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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARTIN ARTHUR JONES,

Respondent.

STATE'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

A jury convicted Martin Jones of attempted murder because he shot Washington State Patrol Trooper Scott Johnson in the back of the head at close range. Jones asks for the verdict to be reversed, claiming a violation of his public trial rights and right to be present. His claims focus on the end of the trial when the court clerk randomly selected which of the sixteen seated jurors would be alternates. The drawing occurred during a brief afternoon recess long after voir dire and jury selection were complete and an hour before the end of closing argument.

This Court should affirm the conviction for three reasons. First, Jones cannot meet his burden to show that the drawing occurred in a closed courtroom. Second, the clerk's random draw of juror numbers is not a proceeding subject to public trial rights under the experience and logic test. Third, Jones had no constitutional right to be present during the drawing, waived any objection, and any error is harmless.

II. ISSUES

1. Was the defendant's right to a public trial violated when, long after voir dire and jury selection, the court clerk drew numbers at random to identify which jurors would be alternates, the drawing occurred during a brief recess in closing argument, and there is no evidence it occurred in a closed courtroom?

2.1. Did Jones waive any objection based on a right to be present during the drawing by failing to object when the drawing was announced and accepting the jury?

2.2. Is there a constitutional right to be present when the clerk draws numbers to identify the alternate jurors, when the defendant's presence cannot meaningfully affect a random drawing?

2.3. Is the alleged violation of a right to be present harmless error when the verdict was rendered by a fair and impartial panel of twelve qualified jurors that Jones approved?

III. STATEMENT OF CASE

Trooper Scott Johnson was impounding a vehicle on the highway near Long Beach, Washington, shortly after midnight. Another Trooper had just left the scene after arresting the vehicle's driver, the wife of defendant Martin Jones. Jones had been at his nearby home, where he received a text message from his wife saying she had been stopped by police. Jones approached the impound scene on foot, spoke with Trooper Johnson, and then shot him in the back of the head at close range. Trooper Johnson returned fire, survived the shooting, and later testified that Jones was the shooter. A jury found Jones guilty of attempted murder after a seven week trial.

Facing a long trial, the court empaneled sixteen jurors. RP 33-34. The State wanted four jurors to be identified as alternates during jury selection, but the court gave Jones the option to have the alternates identified at the close of evidence by random draw. RP 34-36. The court informed the parties that at the end of trial the clerk would randomly pull four numbers from a box that contained the sixteen juror numbers. RP 35, 127. The box was in the courtroom. RP 127 (“The box is back there in the corner.”). Nothing in the record shows that the box left the courtroom.

Voir dire and evaluation of all prospective jurors occurred in open court. RP 518-816. Challenges for cause for all jurors occurred in open court. RP 518-816. All the peremptory challenges occurred in open court. CP 1407-31; RP 866.

Weeks later, at the close of evidence, the court stated it would announce the drawing of alternate jurors after closing argument. RP 3808, 3865. During closing, the judge announced a break at 2:55 p.m. CP 1429; RP 4017-18. Counsel were to be ready to resume “in five minutes.” RP 4018. The break lasted eight minutes. CP 1429. The drawing occurred during that recess and the court announced the results at 4 p.m., when the State’s rebuttal ended:

We talked about it yesterday, we talked about it in January. At the outset of this trial we seated four alternates. . . . [a]t the break at 3:00, four jurors number [sic] were pulled

randomly, and at this time I am temporarily excusing these four jurors[.]

RP 4061. The court dismissed the jurors drawn as alternates, subject to recall. RP 4061-63. Jones made no objection at that time, or during any of the hearings that occurred during deliberations. RP 4071, 4082, 4091.

The jury found Jones guilty. CP 1283-85; RP 4091-92. Jones then moved for a new trial, claiming the drawing violated his right to be present and right to a public trial. CP 1286-1300. Jones's motion for a new trial did not claim or attempt to show that the courtroom was closed during the short recess when the clerk drew alternates, and nothing suggests the courtroom was closed during that break. RP 4018. Similarly, nothing shows that Jones was absent from the courtroom during the break. And, nothing suggests that spectators or the press were excluded from the courtroom during the break.¹

Jones's motion for a new trial pursued an unfounded theory that the court told the parties that the judicial assistant drew alternates during the lunch hour. CP 1286-1300; RP 4111. But defense counsel's theory was contradicted by the record where the trial court stated that the drawing occurred during the 3 o'clock break. RP 4061. Moreover, Jones's counsel admitted he was uncertain and did not claim personal knowledge of a

¹ Spectators (RP 686-89) and members of the press were present during the trial. The Minutes (CP 1407-31) reflect the trial court addressing "news media" requests.

lunch hour drawing. RP 4111 (“we don’t know for sure”). The trial court denied the motion. RP 4116.

The court of appeals reversed, declaring that this Court’s recent cases made “virtually any courtroom closure structural error[.]” *State v. Jones*, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013). After some delay while it addressed other public trial cases, this Court granted review.

IV. ARGUMENT

A. **The Clerk Did Not Violate Public Trial Rights When She Randomly Drew Alternate Jurors at the End of Closing Argument During a Brief Trial Recess**

A defendant’s right to a public trial is guaranteed by article I, sections 22 and 10 of the Washington Constitution and by the United States Constitution’s Sixth Amendment rights to public trial as incorporated by the federal due process clause. *E.g.*, *State v. Love*, 183 Wn.2d 598, 604-05, 354 P.3d 841 (2015). Whether public trial rights are violated is a question of law subject to de novo review. *Id.* To establish a public trial violation, Jones must show: (1) a proceeding was held in a closed courtroom; (2) that the public trial right attaches to the proceeding at issue; and (3) that the closure was not justified. *E.g.*, *Id.* at 605 (citing *State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014)).

Only the first two elements are at issue here—two elements where Jones has the burden. *Id.* He fails to meet the burden on either element. He

does not show that the drawing occurred in a closed courtroom and he does not show that the administrative task of randomly drawing juror numbers is one to which the public trial right attaches. *E.g.*, *Love*, 183 Wn.2d at 605 (failure to show closed courtroom); *State v. Gomez*, 183 Wn.2d 29, 33, 347 P.3d 876 (2015) (same).

1. Jones cannot meet his burden to show that the drawing occurred in a closed courtroom

The type of closure that can violate public trial rights “occurs ‘when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.’” *Gomez*, 183 Wn.2d at 33 (quoting *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)). Jones cannot show the drawing occurred in a completely or purposefully closed courtroom or that the “public [was] *fully* excluded.” *Id.* This defeats his claim because it is his burden to supply “a record that is sufficient to show that the proceeding in question was actually closed.” *Id.* at 34. A court “will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.” *Id.* (internal quotation marks omitted) (citing *State v. Jasper*, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012)); *see also State v. Njonge*, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014) (A trial judge’s comments about limited space did not close a court without a “conclusive showing that spectators were totally excluded from the juror excusals.”).

Applying these standards, the *Love* Court found no violation of public trial rights after counsel exercised for cause challenges and peremptory challenges on the struck juror sheet at the bench but where the courtroom “was unlocked and open.” *Love*, 183 Wn.2d at 604. The defendant could not demonstrate a closed proceeding by merely claiming “the public was not privy to the challenges in real time.” *Id.* Rather, the Court emphasized that it had “reversed convictions for two types of closures.” *Id.* at 606. One type is “when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.” *Id.* A “second type of closure occurs where a portion of a trial is held someplace ‘inaccessible’ to spectators, usually in chambers.” *Id.*

As in *Gomez*, *Love*, and *Njonge*, Jones cannot meet his burden to show a closure. The record shows that the random drawing used a “box . . . back there in the corner” of the courtroom. RP 127. The record shows that, on the eve of the drawing, the judge again stated the drawing would use the “old fashioned bingo” box. RP 3808. Jones does not show that the box left the courtroom and does not show that the drawing occurred in another place. And no evidence suggests the courtroom was closed during the short 3 o’clock break when the drawing occurred.

As the court of appeals noted, the drawing was not conducted on the record. But being off the record does not establish a court closure

under this Court's cases. Nor should it, when the drawing occurred in an open courtroom during a short break and the results were promptly announced when the court was back on the record.

This Court should reverse the court of appeals for failing to address the requirement that Jones demonstrate from the record that spectators were in fact excluded from the drawing. Imposing that burden on Jones is particularly fair because the State responded to the motion for a new trial and emphasized that the courtroom was "never closed." CP 1310. If the courtroom had actually been closed, Jones had the forum and opportunity to document an inappropriately closed proceeding. He did not do so and his public trial claim should therefore be rejected.

2. Under the "experience and logic test," the clerk's task of drawing random juror numbers is not a proceeding subject to public trial rights

"[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial or constitute a closure if closed to the public." *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). The *Sublett* decision adopted the experience and logic test to evaluate when public trial rights apply to a proceeding. The court of appeals misapplied experience and logic when it equated the clerk's drawing to "alternate juror selection [that] is largely performed at the same time and in the same way as voir dire[.]" *Jones*, 175 Wn. App. at 97. The

clerk's drawing in this case occurred long after voir dire and selection of the jurors. That drawing was substantially different from voir dire and juror selection because it did not evaluate juror qualifications and did not allow for any strategy or discretion by the court or the parties.

a. Experience shows that the administrative task of randomly drawing juror members does not implicate public trial rights

The experience prong asks whether the place and process have historically been open to the press and public. *Sublett*, 173 Wn.2d at 73. Contrary to the court of appeals approach where every component of creating a jury falls under the label of voir dire and juror selection, experience teaches that many actions by the clerk are distinct from the evaluation and selection of individual jurors—like the random drawing in this case. For example, a clerk must administer lists of eligible jurors, issue summons from that list to create venire panels for particular cases, excuse people for hardship reasons, and randomly number potential jurors before the jury selection process. *See* CrR 6.3 (“jurors shall be selected at random from the jurors summoned who have appeared and have not been excused”). Similarly, CrR 6.5 provides that “the clerk shall draw the name of an alternate” where jury selection includes alternate jurors and a regular juror is dismissed. Jones makes no showing that the clerk’s tasks under

CrR 6.3 or drawing an alternate under CrR 6.5 triggers public trial rights under the experience prong.

The court of appeals error in this case is readily shown by comparison to *State v. Skert*, 181 Wn.2d 598, 604-05, 334 P.3d 1088 (2014). The defendant in *Skert* argued that it was “well-settled that the public trial right applies to jury selection.” *Id.* at 604 (internal quotation marks omitted). He relied on that label to attack a pre-voir-dire in-chambers discussion of jury questionnaires and dismissal of four prospective jurors for outside knowledge of the case. The lead opinion emphasized that “the mere label of a proceeding is not determinative.” *Id.* (citing *Sublett*, 176 Wn.2d at 72-73). The experience prong teaches that public trial rights are concerned with a “specific component of jury selection—i.e., the ‘voir dire’ of prospective jurors who form the venire[.]” *Id.* at 605 (quoting *State v. Wilson*, 174 Wn. App. 328, 338, 298 P.3d 148 (2013)).

[E]xisting case law does not hold that a defendant’s public trial right applies to every component of the broad “jury selection” process (which process includes the initial summons and administrative culling of prospective jurors from the general adult public and other preliminary administrative processes).

Id. (alteration in original).

The court of appeals rationale for upholding Jones’s claim is the same subsequently rejected in *Skert*. The court affixed the label of

“alternate juror selection” to encompass the drawing in this case and used that label to describe anything “largely performed at the same time and in the same way as voir dire, and . . . on the record in a courtroom that is open to the public.” *Jones*, 175 Wn. App. at 97. The court of appeals also erred by citing to pattern jury instructions and voir dire practices that concern a voir dire proceeding that selects jurors *and* designates the alternates. Those pattern instructions and practices are immaterial here because voir dire in this case ended with sixteen jurors vetted by the parties and selected to hear the entire trial.

If anything, the facts make this case easier than *Slert*. In *Slert*, the lead opinion found that the examination of jury questionnaires in chambers occurred before “voir dire had begun.” *Slert*, 181 Wn.2d at 605. The dissenting opinion argued that the procedure was part of examining jurors for fitness. *See id.* at 613 (Stephens, J., dissenting) (“public trial right attaches to voir dire, as that term encompasses the individual examination of jurors concerning their fitness to serve in a particular case”). But the random drawing here had nothing to do with examining jurors for fitness and, therefore, it falls outside of the term voir dire under both opinions in *Slert*.

In sum, experience does not support the conclusion that the clerk’s drawing in this case was part of voir dire or jury selection, as those terms

have been used in public trial cases. The random drawing provided no opportunity for strategy or discretion by parties or judge. *Cf. In re Pers. Restraint of Yates*, 177 Wn.2d 1, 28-29, 296 P.3d 872 (2013) (public trial rights do not apply to the clerk's action of lining up venire jurors in the hallway and then seating them before unlocking the courtroom). The random drawing occurred *after* voir dire, and after every juror had been selected in a public courtroom. *See State v. Beskurt*, 176 Wn.2d 441, 447-48, 293 P.3d 1159 (2013) (no public trial violation from an order sealing juror questionnaires "entered after the fact and after voir dire occurred" where "everything that was required to be done in open court was done").

b. Logic shows that randomly drawing juror members does not implicate public trial rights

The "logic" test asks whether public access plays a significant positive role in the functioning of the process in question and examines the core values served by open court requirements. *Sublett*, 176 Wn.2d at 73-74. The best example of the logic prong is *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). *Sublett* cites *Press-Enterprise Co.* to explain how logic requires that public trial rights apply to a preliminary hearing in a criminal case, because that hearing implicated a defendant's rights to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence. *Sublett*, 176 Wn.2d at 74.

In contrast to *Press-Enterprise Co.*, the logic of public trial rights does not extend to a clerk randomly drawing alternates at the end of closing arguments. No specific constitutional values are implicated by that task. The court of appeals recognized that the drawing had no “relation, let alone a reasonably substantial one, to Jones’s ability to defend.” *Jones*, 175 Wn. App. at 106 (discussing right to be present). Every number in the bingo box was a juror that Jones had questioned and accepted as fair and impartial during the public voir dire. Under these facts, the random drawing could not impair his right to an impartial jury because the only possible outcome of the drawing was a jury of fair and impartial jurors. See *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009) (purpose of public trial right at jury selection is to protect the defendant’s right to an impartial jury); *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995) (no prejudice is caused when alternate juror is mistakenly substituted for juror).

The court of appeals, however, approached the logic prong by reasoning that “the defendant and the public lack the assurance of a truly random drawing that they would have if the drawing were performed in open court on the record.” *Jones*, 175 Wn. App. at 102. This strains the logic prong to the breaking point. If public trial rights must appease fear of “chicanery on the part of the court staff member,” the logic prong will

have no limits. *Jones*, 175 Wn. App. at 102. That type of logic would extend public trial rights to tasks like summoning potential jurors, numbering the persons in a jury pool, or sending sick jurors home. *See State v. Wilson*, 174 Wn. App. 328, 332, 298 P.3d 148 (2013) (clerk's decision to release a sick juror was not subject to public trial rights).

In summary, Jones cannot show that neither the experience prong nor the logic prong extends public trial rights to the clerk's drawing in this case. His public trial claim should be denied.

3. The alleged public trial error is patently harmless and not reversible

In the Brief Of Respondent at page 26-28, the State explained why this alleged public trial error is not reversible as structural error. The State continues to contend that the Court should not have an inflexible rule where even a trivial closure not preceded by a *Bone-Club* analysis is structural error that requires reversal. *See generally* State's Briefing in *State v. Russell*, No. 85996-5. This case, however, does not present a closed court violation. If it did, the State's response brief addresses why the alleged error is not structural.

B. The Drawing of Numbers for Alternate Jurors Did Not Violate Jones's Constitutional Right to Be Present

In his cross-petition, Jones claims the drawing violated his right to be present as guaranteed by the due process clause of the Fourteenth

Amendment and by article I, section 22 of the Washington Constitution. He raised this issue first in a motion for a new trial. CP 1286-1300. “Whether a defendant’s constitutional right to be present has been violated is a question of law, subject to de novo review.” *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

1. Jones waived his claim that the drawing violated his right to be present by accepting the drawing and the jury and failing to object

In *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981), the State disclosed exculpatory discovery to the defense mid-trial, but the defense did not ask for a mistrial. After an adverse verdict, the defendant moved for a new trial on grounds of late discovery. The Court held that the defendant forfeited any objection to that claimed error because he “had many opportunities to request a mistrial and never did so.” *Id.* at 226. “The defense made a tactical decision to proceed, ‘gambled on the verdict’, lost, and thereafter asserted the previously available ground as reason for a new trial.” *Id.* at 225. “This is impermissible.” *Id.*

The principle in *Williams* applies equally to this alleged violation of the right to be present. The record shows that Jones was present with counsel when the court announced that a drawing would occur; he was present later when the court announced the results and excused jurors. RP 4062-63. He made no objection then, or during the six days preceding

the verdict, even though the alternate jurors were still on call. RP 4061, 4097. A timely objection, if valid, could have asked the court to redraw numbers from the box, reconstitute the jury if necessary, and order new deliberations. Under these facts, Jones waived any objection based on the alleged violation of a right to be present. *See United States v. Gagnon*, 470 U.S. 522, 523-24, 529, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (right to be present when court addressed a juror in chambers was waived by the defendants' "failure to assert their rights to attend the conference" before or afterward); *see, e.g., State v. Hubbard*, 2002 UT 45, ¶ 34, 48 P.3d 953 (defendant who knows of a matter must assert whatever right he may have to be present); *Campbell v. State*, 999 P.2d 649 (Wyo. 2000) (same); *cf. State v. Thomson*, 123 Wn.2d 877, 883, 872 P.2d 1097 (1994) (waiver of right to be present shown by voluntary absence).

This trial court did not abuse its discretion in denying the motion for new a trial in the face of an untimely assertion of a right to be present where the conduct showed an intentional waiver of the objection.

2. Jones's constitutional right to be present did not extend to the clerk's random drawing of numbers for the alternative jurors

The record does not show that Jones was absent from the courtroom when the clerk drew alternate jurors. But even if he could show

a drawing occurred outside his presence, it would not violate his constitutional right to be present.

This Court “has routinely analyzed alleged violations of the right of a defendant to be present by applying federal due process jurisprudence.” *Irby*, 170 Wn.2d at 880. “The core of the constitutional right to be present is the right to be present when evidence is being presented.” *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994). But the right to be present also exists whenever the defendant’s “presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.” *Irby*, 170 Wn.2d at 881 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934)); *see also In re Pers. Restraint of Lord*, 123 Wn.2d at 306-07 (holding that the right to be present depends on whether defendant’s presence could meaningfully affect the proceeding). For example, in *Snyder*, the Court held that the right to be present does not extend to a crime scene viewing because “[t]here is nothing [the defendant] could do if he were there, and almost nothing he could gain.” *Snyder*, 291 U.S. at 108.

Jones relies on *Irby*, where the defendant was denied a right to be present during a proceeding that evaluated jurors individually and dismissed them for cause. *Irby*, 170 Wn.2d at 882. The *Irby* Court

expressly distinguished the defendant's role in that proceeding from other proceedings such as "general [juror] qualification" and a "preliminary hardship colloquy." *Irby*, 170 Wn.2d at 882 (citations omitted). And it explained the distinction between jury voir dire and juror selection compared to the "administrative impaneling process." *Id.* at 883-83 (citing *Gomez*, 490 U.S. at 873).

In contrast to *Irby*, the clerk's random drawing of juror numbers at the end of trial is not part of voir dire or evaluating jurors. The drawing did not present a reasonably substantial opportunity for Jones to defend or assist his counsel. Jones claims that the drawing affected "substantial rights" (Appellant's Br. at 17), but he never identifies a substantial right. Nor can he, because he fully vetted and approved all sixteen jurors during the voir dire. He had no substantive role in the random drawing.

Jones has cited footnote 6 from *Irby* to claim that the state constitution provides more protection than the Fourteenth Amendment. Answer to Pet. at 8. He ignores how that footnote states only that someone could argue that the state constitutional right to be present is broader. *Irby*, 170 Wn.2d at 885 n.6. The real holding in *Irby* is that article I, section 22 follows federal jurisprudence and that *Irby*'s rights were violated under both the Fourteenth Amendment and article I, section 22. *Id.* The footnote does not express why and how the state constitutional text or history leads

to a substantively different protection, nor has Jones provided any principled basis for a more expansive state constitutional right to be present. *See State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

Thus, the court of appeals properly applied well-established law to hold that the random drawing “was not a critical phase of the trial.” *Jones*, 175 Wn. App. at 105. Jones had the entire voir dire process to question, challenge, and select all the jurors including those who were later drawn as alternates by the clerk. The clerk’s drawing had no relation, let alone a reasonably substantial one, to Jones’s ability to defend against the attempted murder charge.

3. The alleged error was harmless because Jones was tried by a fair and impartial jury

A violation of the right to be present may be harmless error. *In re Pers. Restraint of Lord*, 123 Wn.2d at 306-07. The State must show harmless error beyond a reasonable doubt, but the defendant must first raise at least the possibility of actual prejudice before the State is required to meet its burden. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). Speculation is insufficient to establish the prejudice necessary to obtain relief from an alleged violation of due process. *E.g., State v. Ahern*, 64 Wn. App. 731, 735, 826 P.2d 1086 (1992).

The harmless error analysis for the right to be present issue is controlled by this Court’s recent decision in *Gentry*, where the defendant

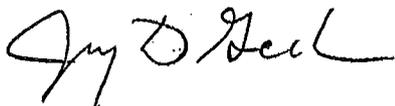
sought reversal of his conviction and capital sentence because the trial court mistakenly allowed an alternate juror to deliberate in place of the juror who was supposed to deliberate. *Gentry*, 125 Wn.2d at 615. *Gentry*, however, participated in the selection of the entire jury panel and accepted the panel, including the alternates. *Id.* at 616. *Gentry* could not show that he was prejudiced by the composition of the jury after he had accepted all of the jurors as fair and impartial. *Id.* at 615. Jones's claim is similarly without harm or prejudice. He has a constitutional right to an impartial jury of randomly selected citizens; not a right to a particular juror or group of jurors. *Id.* Any violation of his right to be present is, therefore, harmless beyond a reasonable doubt.

V. CONCLUSION

The Court should affirm the judgement and conviction imposed by the trial court and reverse the court of appeals with regard to the claimed violation of public trial rights.

RESPECTFULLY SUBMITTED this 19th day of January 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of State's Supplemental Brief to be served via electronic mail on the following:

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DATED this 19th day of January 2016, at Olympia, Washington.


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State Cause No. 89321-7

v.
Jones, Martin Arthur

State's Supplemental Brief

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