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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

vs.

Kenneth Slert,

Respondent.

Lewis County Superior Court Cause No. 04-1-00043-7
The Honorable Judge James Lawler

Respondent's Supplemental Brief

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STATEMENT OF ISSUES

1. Should the Supreme Court refuse to issue an advisory opinion in the absence of a justiciable controversy on the open trials issue?

2. Did the trial judge violate the constitutional requirement that criminal trials be open and public by reviewing jury questionnaires and dismissing four prospective jurors in chambers prior to the start of *voir dire*?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. PRIOR PROCEEDINGS

In 2004, Kenneth Slert was charged with second-degree murder. CP 1-3. After two successful appeals, Mr. Slert was tried a third time in 2010. CP 25-37, 48-66. The jury convicted, and Mr. Slert appealed. CP 13.

The Court of Appeals reversed his conviction on two related grounds. The court held (1) that Mr. Slert's right to be present had been violated by the trial court's *in camera* dismissal of four prospective jurors, and (2) that Mr. Slert's right to a public trial had been violated by the *in camera* proceeding. *State v. Slert*, 169 Wn. App. 766, 769, 774-75, 282

P.3d 101 (2012) *review granted in part*, 176 Wn.2d 1031, 299 P.3d 20 (2013).

The state petitioned for review, asking the Supreme Court to review both the public trial issue and the right to be present issue. *See* Petition for Review, pp. 5-17.

The Supreme Court granted review “only on the public trial issue.” Order (April 8, 2013).

II. STATEMENT OF FACTS

In October of 2000, Kenneth Slert met John Benson while both were hunting on national forest land. RP 491-492, 548. They became intoxicated together, argued, and fought. RP 153-154, 405, 492, 548-550, 616, 764-769. Mr. Slert shot and killed Benson. RP 492, 517.

Mr. Slert contacted a forest ranger for help. RP 176-178. He told the ranger that he’d acted in self defense, that he’d been afraid the other man would choke him to death, and that he’d feared for his life. RP 179, 187, 215, 217.

Over the course of the next four years, Mr. Slert consistently maintained that he’d acted in self defense. He had a poor recollection of the details of the incident, and repeatedly engaged Lewis County Sheriff’s Detective Kurt Wetzold in conversation about the shooting. Wetzold

made no record of these conversations. RP (11/8/09) 89-102, 175-222; RP (1/27/10) 483-521; RP (1/28/10) 528-611.

In 2004, Mr. Slert was charged. CP 1-3. At the start of his 2010 trial, prospective jurors were summoned to court and completed a questionnaire to determine their fitness to serve. CP 359-361.

The trial judge excused four prospective jurors during a pretrial conference held in chambers. CP 194-197. The court disclosed this just prior to the start of *voir dire*:

THE COURT: There are a couple other things. We have had the questionnaires that have been filled out. I have already, based on the answers, after consultation with counsel, excused jurors number 19, 36, and 49 from panel two which is our primary panel and I've excused juror number 15 from panel one, the alternate panel that we'll be using today.
RP 5.

Mr. Slert was not present for this pretrial conference in chambers, and the record does not show that his attorney consulted with him before the four prospective jurors were dismissed. RP 5.

The Court of Appeals reversed this conviction on two grounds: (1) that Mr. Slert's right to be present had been violated by the trial court's *in camera* dismissal of the four prospective jurors, and (2) that Mr. Slert's right to a public trial had been violated by the *in camera* proceeding. *Slert*, 169 Wn. App. at 769, 774-75.

ARGUMENT

I. IN THE ABSENCE OF A JUSTICIABLE CONTROVERSY, THE SUPREME COURT SHOULD NOT ISSUE AN ADVISORY OPINION IN THIS CASE.

A. Standard of Review

The issue of appellate court jurisdiction may be raised at any time.

RAP 2.5(a). Jurisdictional issues are reviewed *de novo*. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011).

B. The public trial issue does not present a justiciable controversy in light of the Court of Appeals decision reversing Mr. Slert's conviction for a violation of his constitutional right to be present.

The Supreme Court's jurisdiction over an issue "cannot be invoked unless a justiciable controversy exists." *State v. Eggleston*, 164 Wn.2d 61, 76, 187 P.3d 233 (2008). A justiciable controversy is:

- (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137

(1973) (quoted with approval in *Eggleston*, 164 Wn.2d at 76-77). The

Supreme Court does not issue advisory opinions. *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994).

This proceeding lacks a justiciable controversy.

The Court of Appeals reversed Mr. Slert's conviction for two reasons: the violation of the public trial right, and the violation of his right to be present at all critical stages. *Slert*, 169 Wn. App. at 769, 774-75.

The Supreme Court specifically limited its grant of review, ordering that review was accepted "only on the public trial issue." Order (April 8, 2013).

Any disagreement over the public trial issue is "dormant... or moot." *Diversified*, 82 Wn.2d at 815. Mr. Slert will have a new trial, whether the Supreme Court affirms or reverses the Court of Appeals' decision on the public trial issue. His interest in the resolution of this issue is therefore "theoretical, abstract, [and] academic" rather than "direct and substantial." *Id.*

Furthermore, any resolution of the public trial issue will not be "final and conclusive" in Mr. Slert's case; regardless of the outcome of the Supreme Court proceeding, he will stand trial again. *Id.*

Any decision in this case would be advisory. The Supreme Court should hold that review was improvidently granted and affirm the Court of

Appeals. See, e.g., *Pappas v. Hershberger*, 85 Wn.2d 152, 154, 530 P.2d 642 (1975).

II. THE TRIAL COURT VIOLATED MR. SLERT'S AND THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, No. 85367-3, 291 P.3d 876 (2012). Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, 161 Wn. App. 568, 573, 255 P.3d 753 (2011).

B. Jury selection in a criminal trial must be open and public.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. art. I, §§ 10 and 22; *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). The public trial guarantee belongs both to the accused person and to the public (including the press).¹ The individual

¹ The accused person's public trial rights stem from the Sixth Amendment and art. I, § 22. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The public's open trial rights are protected by the First Amendment and art. I, § 10. *Id.*, at 179-80.

and the public right “serve complementary and interdependent functions in assuring the fairness of [the] judicial system.” *Bone-Club*, 128 Wn.2d at 259,

Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, 128 Wn.2d at 258-259. An accused person “cannot waive the public's right to open proceedings,”² and may win reversal of a conviction based on a violation of the public’s right. *Easterling*, 157 Wn.2d at 179-80.³

The public trial right attaches to a particular proceeding when “experience and logic” show that the core values protected by the right are implicated. *State v. Sublett*, 176 Wn.2d 58, 72-78, 292 P.3d 715 (2012). A reviewing court first asks “whether the place and process have historically been open to the press and general public,” and second, “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.*, at 73 (quoting *Press-*

² *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009) (plurality); *see also Presley*, 558 U.S. at 214 (“The public has a right to be present whether or not any party has asserted the right.”)

³ *But see State v. Wise*, 176 Wn.2d 1, 16 n. 9, 288 P.3d 1113 (2012) (“This court has not resolved whether a defendant may assert the public's right to an open trial.”)

Enterprise Co. v. Superior Court, 478 U.S. 1, 7-8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (Press-Enterprise I)). If the place and process have historically been open and if public access plays a significant positive role, the public trial right attaches and closure is improper unless justified under *Bone-Club*.

The state and federal supreme courts have repeatedly affirmed that the public trial right attaches to jury selection. *Strode*, 167 Wn.2d 222; *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005); *Presley*, 558 U.S. 209. A reviewing court need not apply the “experience and logic” test to jury selection, because it is well-settled that the public trial right applies. *Wise*, 176 Wn.2d at 12 n. 4; *see also In re Morris*, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Where a portion of jury selection is unnecessarily closed, reversal is automatic. *Strode*, 167 Wn.2d at 231 (plurality); *Presley*, 558 U.S. 209.

C. The dismissal of jurors during an *in camera* proceeding closed to the public violated the requirement that criminal trials be open and public.

In this case, the trial judge excused four potential jurors⁴ during a closed proceeding that occurred in chambers. RP 5. The prospective

⁴ One of the four belonged to the alternate jury panel, which was later excused as a whole. Clerk’s Minutes (1/25/10), Supp. CP.

jurors were dismissed based on their questionnaire answers “after consultation with counsel.”⁵ RP 5. No record was made of the court’s consultation with counsel. Nor did the court explain the reasons for each juror’s removal. The court did not consider the *Bone-Club* factors prior to closing the courtroom, and nothing in the record explains why this portion of jury selection was closed, or whether alternatives to closure were available.⁶ RP 5.

What transpired in this case is the very essence of jury selection: jurors answered questions under oath in writing and were then excused from service at this particular trial for reasons that related specifically to Mr. Slert’s case. Because the closed proceeding cannot be described as anything other than jury selection, it should have been open under well-established precedent. *Strode*, 167 Wn.2d at 227; *Brightman*, 155 Wn.2d at 515; *Presley*, 558 U.S. 209.

⁵ The Clerk’s Minutes indicate that the decision was made with the agreement of counsel. This appears to be the clerk’s interpretation of the trial judge’s announcement. CP 194-197.

⁶ In fact, the completed questionnaires upon which the dismissals were based have since been destroyed; the court failed even to maintain a copy of the blank questionnaire in the court file. *Slert*, 169 Wn. App. at 769.

Furthermore, the trial court's *in camera* hearing is legally indistinguishable from the closed proceeding addressed in *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). In *Irby*, the superior court excused prospective jurors on the basis of their answers to written questionnaires. *Id.*, at 877-878. The trial court's decision to excuse jurors followed an email exchange with counsel. *Id.* In reversing the conviction, the Supreme Court held that

the e-mail exchange was a portion of the jury selection process. We say that because this novel proceeding did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in this particular case.

Id., at 882. After concluding that the email exchange was part of jury selection, the court went on to examine whether jury selection was a critical stage implicating the defendant's right to be present.⁷ *Id.*, at 883-885.

Irby's determination (that a proceeding testing "fitness to serve as jurors in [a] particular case" is part of jury selection) controls the issue in this case as well. First, the *Irby* court did not suggest that its discussion about what constitutes jury selection applies only to right-to-be-present issues. *Id.*, at 882-883. As in *Irby*, the *in camera* proceeding here resulted

⁷ The court found a violation of the defendant's Fourteenth Amendment right to be present and his state constitutional right to be present under art. I, § 22. *Id.*, at 884-885.

in the removal of potential jurors for reasons related to the case; it was therefore part of “[t]he process of juror selection” to which the public trial right applies. *Press-Enterprise Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (Press-Enterprise II).

Second, the *Irby* standard and the reasoning underlying that standard make sense in the public-trials context just as they do in the right-to-be-present context. If the procedure in *Irby* and the *in camera* hearing in this case were examined under *Sublett’s* experience and logic test,⁸ the result would be clear: experience and logic dictate openness in both circumstances. Historical evidence shows that the “process of selection of jurors” has been open and public “since the development of trial by jury.” *Press-Enterprise II*, 464 U.S. at 505. There are good reasons for this: when jury selection is open,

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.

⁸ As previously noted, *Sublett’s* experience-and-logic test need not be applied to this subset of jury selection, because it is already well established that jury selection must be open and public. *Wise*, 176 Wn.2d at 12 n. 4.

Id., at 508. As these quotations from *Press-Enterprise II* show, both experience and logic establish that proceedings of the sort conducted here must be open to the public.⁹ *Press-Enterprise II*, 464 U.S. at 505-508.

The closed proceedings here violated the requirement that criminal trials be open and public. This conclusion is compelled by *Irby*, as well as *Strode*, *Presley*, and other cases that have applied the public trial right to jury selection. Even if those cases were inapplicable, the violation is clear under the experience and logic test announced in *Sublett*. Because the trial court ignored the dictates of *Bone-Club*, Mr. Slert's conviction must be reversed, and the case remanded for a new trial. *Id.*

CONCLUSION

Given the lack of a justiciable controversy, this court should hold that review was improvidently granted and affirm the Court of Appeals.

If the court analyzes the public trial issue, it should affirm the Court of Appeals' decision reversing Mr. Slert's conviction for violation of the requirement that criminal trials be open and public.

⁹ As previously noted, *Sublett's* experience-and-logic test need not be applied to this subset of jury selection, because it is already well established that jury selection must be open and public. *Wise*, 176 Wn.2d at 12 n. 4.

Respectfully submitted on June 6, 2013,

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Respondent's Supplemental Brief electronically with the
Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on June 6, 2013.



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Thank you.

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