

NO. 62459-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TONY SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GEORGE MATTSON

BRIEF OF RESPONDENT

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**A. ISSUES PRESENTED**

1. A trial court has a continuing obligation to excuse any juror who is unfit and unable to perform her duties. A juror's purposeful refusal to follow the court's jury instructions is an appropriate basis for removal; however, the juror may not be dismissed if there is any reasonable possibility that her views stem from an evaluation of the sufficiency of the evidence. Here, after Juror 8 sent the trial court a note saying that further deliberation was impossible, the court asked Juror 8 if she could follow the court's instructions. Juror 8 responded with an emphatic, "No." When there was no reasonable possibility that Juror 8's view stemmed from her view of the sufficiency of the evidence, did the trial court properly dismiss an unfit juror?

2. A criminal defendant has a constitutional right to a public trial. The superior court criminal rules provide that an *in camera* review is appropriate when the trial court is called upon to determine whether material is discoverable or protected work product. In this case, the defense withheld discovery and then asked the trial court to review the material *in camera* to determine if it was protected work product. The trial court excluded only the two deputy prosecutors and the case detective — the defendant, his

counsel, a defense witness and any other members of the public (if there were any) remained. Was this procedure appropriate?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged defendant Tony Smith with three counts of first-degree murder, each alleged to have been committed with a firearm. CP 1-3. The murder charges were predicated on premeditated or felony murder. The jury found Smith guilty of first degree felony murder, based on robbery. It also found that Smith was armed. CP 774, 777-78, 781-82, 785.

Pre-trial, after defense counsel expressed concerns about Smith's competency, the trial court ordered a Western State Hospital evaluation. CP 98-101, 102-14. The trial court held a three-day competency hearing during which seven mental health experts (three defense witnesses and four State's witnesses) testified. CP 121. Afterward, the trial court concluded that Smith had "exaggerated, evaded and failed to cooperate with the evaluation process." CP 130. The court found Smith competent to stand trial.<sup>1</sup> CP 134.

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<sup>1</sup> Smith does not challenge the trial court's determination of competency.

Post-verdict, Smith moved for a new trial based on (1) the trial court's excusal of a deliberating juror, and (2) new evidence.<sup>2</sup> CP 790-817, 818-26, 898-905, 906-13. The trial court denied both motions for a new trial. 6/12/08RP 1-22; CP 981-1003.

The trial court sentenced Smith to 407 months on count 1, and 380 months on counts 2 and 3 consecutively, for a total term of 1167 months, including three firearm enhancements. CP 1007.

Smith timely appeals. CP 1013.

## **2. SUBSTANTIVE FACTS**

Margarita Martinez's 2003 New Year began with a visit from the police; they informed her that her family was dead. 4/9/08RP 13-21, 54-55. Martinez's 24-year-old son, Francisco ("Cisco") Santos-Rojas, her 16-year-old grandson, Edgar Santos, and her nephew, Reuben Fuentes, had all been shot dead inside Martinez's Chevrolet Tahoe, which had been left parked along the West Valley Highway. 4/9/08RP 29-30; 4/10/08RP 153-60, 184-85, 207, 225.

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<sup>2</sup> The State fully discusses the trial court's excusal of an unfit juror below, at section C.1 of this brief. The "new evidence" concerned a recent publication questioning the scientific accuracy of fingerprint evidence. Smith has not challenged the trial court's ruling on this issue.

On January 1, 2003, late in the afternoon, Cisco borrowed Martinez's Tahoe, as he often did. 4/9/08RP 33, 75-76. Cisco would take trips down to California to buy drugs. 4/9/08RP 156. Cisco told Martinez that "Pit Bull" was going to drive, because Cisco did not have a driver's license. 4/9/08RP 33-34, 42-43, 53. Pit Bull is the defendant, Tony Smith. 4/9/08RP 42-43, 153. When Cisco left in Martinez's Tahoe, Reuben and Edgar were with him. 4/9/08RP 51. Martinez never saw any of them again. 4/9/08RP 52.

According to Cisco's former wife, Jessica Tijiboy, Cisco and Smith were business associates. 4/9/08RP 146-48, 154. In addition to trafficking in drugs, Cisco raised pit bulls for fighting. 4/9/08RP 154-55, 195, 200, 205-06. Because one of the females was in heat and ready to breed, and another pit bull was scheduled for a fight, Cisco took them on his January 1 trip. 4/9/08RP 163-66; 5/14/08RP 129. Cisco also had \$60,000 wrapped in cellophane with fabric softener sheets (to hide the smell of money in case they were stopped by the police) to buy drugs. 4/9/08RP 157. When Cisco left, Tijiboy saw Pit Bull in the driver's seat. 4/9/08RP 169.

Cisco paid Smith — sometimes in cash, sometimes in drugs — to drive him to California and back. 4/9/08RP 181. The understanding was that if the police ever stopped the car and found

drugs, Smith would say that the drugs were his. 4/9/08RP 205.

Although Tijiboy had never seen Cisco with a firearm, she believed that he owned a gun. 4/10/08RP 35.

Just before New Year's Eve 2003, Smith contacted a friend, Justin Chase, and asked if he knew where he (Smith) could get a gun. 4/10/08RP 48-49. Smith said that he needed the gun because he was "trying to hit a lick" (commit a robbery). 4/10/08RP 49-50. On January 1, Chase gave Smith a .45 caliber chrome Ruger. Later that night or early the next morning, Smith called Chase and wanted him to come over and pick up two guns that were "smoking hot," but Chase refused. 4/10/08RP 58-59. In court, Chase identified the Ruger that he had given Smith. 4/10/08RP 62.

In the early morning hours of January 3<sup>rd</sup>, Kent Police investigated a report of a suspicious car. When Officer Ford looked inside the abandoned Tahoe, he found three dead bodies. 4/10/08RP 148-59. Cisco was in the front passenger seat. 4/14/08RP 75. He had been shot in the head; he died instantaneously. 4/14/08RP 85, 89, 128-29. Edgar Santos was seated behind the driver. He died as the result of two gunshots to his chest — he had also been shot in the arm and had blunt force

injuries on his forehead. 4/14/08RP 130-34, 142. Reuben Fuentes was the right rear passenger. He died from a single gunshot to his head. 4/14/08RP 145, 147, 151.

When the police inspected the car, they discovered that the rear door panels were missing. 4/15/08RP 70. In addition, four bullet casings, all fired from the gun that Chase had given Smith, were recovered from inside the car (a fifth casing was recovered from inside Fuentes's shirt collar). 4/15/08RP 74, 84-89; 4/30/08RP 63-65, 120; 5/1/08RP 26, 39. Three bullets were recovered from the Tahoe, all fired from the same .45 caliber gun (a fifth bullet, also fired from the same gun, was recovered from one of the victims). 4/15/08 RP 145-51; 4/29/08RP 220-24; 4/30/08 RP 121; 5/1/08RP 39.

On January 5, 2003, after police officers spoke to Ms. Martinez and Ms. Tijiboy, Smith was arrested. 4/16/08RP 131-35; 4/17/08RP 13-14. Post-Miranda<sup>3</sup>, Smith gave the police many, many versions of the events.

In his first statement, Smith admitted that he and Cisco ran drugs to California. 4/17/08RP 23. Smith said that Cisco, along

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

with Edgar and Reuben, drove Smith to his apartment and dropped him off with two pit bulls that they had just picked up from Cisco's apartment. 4/17/08RP 24-25. Smith denied killing Cisco, but he assured the detectives that he would help them try to solve the case. 4/17/08RP 27-28.

Smith denied knowing Christopher Wright, a man known as "Wishbone," "T-Bone," or just "Bone." 4/17/08RP 32-33, 37. After the police told Smith that a witness had seen two black men unloading pit bulls from a Tahoe, Smith admitted that he knew Wright. 4/17/08RP 37. Cisco is not black, Wright and Smith are.

After the police confronted Smith with what the witness had seen, Smith told police that he drove Cisco, Edgar and Reuben to Federal Way for a drug deal. Smith got out of the car just before a "Mexican dude" shot everyone in the car. 4/17/08RP 39, 81. According to this story, when the Mexican dude pointed the gun at Smith and pulled the trigger, the gun did not fire, so the man fled. 4/17/08RP 40, 44, 81, 89. Smith said that he got scared and called his friend, Bone, to see what he should do. 4/17/08RP 44. Bone told Smith not to call the police because they would never believe him. Smith said he then drove around for hours and that he brought the dog crates up to Bone's apartment. 4/17/08RP 45-47,

90-95. Smith explained that he might have gotten some blood on him when he leaned in the car to check on Cisco after the Mexican dude left. 4/17/08RP 116.

Smith had no explanation for Cisco's missing wallet or why Cisco's pockets were turned inside out or why the rear panels of the Tahoe were missing or why money was missing or why guns were missing. 4/17/08RP 132-33.

As the police escorted Smith to jail, Smith said that he knew the name of the shooter. 4/17/08RP 164. Smith said that the man who shot everyone was "Angel." 4/17/08RP 169. Angel and Cisco had previously exchanged gun fire at a club.<sup>4</sup> 4/17/08RP 171-72. Smith denied taking Cisco's wallet. However, Smith saw Angel remove the rear panels; Smith was too scared to stop him. 4/17/08RP 176-77. Smith explained that he had not previously identified Angel because he was afraid that Angel would kill him or his family. 4/17/08RP 180.

About 15 minutes after that interview, Smith claimed that he realized he needed to be "truthful" with the police; he wanted to make another statement. 4/17/08RP 207. Smith admitted that he

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<sup>4</sup> Smith never explained why Cisco would conduct business with Angel after this violent incident.

shot Cisco (while driving on the freeway at 60 M.P.H.) because he knew that Cisco had previously murdered someone and Cisco had threatened to kill Smith and Smith's family. So, Smith said, "Fuck that. And when I say fuck that I pointed and I shot, I shot him man." 4/17/08RP 213-14. Smith also admitted taking Cisco's wallet and putting it on the roof of "Bone's" apartment complex — where police later found it. 4/17/08RP 208-34; 4/29/08RP 94-95. Smith then put the .45 caliber Ruger and a 9mm gun (Cisco's gun) in a box that he gave to a friend to hold for him. 4/21/08RP 74-75, 99; 4/29/08RP 164. Police went to Smith's friend's house and recovered the guns. 4/21/08RP 77-80; 4/29/08RP 161-66.

Later that same day, after the police recovered the murder weapon, Smith told the police that he wanted to clarify his earlier statement. Smith said that Cisco told Smith to drive him to California and when Smith said that he did not want to, Cisco called him a "bitch" while holding a gun. 4/21/08RP 86-89. Smith said that he feared for his life. So, he closed his eyes and shot Cisco in the head. 4/21/08RP 86-89. Edgar then jumped over the seat, so Smith shot him too. Smith said, "I just shot all of them. When this shit happened man it was just a tragedy man. A tragedy." 4/21/08RP 91-97.

Smith took the money out of the car door panels, bought a car for \$2,000 and an engagement ring for his girlfriend.<sup>5</sup> He spent a hundred dollars on cigarettes and he then threw the rest of the money away. 4/21/08RP 100-04. He also took the \$400 from Cisco's wallet. 4/21/08RP 101.

At trial, Smith testified. He admitted that he had repeatedly lied to the police (a psychologist had tested Smith's IQ (76) and determined that Smith's borderline mental retardation made him gullible, naive and easily manipulated; thus, the defense theory was that Smith had falsely confessed). 5/12/08RP 23-24, 38, 58; 5/14/08RP 198-200, 205, 216, 223-27.

Smith then told the jury "what had really happened." 5/14/08RP 125-69. The drug trafficking involved Smith driving Cisco down to California with marijuana that he would sell and then use the proceeds to buy cocaine, which Cisco would bring back up to Washington. 5/14/08RP 68-82. They sold marijuana to members of the Crips, but bought the cocaine from a Mexican gang, the MS-13. 5/14/08RP 69-86. The two gangs were essentially at war over drug territory. 5/14/08RP 85-86. For awhile,

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<sup>5</sup> At trial, two witnesses said that Smith had purchased a car from them on January 2, 2003. Smith paid \$2,500 in cash for the car and he said that he had a lot more money — about another \$58,000. 5/5/08RP 20-25; 5/6/08RP 31-32, 37.

business continued as usual, but then Smith and Cisco started receiving threats from members of the MS-13. 5/14/08RP 86-110.

On January 1, Cisco told Smith to drive him to California. 5/14/08RP 121-22. When Cisco picked Smith up, Reuben and Edgar were in the car. 5/14/08RP 123-24. Before they left Washington, Cisco needed to meet some people for a drug deal. When they got to the meeting place, Smith went to use the bathroom. 5/14/08RP 136-39. Two cars pulled in and five Crips got out. 5/14/08RP 81, 139-40, 143. Three men stood by Smith and told him to be cool and two men approached Cisco's car; Smith heard multiple gunshots. 5/14/08RP 141-44. One of the shooters tried to hand the gun to one of the men guarding Smith, but the man refused to take it. The gun dropped to the ground, which was how Smith ended up with the murder weapon. 5/14/08RP 144, 168-69.

On cross-examination, Smith admitted that his testimony was wholly different from any of the statements that he made to the police. 5/14/08RP 230. Those statements, Smith said, were all lies. 5/14/08RP 227-28.

Ironically, according to Ms. Tijiboy, Cisco hired Smith for security and protection. 5/19/08RP 72.

Additional procedural and substantive facts will be discussed in the section to which they pertain.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING JUROR 8 AFTER SHE UNEQUIVOCALLY STATED THAT SHE HAD NOT OR COULD NOT FOLLOW THE COURT'S INSTRUCTIONS.**

Smith contends that Juror 8's dismissal was a violation of his right to trial by a fair, impartial, and unanimous jury. Specifically, he claims that the trial court erred (1) because it failed to reinstruct the jury and have it continue deliberating, and (2) because the court failed to apply the correct evidentiary standard. He is mistaken. Reinstrucing the jury would have been futile since Juror 8 begged to be removed from the jury for the defendant's own good. The trial court also applied the correct evidentiary standard to his question.

**a. Facts.**

**i. Juror note and trial court's inquiry.**

After approximately five weeks of voir dire, the trial court impaneled 17 jurors on April 8, 2008. CP 1020, 1044. Opening statements occurred the following day for a trial that lasted over

6 weeks. Jury deliberations began on May 23, 2008. CP 1046-124. The jury deliberated for just over two days during which the presiding juror—Juror 8—sent out two questions on behalf of the jury. See CP 786-89.

On May 28 at 11:19 A.M., the presiding juror, Juror 8, sent out the following note:

SORRY FOR ANY UNDUE BURDEN THIS MAY CAUSE THE COURT. I ASK (BEG!) THAT I BE EXCUSED FROM THIS JURY FOR REASONING THAT IS BEYOND MY CONTROL. I DO NOT – NO – I KNOW THAT I WILL NEVER BE ABLE TO REACH A VERDIT (*sic*) IN THIS CASE. NO AMOUNT OF INSTRUCTIONS TO RETURN TO THIS JURY AND COME TO A CONCENSUS WILL EVER HAPPEN. I KNOW THAT YOU DON'T KNOW ME PERSONALLY, BUT PLEASE BE ADVISED THAT MY WORD (WHICH I'VE GIVEN FREELY FROM THE BEGINNING OF THIS CASE) IS BOND (*sic*). AND MY REQUEST IS JUSTIFIABLE AND TRUE AND CORRECT. IN THE END THIS ACTION IS TO ENSURE THAT MY ACTIONS ARE TOTALLY TO ENSURE THAT THE DEFENDANT IN THIS CASE GETS THE BEST AND THE FARIEST (*sic*) THAT I CAN GIVE. PLEASE REPLACE ME WITH AN ALTERNATE.<sup>6</sup>

CP 772, 1127; 5/28/08RP 1-2.

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<sup>6</sup> Unlike the first two notes, which were sent on behalf of the jury, this note was sent to the trial court without the full knowledge of all of the jurors. The Presiding Juror improperly wrote her note on the "INQUIRY FROM THE JURY AND COURT'S RESPONSE" form for her personal use. Although some of the jurors were aware that the Presiding Juror was writing a note to the court asking to be removed from the jury, the jurors did not see the note nor were they given any information as to why the Presiding Juror was seeking removal. CP 982 n.2.

The trial court immediately notified all counsel by email, along with a request for suggestions as to how the court should proceed. CP 845-46, 982.

A hearing occurred three hours later at 2:15 P.M. CP 1127-28. The court heard argument from both parties. The defense wanted the court to call out all of the jurors and inquire whether, if given additional time, there was a reasonable probability of the jury reaching a verdict. 5/28/08RP 2-3; CP 982-93, 1128. The State opposed defense counsel's position because there was no indication that the jury had reached an impasse. Accordingly, the State wanted the court to make inquiry of only this particular juror to determine whether she is unwilling or unable to deliberate. 5/28/08RP 3-4; CP 982-93, 1128. Defense opposed any individual questioning of Juror 8, arguing that any such inquiry would necessarily pierce the secrecy of jury deliberations. 5/28/08RP 5-6; CP 983, 1128.

After carefully considering all parties' positions, the controlling authority (State v. Elmore<sup>7</sup>) and the persuasive authority (United States v. Thomas<sup>8</sup>), the trial court determined that further

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<sup>7</sup> 155 Wn.2d 758, 123 P.3d 72 (2005).

<sup>8</sup> 116 F.3d 606 (2<sup>nd</sup> Cir. 1997).

inquiry of Juror 8 was required. 5/28/08RP 13-24; CP 984. The court advised Juror 8 that she needed to adhere to some rules as she answered the court's inquiry:

Okay. We, we're very concerned that when we bring you out to ask you about your message to us *that we learn absolutely nothing about what the deliberative process of the jury has been.* In other words, *I don't want to know votes, I don't know where people, where people stand or I don't want to know where you stand.* Okay, this is very important because the secrecy of jury deliberations is probably one of the highest of our values here and we always want people who sit on a jury to know that what goes on in that jury room is, is just between them okay, so very carefully now do not tell us anything about what's going on in there[.] I'm going to ask you a question more specifically that I've been prompted to ask you by what you said on your message. Okay, your message was pretty long, but the core of the message that we're concerned about is that you say "I asked and in parentheses begged that I be excused from this jury for reasoning that is beyond my control. I do not, no, I know that I will never be able to reach a verdict in this case." I don't really actually want to know precisely what the, what is meant by reasoning beyond your control but I'm going to ask a more narrow question. And the question is . . . throughout this process and up until this point have you been able and moreover in the future do you continue to be able to follow the Court's instructions that were given to you?

5/28/08RP 27-28.

Juror 8: "No."

5/28/08RP 28; CP 984, 1128. The court then excused Juror 8 to return to the jury room. 5/28/08RP 29; CP 984.

Despite defense counsel's claim that the trial court's question had been ambiguous, the court found that Juror 8 clearly, unequivocally and emphatically had stated that she could not follow the court's instructions—no matter the content of those instructions. 5/28/08RP 30; CP 984-85. Because Juror 8 had been clear in her refusal to follow the court's instructions, the court dismissed Juror 8, but admonished her that she remained under the court's order to not discuss the case with anyone. 5/28/09RP 34-39; CP 985-86.

The following morning the court seated the alternate, reinstructed the jury and advised the reconstituted jury that it needed to elect a presiding juror and then begin deliberations anew. 5/29/08RP 1-2; CP 1130. At approximately 3:00 P.M. that same day — about six hours after the jury had recommenced deliberations — the jury reached unanimous verdicts as to all charges. 5/29/08RP 7-8; CP 774, 777-78, 781-82, 785, 1131.

ii. June 9, 2008 hearing.

On June 9, 2008, the trial court heard a defense motion for a new trial based, in part, on the trial court's decision to dismiss

Juror 8. CP 790-817, 906-13. The State opposed the motion. CP 827-83, 914-59; 6/9/08RP 1-2. Both parties, however, agreed that the trial court should make its ruling based on the information known to the court at the time that Juror 8 was dismissed; i.e., any information that the court learned at a future hearing in which Juror 8 would be questioned about the circumstances surrounding her May 28 note should not bear on the court's ruling. 6/9/08RP 1-2.

In support of the motion for a new trial, defense counsel argued that the trial court erred because it had not followed the procedures set forth in Elmore. 6/9/08RP 20-22. The State disagreed, arguing that Elmore gives the trial court discretion to decide how to best investigate any problem with a deliberating juror. 6/9/08RP 24. Moreover, the State said that there was nothing in Ms. Brown's note to indicate that she sought dismissal based on her view of the sufficiency of the evidence. 6/9/08RP 25-26.

After hearing argument, the court stated that it makes no sense to believe that Ms. Brown was a holdout juror—especially because she said that she wanted to ensure that the defendant gets a fair trial. 6/9/08RP 38. If Ms. Brown knew that she was the

only holdout juror, the only logical inference is that she would not seek removal. Thus, the court concluded that there must have been other reasons Ms. Brown believed her continued presence on the jury would be disadvantageous to the defendant. 6/8/08RP 38-41. The trial court stated that three issues needed to be resolved at the next hearing: (1) what reasons were beyond Ms. Brown's control; (2) why Ms. Brown believed that she could not follow the court's instructions or continue to deliberate toward a verdict; and (3) what did Ms. Brown mean by ensuring that the defendant got a fair trial. 6/8/08RP 42.

iii. June 12, 2008 hearing.

Before the June 12 hearing, the trial court and counsel exchanged myriad emails regarding the scope of the court's questions to former Juror 8. CP 986. Defense counsel opposed any inquiry by the court. 6/12/08RP 2-3.

The court advised Ms. Brown that she was free to answer—or not—any of the court's questions. 6/12/08RP 6. The court first asked what Ms. Brown meant by the words “for reasons beyond my control.” 6/12/08RP 8; CP 986. Ms. Brown stated that there were things said in the jury room that should not have been said.

“Things that were told in the beginning that we shouldn't bring into the jury room, they were brought into the jury room.” 6/12/08RP 8-9; CP 986-87.

Next, the court asked Ms. Brown what she meant by being unable to follow the court's instructions—was she referring to one or some or all of the instructions. 6/12/08RP 9; CP 987.

Ms. Brown stated that when she was first asked the question she was kind of nervous and she wasn't able to really say what she needed to say. “It was kind of a, a loaded question to the point where it could have been taken to me two different ways, it could have meant did I understand the verbiage of the document or because of outside reasons was I able to make the determination.” 6/12/08RP 9; CP 987.

The court later commented in its written opinion that Ms. Brown's response to this question was in stark contrast to her answer on May 28, which was an immediate, without hesitation and emphatic “No.” CP 987. The court did not find that Ms. Brown had lied at any point in the two proceedings but, rather, the court

considered her answer at the June 12 hearing to be an “after-the-fact rationalization of her initial response.”<sup>9</sup> CP 987.

As questioning continued, Ms. Brown painted a picture of deliberations fraught with racism; she insisted that she had been treated with disrespect and isolated because of her race.

6/12/08RP 13-18; CP 991. (Ms. Brown was the only African-American juror in the original 12. The defendant is African-American. The alternate who replaced Ms. Brown is African-American). 6/12/08RP 19; CP 985-86, 989 n.9. Ms. Brown said that another juror came over to her and said that he has never been so ashamed to be white as he was during the deliberations.<sup>10</sup>

6/12/08RP 16-17.

A newspaper reporter was in the courtroom during this hearing. The article, which headlined that claims of jury racism could require a new trial, selectively printed bits and pieces of

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<sup>9</sup> The court later commented that in actuality Ms. Brown did not think about the court's question for a second. The court said, “The court no sooner got the question out of its mouth when she said no.” 7/31/08RP 27.

<sup>10</sup> The juror to whom Ms. Brown had attributed this comment later submitted an affidavit under penalty of perjury that stated he was the father of two African-American sons, the step-father to two mixed race Hispanic children, had a full-blooded Samoan son-in-law and that he had “not at any time hear[d] any racially based comments or slurs from any one of the Jurors.” CP 991 n.12 (quoting CP 961).

statements to imply that the jury had been racist. CP 991. As a result of the article, several of the former jurors wrote to the trial court and the State. The State appended the letters and affidavits to its response to the defense motion for a new trial. CP 960-80, 992. One of the declarations, written under penalty of perjury, was from the alternate juror who stated that she had sensed no racial bias among the other jurors. CP 992 (referring to CP 971).

Based on Ms. Brown's statements during the June 12 hearing and the declarations of the other jurors—especially the declaration of the alternate juror who was also African-American, the court concluded that race was absolutely not a factor in the jury's evaluation of the evidence against Mr. Smith.<sup>11</sup> CP 992.

iv. July 31, 2008 hearing.

The trial court set a hearing for additional argument on the defendant's motion for a new trial. In preparation, the court

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<sup>11</sup> The trial court also noted that nothing in Juror 8's note mentioned or even alluded to improper deliberations based on juror bias. Furthermore, normally the issues of this kind come to the court's attention by one juror complaining about another juror's conduct; it is not a juror requesting her own release from further participation. CP 1001-02.

reviewed affidavits that the State had obtained from the other jurors. The court then issued a written opinion denying the motion for a new trial. CP 960-80, 986-1002; 6/9/08RP 5-60; 6/12/08RP 11-22. The court concluded that when former Juror 8 wanted to be removed because she either was unwilling, or in her mind, unable to continue deliberations, there was no deadlock or hung jury at that point; i.e., the June 12 hearing supports the court's view that Juror 8's decision had nothing to do with the weight of the evidence. CP 993-94. The court also concluded that it had properly (1) dismissed Juror 8 based on her refusal to follow the law, and (2) refrained from making any further inquiry on May 28 because to have done so would have violated the secrecy of jury deliberations. CP 994-94, 1002.

b. The Trial Court Properly Excused Juror 8.

A criminal defendant in Washington has a constitutional right to a fair, impartial, and unanimous jury. Wash. Const. article I,

sections 3<sup>12</sup>, 21<sup>13</sup>, 22<sup>14</sup>; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

A trial court has the duty to dismiss any juror that the court determines to be unfit for service:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110. After a trial court determines in its discretion that a deliberating juror should be dismissed, the court must ensure that an alternative juror is available and fit for service, and must instruct the reconstituted jury to begin its deliberations anew. CrR 6.5. The statute and the court rule “place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the

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<sup>12</sup> “No person shall be deprived of life, liberty, or property, without due process of law.”

<sup>13</sup> “The right of trial by jury shall remain inviolate. . . .”

<sup>14</sup> “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases. . . .”

duties of a juror.” State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000), rev. denied, 143 Wn.2d 1015 (2001).

Jurors are sworn or affirmed “well and truly to try the issue between the State and the defendant, according to the evidence and instructions by the court.” CrR 6.6. A juror's purposeful refusal to follow the law as set forth in the jury instructions is a basis for removal. United States v. Thomas, 116 F.3d 606, 617 (2<sup>nd</sup> Cir. 1997); see also State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005) (finding that a juror is unfit if she exhibits prejudice by refusing to follow the law). On the other hand, a juror may not be dismissed based on the juror's doubts about the sufficiency of the evidence. Elmore, at 761.

Cases in which a juror is accused of refusing to follow the law require “special consideration.” Elmore, at 770 (citing United States v. Edwards, 303 F.3d 606, 632-33 (5<sup>th</sup> Cir. 2002); United States v. Symington, 195 F.3d 1080, 1085 & 1087-88 n.6 (9<sup>th</sup> Cir. 1999)). This is so whether the juror allegedly refuses to follow the law and the juror herself requests to be discharged from the duty or fellow jurors raise allegations of this form of misconduct. Thomas, 116 F.3d at 622.

The court in Elmore described the scope of the trial court's duty to meet its continuing obligation under RCW 2.36.110 and CrR 6.5 to investigate allegations of juror unfitness. Elmore, 155 Wn.2d at 774. Although trial courts were generally held to have discretion in conducting such investigations, "a study of the case law reveals that some *general guidelines* have emerged," one of which was that "if a juror or jurors accuse another juror of refusing to deliberate or attempting nullification, the trial court should first attempt to resolve the problem by re-instructing the jury." Elmore, at 774 (emphasis added). If re-instruction is ineffective and the problem unresolved, the trial court's inquiry should remain as limited in scope as possible. Id.

To protect against juror dismissals based on a juror's view of the evidence, the Washington Supreme Court has adopted a heightened evidentiary standard for a dismissal based on a juror's alleged misconduct during deliberations. Elmore, 155 Wn.2d at 775-76, 778. The court in Elmore held that a juror cannot be dismissed when there is "any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence." Elmore, at 778; see also Symington, 195 F.3d at 1087 ("We

emphasize that the standard is any *reasonable* possibility, not any possibility whatever”) (emphasis in original).

This “heightened evidentiary standard” strikes a delicate balance between the trial court’s duty to investigate allegations of juror misconduct during deliberations and the secrecy of those deliberations. Id. at 761, 773. Although the trial court retains discretion to investigate accusations of juror misconduct in the manner most appropriate for a particular case, the inquiry must focus on the juror’s conduct and the *process* of deliberations, rather than the *content* of discussions. Id. at 774.

Whether the trial court applied the appropriate standard of proof is a question of law reviewed de novo. Elmore, 155 Wn.2d at 768. Once the trial court applies the proper evidentiary standard, the decision to dismiss a juror is reviewed for abuse of discretion. Id. at 761, 778. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Based on the standards set forth above, the trial court carefully and soundly exercised its discretion in this case.

- i. The trial court was not required to reinstruct the jury.

Under the facts of this case, the trial court was not required to reinstruct the jury for several reasons. First, the Elmore decision recommends “general guidelines,” not mandatory procedures. The court stated:

We emphasize that the trial court retains discretion to investigate accusations of juror misconduct in the manner most appropriate for a particular case, and the procedures outlined above are *only guidelines*.

Elmore, 155 Wn.2d at 774-75 (italics added). Consequently, this Court should reject Smith's contention that Elmore *requires* that a court *must* first reinstruct the jury. Br. of Appellant at 10, 12 (citing Elmore, at 774). Cf. State v. Reier, 127 Wn. App. 753, 757, 112 P.3d 566 (2005) (reaffirming a previous holding that “should” is directional and not mandatory as is the term “shall”), rev. denied, 156 Wn.2d 1019 (2006); In re Elliott, 74 Wn.2d 600, 446 P.2d 347 (1968) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1964) (finding “shall” synonymous with “must” and either term used in a law expresses what is mandatory)).

Second, although the opinion in Elmore cautions that:

Where a juror asks to be dismissed the court must be equally careful that the request does not stem from the juror's wish to avoid the unenviable position of holdout juror, even though the juror has doubts as to the sufficiency of the evidence.

Elmore, 155 Wn.2d at 772 n.5, the trial court aptly found the situation in the instant case distinguishable. CP 997.

Unlike in Elmore, where two jurors communicated in writing to the judge that they believed another juror was refusing to convict under any view of the facts and refusing to follow the law, here there was no indication that any other juror prompted Juror 8 to beg removal from the jury. CP 772, 997. Elmore, 155 Wn.2d at 763; CP 772, 997. More significantly, Juror 8's note in no way indicated that the jury was close to a verdict, that Juror 8 was hindering the deliberations, or that Juror 8 favored either acquittal or conviction. As the trial court said, "This was not a jury asking for a 'hold out' juror to be removed so that a particular result could be reached." CP 997 & n.15. Rather, Juror 8 made her own assessment of her ability to remain on the jury and she unilaterally decided to communicate her need to be excused from deliberations to ensure

that the defendant got the best and fairest that she could give.<sup>15</sup>

CP 772, 997.

Finally, Juror 8 begged to be excused because no amount of instructions would dissuade her from her belief that she would never be able to reach a verdict. CP 997; 5/28/08RP 2. Given Juror 8's unequivocal position, the trial court was not required to tilt at windmills by reinstructing a juror for whom no amount of instructions would have altered her mindset. See 7/31/08RP at 19 (trial court finding that no amount of instruction to go back and deliberate toward reaching a verdict was going to have any effect).<sup>16</sup>

- ii. After applying the heightened evidentiary standard, the trial court properly exercised its discretion.

The trial court applied the correct legal standard. The court proceeded with extreme caution to protect the integrity of the jury process. 5/28/08RP 2, 6-7, 13; CP 984. The court cautioned

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<sup>15</sup> Smith claims that Juror 8's note "strongly supports the conclusion that she was a hold-out juror." Br. of Appellant at 11. However, Smith does not point to any language in the note that supports his claim. There is not any reference in the note to the evidence or Juror 8's view of the evidence. See CP 772.

<sup>16</sup> Smith has not challenged the trial court's factual findings, nor assigned error to any of the trial court's findings. See RAP 10.3(g). Thus, they are verities on appeal. Riley v. Rhay, 76 Wn.2d 32, 33, 454 P.2d 820 (1969).

Juror 8 not to divulge her views about the merits of the case or the state of deliberations; the court emphasized that “the secrecy of jury deliberations is probably one of the highest of our values here and we always want people who sit on a jury to know that what goes on in that jury room is, is just between them. . . .” 5/28/08RP 27-28. The court's inquiry thus focused on the deliberative *process*, not the *content*:

[T]hroughout this process and up until this point have you been able and moreover in the future do you continue to be able to follow the Court's instructions that were given to you?

5/28/08RP 28. Juror 8 responded “clearly, without hesitation, and emphatically: ‘No.’” CP 984; 5/28/08RP 29.

The trial court found that any further questioning would invade the secrecy of jury deliberations, and the court was satisfied that the situation was not one in which it was reasonably possible that the juror's request was based on her view of the evidence. CP 1000; 5/28/08RP 28-34. Rather, Juror 8 was “clear in her refusal to deliberate.” CP 984-85. She “clearly and unequivocally communicated her inability to follow the Court's instructions, which made her continuing participation in the jury deliberations legally impermissible.” CP 999. The trial court stated that, “This

unwillingness or inability to participate in deliberations and to follow the Court's instructions amounts to juror misconduct and an acceptable cure for juror misconduct is to replace the juror with an alternate." CP 994. Thus, after applying the proper evidentiary standard, the trial court concluded that Juror 8 would be excused. CP 985.

Deference is warranted to the trial court's finding that Juror 8 "can't follow the instructions. It doesn't matter what instructions," because "[t]he trial court is simply in the best position to evaluate the jurors' candor and their ability to deliberate." Elmore, 155 Wn.2d at 769 n.3 (citing United States v. Symington, 195 F.3d 1080, 1085 (9th Cir. 1999)). In reaching its conclusion, the court specifically noted Juror 8's demeanor.<sup>17</sup> CP 984-85 & nn.5-6. Juror 8 "appeared composed and resolute." CP 1000. Her answer to the court was "without hesitation and it was clear and definite"; Juror 8 "appeared determined and unwavering in her manner and speech." CP 1000.

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<sup>17</sup> See also CP 1000 (in reaffirming the decision to dismiss Juror 8 and denying the defense motion for a new trial, the trial court detailed Juror 8's demeanor throughout the six week trial and during the court's inquiry after it received Juror 8's note.)

Although the opinion in Elmore provides some general guidelines, the trial judge in this case was acutely aware that he was navigating difficult terrain. On the one hand, too much probing could result in a breach of the secrecy of jury deliberations. On the other hand, too little inquiry might be viewed on appeal as too little investigation. 5/29/08RP 8-25. Whatever the outer boundaries of appropriate inquiry, the trial court did not exceed them here.<sup>18</sup>

Consequently, because there was no reasonable possibility that the impetus for Juror 8's plea to be dismissed arose from her view of the evidence and because any further inquiry by the trial court may have intruded into the secrecy of jury deliberations, this Court should affirm the trial court's decision to dismiss Juror 8.

## **2. SMITH RECEIVED A PUBLIC TRIAL.**

Smith raises two issues in connection with the trial court's *in camera* review of a defense expert's report. First, Smith argues that the *in camera* review violated his right to a public trial. Second,

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<sup>18</sup> The trial court stated that one of its goals in seeking additional information from Ms. Brown was to provide this Court with a record from which a harmless error analysis could occur. 6/9/08RP 4. In other words, if this Court held that an insufficient inquiry occurred at the time the court initially excused Ms. Brown, the Court may nevertheless conclude that it was harmless error given what the trial court learned in a separate hearing post-verdict. 6/9/08RP 4.

Smith contends that he was deprived of his constitutional right to be present during a critical stage of the proceedings.<sup>19</sup>

This Court should reject these claims because Smith has misread the trial record. The trial court never closed the courtroom at any point in this case. Instead, the court excluded only the two prosecutors and the lead detective during an *in camera* hearing to determine whether a defense expert's report was discoverable or privileged. Smith, his counsel and a defense witness remained in court during the *in camera* review. Smith's claims are meritless and the cases cited by Smith are simply not controlling.

a. Facts.

During trial, the State informed the court that defense expert Kay Sweeney had examined evidence on two occasions; but, the State had never received Sweeney's photographs, bench notes or updated invoices from the second examination. 4/23/08RP 11, 40, 44. In addition, the State needed to re-interview Sweeney.<sup>20</sup>

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<sup>19</sup> Smith addresses these claims separately in his brief. Br. of Appellant at 13-24, §§ E.2, 3. However, because the trial court never ordered the courtroom closed, and because Smith was never excluded from the court proceedings, the State will address both claims in this section of the brief.

<sup>20</sup> The State had originally interviewed Sweeney February 7, 2007, but Sweeney's second evidence examination occurred after that interview. 5/12/08RP 83.

4/23/08RP 11. The trial court ordered the defense to provide the State with the outstanding discovery and to contact Sweeney and tell him that he needed to make himself available for a State's interview. 4/23/08RP 45, 48; 5/6/08RP 3.

Before the State's May 8, 2008 interview with Sweeney, the defense provided the State with copies of Sweeney's notes through May 14, 2007, which were purported to be Sweeney's "most recent notes." 5/12/08RP 83, 87.

On May 12, 2008, just before Sweeney testified, the State objected to the admission of photographs of a computer simulation of the crime scene because the individual who had prepared the simulations for Sweeney had died and was unavailable for cross-examination. 5/12/08RP 71-73. In addition, the State had just spoken with Sweeney in the hallway about other proposed defense exhibits. Sweeney told the prosecutors that he had consulted with a new computer expert sometime before March 28, 2008, information that Sweeney had denied just days earlier in the State's interview, and information that the defense had never provided to the State. 5/12/08RP 87-89. Sweeney could not specify the precise date because he did not have his notes with him—notes that the State never received despite multiple requests. 5/12/08RP

87-88. Defense counsel insisted that he was unaware of the existence of other notes apart from what had already been provided to the State. 5/12/08RP 107-09, 126.

The trial court determined that the best way to resolve whether there was any outstanding discovery was to take sworn testimony from Kay Sweeney. 5/12/08RP 111. Sweeney stated that he had notes from March 25 - April 11, 2008 that covered his work (including his consultation with the previously undisclosed new computer expert) and conversations that Sweeney had with defense counsel. 5/12/08RP 114-16, 120. Sweeney said that he believed he had previously provided the page of notes to defense counsel. 5/12/08RP 115, 119-20.

Before the trial court excused Sweeney, the State requested a copy of the notes. 5/12/08RP 122. Although defense counsel said that he had not seen the notes, he objected; he claimed that they were work product.<sup>21</sup> 5/12/08RP 122-26, 129. Counsel wanted the trial court to review the notes and excise any privileged information. 5/12/08RP 126.

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<sup>21</sup> After the court had excused Sweeney and told him to wait in the hallway, Sweeney found three additional pages of notes that also had not been provided to the State. 5/12/08RP 130-32.

Because the notes were illegible, the trial court needed Sweeney's help to conduct an *in camera* review of the documents with Sweeney. The court said:

Here is what I want to do. I want to clear this courtroom and make this an *incamera (sic)* courtroom and I want Sweeney in here and I want him to read me his notes, so I can make sure I understand what he is saying. It is not the most legible. That means the defendant has to go, everybody else has to go. If it is as I think, I don't think there is anything to redact, but I just want to make sure I am not missing the point because I don't understand the name of the certain person he's talking to because he is kind of illegible

5/12/08RP 133.

The court then asked the State, "Unless you are okay with me dealing with these guys in an *incamera (sic)* hearing and we can keep him (the defendant) here then." 5/12/08RP 134. Deputy Prosecutor Berliner inquired, "*So everybody but us in the room?*" 5/12/08RP 134. Defense counsel responded, "Yeah, that's pretty much it." The court said, "I mean I suppose that is a way to deal with it." 5/12/08RP 134. Berliner said, "We are fine with that Your Honor." 5/12/08RP 134. The court told the case detective that he too needed to leave. 5/12/08RP 134. No one else—assuming that other persons were present in the courtroom—was asked or ordered to leave. 5/12/08RP 134.

The court then said, “Okay, now I want this declared to be an . . . *in camera* (*sic*) proceeding[;] it is sealed, at least for the time being [but,] it will be unsealed if I learn that there is nothing to seal.” 5/12/08RP 134-35. The court asked Sweeney to read his notes into the record. 5/12/08RP 135. The defense was instructed to inform the court of any notes that they believed were work product. 5/12/08RP 135.

After Sweeney had read his notes, the court determined that one communication between Sweeney and defense counsel appeared privileged and needed excision. 5/12/08RP 142-43. The court stated that it would make two copies of Sweeney's notes—an original unredacted copy to be filed under seal and a redacted copy for all counsel. 5/12/08RP 143. The court then told his bailiff, “I think we are okay. *And you can tell the counsel they can come back in.*” 5/12/08RP 144.

The trial court entered an “Order to Seal,” which directed the Clerk of the Court to seal the 18-minute *in camera* proceeding. CP 1137-38. The clerk's minutes also reflect an *in camera* proceeding, not a courtroom closure. CP 1102.

b. The *In camera* Proceeding Did Not Abridge Any Public Trial Right.

A criminal defendant has a right to a public trial under both the federal and state constitutions. U.S. CONST. AMEND. VI; CONST. ART. I, § 22. Article I, section 10 of our constitution requires that “[j]ustice in all cases shall be administered openly. . . .”<sup>22</sup> The question of whether a violation has occurred is a question of law subject to de novo review. State v. Brightman, 155 Wn.2d 514, 122 P.3d 150 (2005).

The Washington Supreme Court has held that trial courts generally must consider five factors (“Bone-Club” factors) on the record and enter findings justifying its closure order before closing the courtroom during trial.<sup>23</sup> State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The failure to conduct the Bone-Club

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<sup>22</sup> Although Smith claims a violation of the public trial right (Br. of Appellant at 20), it is doubtful that Smith has standing to assert the public’s right to a public trial. See State v. Paumier, Slip op. 36346-1-II (filed April 27, 2010), at 18 (Quinn-Brintnall, J., dissenting); see also State v. Strode, 167 Wn.2d 222, 230 n.4, 217 P.3d 310 (2009).

<sup>23</sup> These factors are as follows: 1) there must be a compelling interest justifying the closure and, if the interest is a reason other than the defendant’s right to a fair trial, there must be a serious and imminent threat to the interest in question; 2) anyone present when the closure motion is made must be given an opportunity to object; 3) the method of closure must be the least restrictive means available for protecting the threatened interest; 4) the court must weigh the competing interests of the proponent of closure and the public; and 5) the closure order must be no broader in application or duration than is necessary. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

inquiry results in reversal for a new trial. Brightman, 155 Wn.2d at 518; but see State v. Coleman, 151 Wn. App. 614, 623-24, 214 P.3d 158 (2009) (finding that the trial court's failure to conduct a Bone-Club analysis before sealing jury questionnaires results in remand for reconsideration of the closing order under Bone-Club and Waldon<sup>24</sup>). To determine whether there was a courtroom closure, this Court looks to the plain language of the trial court's order. In re Personal Restraint of Orange, 152 Wn.2d 795, 807-08, 100 P.3d 291 (2004); see also State v. Gregory, 158 Wn.2d 759, 815-16, 147 P.3d 1201 (2006) (distinguishing a full courtroom closure from a temporary and limited exclusion).

But although almost all proceedings that occur during a trial are subject to the application of the Bone-Club factors before the courtroom may be closed, the superior court criminal rules also provide that an *in camera* hearing is the appropriate method for determining whether materials are discoverable. CrR 4.7(h)(6).<sup>25</sup>

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<sup>24</sup> State v. Waldon, 148 Wn. App. 952, 967, 202 P.3d 325 (holding that the Bone-Club analysis applies to the sealing of court documents), rev. denied, 166 Wn.2d 1026 (2009).

<sup>25</sup> "*In camera Proceedings*. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made *in camera*. A record shall be made of such proceedings. If the court enters an order granting relief following a showing *in camera*, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal."

Court rules are governed by principles of statutory construction and are presumed constitutional. State v. Waldon, 148 Wn. App. 952, 962, 202 P.3d 325, rev. denied, 166 Wn.2d 1026 (2009). “[A] court rule will not be construed to circumvent or supersede a constitutional mandate.” Waldon, 148 Wn. App. at 962 (quoting State v. Duckett, 141 Wn. App. 797, 808, 173 P.3d 948 (2007)). Yet, as this Court noted in State v. White, “[*In camera* proceedings by definition, by historical practice predating this state's constitution, and pursuant to case law predating *Bone-Club* were not open to the public.” 152 Wn. App. 173, 182, 215 P.3d 251 (2009) (holding that no public trial right was abridged by the trial court's *in camera* hearing to determine whether a witness had a Fifth Amendment Privilege, despite the trial court's failure to conduct a Bone-Club analysis before closing the courtroom), rev. denied, 168 Wn.2d 1015 (2010).<sup>26</sup>

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<sup>26</sup> Cf. State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (holding that a defendant does not have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts); State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001) (holding that the defendant had no right to be present at a chambers conference where jurors complained about the hygiene of another juror, because the matter was purely ministerial); State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000) (holding that a defendant had no right to be present at a chambers conference between the court and counsel regarding proposed jury instructions because the inquiry was legal and did not involve resolution of questions of fact); Meisenheimer v. Meisenheimer, 55 Wash. 32, 42-43, 104 P. 159 (1909) (finding that the trial court's order is valid even though judge exercised authority in chambers rather than in open courtroom).

If, after an *in camera* review of the material, the trial court determines that some material is privileged and therefore exempt from disclosure, the court should excise the protected portions and then disclose the remaining material. See CrR 4.7(f)(1);<sup>27</sup> (h)(5).<sup>28</sup> Determining whether an *in camera* review is required is left to the trial court's discretion. See Overlake Fund v. City of Bellevue, 60 Wn. App. 787, 796-97, 810 P.2d 507, rev. denied, 117 Wn.2d 1022 (1991).

In this case, the trial court exercised sound discretion when it found that an *in camera* review of Sweeney's notes was necessary to determine whether the notes were discoverable or privileged. Whereas generally a trial court would review the documents alone in chambers, here the documents were illegible, so the court needed Sweeney to read the notes into the record. 5/12/08RP 133-35. The court declared the hearing an *in camera* proceeding

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<sup>27</sup> **"Matters Not Subject to Disclosure.** (1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(1)(iv)."

<sup>28</sup> *"Excision.* When some parts of certain material are discoverable under this rule, and other parts not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal."

and ordered the transcript sealed, as required under CrR 4.7. 5/12/08RP 134; CP 1137-38. The defendant and his counsel remained and were instructed to tell the court which portions of the notes they believed were protected. 5/12/08RP 135. Then, as required by CrR 4.7, the court sealed an unredacted copy of Sweeney's notes – to protect the work product and make the notes available for appellate review – and ordered the defense to produce the remainder of the notes to the State. 5/12/08RP 142-43.

The trial court never ordered a courtroom closure. See, e.g., Gregory, 158 Wn.2d at 815-16. The only people excluded were the prosecutors and the case detective. 5/12/08RP 133-34. These three people are not members of the general public; they are officers of the court. See Rules of Professional Conduct, Preamble (stating that a lawyer is an officer of the court); cf. State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008) (finding that prospective jurors take an oath and are officers of the court until discharged), rev. denied, 165 Wn.2d 1024 (2009). Furthermore, the record does not reflect that the courtroom door was locked (or even closed). After Sweeney read his notes into the record, the trial court advised his bailiff, “And you can tell the counsel they can come back in.” 5/12/08RP 144. Taken in context, the only

reasonable inference from the court's comment is that no persons other than counsel (and the case detective) had been asked, much less ordered, to leave the courtroom.

Significantly, the *in camera* proceeding concerned only a legal or ministerial matter—whether any portion of Sweeney's notes were protected. There was no evidence-taking component. See, e.g., State v. White, 152 Wn. App. 173, 182, 215 P.3d 251 (2009).

In White, the trial court closed the courtroom over the defendant's objection and without consideration of the Bone-Club factors to conduct an *in camera* review of a witness's Fifth Amendment claim. 152 Wn. App. at 177. After a brief colloquy with the witness, the court learned that she did not intend to assert her privilege; thus, the matter was resolved, the courtroom reopened, the defendant returned, and the witness subsequently testified in open court. Id. at 177-78. This Court noted the historical practice of *in camera* proceedings, the propriety of using an *in camera* hearing to review the witness's claimed privilege and concluded that no public trial right had been abridged by the proceeding. Id. at 182. Moreover, the Court noted that applying the Bone-Club factors before an *in camera* review “would serve little purpose,

because proper *in camera* proceedings would always satisfy them.”

White, 152 Wn. App. at 182.

Similarly, in this case, an *in camera* hearing was the proper proceeding to determine whether work product or attorney-client privilege exempted any portion of Sweeney's notes from discovery. See CrR 4.7(f)(1); (h)(5), (6). As such, the consideration of the five factors would serve little purpose, because the proper *in camera* proceeding would satisfy them: (1) the defendant's work product and attorney-client privileges are clearly compelling interests, and having Sweeney read his notes in open court would render any privilege meaningless; (2) the State was given an opportunity to object, but properly refrained from interposing any objection; (3) the *in camera* review, while certainly restrictive, was the least restrictive means available to protect the interests in question; (4) a defendant's work product and attorney-client privileges are of sufficient importance to outweigh the public's interest in open proceedings; and (5) the proceeding lasted about 18 minutes—just long enough to confirm that some of Sweeney's notes were protected work product. Thus, here, as in White, no public trial rights were abridged.

Finally, if the trial court erred by failing to consider the five factors, the error was invited. See State v. Momah, 167 Wn.2d 140, 151-52, 217 P.3d 321 (2009) (finding that Momah affirmatively assented to the closure, argued to expand its scope, had the opportunity to object but did not, actively participated in the closed proceeding, and benefitted from the closure, the purpose of which was to safeguard his right to a fair trial by an impartial jury). So, too, in this case, Smith not only assented to the *in camera* proceeding, he requested it. 5/12/08RP 126. The *in camera* review was to safeguard Smith's privileges. Moreover, any alleged error could have been avoided if defense counsel had just honored his discovery obligations. He should not get a windfall after his misconduct necessitated the *in camera* review.

This Court should hold that Smith's right to a public trial was not violated. If, however, the trial court was required to conduct a Bone-Club analysis before sealing an unredacted copy of Sweeney's notes, the Court should remand for consideration of the Bone-Club factors, not grant a new trial. And, since Smith was never excluded from the courtroom, this Court need not resolve whether the *in camera* review was a critical stage of the proceedings.

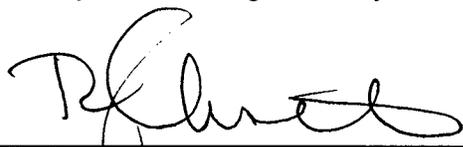
**D. CONCLUSION**

This Court should hold that the trial judge exercised his discretion properly when he excused a deliberating juror who emphatically and unequivocally stated that she could not follow the court's instructions. The Court should also hold that Smith's trial was public. The Court should affirm Smith's three convictions for first-degree murder.

DATED this 11 day of May, 2010.

Respectfully submitted,

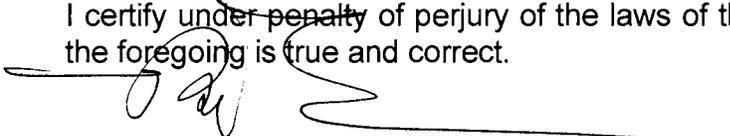
DANIEL T. SATTERBERG  
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By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of Respondent, in STATE V. TONY SMITH, Cause No. 62459-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly  
Done in Seattle, Washington

05/11/10  
Date

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