

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 19, 2013, 3:10 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

NO. 86072-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH NJONGE,

Respondent.

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

The Honorable Laura Middaugh, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT JOSEPH NJONGE

CASEY GRANNIS
Attorney for Respondent

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

ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT VIOLATED NJONGE'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL WHEN IT CLOSED OFF A PORTION OF THE JURY SELECTION PROCESS FROM THE PUBLIC.....	6
a. <u>The Courtroom Was Closed To The Public During The First Morning Of The Jury Selection Process Without Consideration Of The Requisite Factors To Justify The Closure.</u>	7
b. <u>The Right To A Public Trial Attaches To The Jury Selection Process, Including Hardship Questioning.</u>	9
c. <u>The Remedy Is A New Trial</u>	20
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Orange,
152 Wn.2d 795, 100 P.3d 291 (2004)..... 6, 8, 9, 18

In re Pers. Restraint of Yates,
177 Wn.2d 1, 296 P.3d 872 (2013)..... 12

State v. Bone-Club,
128 Wn.2d 254, 906 P.2d 325 (1995)..... 6, 8, 11, 19

State v. Brightman,
155 Wn.2d 506, 122 P.3d 150 (2005)..... 7

State v. Burch,
65 Wn. App. 828, 830 P.2d 357 (1992)..... 13

State v. Easterling,
157 Wn.2d 167, 137 P.3d 825 (2006)..... 6

State v. Irby,
170 Wn.2d 874, 246 P.3d 796 (2011)..... 10

State v. Njonge,
161 Wn. App. 568, 255 P.3d 753 (2011)..... 5-7, 9

State v. Rice,
120 Wn.2d 549, 844 P.2d 416 (1993)..... 13, 14

State v. Strode,
167 Wn.2d 222, 217 P.3d 310 (2009)..... 7

State v. Sublett,
176 Wn.2d 58, 292 P.3d 715 (2012)..... 9

State v. Wilson,
___ Wn. App. ___, 298 P.3d 148 (2013)..... 16

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Wise,
176 Wn.2d 1, 288 P.3d 1113 (2012)..... 6, 8-11, 19, 20

FEDERAL CASES

Batson v. Kentucky,
476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)..... 13

Gomez v. United States,
490 U.S. 858, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)..... 15, 17

Presley v. Georgia
558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010)..... 9

Press-Enterprise Co. v. Superior Court of California, Riverside County,
464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)..... 9, 17

Snyder v. Louisiana,
552 U.S. 472, 128 S. Ct. 1203 (2008)..... 13

United States v. Bordallo,
857 F.2d 519 (9th Cir. 1988) 14, 20

United States v. Williams,
927 F.2d 95 (2d Cir. 1991) 14

Waller v. Georgia,
467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)..... 6, 13

RULES, STATUTES AND OTHER AUTHORITIES

CrR 6.4(b) 16, 17

GR 28(b)(1)..... 14

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

RAP 13.7(b)	20
RCW 2.36.100	14
U.S. Const. Amend. I.....	6
U.S. Const. Amend. VI.....	6
Wash. Const. art. 1, § 10.....	6
Wash. Const. art. I, § 22	6
WPIC 1.01	15

A. ISSUE

Whether the constitutional right to a public trial was violated because observers were barred from a portion of jury selection due to purported space limitations?

B. STATEMENT OF THE CASE

The State charged Joseph Njonge with premeditated first degree murder. CP 1. The case garnered media attention. 3RP 5, 91-93, 112. On June 2, 2009, the prosecutor asked the court during pre-trial motions if a family member could be present during voir dire. 1RP 45-46. The judge responded she was not going to allow it in part because "we are in very cramped quarters for jury selection, and I think about the only place for visitors to sit is going to be in the little anteroom out there, and I will tell you, with what we are going to do about trying to get enough just to do this in one meeting." 1RP 46.

The judge later described how voir dire would be conducted:

Here is how I handle the jury. We send the questionnaire down and they get to review the questionnaire, obviously, and the jury bios in advance. A lot of this is also for your benefit, Mr. Njonge, because you have never been involved in a trial before; and it's important for you to understand what's going on, okay.

So then we call the entire jury panel up. *We have received permission to get more than the standard 50. I think we are getting 65. That necessitates a rearrangement of our courtroom,* and my Bailiff put out a map for you

guys as to how we are going to get this number in. The first two benches must remain clear at all times.

So, we will have jurors seated in front of the jury box. The court reporter is going to move over here; we have a few jurors here. It's kind of a little awkward, but it's more of a jury selection in the round process that way.

1RP 90-91 (emphasis added).

At the close of day, the judge told courtroom observers:

Just let me say for the people who are observing. You are certainly welcome to observe. Tomorrow when we have the jury selection, there will not be room for all of you. *What we are going to do to allow people to observe is check with the fire marshal -- we have a new fire marshal in Kent -- and make sure that we can keep those first swinging doors open. And if we can do that, then we will allow some people to observe if they wish to do so during jury selection by sitting in that kind of entry hall, if we can do that.*

But, otherwise, as you can see, we are already putting chairs up here to accommodate the jury. We may be able to have chairs out there, we may not. We may be able to have the doors open without the chairs. We are going to find out. The chance of all you being able to be here and observe are slim to none during the jury selection process.

1RP 105-06 (emphasis added).

Jury selection started the following day, June 3. 2RP. The court and counsel addressed the questionnaires filled out by prospective jurors, which included questions about whether they had heard about Njonge's case and whether they could fairly try his case. 1RP 85-86; 2RP 2-3, 7, 18. Six prospective jurors expressed an inability to be fair while "a whole

stack of people" had heard about Njonge's case. 2RP 2-3. After the judge and counsel addressed who would be questioned individually, the prospective jurors were brought into the courtroom. 2RP 2-3, 8. The judge talked about how voir dire would proceed, telling them the purpose of voir dire was to make sure that Njonge's case was tried before an impartial jury. 2RP 8-13.

The prospective jurors were then sworn in. 2RP 13. The judge talked some more about the selection process. 2RP 14-18. The prosecutor introduced herself and the detective sitting next to her. 2RP 18. Defense counsel introduced himself. 2RP 18-19. The judge then asked Njonge to stand up to make sure everyone could see him because, as she explained, "one of the questions later on is if anybody knows this gentleman." 2RP 19. The judge then read the charge against Njonge to the prospective jurors: premeditated murder committed against Jane Britt. 2RP 19.

The judge next talked about the burden of proof and the presumption of innocence. 2RP 20-21. The judge then told the prospective jurors how long the trial would last. 2RP 21-22. The judge asked if anyone felt serving on a trial of that length would cause a hardship. 2RP 22. A number of prospective jurors raised their cards in response. 2RP 22-23.

The court questioned jurors on hardship during the morning session. 2RP 23-44. Near the outset of questioning, juror number 7 asked if they could talk about personal reasons. 2RP 25. The judge responded he could talk about anything that he thought was going to be a hardship and that he could talk about it outside of everyone's presence if he wanted to. 2RP 25. Juror 7 said "It is personal for me. It goes deeper than just work. I lived in Indonesia for a couple of years and that society in dealing with persecution and the suppression of women and this whole situation, this whole case is going to be very disturbing for me." 2RP 25. The judge said she was talking about hardship. 2RP 25. Juror 7 said he was just asking and said, "If I could just express that." 2RP 25. Juror 7 then claimed hardship based on "work and personal." 2RP 25.

Some prospective jurors were excused from the panel for hardship. 2RP 44-53. Some were not. 2RP 44-53. The prosecutor asked about juror 7: "Your honor, about No. 7, I don't know if we need to, he talked about some problems about hearing a case like this. He is the one who referred about Muslim." 2RP 48-49. The judge responded, "I didn't quite get that. He may get excused for cause but not for hardship. So, we can add him to our individual list if you would like." 2RP 49. Defense counsel said that would be good. 2RP 49.

At the start of the afternoon session, the following exchange occurred:

[Prosecutor]: Some family members who are not witnesses stuck around this morning, hoping there might be some seats later, and your bailiff informed them at lunch since some people were excused there were some. So I don't know if the Court has any problem with that. They are not witnesses. We tried to figure out a spot that would be in a row that basically has no jurors. So that second row over there only has Juror 30.

The Court: Actually, that seemed to be a better idea. *We checked with fire department. They wouldn't let us leave the doors open for visitors to come in.* Let's move No. 30 over next to 34, and then we can have visitors sitting in the second row there.

2RP 54-55 (emphasis added).

Jury selection proceeded until the end of the day. 2RP 55-145. Following up on what was said earlier, juror 7 was further questioned and then excused for cause. 2RP 56-66.

A jury found Njonge guilty of the lesser offense of second degree murder. CP 65. On appeal, Njonge argued the trial court violated his constitutional right to a public trial during the jury selection process. Amended Brief of Appellant at 7-23. The Court of Appeals agreed and reversed the conviction. State v. Njonge, 161 Wn. App. 568, 570, 255 P.3d 753 (2011).

C. ARGUMENT

1. THE TRIAL COURT VIOLATED NJONGE'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL WHEN IT CLOSED OFF A PORTION OF THE JURY SELECTION PROCESS FROM THE PUBLIC.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012).

The Court of Appeals reversed the conviction because the trial court closed the courtroom to the public during a portion of jury voir dire. Njonge, 161 Wn. App. at 570, 578-80. This Court should affirm because Njonge's right to a public right was triggered when the jury selection process began in a closed courtroom without considering the requisite factors under State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

a. The Courtroom Was Closed To The Public During The First Morning Of The Jury Selection Process Without Consideration Of The Requisite Factors To Justify The Closure.

The trial judge's announcements about who would be allowed to observe voir dire and under what circumstances amounted to a closure of the courtroom. The record shows members of the public were only allowed to observe the first portion of voir dire from the anteroom if the doors could remain open as per the judge's directive, the door separating the courtroom and the anteroom in fact remained closed, and therefore no member of the public was permitted in the courtroom during that time period. 1RP 46, 105-06; 2RP 55. The Court of Appeals correctly determined the combined effect of the trial court's statements and the closed courtroom doors resulted in a full closure for the morning session of voir dire. Njonge, 161 Wn. App. at 578-79.

The Court of Appeals also correctly recognized a courtroom closure can occur in the absence of an explicit court order directing the closure. Njonge, 161 Wn. App. at 575-76; see, e.g., State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009) ("The trial judge's decision to allow this questioning of prospective jurors in chambers was a courtroom closure and a denial of the right to a public trial."); State v. Brightman, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) (trial judge closed courtroom in

announcing "In terms of observers and witnesses, we can't have any observers while we are selecting the jury, so if you would tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that.").

Before a trial judge closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12.¹ There is no indication the court here considered the Bone-Club factors before conducting the private jury selection process at issue here. Appellate courts do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

Even so, lack of courtroom space is not a compelling interest capable of overriding the right to a public trial, the extent of the closure was not reasonably tailored, and the judge did not consider every

¹ Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (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 258-60; Wise, 176 Wn.2d at 10.

reasonable alternative. Orange, 152 Wn.2d at 809-11; Presley v. Georgia 558 U.S. 209, 215-16, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010) (right to public trial violated where the trial court closed voir dire due to space limitations; court did not consider alternative of reserving a row in the courtroom for members of the public or dividing the jury venire panel to reduce courtroom congestion). The trial court in Orange at least gave those present an opportunity to object. Orange, 152 Wn.2d at 811. That did not even happen in Njonge's case.

b. The Right To A Public Trial Attaches To The Jury Selection Process, Including Hardship Questioning.

The right to a public trial encompasses jury selection. Wise, 176 Wn.2d at 11. Historical evidence reveals, "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Here, the trial judge conducted a portion of the jury selection process in private. Njonge, 161 Wn. App. at 578-79.

The State claims the right to public trial does not attach under the "experience and logic" test announced in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). In Wise, however, this Court recognized it was

unnecessary to engage in a complete "experience and logic test" because "it is well settled that the right to a public trial also extends to jury selection" and the private questioning of individual jurors was part of jury selection. Wise, 176 Wn.2d at 12 n.4 (quoting Brightman, 155 Wn.2d at 514-15).

The jury selection process begins when jurors are sworn and complete their questionnaires. State v. Irby, 170 Wn.2d 874, 883-84, 246 P.3d 796 (2011). In Njonge's case, jurors completed their questionnaires, entered the courtroom, and were sworn in. 2RP 2-3, 7, 13. At that point, the jury selection process began. Njonge was displayed to the jurors for the purpose of determining whether anyone knew him. 2RP 19. Jurors were read the charge against Njonge. 2RP 19. Jurors were then questioned on hardship, during the course of which one of the jurors expressed a case-specific reason why he did not want to serve on this particular trial. 2RP 25.

All of this took place in a courtroom closed to the public. There is no need to apply the experience and logic test because the right to a public trial attaches to the jury selection process and a portion of the jury selection process in Njonge's case took place in a closed courtroom.

Contrary to the State's suggestion, hardship questioning and for-cause questioning are not hermetically sealed phases of the jury selection

process. Questions on whether a prospective juror can try a specific case impartially arise during hardship questioning. Often times what is said during hardship questioning is used as the basis for challenging a juror for cause at a later time or exercising a peremptory challenge.

Njonge's case illustrates this fact. During hardship questioning, juror 7 voiced a personal reason for not wanting to sit on the jury that tried Njonge's case based on past experience with women being badly treated, unmistakably raising a red flag that he was not a juror that could fairly decide Njonge's case. 2RP 25. That is precisely the kind of event that implicates the core values served by the right to public trial. See Wise, 176 Wn.2d at 5-6 (open and public judicial process helps assure fair trials); Bone-Club, 128 Wn.2d at 259 ("[t]he 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.").

The Court recently held in Yates that the sealing of juror questionnaires did not violate the right to public trial because "though the questionnaires served as a 'framework' for oral voir dire, the oral portion of voir dire provided the basis for any for-cause challenges, and that portion of voir dire was open to the public." In re Pers. Restraint of Yates,

177 Wn.2d 1, 29, 296 P.3d 872 (2013). There was no public trial violation because Yates failed to show "any for-cause challenge was based on the jury questionnaires, as opposed to oral voir dire, which was open to the public." Yates, 177 Wn.2d at 29-30.

Njonge's case poses the opposite dynamic. The thing that was lacking in Yates is present in Njonge's case: a for-cause challenge based on something that happened during oral voir dire in a closed courtroom. The for-cause challenge to juror 7 stemmed from what transpired during hardship questioning, which was closed to the public. 2RP 48-49, 56-66.

The hardship and for-cause phases of jury selection are fluid and often intermingle. The State's rigidly drawn distinction between hardship and other phases of the jury selection process does not comport with reality. Hardship questioning that takes in place in court in front of a judge after prospective jurors have been sworn is linked to other aspects of the jury selection process for the particular case at issue.

For example, answers given in response to hardship queries may later form the basis to peremptorily strike a juror, giving rise to Batson² issues. Snyder v. Louisiana, 552 U.S. 472, 478-86, 128 S. Ct. 1203 (2008)

² Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (prosecutor's use of a peremptory challenge based on race violates a defendant's right to equal protection); see also State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992) (rule applied to gender).

(prosecutor's reliance on hardship as race-neutral reason for exercising peremptory strike on prospective black juror insufficient to show non-discriminatory intent).³ But under the State's proposed rule, the defendant would have no right for the public to attend that portion of the jury selection process informing a later Batson ruling. That outcome makes little sense, as it would deprive the public of important information in observing how the trial court handles the Batson challenge. The public trial right "ensure[s] that the judge and prosecutor carry out their duties responsibly." Waller, 467 U.S. at 46. The presence of the public in an open courtroom during hardship questioning furthers that goal.

In its supplemental petition for review, the State relies heavily on State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993) to argue the closed portion of the jury selection process at issue here did not trigger the right to a public trial. Under RCW 2.36.100, the judge may delegate the task of excusing jurors to the clerk of the court.⁴ Rice, 120 Wn.2d at 561.

Whether the right to a public trial was triggered and violated was not at issue in Rice. To the extent it is relevant, Rice favors Njonge's argument. In Rice, the clerk excused jurors over the telephone, before

³ The United States Supreme Court treated hardship questioning as part of voir dire. Snyder, 552 U.S. at 475, 479-80, 483-84.

⁴ GR 28(b)(1) is in accord: "The judges of a court may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service."

they were sworn to try any particular case, before they were introduced to any particular case, and before they were brought into the courtroom to be questioned on any particular case. Id. at 560.

In contrast, the prospective jurors in Njonge's case had already filled out a case specific questionnaire, had been sworn in on Njonge's case, and were questioned in the courtroom. Whatever line exists between administrative excusals carried out by a clerk and the voir dire process, Njonge's case falls firmly on the side of voir dire. See United States v. Williams, 927 F.2d 95, 96 (2d Cir. 1991) ("Voir dire is conducted by the judge in the courtroom, not by the clerk in the central jury room."); United States v. Bordallo, 857 F.2d 519, 522 (9th Cir. 1988) ("At the stage of voir dire, the prospective jurors are questioned about their knowledge of a specific case; the jurors know what case they will hear if selected and know which parties are involved.").

The public has no expectation that it will be able to observe administrative excusals that take place before prospective jurors reach the courtroom. But once a prospective panel of jurors is sworn in on a particular case and questioned about their ability to try that particular case in the courtroom, the expectation exists that the ensuing process of selection will be observable by the public.

"Far from an administrative empanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case." Gomez v. United States, 490 U.S. 858, 874, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989). Prospective jurors were introduced to the substantive factual and legal issues in Njonge's case when the court brought them brought into the courtroom after filling out a case-specific questionnaire, and in accordance with WPIC 1.01,⁵ read the charge against Njonge, gave them a primer on basic criminal law principles such as the presumption of innocence, and displayed Njonge to their gaze because one of the questions would be if anyone knew him. 2RP 13-21.

CrR 6.4(b) makes no distinction between hardship questioning and the *voir dire* process in general. Under CrR 6.4(b), "[t]he judge shall initiate the *voir dire* examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case." That is what happened in Nonges's case. The initiation of *voir dire* examination occurred in a completely closed courtroom and continued throughout the entire morning session.

⁵ WPIC 1.01 contains the script to be read "Before Voir Dire of Prospective Jurors." Voir dire begins following the oath, which consists of an affirmative answer to the question "Do each of you solemnly swear or affirm that you will truthfully answer questions about your qualifications to act as jurors in this case." WPIC 1.01.

In State v. Wilson, Division Two recently held two "administrative" juror excusals occurred before the right to a public trial was triggered. State v. Wilson, __ Wn. App. __, 298 P.3d 148, 150 (2013). In that case, the bailiff excused two jurors for illness-related reasons before voir dire began in the courtroom. Wilson, 298 P.3d at 150. The difference in Njonge's case is obvious: the closure occurred while voir dire took place in the courtroom.

The State argues "[h]ardship excusals often are performed by court staff or clerks before the prospective jurors ever reach the courtroom, in accordance with applicable statutes and court rules." Supp. Petition for Review at 7. Yet the State has cited no case, and undersigned counsel has found none, where the trial judge delegated his authority to the clerk to excuse a juror *after* the voir dire process began; i.e., where, as here, a panel of jurors filled out a case-specific questionnaire, were brought into the courtroom to be questioned about a specific case, and were administered the oath.

Public access to voir dire, including introduction of the case to prospective jurors and hardship questioning, serves the values underlying the public trial right. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives

assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Press-Enterprise Co., 464 U.S. at 508.

Under CrR 6.4(b), the "voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges." As part of voir dire, the trial court "must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality." Gomez, 490 U.S. at 875. The defendant's supporters, as well as other members of the public, are likewise entitled to scrutinize the spoken words as well as the gestures and attitudes of those questioned during the hardship phase of voir dire.

Responses to hardship questioning are capable of revealing a host of useful information that may later form the basis to exercise for-cause or peremptory challenges. If a prospective juror rolls his eyes or slumps down in his chair upon learning that the trial will take a certain amount of time, the defendant may decide he does not want that juror deciding his fate. A defendant's supporters may notice subtle cues such as these while the attention of defense counsel and the defendant is focused elsewhere, and inform the defendant during a break in the action about what was

observed so that and intelligent choice can be made about what to do with such a juror. See Orange, 152 Wn.2d at 812 (right to public trial protects ability "of the defendant's family to contribute their knowledge or insight to the jury selection.").

A prospective juror who frets about missed work income or worries about the need to take care of a young child or aged parent raises legitimate questions about whether that particular juror, from the perspective of the defendant, is someone that should be responsible for his fate. One of the qualifications to serve is that a juror will not be so distracted by such concerns that he or she will not be able to attentively concentrate on the task at hand; hearing and assimilating the evidence day in and day out and participating in the deliberation process without regard to personal time constraints. The defendant and the public may have legitimate concerns about whether such a juror could fairly try the case or would be more willing to cut short the proper deliberative process simply to be done with the trial and get back to normal life.

It may also appear that a juror is trying to get out of jury service through the pretext of claimed hardship. Having the process open to the public discourages that type of behavior. See Bone-Club, 128 Wn.2d at 259 ("[T]he presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their

functions."). At the same time, a prospective juror trying to get out of serving due to hardship may call into question whether that juror has a true interest in fairly trying the case, an issue in which a defendant's supporters may have useful input.

Conversely, a juror may want to stay on the jury despite suffering from potential distraction or inattentiveness due to the effects of continuing to work outside trial hours or tending to some other responsibility. Public scrutiny helps assure the trial court will appropriately exercise discretion on the matter. See Wise, 176 Wn.2d at 6 (the public nature of trials is a check on the judicial system, providing for accountability and transparency).

Having the hardship portion of jury selection open to the public guards against arbitrary or discriminatory removal of prospective jurors. A judge could consciously or unconsciously exercise discretion in removing jurors for hardship without requisite justification. See Bordallo, 857 F.2d at 523 ("circumstances could arise in which a judge, either consciously or inadvertently, excused a disproportionate percentage of a juror population, such as women or minorities . . . or otherwise adversely affected the neutrality of the juror pool."). The values served by the public trial right are violated when hardship questioning does not occur in open court.

c. The Remedy Is A New Trial.

The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Njonge's conviction must be reversed due to the public trial violation. Id. at 19.

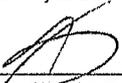
D. CONCLUSION

Njonge respectfully requests that this Court affirm the Court of Appeals.⁶

DATED THIS 19th day of June, 2013. _____

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Respondent

⁶ Njonge also argued in the Court of Appeals that a public trial violation occurred because the court barred the press from observing the entire voir dire. Amended Brief of Appellant at 23-25. The Court of Appeals did not reach that issue. See RAP 13.7(b) ("If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.").

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Petitioner,)	
)	
v.)	NO. 86072-6
)	
JOSEPH NJONGE,)	
)	
Respondent.)	

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 19TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF RESPONDENT JOSEPH NJONGE TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH NJOONGE
 DOC NO. 332783
 CLALLAM BAY CORRECTIONS CENTER
 1830 EAGLE CREST WAY
 CLALLAM BAY, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF JUNE, 2013.

X Patrick Mayovsky

OFFICE RECEPTIONIST, CLERK

To: Patrick Mayovsky
Cc: Ly, Bora; donna.wise@kingcounty.gov
Subject: RE: State of Washington v. Joseph Njonge, No. 86072-6

Rec'd 6-19-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Patrick Mayovsky [<mailto:MayovskyP@nwattorney.net>]
Sent: Wednesday, June 19, 2013 3:05 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Ly, Bora; donna.wise@kingcounty.gov
Subject: State of Washington v. Joseph Njonge, No. 86072-6

Attached for filing today is a supplemental brief of respondent Joseph Njonge for the case referenced below.

State v. Joseph Njonge

No. 86072-6

Motion to Extend Time to File Supplemental Brief

Filed By:
Casey Grannis
206.623.2373
WSBA No. 37301
grannisc@nwattorney.net