NO. 45588-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER MOTHERSHEAD,

Appellant.

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

APPELLANT'S SUPPLEMENTAL ASSIGNMENTS OF ERROR AND BRIEF IN SUPPORT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Courts

Constitutional Provisions

Statutes

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Ms. Mothershead's and the public's rights to an open trial were violated when a portion of the for-cause challenges and rulings were made at sidebar.

2. Ms. Mothershead's and the public's rights to an open trial were violated when peremptory strikes were made on paper, outside the public specter.

3. Ms. Mothershead's constitutional right to be present under the Sixth Amendment, the Due Process Clause and article I, section 22 was violated when the court conducted for-cause challenges at a sidebar.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee the public and an accused the right to open and public trials. Accordingly, criminal proceedings, including jury selection and trial, may be closed to the public only when the trial court performs an on-the-record weighing test, as outlined in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and finds closure favored. Violation of the right to a public trial is presumptively prejudicial. Where peremptory challenges were conducted in written form and some of the for-cause challenges and rulings were made at sidebar, all removed from public scrutiny without considering the

Bone-Club factors, was Ms. Mothershead's and the public's right to an open trial violated, requiring reversal?

2. The federal constitution guarantees an accused the right to be present at all critical stages in his trial. The Washington Constitution provides an even broader right to be present throughout trial. Was Ms. Mothershead's constitutional right to be present violated when the trial court held conference at the bench during which for-cause challenges were brought and decided?

C. ARGUMENT

1. Ms. Mothershead should be afforded a new, public trial because portions of voir dire were closed to the public without on-the-record analysis by the trial court.

a. Ms. Mothershead and the public are guaranteed open, public trials by our state and federal constitutions.

Our state constitution requires that criminal proceedings be open to the public without exception. Const. art. I, § 10; Const. art. I, § 22. Two provisions guarantee this right. First, article I, section 10 requires that "Justice in all cases shall be administered openly." Additionally, article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial." These provisions serve "complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d

325 (1995). The federal constitution also guarantees the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *see* U.S. Const. amends. I, V.

While article I, section 10 clearly entitles the public and the press to openly administered justice, public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 58-60, 615 P.2d 440 (1980).

The public trial guarantee ensures "that the public may see [the accused] 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." *Bone-Club*, 128 Wn.2d at 259 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). "Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "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. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*).

Open public access provides a check on the judicial process, which is both necessary for a healthy democracy and promotes public understanding of the legal system. *State v. Sublett*, 176 Wn.2d 58, 142 n.3, 292 P.3d 715 (2012) (Stephens, J. concurring); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). Openness deters perjury and other misconduct; it tempers biases and undue partiality. *Wise*, 176 Wn.2d at 5.

With regard to jury selection in particular, closed proceedings "harm[] the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004)); *accord* Const. art. I, § 35 (victims of crimes have right to attend trial and other court proceedings).

To protect this constitutional right to a public trial, our courts have repeatedly held that a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying

the closure order." *E.g.*, *Wise*, 176 Wn.2d at 12; *State v. Paumier*, 176 Wn.2d 29, 34-35, 288 P.3d 1126 (2012); *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting *Press-Enterprise I*, 464 U.S. at 510).

This Court reviews violations of the public trial right de novo, and a defendant does not waive his public trial right by failing to object to a closure during trial. *Paumier*, 176 Wn.2d at 34, 36-37; *Wise*, 176 Wn.2d at 15-16.

b. Without analysis, the trial court closed proceedings when it heard and ruled on for cause challenges at a sidebar and peremptory challenges were conducted by secret ballot.

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *Sublett*, 176 Wn.2d at 71-72; *Wise*, 176 Wn.2d at 11-12; *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009); *Orange*, 152 Wn.2d at 804. "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise I*, 464 U.S. at 505. Accordingly, the Court

need not apply the experience and logic test to determine whether the proceeding is subject to the open trial right. *Sublett*, 176 Wn.2d at 73 (lead opinion); *id.* at 136 (Stephens, J. concurring); *see State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (distinguishing voir dire, to which open trial right conclusively applies, to pre-voir dire release of prospective jurors by clerk for illness, a stage to which experience and logic test must be applied).

In *State v. Love*, this Court applied the experience and logic test to evaluate that appellant's claim that similarly closed proceedings violated his public trial right. 176 Wn. App. 911, 309 P.3d 1209, 1212-14 (2013). The Court did not explain why the experience and logic test must be applied to the for-cause and peremptory challenge portion of jury selection but not to other parts of that process. However, if the experience and logic test applies, the State must bear the burden to convince this Court that the proceeding is not generally open to the public. *Sublett*, 176 Wn.2d at 70-71 ("There is a strong presumption that courts are to be open at all stages of the trial."); *State v. Richardson*, 177 Wn.2d 351, 359-60, 302 P.3d 156 (2013) ("Because court records are presumptively open, the burden of persuasion rests on the proponent of continued sealing."); *Ishikawa*, 97 Wn.2d at 37-38 (proponent of closed proceedings or records bears burden

to justify closure).[1] The State cannot satisfy that burden—even under the experience and logic test, preliminary challenges to the venire must be held in open court absent on-the-record satisfaction of the *Bone-Club* factors. *E.g.*, *State v. Jones*, 175 Wn. App. 87, 98-99, 303 P.3d 1084 (2013) (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30(6) as requiring peremptory challenges to be held in open court); *State v. Beskurt*, 176 Wn.2d 441, 446-48, 293 P.3d 1159 (2013) (no public trial violation where juror questionnaires were sealed after voir dire and for cause challenges were conducted in open court within public's purview); *see infra* (discussing importance of public scrutiny during peremptory challenges).

The process of excusing prospective jurors is a critical part of voir dire that must also be open to the public. *E.g.*, *Batson v. Kentucky*, 476

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[1] The plurality lead opinion in *Sublett* did not hold otherwise. In discussing the test to be applied to determine whether the public trial right is implicated, the plurality did not address which party bears the burden. 176 Wn.2d at 71-74. The lead opinion only states that the petitioners did not "establish that their right to a public trial was violated." *Id.* at 75. The plurality did not hold that the burden of meeting the experience and logic test is always on the proponent of an open proceeding, and it could not have done so without overruling 30 years of precedent. *See, e.g.*, *Ishikawa*, 97 Wn.2d at 37-38; *Richardson*, 177 Wn.2d at 359-60. When this Court has "expressed a clear rule of law[,]" the Court "will not—and should not—overrule it sub silentio." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). Moreover, this Court only overrules precedent upon "'a clear showing that [the] established rule is incorrect and harmful.'" *Id.* (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting in turn *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1920))).

U.S. 79, 98, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory challenge occupies important position in trial procedures); *Beskurt*, 176 Wn.2d at 447-48 ("[T]he attorneys' for cause challenges, and the trial judge's decisions on those challenges all occurred in open court. The public had the opportunity to observe this dialogue. . . . Importantly, everything that was required to be done in open court was done."); *Wilson*, 174 Wn. App. at 342 (noting peremptory and for-cause challenges are part of voir dire); *New York v. Torres*, 97 A.D.3d 1125, 1126-27, 948 N.Y.S.2d 488 (2012) (closure of courtroom to defendant's wife while initial jury selection held, including exercise of 16 peremptory challenges, is erroneous). The "interplay of challenges for cause and peremptory challenges" are an essential part of criminal trial proceedings. *State v. Vreen*, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923 (2001).

Public scrutiny is essential because there are important limits on both parties' exercise of peremptory and for-cause challenges. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 47-50, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury selection, including in exercise of peremptory challenges, and critical role of public scrutiny). For example, neither may be exercised in a racially discriminatory fashion. *Id.*; *see State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008) (open trial right violated where *Batson* challenge

conducted in private).[2] "Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." *State v. Saintcalle*, 178 Wn.2d 34, 41-42, 309 P.3d 326 (2013) (discussing important public interest in proper exercise of juror challenges); *id.*, at 44 ("peremptory challenges have become a cloak for race discrimination"). Beyond the potential for discrimination, for-cause excusals require the court to determine whether a prospective juror is "disqualified." Criminal Rule (CrR) 6.4(c); RCW 4.44.150. A party may except to an adverse party's for-cause challenge, requiring the court to "try the issue and determine the law and the facts." CrR 6.4(d); *see* RCW 4.44.190 (governing trial on challenge for actual bias). Like the questioning of prospective jurors, such challenges to the venire must be held in open proceedings absent an on-the-record consideration of the public trial right, competing interests, alternatives to closing the proceeding and the other *Bone-Club* considerations. *See Jones*, 175 Wn. App. at 98-99 (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by

[2] In *Sublett*, our Supreme Court declined to follow *Sadler* to the extent it relied on a legal/ministerial distinction. The Court did not discuss, or call into question, *Sadler*'s substantive holding. *Sublett*, 176 Wn.2d at 71 (lead opinion).

Laws of 1984, ch. 76, § 30(6), as requiring peremptory challenges to be held in open court).

In *Wilson*, this Court distinguished between hardship strikes made by the clerk prior to the commencement of voir dire, which is not subject to the open trial right, and the for-cause and peremptory challenge process, which is part and parcel of voir dire. 174 Wn. App. at 343-44. This Court observed that unlike hardship strikes made by a clerk, "voir dire" under Criminal Rule 6.4 involves the trial court and counsel questioning prospective jurors to determine their ability to serve fairly and impartially, and to enable counsel to exercise informed challenges for-cause and peremptory challenges. *Id.* at 343. While a clerk may excuse jurors on limited, administrative bases, such excusals cannot interfere with the court's and parties' rights to excuse jurors based on cause and peremptory challenges. *Id.* at 343-44.

This approach is consistent with other jurisdictions. California has long held that peremptory challenges must be exercised in open court. *People v. Harris*, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (1992). In *Harris*, the right to a public trial was violated where peremptory challenges were exercised in chambers based on the trial court's unilateral determination. *Id.* at 677. The violation required reversal even though the court tracked the challenges on paper, announced in open court the names

of the stricken prospective jurors, and the proceedings were reported. *Id.* at 684-85, 688-89.

Our courts consider proceedings held outside the view of the public, including at the bench or at sidebar, to be closed proceedings even if not held in the judge's chambers. For example, in *State v. Slert*, this Court reasoned that because the public cannot scrutinize the dismissal of jurors that occur during sidebar proceedings, such proceedings violate the constitutional public trial right. 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012), *review granted* 176 Wn.2d 1031, 299 P.3d 20 (2013) (oral argument heard Oct. 17, 2013). Likewise, an interview of a panel member in the hallway outside the courtroom while both the hallway and the courtroom at least arguably remained "open" and the conversation was recorded violates the accused and the public's open trial right. *State v. Leyerle*, 158 Wn. App. 474, 483-84 & n.9, 242 P.3d 921 (2010).

The trial court's use of a secret ballot and a private bench conference during Ms. Mothershead's trial closed proceedings to at least the same extent as in these cases. Here, the court conducted most for-cause challenges on the record, in open court. *E.g.*, 9/9/13 RP 3-48, 54-129; 9/10/13 RP 79-88; 9/11/13 RP 75-83; CP __ (trial minutes), pp.5-7.[3]

[3] A motion to supplement the record on appeal and a supplemental designation of clerk's papers have been filed concurrently with this brief.

However, after the parties' voir dire questioning concluded, the court called the attorneys to the bench for a sidebar conference. 9/11/13 RP 72; CP __ (trial minutes), p.7. At the conclusion of the conference, the content of which is not in the record, the trial court excused five jurors for cause. 9/11/13 RP 72-75; CP __ (trial minutes), p.7.

The trial court also closed the courtroom by instructing the parties to conduct peremptory challenges on paper. 9/11/13 RP 90-91. In both cases, although the public was allowed in the courtroom where the silent proceedings occurred, the public did not see or hear which party struck which jurors or in what order and the process was conducted "of the record." *Id.*; *cf. Leyerle*, 158 Wn. App. at 483-84 & n.9 (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). The public had no basis upon which to discern which jurors had been struck by which party. Further, there was no public check on the non-discriminatory use of challenges to the venire or the court's rulings on such challenges. The procedure had the same effect as excluding the public from the courtroom. *See Lormor*, 172 Wn.2d at 92 (citing cases where closure found because public was excluded from the courtroom during voir dire or other proceedings). "Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004).

The subsequently-available record of the challenges does not absolve the constitutional violation. *See* CP __ (peremptory challenge sheet and jury panel selection list); *Paumier*, 176 Wn.2d at 32-33 (public trial violation even where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); *Sublett*, 176 Wn.2d at 142 n.3 (Stephens, J. concurring); *Leyerle*, 158 Wn. App. at 484 n.9 (citing *Strode*, 167 Wn.2d at 223-24 & n. 1); *Harris*, 10 Cal. App. 4th at 684-85, 688-89. "[T]he mere existence of such recordings, and thus the public's potential ability to access those recordings through determined effort, plays no role in deciding whether a trial court has observed proper courtroom closure procedures." *Leyerle*, 158 Wn. App. at 484 n.9. Moreover, the existence of records does not dispel the likelihood that different jurors would have been stricken if the parties had to face the public scrutiny of open proceedings. *Globe Newspaper*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process."); *Wise*, 176 Wn.2d at 5-6 (openness deters misconduct, tempers bias, mitigates undue partiality). "[P]ublic trials embody a 'view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.'"

Strode, 167 Wn.2d at 226 (quoting *Waller*, 467 U.S. at 46 n.4 (internal quotation omitted)).

c. These errors require reversal and remand for a new trial.

When the record does not reveal that "the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted" and reversal is required. *Brightman*, 155 Wn.2d at 515-16; *accord Easterling*, 157 Wn.2d at 181. If the trial court fails to conduct a *Bone-Club* inquiry, "a 'per se prejudicial' public trial violation has occurred 'even where the defendant failed to object at trial.'" *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18).

In Ms. Mothershead's trial, the court provided no compelling interest that required peremptory strikes and some for-cause challenges to be conducted in secret. Further, the court failed to consider any of the *Bone-Club* factors on the record. Allowing the error to "go unchecked 'would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings.'" *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18). Ms. Mothershead's convictions should be reversed and the matter remanded for a new, public trial.

2. Ms. Mothershead should be afforded a new trial because five jurors were excused for cause during a sidebar conference.

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983). Under the federal constitution, the right derives both from the Sixth Amendment and from the Due Process Clause. U.S. Const. amends. VI, XIV; *United States v. Gagnon*, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). These provisions protect a defendant's right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934). The constitutional right to be present includes the right to be present during voir dire and empanelling of the jury. *Diaz v. United States*, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912).[4]

Jury selection is "'the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.'" *Irby*, 170 Wn.2d at 884 (quoting *Gomez v. United States*, 490 U.S. 858,

[4] As with all allegations of constitutional violations, "[w]hether 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, 246 P.3d 796 (2011); *accord State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010).

873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). "[A] defendant's presence at jury selection 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" *Id.* at 883 (quoting *Snyder*. 291 U.S. at 105-06).

Our Supreme Court recently held that a defendant's right to be present is violated when a portion of jury selection is conducted without him or her present. *Irby*, 170 Wn.2d at 877, 887. In that case, counsel and the court corresponded over email about the release of jurors from the panel. *Id.* at 877-78. The defendant was in custody and there was no indication that he was consulted. *Id.* at 878. Because the email communication tested the jurors' fitness to serve in the case at hand, the Court held the communication was a portion of jury selection to which Mr. Irby was entitled to be present. *Id.* at 882, 884-85.

As in *Irby*, the record here indicates the jurors excused after a sidebar conference "were being evaluated individually and dismissed for cause." 170 Wn.2d at 882; 9/11/13 RP 72-75; CP __ (trial minutes), p.7. In conducting this process, the court only called counsel to the bench. 9/11/13 RP 72. Ms. Mothershead was not present while members of her

jury panel were evaluated individually and dismissed for cause. Thus, like in *Irby*, this process violated Ms. Mothershead's right to be present.

In *Irby*, the Court held the defendant's absence from the portion of jury selection at issue was not harmless:

> [T]he State has not and cannot show that three of the jurors who were excused in Irby's absence ... had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence . . . . Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

170 Wn.2d at 886-87. Here, the lack of record regarding the substance of the for-cause challenges and rulings makes it impossible for the State to satisfy its burden. Although Ms. Mothershead was present during the individual and panel questioning, she was not called to the bench to discuss the jurors that were subsequently excused for cause. Ms. Mothershead is entitled to a new trial at which she is present during all critical stages, including jury selection.

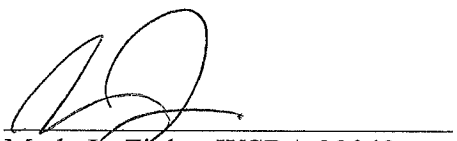
D. CONCLUSION

In addition to the reasons set forth in Ms. Mothershead's opening brief, the Court should remand for a new trial because a portion of for cause challenges and the court's rulings and all peremptory strikes were conducted in private without a *Bone-Club* analysis. A new trial is also

required because Ms. Mothershead's right to be present was violated when for cause excusals were discussed and decided without her present.

DATED this 17th day of September, 2014.

Respectfully submitted,



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

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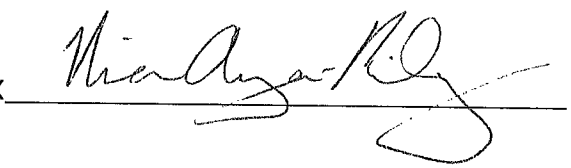
X 

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