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NOTE:

- 1 VRP is voir dire of June 3rd, 2008, Pages 1 – 35;
- 2 VRP is voir dire the afternoon of June 3rd, 2008, Pages 1 – 124;
- 3 VRP is voir dire of June 4th, 2008, Pages 1 – 87;
- 4 VRP is Opening Statements of June 5th, 2008, Pages 1 – 24;

The above transcripts were provided after amendment of the Order of Indigency and received the 30th, of October, 2009.

- 1 RP is 3.5 Hearing of June 2nd, 2008, Pages 1 - 153;
- 2 RP is Motion in Limine June 3rd, 2008, Pages 154 – 188;
- 3 RP is Raymond Howell's Plea of guilty June 4th, 2008, Pages 189 – 209;
- 4 RP is Trial June 5th, 2008, Pages 210 – 325;
- 5 RP is Trial June 9th, 2008, Pages 326 – 520;
- 6 RP is Trial June 10th, 2008, Pages 521 – 700;
- 7 RP is Trial June 11th, 2008, Pages 701 – 873;
- 8 RP is Trial June 12th, 2008, Pages 874 – 1075;
- 9 RP is Trial June 16th, 2008, Pages 1076 – 1235;
- 10 RP is Trial June 17th, 2008, Pages 1236 – 1366;
- 11 RP is Trail June 18th, 2008, Pages 1367 – 1544;
- 12 RP is Trial June 19th, 2008, Pages 1545 – 1710;

Recess from June 19th, through August 4th, 2008.

- 13 RP is Motions August 4th, 2008, Pages 1721 – 1741;
- 14 RP is Motions August 5th, 2008, Pages 1742 – 1782;
- 15 SRP is Sentencing September 12th, 2008, Pages 1783-1827;
- 15 RP is Trial August 18th, 2008, Pages 1 – 48;
- 16 RP is Trial August 19th, 2008, Pages 1 – 124;
- 17 RP is Verdict August 20th, 2008, Pages 1 - 16

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

**STATE OF WASHINGTON,
Respondent,**

V.

**TIMOTHY J. BLUEHORSE,
Petitioner, Pro-Se.**

No. 38325-0-II

**STATEMENT OF
ADDITIONAL GROUNDS
PURSUANT TO
RAP 10.10**

I. STATEMENT

I, Timothy J. Bluehorse have received and reviewed the opening brief prepared by my appellate attorney, Stephanie C. Cunningham. Summarized below are the additional grounds that my appellate attorney did not address in her opening brief on my behalf. Appellant believes that the following issues have merit and should be addressed by this Honorable Court. Appellant understands that the Court will review this Statement of Additional Grounds for Review prepared by me when my appeal is considered.

II. ISSUES PRESENTED FOR REVIEW

- 1. HAS THE TRIAL COURT VIOLATED MR. BLUEHORSE'S CONSTITUTIONAL RIGHT TO OPEN AND PUBLIC TRIAL UNDER THE SIXTH AMENDMENT AND WASHINGTON CONSTITUTION ARTICLE I, § 22?**
- 2. WAS IT VINDICTIVE PROSECUTION AT SENTENCING FOR THE STATE TO ALLEGE THEY SHOULD HAVE CHARGED BLUEHORSE WITH FIRST DEGREE ASSAULT?**
- 3. WAS MR. BLUEHORSE'S RIGHT TO FAIR TRIAL VIOLATED WHEN A WITNESS ALLEGED PREJUDICIAL GANG INFORMATION, AND THAT BLUEHORSE AS BEING THE PRIMARY SHOOTER, AND A TAINTED JURY, WITH A TWO MONTH RECESS CAUSE ENOUGH PREJUDICE TO BRING A MISTRIAL?**

III. FACTS AND ARGUMENT GROUND ONE

TRIAL CLOSURE

- 1. HAS THE TRIAL COURT VIOLATED MR. BLUEHORSE'S CONSTITUTIONAL RIGHT TO OPEN AND PUBLIC TRIAL UNDER THE SIXTH AMENDMENT AND WASHINGTON CONSTITUTION ARTICLE I, § 22?**

Both article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee criminal defendants the right to a public trial. *State v Brightman*, 155 Wn.2d 506, 514, 122 p.3d 150 (2005). In addition, article I, section 10 of the Washington Constitution secures the public's right to open and accessible proceedings. *State v Duckett*, 141 WA. App. 797, 803, 173 P.3d 948(2007) (justice in all cases shall be administered openly and without unnecessary delay) (quoting Wash. Const. Art. I, § 10). These provisions "assure a fair trial, foster public understanding and trust in the judicial system, and gives judges the check of public scrutiny." *Brightman*, 155 Wn.2d at 514. The guarantee of open criminal proceedings extends to jury selection, which is important "not simply to the adversaries but to the

criminal justice system.” **State v Coleman**, 151 WA. App. 614, 620(2009) (quoting **In re Pers. Restraint of Orange**, 152 Wn.2d 795, 804, 100 P.3d 291(2004)).

To determine whether the trial court violated Bluehorse’s’ right to a public trial, the court must decide whether the trial court’s action amounted to a closure excluding the public. This case is much like the case in **State v Sadler**, 147 WA. App. 97(2008) (the court never asked anyone in the courtroom to leave the courtroom; nothing in the record shows that the trial court *affirmatively* excluded the public from the *Batson* hearing; and because counsel, the trial court, the defendant, two correctional officers, and the court reporter were present at the hearing). **Id. at 112.**

The case at bar is similarly situated. On two separate occasions the judge closed the courtroom. Once on the afternoon of the June 3rd, 2008, **2 VRP 77-123** and again held over from this day **3 VRP 4-10**; and the second time was **3 VRP 65-86**. During the first closure Judge Chushcoff said the following:

“That’s time. Ladies and gentlemen, we’re going to ask a few of the jurors to stay behind. We’re going to talk to them individually. We’re going to let all the rest of you go. The jurors I’d like to stay behind are juror’s No. 16, 21, 27, 39 and 45. And except for those five jurors, the rest of you may go. **2 VRP 77.**

The court never asked anyone if there was any objection and clearly when a judge makes a request that the court is going to talk to them individually and the rest of you may go, people are going to get up and leave, even though he was generally speaking to the jury pool. The judge further requested that Juror 46 stay back as well. This wording is clearly to the public and the venire members of the court. The court expressed clearly that those six jurors stay back and all of them to follow Ms. Winnie into the jury room. Then all the jurors except No. 27 left the court room. **2 VRP 78.** He was questioned in private until

there was a question about what he could be asked and he left the courtroom. **2 VRP 85.** At this time the court then said that during a break they had a colloquy and that Juror 33 stayed behind to be questioned privately. **2 VRP 86.** Juror 27 re-entered the courtroom at **2 VRP 87.** He was excused for Cause. **2 VRP 88.**

Juror 33 enters the courtroom and was questioned, privately. **2 VRP 88.** After questioning he left the courtroom to come back the next day. **2 VRP 91.** One by one each of these six jurors entered the courtroom for private questioning. Juror No. 16 from **2 VRP 91 – 94;** Juror No. 21 from **2 VRP 94 – 106;** Juror No. 45 from **2 VRP 106 – 108;** Juror No. 39 from **2 VRP 108 – 115** who was excused for cause at **2 VRP 116;** Juror No. 46 then enters the court room from the Jury Deliberation room **2 VRP 116 – 120.** When each of the above jurors entered the courtroom they were asked why they wanted to be questioned in private by the judge.

The court asked everyone to leave, but certain jurors were asked to stay behind, and the Court said:

“That’s time. Ladies and gentlemen, we’re going to ask a few of the jurors to stay behind. We’re going to talk to them individually. **We’re going to let “all” the rest of you go.**” (Emphasis added).

This clearly shows a closure of some kind by its language “*all*”. This was done in violation of the State and Federal Constitution. Yet, there was a second closure where several other jurors expressed a desire to be questioned in private. It went as follows:

“Ladies and Gentlemen, I believe that Jurors 23 and 29 have expressed a desire to be questioned privately. We have 15 minutes before noon. We are going to take that time to do that so we can talk to those folks.

If there is anyone else that wants to raise an issue with us privately, feel free to stay back. I will ask Juror No. 23 and 29 to stick around. The rest of you - - we will let you recess here in a second until 1:30.

I am going to ask you to report downstairs to Jury Administration. There is a couple little housekeeping things that we are going to have to do right about that time. It is a little easier to do that with you all down there instead of up here.

We will ask you - - all of you to come back at 1:30 to Jury Administration, and we'll get you from there.

Juror 23, 29, Juror No. 1, and anyone else who would like to discuss things privately, please stay back.

Mr. Ferrell: I think that 13 had also expressed that.” **3 VRP 65-66.**

There is no doubt that this was private questioning for the prospective jurors 1, 13, 23, and 29. It is clear that the Court was speaking to the audience by his opening statement:

“Ladies and Gentlemen, I believe that Jurors 23 and 29 have expressed a desire to be questioned privately. We have 15 minutes before noon. We are going to take that time to do that so we can talk to those folks.”

3 VRP 65.

This is because he then began to talk to the prospective jurors in the next 3 paragraphs:

“If there is anyone else that wants to raise an issue with us privately, feel free to stay back. I will ask Juror No. 23 and 29 to stick around. The rest of you - - we will let you recess here in a second until 1:30.

I am going to ask you to report downstairs to Jury Administration. There is a couple little housekeeping things that we are going to have to do

right about that time. It is a little easier to do that with you all down there instead of up here.

We will ask you - - “all of you” to come back at 1:30 to Jury Administration, and we’ll get you from there.” (Emphasis added).

3 VRP 66.

Court convened when prospective juror 29 enters the courtroom to be examined privately while jurors 23, 13, and 1 went with Mrs. Winnie back into the Jury deliberation room. **3 VRP 66.** When that conversation was finished, the court excused juror 29 to go to Jury Administration at 1:30 when they will call the jurors back up. **3 VRP 72.** The same was repeated with prospective juror 23, same people, and same situation as juror 29. **3 VRP 72.** The court excused juror 29 to “Please come back at 1:30, but report to Jury Administration downstairs. **3 VRP 76.** The Court called the next juror and No. 13 entered the courtroom and the Court indicated to that Juror that there was an issue that you wanted to talk about privately? Juror 13: yes. **3 VRP 76.** The Court excused this juror after questioning by telling him to “Please come back at 1:30, and report back downstairs to Jury Administration.” **3 VRP 78.** Then the Court called for Juror No. 1, and No. 1 entered the courtroom. The court indicated to this juror that they did not know why we are questioning you except that you indicated you did want to be questioned privately about something. **3 VRP 78.** Juror No. 1 was excused for cause after exiting the courtroom. Then the jury panel enters the courtroom. **3 VRP 84.** Mr. Howell and his attorney, Mr. Shaw is no longer participating due to taking a plea during the closure. **3 VRP 84-85.** The court stated they are now going to seat those who have been selected for the jury. **3 VRP 85.** Again, this was also outside of the presence of the public. The Judge again asked each and every juror why they wanted to be questioned or interviewed in private.

The above instances are clearly closure of the proceedings for juror privacy, thus violating the plainly articulated guidelines that every trial court must follow before it closes a courtroom to the public. **State v Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325(1995)** (In the *Bone-Club* case the Washington Supreme Court held that a courtroom may be closed to the public only when the criteria for closure identified in that case are satisfied). In **State v Strode, Washington Supreme Court Case No. 80849-0 (October 8, 2009)** is even more on point to this case due to being voir dire private questioning. There the trial court violated Strode's right to a public trial by conducting a portion of jury selection in the trial judge's chambers in unexceptional circumstances without first performing the required *Bone-Club* analysis. The Supreme Court held that this is a "structural error that cannot be considered harmless." Therefore, remand for new trial is required. **State v Strode, Decision Oct. 2009 Case No. 80849-0.**

Again, the similarities of this case and the *Strode* case are unquestionably similar. In *Strode* the prospective jurors were asked questions outside of the presence of the other jurors. The record in Bluehorse's is unclear as to who exactly were present during the private questioning other than the three defendants' and their counsel, the judge, prosecutor, transcriptionist, clerk of the court, and the juror being questioned. Like the *Strode* case the judge elicited this was in private. Challenges for cause were done on juror No. 1, after examination in private, and on all of the four (4) jurors. All were returned to the jury administration, but none were ever admitted as jurors, they were among the others that were excluded service while the courtroom was "closed." **3 VRP 85.**

The first statement of the judge was clearly addressing the courtroom patrons by its wording:

“Ladies and Gentlemen, I believe that Jurors 23 and 29 have expressed a desire to be questioned privately. We have 15 minutes before noon. We are going to take that time to do that so we can talk to those folks.”

Clearly the term ladies and gentlemen is critical when focused that it addresses everyone in the courtroom along with the next part of the same statement to the jury pool:

“If there is anyone else that wants to raise an issue with us privately, feel free to stay back. I will ask Juror No. 23 and 29 to stick around. **The rest of you - - we will let you recess here in a second until 1:30.**”

This address to the court and the members shows that the judge asked for privacy to question certain jurors. However, this seems not to be the only time that there were some types of closure due to jury matters.

During the trial and after a recess there became issues with jurors 5 and 9. **10RP 1319-1324.** Here the court questioned these jurors before the other jurors and the public were let in.

The assumption clearly points to two distinct courtroom closures short of saying it was closed. The venire panel is a public entity whether they are prospective jurors, visitors, or interested parties. If they are not present for portions of the trial when they are not actually “jurors” yet, what harm is it for them to be there. The public trial right applies to the evidentiary phases of the trial, *and to other adversary proceedings.* **State v Rivera, 108 WA. App. 645, 652-53, 32 P.3d 292 (2001) (quoting Ayala v Speckard, 131 F.3d 62, 69 (2nd Cir. 1997)).** The right to public trial is linked to the defendant’s constitutional right to be present during the critical phases of a trial; thus, “a defendant has a right to an open court whenever evidence is taken, during a suppression hearing . . . during voir dire,” and during the jury selection process. **Rivera, at 653 (citing Press-Enter, Co., 464 US 501).** A defendant does not, however, have a right to a public hearing on purely ministerial

or legal issues that do not require the resolution of disputed facts. See Rivera, at 653 (neither public nor defendant had a right to be present when trial court addressed a juror’s complaint about another juror’s hygiene).

Even under GR 16 (c) (1) open access is presumed in courtroom photography and recording by the news media; any limitations on access “must be supported by reasons” found by the judge to be sufficiently compelling to outweigh that presumption.

The same is true for voir dire or any other proceeding in court. Under State v Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), there is a required inquiry to determine if the closure will unjustifiably interfere with the defendant’s right to a public trial.

A. ACCESS TO WASHINGTON COURT PROCEEDINGS

Trial and court proceedings are public events, but in very rare circumstances they may be closed. In Seattle Times Co. v Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), the Washington Supreme Court set out circumstances and specific procedures that must be satisfied before closure and/or sealing of Washington court proceedings can be allowed. Those circumstances and procedures have been summarized as follows:

1. The proponent of closure or sealing must make some showing of the need for doing so, and where that need is based on a right other than an accused’s right to fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method of curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Allied Daily Newspapers v Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993) (citing **Ishikawa**, 97 Wn.2d at 37-39). In **State v Bone-Club**, 128 Wn.2d 254, 906 P.2d 325 (1995), the court described these procedures as “a strict, well-defined standard” intended “[t]o assure careful, case-by-case analysis of a closure motion,” and which “clearly call[] for a trial court to resist a closure motion except under the most unusual circumstances.” **Id.** at 258-59.

The *Ishikawa* standards apply to both criminal and civil trials. See **Dreiling v Jain**, 151 Wn.2d 900, 915, 93 P.3d 861 (2004); **Cohen v Everett City Council**, 85 Wn.2d 385, 388, 535 P.2d 801 (1975).

The U.S. Supreme Court has consistently held that the public and press have a constitutional right to open court proceedings under the First and fourteenth Amendments.

In **Richmond Newspapers, Inc. v Virginia**, 448 US 555, 573, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), the court recognized that criminal trials are presumptively open to the press and the public unless an “overriding” showing is made that “closure is required to protect the defendant’s superior right to a fair trial.” In **Globe Newspaper Co. v Superior Court**, 457 US 596, 603, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), the court reaffirmed *Richmond newspapers*, holding that “the press and general public have a constitutional right of access to criminal trials” and that this right may be denied only when it is shown that closure “is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.”

In Press Enterprise Co. v Superior Court (Press Enterprise I), 464 US 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), The court held that voir dire proceedings are presumptively open to the public and press and that to overcome the presumption, a trial court “must”¹ make specific findings that: (emphasis added).

1. Closure is essential to preserve a higher value;
2. The order of closure is no broader than necessary; and
3. No less restrictive alternatives would adequately protect the specified interests.

In Press Enterprise Co. v Superior Court (Press Enterprise II), 478 US 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), the court specifically applied these rules to preliminary hearings, allowing closure only if there is a “substantial probability that the defendant’s right to a fair trial would be prejudiced,” and required “specific, on the record findings,” demonstrating “closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* at 13-14.

The Supreme Court has also recognized that the policies favoring open justice apply regardless of the nature of the proceeding, and that “historically both civil and criminal trials have been presumptively open.” Richmond Newspapers, Inc., 448 US at 580 n. 17; see also *Id.* at 559 (Stewart, J., Concurring); *Id.* at 596 (Brennan, J., Marshall, J., concurring). A majority of the federal circuits follow this reasoning and found a First Amendment right to open proceedings and court records in a wide variety of civil cases.

¹ RAP 1.2(b) The command "must" is used in the rules to emphasize that noncompliance will result "in more severe than usual sanctions. When a party fails to do what he or she "should," the appellate court has wide discretion in fashioning a sanction. RAP 1.2(b), 18.9. When a party fails to do what he or she "must," the failure is governed by RAP 18.8(b) or 1.2(b). *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978).

The decisions of the U.S. Court of Appeals for the Ninth Circuit, which includes Washington and most of the western states, recognize this First Amendment right of access in a variety of contexts. See U.S. v Brooklier, 685 F.2d 1162 (9th Cir. 1982) (voir dire, suppression hearings, and transcript); Associated Press v US District Court, 705 F.2d 1143(9th Cir. 1983) (pre-trial hearings and documents); CBS, Inc. v US District Court, 765 F.2d 823 (9th Cir. 1985) (post trial memorandum on sentence reduction motion); Seattle Times Co. v US district Court, 845 F.2d 1513 (9th Cir. 1988) (Pretrial release proceedings and documents); Oregonian Publ'g Co. v US District Court, 920 F.2d 1462 (9th cir. 1990), cert. denied, 501 US 1210 (1991) (plea agreements and related documents). In each case the Ninth Circuit applied standards similar to those set out by the Supreme Court in **Press Enterprise I** emphasized that the proponent of closure must first show there is “a substantial probability” of “irreparable damage” to the defendant’s fair trial right if the proceedings are not closed – simply showing extensive publicity is not enough.

The record does not show that Mr. Bluehorse waived this right, nor does it show that the trial court ever advised Bluehorse’s of his right to a public trial or asked him to waive his right. Case law clearly and convincingly requires that the trial court ensure the defendant is aware of his right to public trial before waiver can occur. Bone-Club, 128 Wn.2d at 261 (“[T]his court has held an opportunity to object holds no ‘practical meaning’ unless the court informs potential objectors of the nature of the asserted interests.” (quoting Seattle Times Co. v Ishikawa, 97 Wn.2d 30, 39, 640 P.2d 716 (1982))).

The trial court’s affirmative speaking that the prospective jurors are speaking privately, without the jury/venire panel or public, has the same effect as excluding the public. These jurors were essentially isolated from the public eye, insulated to their matters

being privately heard. The mere presence of counsel's, court reporter, defendants, court staff, judge and security officer, and the juror who wanted his matters heard privately, by no means, demonstrates, that the public was entitled to attend.

i) A JURY SELECTION PROCESS IN A CRIMINAL TRIAL THAT IS CLOSED TO THE PUBLIC HARMS THE DEFENDANT AND TRIAL COURT'S FAILURE TO CONDUCT THE INQUIRY REQUIRED BY STATE V. BONE-CLUB, 128 Wn.2d 254(1995) IS A VIOLATION OF BLUEHORSE'S' CONSTITUTIONAL RIGHTS.

Generally, to protect these important rights, before a trial court may exclude the public from the courtroom, it must conduct the five-part *Bone-Club* inquiry and determine if the closure will unjustifiably interfere with the defendant's right to a public trial. State v Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). If the proceeding is subject to the right to public trial, a trial courts failure to a conduct a *Bone-Club* inquiry before excluding the public "results in a violation of the defendant's public trial rights. Id. at 515-16 (citing In re Pers. Restraint of Orange, 152 Wn.2d 795, 809, 100 P.3d 291 (2004). The defendant need show no prejudice resulting from a violation of this right; prejudice is presumed. Bone-Club, 128 Wn.2d at 261-62 (citing State v Marsh, 126 Wash. 142, 147, 217 P. 705 (1923); State v Rivera, 108 WA. App. 645, 652, 32 P.3d 292 (2001). Furthermore, a defendant's failure to "lodge a contemporaneous objection" at the time of closure does not amount to a waiver of his right to a public trial. Brightman, at 517 (citing Bone-Club, at 257). The remedy for a violation of article I, section 22 is remand for a new trial. Rivera, at 652 (citing Bone-Club, at 261-62). Because the issue of whether Bluehorse's right to public trial has been violated is a question of law that this

Court has established has joined with Division Three in disagreeing with the approach of Division One.

Division One takes a very different standpoint to what constitutes a violation of the right to a public trial. **State v Momah, 141 WA. App. 705, 171 P.3d 1064 (2007) review granted, 163 Wn.2d 1012 (2008).**² In that case, the trial court conducted individual questioning of certain jurors in chambers or in the jury room with the defendant, counsel, and a court reporter present. **Id. at 710-11.** The court held that a defendant's right to a public trial is not triggered until the trial court explicitly orders the courtroom closed, citing **Brightman's** rule that "[o]nce the plain language of the trial court's ruling imposes closure, the burden is on the State to overcome the strong presumption that the courtroom was closed." **Momah, 141 WA. App. at 714** (emphasis omitted) (alteration in original) (quoting **Brightman, 155 Wn.2d at 516**). But division One's analysis seems to foreclose any possibility that a defendant could prove that a courtroom was closed by other than an explicit ruling by the court. This is where the court joined Division three in strongly disagreeing with this approach. **State v Erickson, 146 WA. App. 200, 207-08, 189 P.3d 245 (2008)**; see **State v Duckett, 141 WA. App. 797, 809, 173 P.3d 948(2007)**; **State v Frawley, 140 WA. App. 713, 720, 167 P.3d 593 (2007)**.

B. RIGHT TO OPEN AND PUBLIC TRIAL

i) THE SIXTH AMENDMENT AND CONSTITUTIONAL ARTICLE ONE §§ 22 BOTH GUARANTEE CRIMINAL DEFENDANT'S THE RIGHT TO A PUBLIC TRIAL.

² The Supreme Court of Washington heard oral argument in this case on June 10, 2008 No. 81096-6, and decided on October 8, 2009 that Momah had waived this right due to counsel agreement to private questioning because of heavy publicity. *State v Strode*, No. 80849-0 was decided that same day on trial closure and found his right to be a structural error that cannot be deemed harmless.

Article I, section 22 of the Washington Constitution ³ and the Sixth Amendment to the United States Constitution ⁴ both guarantee criminal defendants the right to a public trial. ⁵ **State v Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)**. The right to an open and public trial ensures that the defendant receives a fair trial, “in part reminding the officers of the court of the importance of their functions,” encouraging witnesses to come forward, and discouraging perjury. **Waller v Georgia, 467 US 39, 46-47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)**; see **Brightman, 155 Wn.2d at 514**. Although the right to a public trial can serve the public or the defendant, the public’s right and the defendant’s right “serve complementary and interdependent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards.” ⁶ **State v Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995)**.

³ Section 22 provides in relevant part:

In criminal prosecutions the accused shall have the right . . . 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.

⁴ The Sixth Amendment provides in relevant: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”

⁵ Article I, section 10 of the Washington Constitution gives the public and the press a right to open and accessible court proceedings. Section 10 provides: “Justice in all cases shall be administered openly, and without unnecessary delay.” In **State v Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325(1995)**, our Supreme Court held that the same closure standards apply for both section 10 and section 22 rights.

⁶ In **Waller**, the United States Supreme Court noted that “[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that *the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.*” **Waller, 467 US at 46** (internal quotation marks omitted) (quoting **Gannett Co. v DePasquale, 443 US 368, 380, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979)**). As succinctly put by the California Court of Appeals, This benefit of public oversight or superintendence *accruing to a criminal defendant* as a result of the openness inherent in a truly public trial is largely lost if the only openness attending the trial proceedings (or any portion thereof) is to be found in an after-the-fact review of a cold written record of proceedings to which the public had no access. **People v Harris, 10 Cal. App. 4th 672, 685, 12 Cal. Rptr.2d 758 (1992)** (emphasis added).

**ii) A CRIMINAL DEFENDANT’S CONSTITUTIONAL
RIGHT TO A PUBLIC TRIAL EXTENDS TO JURY
SELECTION**

Additionally, “it is well settled that the right to a public trial also extends to jury selection.” Brightman, 155 Wn.2d at 515 (citing In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (citing Press-Enter. Co. v Superior Court of Calif., 464 US 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984))). “[A] closed *jury selection process* harms 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.” Brightman, 155 Wn.2d at 515 (emphasis added) (citing Orange, 152 Wn.2d at 812). In addition, “[t]he guaranty of open criminal proceedings extends to ‘[t]he process of juror selection’” because the jury selection process “‘is itself a matter of importance, not simply to the adversaries but to the criminal justice system.’” Orange, 152 Wn.2d at 804 (emphasis added) (second alteration in original) (quoting Press-Enter. Co., 464 US at 505).

IV. CONCLUSION - ADDITIONAL GROUND ONE

1. **MR. BLUEHORSE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN OPEN AND PUBLIC TRIAL WHEN THE TRIAL COURT CONDUCTED “PRIVATE” VOIR DIRE WITHOUT FIRST CONDUCTING A STATE V BONE-CLUB ANALYSIS.**

The trial court closed the courtroom during a significant portion of jury selection. In all, this private conversations and exclusions of the public or venire panel cover 73 pages of the transcript of voir dire, 2 VRP 77-123; 3 VRP 4-10; 3 VRP 65-86; and over five pages during the trial. 10 RP 1319-1324. Prior to closing the courtroom, the trial court

failed to conduct a hearing as required. There was not any explicit exclusion of the public, but by the judge's own words of "you wanted to talk to us privately" should help this court to see that it was closed to the public, and all of the above occasions constituted a courtroom closure without the required findings and considerations and this court should reverse and remand for new trial in accordance to those violations of Mr. Bluehorse's Constitutional right to a public trial.

V. FACTS AND ARGUMENT GROUND TWO

REAL FACTS DOCTRINE

VINDICTIVE PROSECUTION

2. WAS IT VINDICTIVE PROSECUTION AT SENTENCING FOR THE STATE TO ALLEGE THEY SHOULD HAVE CHARGED BLUEHORSE WITH FIRST DEGREE ASSAULT?

The State charged Mr. Bluehorse with one count of drive by shooting from an incident on July 5th 2007, and one count drive by shooting and two counts assault 2nd degree from an incident from August 15th 2007. CP 3, 6. Mr. Bluehorse was acquitted on all charges from the August 15th 2007 incident. CP 29-33, 73-75; 08-20-2008 15 VRP 9-10. The jury found Mr. Bluehorse Guilty of drive by shooting from the July 5th 2007 incident and found by special verdict that the offense was gang related. As a result an excessive sentence of 108 months was imposed due to the state telling the court that it failed to adequately charge the defendant with first degree assault, thus the courts reasoning for the exceptional sentence was based on this premise. (Incidentally, his co-defendant was given the same sentence when he was found guilty of more charges).

The state argued that Mr. Bluehorse was undercharged at sentencing. However, in this argument the State should have charged Mr. Bluehorse with assault first degree prior to trial, not at sentencing in order to shoe-horn in the first degree assault sentence. Overwhelming caseload cannot be considered a reason not to charge accurately. Further, the State had several months to amend the charges to first Degree Assault but never did. Instead, the State amended the charges at trial to Second degree assault, and this was the second amendment to the original charges. The fact is that when the jury found Mr. Bluehorse not guilty on all charges against him from the August 15th 2007 incident his sentencing range came down to 15-20 months. **CP 81** The State then asked for an exceptional sentence of 120 months as a result of the not-guilty findings by the jury of the Second degree assaults and the other drive by shooting. That sentence is clearly excessive considering Mr. Bluehorse is a first time offender who has no criminal history what so ever. All the charges Mr. Bluehorse was facing would not add up to 108 months if the jury found Mr. Bluehorse guilty of every crime charged. The Legislators had this in mind when they approved the Sentencing Reform Act of 1981. The 15 to 20 months for Drive by shooting for the first time offender is what the Legislators intended, not 120 months he was given for the reason of he should have been charged with first degree assault. Clearly the sentence is excessive and in error of the “real facts doctrine” and is vindictive for the prosecution to state such matters at sentencing only to prejudice Bluehorse.

Mr. Bluehorse brings this argument along with his appellate attorney Stephanie Cunningham only to add some cases that coincide with the argument that she has presented or to present it in another light for the court to understand clearly that the state was out of line when it mentioned charges that were never charged or proven at trial.

The fact of the matter is that the sentence has no authority in law when it is based upon an unproven or uncharged crime. **State v McAlpin, 108 Wn.2d 458, 740 P.2d 824(1987)**. Here the court sentenced Bluehorse as if he was found guilty of First Degree Assault, yet the state even after a two month recess, amended the charges on Bluehorse, failed to charge him with the First Degree Assault, this failure to correctly charge should not be to his detriment in sentencing due to the state being denied by the jury of the other convictions.

Article I, section 22 of the Washington Constitution requires that the accused be adequately informed of the charge against which he must defend. **State v Pelkey, 109 Wn.2d 484, 487-90, 745 P.2d 854(1987)**. To Mr. Bluehorse detriment, he was surprised to hear the state tell the sentencing judge that it failed to charge the first degree assault and that he was grossly undercharged. **15 RP 1806**. The state further concedes to the court that no one had seen a thing, there were no witnesses, no evidence and that the case later came together. **15 RP 1808**. The only evidence of Bluehorse being a gang member is that he is guilty by association; his brother is a gang member his cousins are gang members; he is surrounded by gang members where he goes to school, and he is surrounded by gang members in his community. Frankly, the State is unhappy with the result of the jury's finding of not guilty on many of their charges and now in retaliation want to sentence Bluehorse as if he had been convicted of first degree assault. Mr. Bluehorse is a victim of circumstances beyond his control. He has a brother that closely resembles him in all ways who claims to be the one that was involved in this incident. Yet, his brother was not allowed to testify due to being incarcerated for murder in the first degree. The court during its say in the matter of sentencing associated the first

degree assault to the drive by shooting. **15 RP 1821**. The court further elaborated about things that Bluehorse was acquitted of. **15 RP 1823**.

This type of sentencing should be shocking to the conscience of fairness. Mr. Bluehorse was acquitted of the August 15, 2007 charges and yet the court used it as a reference and compared it with First Degree assault for the basis of sentencing. The State after all of its amendments and continuances never mentioned once anything about such a charge. Incidentally, the State after a two month recess amended the charges on Mr. Bluehorse. **13 RP 1724**. It was not until sentencing; well after the trial that Bluehorse heard anything about a first degree assault charge. In all earnestness, this prejudices a defendant's constitutional right to demand the nature and cause of the accusations against him and to bring them up at the sentencing stage should be deemed prejudicial to his being able to defend against the charge. See e.g., **State v Pelkey, 109 Wn.2d 484, 745 P.2d 854(1987)**. Although *Pelkey* addresses situations where the state amends the charges after resting its case, it also demonstrates how it would prejudice Bluehorse by the intrusion of information that was not a part of the tribunal in any way or fashion until sentencing, which had a prejudicial effect on the sentence he received, regardless if someone was injured. In *Carr*, the Washington Supreme Court held an amendment during trial stating a new count charging a different crime violates article I, section 22 of the Washington Constitution which provides in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, to have a copy thereof, . . . **State v Carr, 97 Wn.2d 436, 439, 645 P.2d 1098(1982); (quoting State v Olds, 39 Wn.2d 258, 235 P.2d 165(1951)**. The court may permit a complaint to be amended at any time before judgment if no additional or

different offense is charged; and if no substantial rights of the defendant are thereby prejudiced. **Carr, at 439.**

This outburst by the State Prosecutor was only done to prejudice Bluehorse during the sentencing phase because Bluehorse was acquitted of the assault charges against him. However, even though the State was not amending the charges, they made it clear to the sentencing court that this resembled a first degree assault and would have charged Bluehorse had the State not been so busy. The State further conceded at sentencing that Bluehorse was grossly undercharged. **15 SRP 1806 – 09.** It is obvious this was prejudicial to Bluehorse due to the sentence that he received where the court used this reasoning in the sentencing.

Mr. Bluehorse was not found guilty of any assaults, but a drive by shooting, with a gang enhancement. His co-defendant was found guilty of drive by shooting, and the assaults, but no the gang enhancement special verdict. **17 RP 9 – 10.**

Ultimately Mr. Bluehorse took the stand in his defense and testified that he was not in a gang, but people assume he is due to his brother and cousins being in gangs. **12 RP 1578 – 79; 15 RP 16.** When he learned that the police were looking for him, he turned himself in to the police detective. **5 RP 430 – 31; 12 RP 1648.** Many witnesses testified in Bluehorse's defense that he was not a gang member. **12 RP 1554; 11 RP 1478; 11 RP 1521.**

This is significant because the jury gave a special verdict gang enhancement under **RCW 9.94A.535(3)(s)** to Bluehorse, when admittedly he is not a member of a gang. However, Mr. Abuan or aka "Tiny K.O." (**5 RP 376, 491-92.**) admitted to being in

a gang. He was convicted of the August 15, 2007 incident. He never once mentioned Bluehorse was a participant. 7 RP 744.

In the case at bar, there is a major flaw in the finding by the jury.. The scenario plays out is that Mr. Abuan admittedly is a blood gang member called the Native Gangster Bloods (NGB). 5 RP 376, 491-92. The Leoso's and Pritchard are also admittedly gang members called the OLCK, which are also Bloods (OutLaw Crip Killers). 8 RP 1005; 10 RP 1257-58. All of Bluehorse's relatives and brother are part of the NGC's (Native Gangster Crip's). 6 RP 610-11; 12 RP 1578; 15 RP 38; 16 RP 16. This translucent showing of inconsistency is astounding. Why would an alleged CRIP be riding in the car of known, admittedly BLOOD, these are rival gangs which appose one another like north and south. Moreover, the only witnesses that said that Bluehorse was in a gang were the Leoso's and Mr. Pritchard, known gang members whose credibility is questionable at best. (State in opening (4 VRP 11) said that both times were shootings by CRIPS).

Although, this argument gets off tract, it is for the purpose of helping the court understand the situation more clearly than the jury did. They after a two month recess were to recall everything that they heard originally and may have been confused to the person who the gang enhancement should have been given. Mr. Bluehorse has claimed his innocence from the start of this, and maintains this to this day. His only guilt is by association of his brother and cousins, he testified to that and turned himself in to police. Why not, he had nothing to hide, but for the vindictive attitude of the Leoso's and Pritchard, conveying their hate for CRIPS to the state, the State then took up their fight

and vindictively at sentencing produced a charge, an allegation only to prejudice Bluehorse at sentencing to get the high end since he was found not guilty of the assaults.

VI. CONCLUSION – GROUND TWO

It is fundamental that an accused be informed of the charge he is to meet and cannot be tried for an offense not charged.⁷ Mr. Bluehorse was prejudiced by the inclusion of the State's surprise at sentencing to a charge that was not a factor of the tribunal due to their inadequacies in charging properly. Mr. Bluehorse should be remanded for resentencing to the 15 – 20 Months with an offender score of zero, as how he was found guilty of drive – by – shooting, not first degree assault.

VII. FACTS AND ARGUMENT – GROUND THREE

CUMULATIVE ERROR

- 3. WAS MR. BLUEHORSE'S RIGHT TO FAIR TRIAL VIOLATED WHEN A WITNESS ALLEGED PREJUDICIAL GANG INFORMATION; AND THAT BLUEHORSE WAS THE PRIMARY SHOOTER, AND TAINTED JURORS WITH A TWO MONTH RECESS CAUSE ENOUGH PREJUDICE TO BRING A MISTRIAL?**

A joint trial began on June 3rd, 2008 including Mr. Bluehorse, Mr. Abuan and Mr. Howell. Mr. Howell pled guilty after the voir dire was performed to lesser charges. The trial had a two month recess mid-trial in order to avoid losing jurors, the court and all parties agreed to this delay. **06-19-2008 12 RP 1687.**

⁷ See e.g., *State v Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098(1982); *State v Lutman*, 26 WA. App. 766, 767, 614 P.2d 224(1980).

The court further discussed the flagrant use of Police Reports to refresh witness recollections. He said he has “never seen the use of police reports to refresh witnesses’ recollections like I have seen it in this case in my life.” **10 RP 1300.**

Then there were issues with the Juror’s No. 5 and 9 of whom overheard conversations of the defense in the elevator and to the issue of defense witnesses. **10 RP 1319 – 1324.** Mr. Bluehorse’s attorney Mr. Benjamin motioned the court for a mistrial. **10 RP 1325 – 1326.** The court questioned these jurors’s in private, without any of the other jurors or before any opening of the court. There again, the court failed to do any of the required *Bone-Club* factors for closing the hearing. **10 RP 1328 – 1337.** After the Court, State and Defendant’s questioned these jurors, Mr. Bluehorse’s attorney Mr. Benjamin continued with his motion for a mistrial. **10 RP 1337 – 1338.** Mr. Benjamin based his motion on several factors that came to light during the trial that prejudiced his client Bluehorse. One of the reasons was the above jurors being tainted. The other was a misstatement by Francis Leoso that he told the jury Bluehorse is the primary shooter; prejudicial effect of gang information; and the forms of taint by the jurors overhearing information. **10 RP 1324 – 1339.** The court denies the motion for mistrial by Mr. Benjamin, Bluehorse’s attorney.

Where the cumulative effect of multiple errors so infected the proceedings with unfairness a resulting conviction or death sentence is invalid. See **Kyles v Whitley, 514 US 419, 434-35, 115 S.Ct. 1555, 131 L.Ed.2d 490(1995).** As the Ninth Circuit pointed out in **Thomas v Hubbard, 273 F.3d 1164(9th Cir. 2001),** “[i]n analyzing prejudice in a case in which it is questionable whether any single error examined in isolation is sufficiently prejudicial to warrant reversal, this Court has recognized the importance of considering the

cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.” **Id. At 1178.** (Internal quotations omitted) (Citing **US v Fredrick, 78 F.3d 1370, 1381(9th Cir. 1996)**); see also **Matlock v Rose, 731 F.2d 1236, 1244(6th Cir. 1984)** (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

VIII. CONCLUSION – GROUND THREE

Mr. Bluehorse asserts that each of the errors described previously merits relief. However, considered cumulatively, they certainly resulted in sufficient prejudice to merit a new trial or resentencing. The above errors, measured cumulatively, were prejudicial and devastating to Mr. Bluehorse and his right to fair trial and at sentencing.

Therefore, this Honorable Court should exercise it’s discretion, and request additional briefing from counsel to address the issues raised in this Statement of Additional Grounds.

Respectfully submitted, this 24th, ^{day} of November, 2009.

Timothy J. Bluehorse # 322855
Washington State Reformatory
Post Office Box 777
Monroe, WA 98272-0777

WASHINGTON COURT OF APPEALS

DIVISION TWO

STATE OF WASHINGTON,)	No.: 38325-0-II
)	
Plaintiff,)	
)	AFFIDAVIT OF SERVICE
v.)	BY MAILING
)	
TIMOTHY J. BLUEHORSE,)	
Defendant.)	

I, Timothy J. Bluehorse, being first sworn upon oath, do hereby certify that I have served the following documents:

1. Statement of Additional Grounds

Upon:

Washington Court of Appeals
C/O David Ponzoha, Clerk
950 Broadway, Ste. 300
MS TB-06
Tacoma, WA 98402-4454

Stephanie C. Cunningham
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COURT OF APPEALS
 DIVISION II
 09 NOV 25 PM 12:58
 STATE OF WASHINGTON
 BY *[Signature]*
 DEPUTY

By placing same in the United States mail at:

MONROE STATE REFORMATORY-MCC
PO BOX 777
16700 – 177th Avenue SE
Monroe, WA 98272

On this 24th day of November, 2009.



 Timothy J. Bluehorse #322855

Affidavit pursuant to 28 USC 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.