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STATE OF WASHINGTON

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON,  
Respondent,

v.

MICHAEL L. SUBLETT,  
Appellant. *PETITIONER.*

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*PETITIONER*  
SUPPLEMENTAL BRIEF OF APPELLANT  
MICHAEL L. SUBLETT

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## TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	3
	A.    The Trial Court Violated Mr. Sublett's Rights to an Open and Public Trial and to Be Present When it Held a Hearing in Response to a Jury Question in Chambers With Counsel, But Not Mr. Sublett, Present	3
	B.    Mr. Sublett's California Robbery Convictions Are Not Comparable to Most Serious Offenses. Mr. Sublett is not a Persistent Offender	18
III.	CONCLUSION	25

## TABLE OF AUTHORITIES

### Washington State Cases:

<i>In re Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005)	20, 23
<i>In re Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)	8
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 36, 640 P.2d 716 (1982)	5
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	5, 8, 18
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005)	4, 8
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006)	5, 7
<i>State v. Ellis</i> , 136 Wn.2d 498, 963 P.2d 843 (1998)	24
<i>State v. Greene</i> , 139 Wn.2d 64, 984 P.2d 1024 (1999)	23
<i>State v. Johnson</i> , 155 Wn. 2d 609, 121 P.3d 91 (2005)	22
<i>State v. Handburgh</i> , 119 Wn. 2d 284, 830 P.2d 641 (1992)	22
<i>State v. Irby</i> , ___ Wn.2d ___, ___ P.3d ___ (2011)	25
<i>State v. Matthews</i> , 38 Wn. App. 180, 685 P.2d 605 (1984)	22
<i>State v. Ng</i> , 110 Wn.2d 32, 750 P.2d 632 (1988)	10
<i>State v. Ransom</i> , 56 Wn.App. 712, 785 P.2d 469 (1990)	10
<i>State v. Rivera</i> , 108 Wn. App. 645, 32 P.3d 292 (2001)	15
<i>State v. Russell</i> , 141 Wn. App. 733, 172 P.3d 361 (2007)	4
<i>State v. Strobe</i> , 167 Wn.2d 222, 217 P.3d 310 (2009)	18
<i>State v. Thamert</i> , 45 Wn. App. 143, 723 P.2d 1204 (1986)	23
<i>State v. Thieffault</i> , 160 Wn.2d 409, 158 P.3d 580 (2007)	20

Federal Cases:

<i>Ayala v. Speckard</i> , 131 F.3d 62 (2d Cir.1997)	9
<i>CBS, Inc. v. United States Dist. Court</i> , 765 F.2d 823 (9th Cir.1985)	8
<i>In re Charlotte Observer</i> , 882 F.2d 850 (4th Cir.1989)	16
<i>In re Iowa Freedom of Information Council</i> , 724 F.2d 658 (8th Cir.1983)	17
<i>In re Oliver</i> , 333 U.S. 257 (1948)	5
<i>Publicker Indus., Inc. v. Cohen</i> , 733 F.2d 1059 (3d Cir.1984)	17
<i>Press-Enterprise Co. v. Superior Court of Cal.</i> , 464 U.S. 501(1984)	6
<i>Press-Enterprise II v. Superior Court of Cal.</i> , 478 U.S. 1 (1986)	6, 13
<i>Rogers v. United States</i> , 422 U.S. 35 (1975)	6, 12
<i>United States v. Nunez</i> , 889 F.2d 1564 (6th Cir.1989)	10
<i>United States v. Glick</i> , 463 F.2d 491 (2d Cir. 1972)	7
<i>United States v. Schor</i> , 418 F.2d 26 (2d Cir. 1969)	13
<i>United States v. Simone</i> , 14 F.3d 833 (3d Cir. 1994)	8
<i>United States v. Thomas</i> , 449 F.2d 1177 (D.C.Cir.1971)	4
<i>United States v. Walker</i> , 575 F.2d 209 (9th Cir.1978)	10

Other States:

<i>In re Anthony H.</i> , 138 Cal.App.3d 159, 187 Cal.Rptr. 820 (1982)	23
<i>Commonwealth v. Patry</i> , 72 N.E.2d 979 (Mass. 2000)	11
<i>People v. Brew</i> , 2 Cal.App.4th 99, 2 Cal.Rptr.2d 851 (1991)	23
<i>People v. Carroll</i> , 1 Cal.3d 581, 463 P.2d 400 (1970)	22

<i>People v. Davison</i> , 32 Cal.App.4th 206, 38 Cal.Rptr.2d 438 (1995)	23
<i>People v. Garcia</i> , 45 Cal.App.4th 1242, 53 Cal.Rptr.2d 256 (1996)	23
<i>People v. Spurlin</i> , 156 Cal.App.3d 119, 202 Cal.Rptr. 663 (1984)	24
<i>State v. Lawrence</i> , 167 N.W.2d 912, 915 (Iowa 1969)	6
<i>State v. Pullen</i> , 266 A.2d 222 (Me.1970)	6
<u>Other Authorities:</u>	
21A Am.Jur.2d Criminal Law § 668	6
1 Cooley, Constitutional Limitations 647 (8th ed.1927)	6
U.S Const., Amend VI	<i>passim</i>
Wash. Const, Art. I, sec. 10	<i>passim</i>

## I. INTRODUCTION

When a court holds a hearing in response to a jury inquiry, a defendant has the right to be present and the hearing should be open to the public, absent a compelling reason to close the hearing.

Rarely, if ever, is there *any* reason, much less a *compelling* one, justifying the exclusion of a defendant and the public from a hearing to determine how to respond to a jury inquiry. While a jury deliberates in private, when a jury decides to make part of its deliberations public with a question, the hearing held to formulate the answer and the answer, if any, should also be public—absent a compelling reason found after a “closure” hearing.

Jury inquiries can involve a broad number of topics. Juries can communicate facts relating to the conduct and integrity of deliberations. Juries ask questions about both the facts and the law. For example, juries can tell the court about improper third party contacts with jurors; misconduct by a juror during deliberations; as well as requesting to watch or listen to audio-visual exhibits. In addition, jurors can ask questions about the facts, the law, or reveal the status of deliberations.

Seemingly innocuous inquiries can sometimes raise important issues of fact or law. Responding to a deliberating jury many times can be a delicate and tricky proposition. In short, jury inquiries and the decision whether and how to respond are important aspects of trial. Responding in open court serves to promote respect and trust for the law. Holding a hearing and responding secretly occasions distrust and suspicion, even where the question and answer later appear in the court file and especially where a defendant is excluded from this critical stage of his own trial. When the response to a jury inquiry is formulated in chambers with only the lawyers invited to participate often there is no record of what was discussed. The absence of a record hampers review, potentially creating contested facts about the conduct of the hearing and depriving the public of the opportunity to review what happened after the fact.

In this case, the trial court improperly excluded Mr. Sublett and improperly conducted a hearing held in response to a jury question in a closed courtroom. Because the closure of the court without first conducting a hearing is a structural error and because

this Court has never recognized a *de minimis* exception, reversal is required.

In addition, Mr. Sublett is not a persistent offender because a comparison of his California robbery convictions to Washington's definition of robbery reveals that it is possible to be guilty under California law, but not under Washington law. Both the definition of when a robbery is complete, the definition of a "threat," and the range of available defenses make it possible to obtain a conviction in California for conduct that is not a crime or, at least, is not a "strike" in Washington.

These were not the only errors mandating reversal in this case. However, the other issues have been exhaustively briefed both in the lower court and in Sublett's petition seeking review.

## II. ARGUMENT

### A. The Trial Court Violated Mr. Sublett's Rights to an Open and Public Trial and to Be Present When it Held a Hearing in Response to a Jury Question in Chambers With Counsel, But Not Mr. Sublett, Present.

#### *Introduction*

A hearing conducted in response to a question to the court from a deliberating jury is part of trial. There is no reason, much

less a compelling reason, that this hearing should be conducted in private—away from the view of the public and the defendant.

A jury is entitled to deliberate privately. “Any undue intrusion by the trial judge into this exclusive province of the jury is error of the first magnitude.” *United States v. Thomas*, 449 F.2d 1177, 1181 (D.C.Cir.1971) (*en banc*). However, when a jury sends an inquiry to the court, that inquiry; the hearing conducted in response; and the court’s answer to the jury inquiry are part of the public trial. Because the court below justified its ruling entirely on the right to private jury deliberations, its analysis is wholly inapposite.

*The Constitutional Requirement of a Public Trial*

This Court reviews *de novo* whether a trial court procedure violates the right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution each guarantee a criminal defendant the right to a public trial. *State v. Russell*, 141 Wash. App. 733, 737-38, 172 P.3d 361 (2007). Additionally, article

I, section 10 of the Washington Constitution states, “Justice in all cases shall be administered openly,” which provides the public itself a right to open, accessible proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

Article I, Section 10's guarantee of public access to proceedings and article I, section 22's public trial right together perform complementary, interdependent functions that assure the fairness of our judicial system. *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); *see also State v. Easterling*, 157 Wn.2d 167, 187, 137 P.3d 825 (2006) (Chambers, J., concurring) (“[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts.”).

“The 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....” *In re Oliver*, 333 U.S. 257, 266, 270 n. 25 (1948), quoting from 1 Cooley, Constitutional

Limitations 647 (8th ed.1927). The right, in the absence of legitimate reasons for limiting public attendance, extends to the entire trial *including* the judge's instructions to the jury. See *State v. Lawrence*, 167 N.W.2d 912, 915 (Iowa 1969); *State v. Pullen*, 266 A.2d 222, 228 (Me.1970). See also 21A Am.Jur.2d Criminal Law § 668, at 324 (“The constitutional guarantee of a public trial is held to apply to the entire trial of an accused. The trial, for this purpose, consists of the proceedings for empanelment of the jury, the opening statements of counsel, the presentation of evidence, the arguments, the instructions to the jury, and the return of the verdict”).<sup>1</sup>

It is also settled law that messages from a jury should be disclosed to counsel and that counsel should be afforded an opportunity to be heard before the trial judge responds. *Rogers v. United States*, 422 U.S. 35, 39 (1975); *United States v. Robinson*,

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<sup>1</sup> The United States Supreme Court has taken care to point out that “the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, ‘trial’ or otherwise.” *Press-Enterprise II v. Superior Court of Cal.*, 478 U.S. 1, 7 (1986). See also *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501(1984) (Stevens, J., concurring) (“the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues.”). Thus, simply calling this hearing a “chambers conference” does not isolate it from the reach of the constitutional right to an open and public trial.

560 F.2d 507, 516 (2d Cir. 1977); *United States v. Glick*, 463 F.2d 491 (2d Cir. 1972); *United States v. Schor*, 418 F.2d 26 (2d Cir. 1969).

Our court rule is in accord. CrR 6.15 (f) provides that when a jury asks a question during deliberations: “The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court’s response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing.” Of course, the court rule operates within the confines of the state and federal constitutional protections guaranteeing an open and public trial.

*The Constitution Guarantees that a Hearing in Response to a Jury Question is Part of the Public Trial*

Historically, the right to an open and public trial has been broadly interpreted, by both the United States Supreme Court and this Court. For example, pre-trial hearings are open to the public, regardless of whether they involve the resolution of disputed facts. See *State v. Easterling, supra*. Encountering for the first time the

issue of whether a pre-trial hearing (in a co-defendant's case) implicated the right to a public trial, this Court relied "heavily upon our prior decisions," which require trial courts to "strictly adhere to the well-established guidelines for closing a courtroom and upon public policy as made manifest by the federal and state constitutions which favors keeping criminal judicial proceedings open to the public unless there is a compelling interest warranting closure." *Id.* at 176. *Accord State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wn.2d at 256 (reversible error to close the courtroom during a suppression motion). "In light of these precedents, we conclude that Jackson's motion to sever his trial from Easterling's pertained to Easterling's trial and thereby implicated his right to a public trial under the Washington Constitution." *Id.* at 177.

It makes no difference that question in the instant case came after the presentation of the evidence. See *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994) (holding that the right to a public trial applies with equal force to a post-trial hearing regarding allegations of jury misconduct and rejecting argument that later release of transcript cured any error). Indeed, the Ninth Circuit, speaking through then-Judge, now-Justice Kennedy, has concluded that there is “no principled basis for affording greater confidentiality to post-trial documents and proceedings than is given to pre-trial matters.” *CBS, Inc. v. United States Dist. Court*, 765 F.2d 823, 825 (9th Cir.1985) (holding that the First Amendment right of access attaches to post-trial hearings to investigate jury misconduct. “Though experience provides little guidance, logic counsels that access to these proceedings will in general have a positive effect.”). Instead, the right to an open trial applies to all “adversary proceedings.” *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir.1997).

A hearing held in response to a jury question is an adversarial proceeding where a trial court is invested with discretion whether to

give further instructions to a jury after it has begun deliberations. CrR 6.15(f)(1); *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). Indeed, whether and how to answer a jury inquiry during deliberations is often involves several, complex considerations.

In some cases, it may be appropriate to answer the question. *State v. Ransom*, 56 Wn.App. 712, 714, 785 P.2d 469 (1990) (trial court has discretion whether to give supplemental instruction which does not go beyond matters which were or could have been argued to jury). In other cases, it is equally important for the trial court *not* to answer. *United States v. Nunez*, 889 F.2d 1564, 1569 (6th Cir.1989) (“Questions from a deliberating jury present a dilemma for a trial court. The court must be careful not to invade the jury's province as fact-finder. Nevertheless, the court must respond to questions concerning important legal issues.”); *United States v. Walker*, 575 F.2d 209, 214 (9th Cir.1978) (“Because the jury may not enlist the court as its partner in the fact-finding process, the trial judge must proceed circumspectly in responding to inquiries from the jury.”). Where a jury's question relate to a fact at trial, a

substantive reply risks interfering with the jury's exclusive responsibility for resolving factual questions.

This Court has not previously ruled on this issue. In addition, there is very little law directly on point. The only court that appears to have directly encountered this issue ruled in Sublett's favor. See *Commonwealth v. Patry*, 72 N.E.2d 979 (Mass. 2000). In that case, the court held defendant's constitutional right to public trial was violated by trial court's giving of supplemental instructions to the jury, despite fact that both prosecutor and defense counsel were present and defense counsel expressly waived defendant's presence. The court held that the hearing was closed to the public because the trial judge entered the deliberation room from her lobby rather than from courtroom and did not enter courtroom to inform members of public that proceedings were about to occur in the deliberation room and to invite their presence. In addition, the court noted that defense counsel waived defendant's presence without ever discussing issue of his right to public trial with him. As a result, the court reversed. The instant case is similar in many respects. This Court should follow *Patry*.

While the United States Supreme Court has not answered this question directly, it has made clear in *dicta* that when faced with an inquiry from the deliberating jury, “the jury's message should [be] answered in open court and ... [defendant's] counsel should [be] given an opportunity to be heard before the trial judge respond[s].” *Rogers v. United States*, 422 U.S. 35, 39 (1975).

The presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interests of decorum. Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor are judges necessarily restricted in their ability to conduct conferences in chambers, where those conferences are distinct from trial proceedings.

The hearing held in response to a jury question is, however, part of trial. Even if this Court concludes that it did not violate the state and federal constitutions to discuss possible response to the jury inquiry with counsel in chambers (a point that Sublett does not concede), the court was still required to note the question and the

court's response, as well as any objections in open court with the defendant present.

*This Court Should Adopt a "Ministerial" vs. "Adversarial" Test, Rather than a Test Based on Whether the Hearing is Likely to Involve the Resolution of Disputed Facts*

When faced with novel applications of whether a hearing should be open to the public, the United States Supreme Court has developed a two-part test, known as the test of "experience and logic," for determining whether a particular proceeding is one to which the First Amendment right of access attaches. The "experience" prong of the test concerns "whether the place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8. The "logic" inquiry concerns "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

At least six societal interests are advanced by open court proceedings, namely: promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full

public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury. The interests underpinning the public trial right embrace both the testimony of witnesses, the arguments of the parties, and the wisdom of the judge in resolving legal issues.

Five of the identified six interests apply where a trial court holds a hearing, however brief, to decide whether and how to answer a jury inquiry. A judge's answer to a jury question, as well as the positions taken by the respective parties, obviously implicates issues of trial fairness. While some questions may be routine, others may implicate significant fairness issues, either by the court or by the jury. This part of trial should not be excluded from the other portions of trial that are open and public.

As a result, even if history does not require this part of a trial to be open to the public, logic certainly does.

The State posits a test (whether the hearing involves the resolution of disputed facts) that is not based on either history or logic and which runs afoul of much of the closed courtroom jurisprudence. If this Court were to adopt the State's test, not only would it need to overrule much of its previous decisional law, the test would contradict numerous federal decisions. As mentioned previously, the right to an open and public trial extends to pretrial hearings, which frequently involve only legal matters and not the resolution of disputed facts. The State's proposed test would allow a trial court to close the hearing on any pretrial or trial matter which does not involved contested facts.

The Court of Appeals decision in *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), provides a more workable test. In *Rivera*, the Court of Appeals concluded that a question regarding the order in which jurors were seated (due to a hygiene issue) "was a ministerial matter, not an adversarial proceeding. It did not involve any consideration of evidence, or any issue related to the trial." *Id.* at 653.

Answering a jury question about the law is not a "ministerial

matter.” On the other hand, if deliberating jurors asked the court whether they could leave at a certain hour or where they would eat lunch that day, those requests and the response given are ministerial matters not subject to the public trial right. Further, any test that is based on the trial court’s ultimate response to the inquiry is unworkable and will lead only to confusion and, likely, violations of the right to a public trial.

This Court should continue to draw the bright line that the Constitution requires.

*Application of the Proper Harm Standard to this Case  
Mandates Reversal*

This Court should reject any argument that the filing of the jury inquiry and the court’s answer in the court file serves to protect the right to an open and public trial. The value of “openness” itself is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure.” *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir.1989). Furthermore, that document does not reflect the arguments made and the reasoning for the court’s decision. Finally, a transcript is not the equivalent of presence at a proceeding; it does not reflect the

numerous verbal and non-verbal cues that aid in the interpretation of meaning. *See Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1072 (3d Cir.1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 662-63 (8th Cir.1983). *See also Richmond Newspapers*, 448 U.S. at 597 n. 22 (Brennan, J., concurring in the judgment).

This Court has consistently rejected a *de minimis* exception to the rule. This Court recently reiterated in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310, 316 (2009):

Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. *United States v. Ivester*, 316 F.3d 955 (9th Cir.2003). Trivial closures have been defined to be those that are brief and inadvertent. *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir.1994); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir.1975). This court, however, “has never found a public trial right violation to be [trivial or] *de minimis*.” *Easterling*, 157 Wash.2d at 180, 137 P.3d 825.

*Strode* did not change that result.

Instead, *Strode* reaffirmed that this error was structural—mandating reversal without a particularized showing of prejudice. *Strode, supra*. (“By conducting a portion of the trial (jury voir dire) in chambers without first weighing the factors that must be considered prior to closure, prejudice to Strode is presumed. This

error cannot be considered harmless and, therefore, Strode's convictions are reversed, and the case is remanded for a new trial.”).

Protection of the right to public trial requires a trial court “to resist a closure motion except under the most unusual circumstances.” *Bone-Club*, 128 Wn2d at 259. In this case, the trial court did not “resist” closure, but instead apparently never considered the right to an open and public trial (as well as Mr. Sublett’s right to be present at a hearing conducted in his case). As a result, no *Bone-Club* hearing took place in this case.

The trial court’s error mandates automatic reversal.

B. Mr. Sublett’s California Robbery Convictions Are Not Comparable to Most Serious Offenses. Mr. Sublett is not a Persistent Offender.

Comparability asks whether a defendant conviction in a foreign jurisdiction would have necessarily resulted in a conviction in Washington based on those facts admitted or proved beyond a reasonable doubt. Where the answer is “no,” the crimes are not comparable.

Mr. Sublett was convicted on two separate occasions of robbery in California. The trial court erred when it found these

convictions “comparable” to a strike because the elements of the crimes and the available defenses differ.

The decision below held:

A legal comparison of the elements of second degree robbery in California and Washington illustrates that the two appear essentially identical. Both require (1) a taking (2) of personal property (3) from another person or his immediate presence (4) against his will (5) by use of force or fear. Both also require a specific intent to steal. It thus appears that the elements of California and Washington second degree robbery are substantially equivalent.

However, in reaching its decision the lower court identified only the similarities in the crimes. The court below failed to look more closely and to consider the differences between the two statutes. It is those differences that are critical.

#### *The Test for Comparability*

Washington law employs a two-part test to determine the “comparability” of a foreign offense. A court must first query whether the foreign offense is legally comparable--that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If a conviction is not *legally* comparable, then the court must examine whether the conviction is *factually* comparable, *i.e.*, whether defendant admitted to or his jury

found facts beyond those ordinarily required making the crime equivalent to its Washington counter-part.

To determine if a foreign crime is legally comparable to a Washington offense, the sentencing or reviewing court first looks to the elements of the crime. This Court has explained:

To determine if a foreign crime is comparable to a Washington offense, the sentencing court must first look to the elements of the crime. More specifically, the elements of the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed. If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense.

*In re Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (internal citations removed).

This Court has made it clear that the comparison of elements is not merely a superficial comparison, but includes a careful examination of each required mental state, *including* the available defenses permitted by the requisite *mens rea*. *Lavery, supra*; *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (crimes not comparable where Montana attempted robbery statute is broader than its Washington counterpart because Montana law permits a

conviction for assault with a lesser *mens rea* than required under Washington law). For example, in *Lavery*, this Court found that federal bank robbery was not comparable to a state robbery because defenses were available under state law, not applicable in a federal prosecution:

The crime of federal bank robbery is a general intent crime. The crime of second degree robbery in Washington, however, requires specific intent to steal as an essential, nonstatutory element. Its definition is therefore narrower than the federal crime's definition. Thus, a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington. Among the defenses that have been recognized by Washington courts in robbery cases which may not be available to a general intent crime are (1) intoxication, (2) diminished capacity; (3) duress; (4) insanity; and (5) claim of right. Because the elements of federal bank robbery and robbery under Washington's criminal statutes are not substantially similar, we conclude that federal bank robbery and second degree robbery in Washington are not legally comparable.

*Id.* at 255 (internal citations removed).

*The Differences in California and Washington's Robbery*

Mr. Sublett was convicted of robbery in California in 1994 and 1997. At that time, a robbery in the second-degree in Washington was defined as the unlawful taking of personal property from the person of another or in his presence against his will by the

use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.200. The statutory elements of robbery presuppose that intent to steal is an element of the offense. *See State v. Matthews*, 38 Wn. App. 180, 184, 685 P.2d 605 (1984). The use of force or intimidation in attempting to escape, rather than in the physical taking of the property, does not supply the element of force or intimidation essential to a robbery charge. *See State v. Johnson*, 155 Wn. 2d 609, 121 P.3d 91 (2005); *State v. Handburgh*, 119 Wn 2d 284, 830 P2d 641 (1992).

In contrast, in *People v. Carroll*, 1 Cal.3d 581, 463 P.2d 400 (1970), the defendant took a wallet, threw it on the ground (after discovering it had no money), and then shot at the victim. The California Supreme Court held that the shooting was part of the robbery, even though the defendant had already abandoned the property.

In Washington, a robbery requires a *threat* of immediate force. In contrast, under California law the requisite fear need not be the result of an express threat. (*See People v. Garcia*, 45 Cal.App.4th 1242, 1246, 53 Cal.Rptr.2d 256 (1996) (“rather polite ... tap” of

cashier sufficient where it caused cashier to fear defendant might be armed); *People v. Davison*, 32 Cal.App.4th 206, 214, 38 Cal.Rptr.2d 438 (1995) (victim is confronted by two men at an automatic teller machine, and ordered to “stand back”); *People v. Brew*, 2 Cal.App.4th 99, 104, 2 Cal.Rptr.2d 851 (1991) (relative size of defendant and victim a factor); *In re Anthony H.*, 138 Cal.App.3d 159, 166, 187 Cal.Rptr. 820 (1982) (after following victim in car, suspect says, “I don't want to harm you, but I want your purse”).)

Finally, as *Lavery* teaches, differences in the available defenses mean the crimes are not comparable. Washington law recognizes diminished capacity as a defense to robbery. *State v. Thamert*, 45 Wn. App. 143, 723 P.2d 1204 (1986). Under the Washington diminished capacity standard, it is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question—only that it could have, and if so, how that disorder operates. *See State v. Greene*, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999); *State v. Ellis*, 136 Wn.2d 498, 523, 963 P.2d 843 (1998).

Diminished capacity is not now and was not a defense in

California at the time Sublett was convicted. Section 25 of the California Code provides “(t)he defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.” *See also People v. Spurlin*, 156 Cal.App.3d 119, 128, 202 Cal.Rptr. 663 (1984) (“The legislative mandate is clear-the defense of diminished capacity has been abolished.”). In addition, voluntary intoxication is not a defense in California.

Thus, like in *Lavery*, defenses to robbery are available in Washington which are unavailable in California. Consequently, it is clear that a robbery in California is not legally comparable to a robbery in Washington. The trial court erred when it concluded that the crimes were comparable and that Mr. Sublett was a persistent offender and the court below erred when it affirmed that sentence.

### III. CONCLUSION

This Court recently reversed a conviction based on the defendant's absence from a portion of *voir dire* conducted via exchange of emails by the lawyers and the Court. This Court noted that it was no defense that no proceedings took place on the record: "What ought to have happened there [in the court] was instead happening in cyberspace." *State v. Irby*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.2d \_\_\_ (2011). In this case, the proceedings took place in the judge's chamber, but the result was no different. Based on the above, this Court should reverse Sublett's conviction, and remand for a new trial. In the alternative, this Court should vacate Sublett's life sentence and remand for resentencing.

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*/s/ Jeffrey E. Ellis*

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