the court to then rule on whether the requisite factors supporting closure exist before jurors are asked to give answers.

This is exactly why this Court has repeatedly held that a *Bone-Club* hearing must precede an order to close the proceedings. It is also why this Court has repeatedly held that an after-the-fact hearing does not suffice. *Bone-Club,* 128 Wn.2d at 261; *Strode,* 167 Wn.2d at 227. Likewise, a post-trial order unsealing questionnaires does not cure the prejudice any more than releasing a post-trial transcript of private, oral questioning cures the error. This Court has never so held.

The values associated with a public trial are not safeguarded by releasing information only after a trial is over. However, that is exactly the position adopted by the court below and urged by the State now. This Court should treat questionnaires the same as any other part of trial which is presumptively open. If that part of trial is improperly closed, then reversal is automatic. *Strode,* 167 Wn.2d at 231. The error does not become harmless by the later release of information. Otherwise, entire trials could be conducted in secret, as long as the results were made public at some future date.

Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials and public access

to criminal court files. This Court should include juror questionnaires as part of the public trial.

D. CONCLUSION

The use of "confidential" juror questionnaires is no different from the conduct of voir dire in a closed courtroom. Just like oral questioning, the state and federal constitutions mandate that the questionnaire process is presumptively open. If a court contemplates closure, then a hearing must take place before that closure. If the court closes the proceeding without conducting that hearing, then a structural error has occurred. Reversal is required.

Respectfully submitted this 10th day of January, 2012.

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To: Jeffrey Ellis; Austell, Randi; Steven Witchley
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Subject: No. 85737-7, St. v. Tarhan, Mtn to File Amicus

Attached for filing are a motion for permission to file an amicus brief and the amicus brief that we seek to file in this case. I have served counsel for both parties with the motion and the amicus brief by simultaneously sending this email and its two attachments to DPA Austell and Mr. Witchley.

Please let me know if I can provide additional information.

--
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