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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TANER TARHAN,

Appellant.

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**RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF**

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ORIGINAL

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**A. INTRODUCTION**

Amicus Washington Association of Criminal Defense Lawyers ("WACDL") has not addressed the State's primary argument - that appellate review of the trial court's sealing of confidential juror questionnaires without first conducting a Bone-Club<sup>1</sup> analysis on the record is barred by the invited error doctrine. Perhaps WACDL has chosen not to address this argument because it recognizes that this is a "classic case" of invited error, or perhaps it is because WACDL recognizes that even under this Court's analysis in State v. Momah,<sup>2</sup> Tarhan is not entitled to automatic reversal. In any event, it appears WACDL takes no position on this point.

As to the substantive issue on appeal, WACDL misapprehends the State's argument regarding the differences between juror questionnaires and other court records. The State

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<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

<sup>2</sup> 167 Wn.2d 140, 153, 217 P.3d 321 (2009). While this Court said that Momah did not present a "classic case" of invited error, the doctrine was useful in fashioning the appropriate remedy. Id. Although the State agrees that Momah was not entitled to automatic reversal, the State respectfully disagrees with the Court's decision to review Momah's claim at all. The invited error doctrine is a bar to appellate review, not a vehicle for determining what, if any, relief a defendant should get. It is not that Momah simply failed to object, it is that he induced the trial court to act in a way that Momah then claimed on appeal constituted error.

has not claimed that juror questionnaires are not a part of *voir dire*. Rather, the State explained why questionnaires do not fall within the definition of *court records*. Most importantly, because the questionnaires are used for the benefit of the parties to ensure a fair and impartial jury (as was done in this case), and generally not as part of a trial court's deliberative process, the questionnaires do not constitute court records.<sup>3</sup>

Also, WACDL misreads or misapprehends this Court's decision in State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011). The critical deficiency in Irby was Irby's absence from *voir dire*; a violation of his due process right to be present at trial. And, the issue was not the questionnaire that was "part of the jury selection process"; rather, it was the e-mail exchange that resulted in the for-cause dismissal of prospective jurors during *voir dire*. Irby is inapposite.

Finally, WACDL contends that structural error occurred, which results in automatic reversal. As a preliminary matter, WACDL does not identify the specific "error" that is structural.

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<sup>3</sup> Certainly any juror questionnaires that a court considers in and of itself as part of its deliberative process would be a court record.

WACDL does not say whether it is basing its claim on an alleged violation of Tarhan's right to a public trial or the public's right to the open administration of justice. In either event, WACDL does not provide any authority to support its contention that the improper sealing of a document constitutes structural error, necessitating an entire new trial. In fact, in the cases cited by WACDL, the remedy for the improper sealing of a court record was either reversal of the sealing order or remand for an on-the-record balancing of the competing interests, not automatic reversal of an otherwise error-free jury determination.

**B. ARGUMENT**

**1. JUROR QUESTIONNAIRES ARE  
FUNDAMENTALLY DIFFERENT FROM  
TRADITIONAL COURT RECORDS.**

WACDL contends that the State is attempting to justify the distinction between oral answers in *voir dire* and juror questionnaires by "contradict[ing] what it told jurors in the questionnaires and now argu[ing] that questionnaires are not part of

*voir dire*.”<sup>4</sup> Br. of Amicus at 5. WACDL misapprehends the State’s argument.

First, the State argued that questionnaires are not court records, not that they are not part of *voir dire*. Supplemental Br. of Respondent at 14-20. The distinction that the State drew, was in part, that the questionnaires serve as a screening tool for follow-up questions that are asked in open court, and the judge then “administers justice” based on the proceedings held in open court. And, as this Court has held, “[A]rticle I, section 10 is not relevant to documents that do not become part of the court’s decision making process.” Rufer v. Abbott Labs., 154 Wn.2d 530, 548, 114 P.3d 1182 (2005); see also Tacoma News v. Cayce, 172 Wn.2d 58, 69-70, 256 P.3d 1179 (2011) (stating that, “Contrary to the News Tribune’s contentions, the facts that the deposition occurred in a courtroom with a judge present who ruled on objections to testimony did not turn this deposition into a judicial hearing that had to be open to the public and the press” unless the information becomes part of decision making process.).

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<sup>4</sup> Again, WACDL may have chosen to ignore the State’s very strong invited error argument because Tarhan, too, told the prospective jurors that the questionnaires would be kept confidential during jury selection and then either sealed or destroyed. CP 1311.

Members of the defense bar agree that the trial court's decisions on for cause challenges rely on what occurs in open court and not on information contained in the questionnaires. See, e.g., DAVID MARSHALL, *THE NEW CHALLENGE TO EMPANELING AN IMPARTIAL JURY IN SENSITIVE CRIMINAL CASES*, WASHINGTON STATE BAR NEWS, at 15 (Dec. 2011). Mr. Marshall is an attorney in Idaho, Montana and Washington with 15 years experience who specializes in the defense of those accused of child abuse. He agrees that juror questionnaires are fundamentally different from questions in *voir dire*.

[C]ourt decisions on cause challenges rely entirely on venire members' statements and demeanor when they respond to *voir dire* questions about bias and ability to keep emotions in check. Juror questionnaires merely serve as the trigger for those *voir dire* questions.

Id. at 14.

Second, the State argued that not classifying questionnaires as court records would protect a prospective juror's constitutional and rule based right to privacy, without compromising the defendant's right to a fair trial. See State v. Strode, 167 Wn.2d 222, 238-42, 217 P.3d 310, 320 (2009) (Charles, C. J., dissenting) (stating that the failure to recognize jurors' legitimate privacy

concerns involving deeply personal information jeopardizes a defendant's right to an impartial jury).

Mr. Marshall agrees:

Indeed, it is sex offense trials that most often call for extra care in jury selection. And child sex abuse cases, where anger and disgust always threaten to prevent a rational weighing of the evidence.

*THE NEW CHALLENGE TO EMPANELING AN IMPARTIAL JURY IN SENSITIVE CRIMINAL CASES*, at 12.

More importantly, Tarhan agreed. Tarhan recognized the importance of asking questions about "uncomfortable" topics because it was important for the jurors to "open up in a way that we can get all the information" to ensure fair, impartial jurors. CP 1311-12, 1316, 1322; 6/23/08RP 27. The questionnaires were not filed "in anticipation of a court decision,"<sup>5</sup> they were used by the attorneys as a tool toward achieving the ultimate goal: a trial by a fair and impartial jury.

WACDL says that it "recognizes the reticence of private citizens to serve on juries is exacerbated by the need to disclose . . . intimate details of their lives," but that "[n]ot infrequently public service compels jurors to recall their darkest moments, which they

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<sup>5</sup> See Rufer, 154 Wn.2d at 549.

may have struggled for years to forget, and then be required to recount them in public.”<sup>6</sup> Br. of Amicus at 12. Other than when a person is summoned for jury duty, the State knows of no other public service during which a person is compelled to recall and publicly share his or her darkest moments.

The holding that WACDL asks this Court to make - that the sealing of questionnaires must be preceded by a Bone-Club analysis or the questionnaires are presumptively open - would de facto end the use of questionnaires.<sup>7</sup> The trial court, in a case such as Momah (where the prospective jurors numbered over 100),<sup>8</sup> would have to conduct a Bone-Club analysis on each question of each questionnaire. See Bone-Club, 128 Wn.2d at 258-59 (the fifth factor of the Bone-Club analysis mandates that, “The order must be no broader in its application or duration than

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<sup>6</sup> It is not just WACDL that recognizes the reticence; it is also Judge Ruvolo from Division 2 of the California Court of Appeals who wrote the opinion from which WACDL cut and pasted the last paragraph on page 11 and the entire first paragraph on page 12 of its brief without attribution. Compare Br. of Amicus at 11-12 with Bellas v. Superior Court of Alameda County, 102 Cal. Rptr.2d 380, 391, 85 Cal. App. 4<sup>th</sup> 636 (2000).

<sup>7</sup> WACDL says that creating a questionnaire with a disclosure is “easy” and would inform the jurors of their right to request a closed appearance with the judge and counsel. Br. of Amicus at 10. The apparently easy solution was suggested by Justice Maring of the Supreme Court of North Dakota in Forum Communications Co. v. Paulson, 752 N.W.2d 177, 185-86 (N.D. 2008); WACDL does not attribute this proposal to Justice Maring’s opinion.

<sup>8</sup> Momah, 167 Wn.2d at 145.

necessary to serve its purpose.”); see also Rufer, 154 Wn.2d at 545 (advising parties not to seek blanket sealing orders. As a practical matter, because it would be an inefficient use of judicial resources for the trial courts to undertake such a time-consuming process, the use of questionnaires would fall into disfavor. WACDL’s proposed holding thus results in the loss of a valuable and effective tool used to ensure that criminal defendants are tried by a fair and impartial jury.

This Court should reject WACDL’s argument. Instead, the Court should give meaning to the presumption of privacy afforded prospective jurors by GR 31(j) and guaranteed them by article I, section 7 of the Washington State Constitution, and hold that confidential juror questionnaires are not court records.

## 2. IRBY IS INAPPOSITE.

WACDL asserts that this Court’s decision in State v. Irby controls. Br. of Amicus at 8-9. WACDL claims that this Court indicated the “questionnaire process” in Irby was part of the “jury selection process,”<sup>9</sup> and therefore rejected the State’s position in

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<sup>9</sup> More accurately, in Irby, it was the questionnaire itself that indicated filling out the questionnaire was “part of the jury selection process.” Irby, at 882 (citing CP 1234 in that case).

the instant case, i.e., the "questionnaire process" is "separate and distinct" from trial. Br. of Amicus at 8-9 (citing Irby, 170 Wn.2d at 882). WACDL is mistaken. As discussed above, the State has not claimed that questionnaires are separate and distinct from trial. But, more importantly, because Irby's conviction was reversed based on a violation of Irby's due process right to be present at trial, this Court (like the Court of Appeals) found it "unnecessary to decide whether the trial court violated Irby's right to a public trial."<sup>10</sup> Irby 170 Wn.2d at 887. Irby is inapt.

In Irby, the charges included first degree felony murder with aggravating circumstances, first degree felony murder, and first degree burglary. Irby, at 887. During a pretrial hearing, the State and Irby both agreed to the trial judge's suggestion that neither party needed to attend the first day of jury selection, but that counsel should appear the following day to begin questioning jurors. Id.

On the first day of jury selection, as agreed, the judge swore in the members of the *venire* and then gave them a jury

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<sup>10</sup> See Irby at 879 (noting that because the Court of Appeals had held that the trial court committed reversible error vis-à-vis Irby's right to be present and contribute to jury selection, the Court of Appeals did not reach Irby's claims that his right to a public trial was violated.).

questionnaire to fill out. Id. After the judge had reviewed the completed questionnaires, he sent an e-mail to the prosecuting attorney and defense counsel suggesting that 10 *venire* members be removed from the panel for various reasons. Id. at 878. After e-mails were exchanged between the court and both counsel, the judge dismissed 7 of the 10 *venire* members identified in the court's first e-mail. Id. Irby was in custody at the time of this exchange between the court and counsel and the record provided no indication that he was consulted about the dismissal of any of the potential jurors. Id. at 878-79.

The remainder of jury selection continued the next day in Irby's presence. Id. at 878. The jury convicted as Irby charged. Id. at 879. Irby appealed, arguing that the trial court's dismissal of the seven potential jurors via e-mail exchange violated his right to be present at all critical stages of trial. Id. The Court of Appeals agreed and reversed Irby's convictions. Id.

This Court granted the State's petition for review. Id. at 880. This Court held that conducting a portion of jury selection in Irby's absence violated his Fourteenth Amendment and article I, section 22 rights and that this violation was not harmless beyond a

reasonable doubt. Irby, 170 Wn.2d at 877. The court explained that

the e-mail exchange was a portion of the jury selection process. We say that because this novel proceeding did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in this particular case.

The fact that jurors were being evaluated individually and dismissed for cause distinguishes this proceeding from other, ostensibly similar proceedings that courts have held a defendant does not have the right to attend.

Id. at 882. The key in Irby was that the e-mails replaced court proceedings and that Irby could not participate in the process.<sup>11</sup> This Court would have reached the same result in Irby if the trial court and counsel had excused the jurors on the record in open court, in Irby's absence. In this case, the juror questionnaires augmented, but did not take the place of, open proceedings and, of course, Tarhan was present. Irby is inapposite.

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<sup>11</sup> Irby should not be read too broadly. The Court in Irby did not say that hardship challenges must occur in Irby's presence or in open court.

**3. THE REMEDY, IF ANY, IS A REMAND TO THE TRIAL COURT FOR AN ON-THE-RECORD BONE-CLUB ANALYSIS.**

WACDL contends that the sealing of questionnaires without first conducting a Bone-Club analysis is structural error that requires reversal. This Court should reject WACDL's claim for four reasons, (1) it misapprehends structural errors, (2) it is not commensurate with the violation, (3) it is unsupported by authority, and (4) Tarhan cannot show prejudice.

In its supplemental brief to this Court, the State explained why the improper sealing of a document is not structural error. But it bears repeating. Structural errors "infect the entire trial process." Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). A "structural error" is an error that "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Momah, 167 Wn.2d at 155-56. The error is unquantifiable and indeterminate. In Momah, the Court reiterated the principle that a remedy must be proportionate to the violation. Id. at 156.

This Court should adhere to those principles in this case. Improperly closed proceedings are structural error because a hearing can never be fully recreated, thus, making the error

unquantifiable and indeterminate. A sealed record, however, can be unsealed, and at that point, its effect on the proceedings can be assessed. The error is thus not structural. It would be a draconian result to grant Tarhan a new trial for a violation that he invited and that was not fundamentally unfair.

WACDL's logic appears to be that because "it is not good policy to lie to jurors," and a remand by this Court to the trial court with instructions to conduct an on-the-record Bone-Club analysis could result in the unsealing of questionnaires that the State had promised would remain confidential, Tarhan should get the windfall of a new trial. Br. of Amicus at 12-13. Yet, WACDL has not provided any authority to support its claim that the improper sealing of a document is structural error that requires reversal. Moreover, even if the questionnaires used in this case are ultimately unsealed, it is simply inaccurate for WACDL to categorize the initial, good-faith promise of confidentiality as a lie. See In re Access to Jury Questionnaires; The Washington Post, Appellant, Case No.:

10-SP-1612 (Court of Appeals for the District of Columbia, January 19, 2012) (reversing the order sealing the confidential juror questionnaires and adding a note about the trial court's promise of confidentiality)<sup>12</sup> (slip opinion attached as Appendix A)<sup>13</sup>.

Most of the cases cited by WACDL involve motions to intervene by media and none support automatic reversal.<sup>14</sup> Br. of Amicus at 6-8. When the reviewing court has held that documents were improperly sealed, the remedies have been orders to unseal the records (prospectively in at least one instance) or remand for an

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<sup>12</sup> "It is apparent that the trial judge was concerned with keeping his word ("I intend to live up to that promise unless the Court tells me that I have to do otherwise."), and we empathize with his plight. At the same time, we see no reason why the trial court may not, if it so chooses, recall the jurors and advise them of this court's decision on appeal, holding that The Post's request for access to the completed questionnaires was wrongly denied. The trial court may then proceed with the procedures mandated by Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984), explaining to the jurors that this court has ordered those procedures to be followed in this case."

<sup>13</sup> The State thinks, but is uncertain, that the opinion has been cleared for publication. There has been some confusion on that point.

<sup>14</sup> Bellas v. Superior Court of Alameda County, 102 Cal. Rptr.2d 380, 391, 85 Cal. App. 4<sup>th</sup> 636 (2000) (appeal by public defender from trial court's finding of contempt for attorney's failure to return to the court her copies of juror questionnaires, which contained her notes and other work product).

on-the-record balancing of the competing interests.<sup>15</sup> WACDL has not provided this Court with any reason to deviate from the general remedy where a court finds that documents were improperly sealed: remand for the trial court to apply the correct rule and then unseal or maintain the documents sealed. Rufer, 154 Wn.2d at 540.

Finally, WACDL has not shown any prejudice to Tarhan. WACDL bypasses any discussion or analysis of any prejudice to Tarhan that flowed from the sealing of the juror questionnaires. To the contrary, it is precisely because Tarhan knew that he would benefit from the use of confidential questionnaires that he strongly advocated for their use during jury selection, followed by either sealing or destruction.

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<sup>15</sup> Stephens Media, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 221 P.3d 1240, 1255 (Nev. 2009) (order to district court for the release of all blank juror questionnaires and all unredacted completed juror questionnaires); Forum Communications Co. v. Paulson, 752 N.W.2d 177 (N.D. 2008) (concluding remand appropriate for the court to consider if an overriding interest for sealing the questionnaires of the seated jurors overcomes the presumption of openness); State ex rel. Beacon Journal Publishing Co. v. Bond, 781 N.E.2d 180, 195 (Ohio 2002) (issuing a writ that compels disclosure of the juror questionnaires to the newspaper); United States v. Antar, 38 F.3d 1348, 1364 (3<sup>rd</sup> Cir. 1994) (reversing the original sealing order); and Copley Press, Inc. v. San Diego County Superior Court, 278 Cal. Rptr. 443, 451-52, 228 Cal.App.3d 77 (1991) (holding that general principles of estoppel barred release of the questionnaires in the instant case but prospectively the superior court should provide access to questionnaires of individual jurors called to the jury box for oral *voir dire*).

C. CONCLUSION

For the forgoing reasons, WACDL's arguments are without merit, and should be rejected.

DATED this 3<sup>rd</sup> day of February, 2012.

Respectfully submitted,

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APPENDIX A



District of Columbia Court of Appeals.

**IN RE: Access to JURY QUESTIONNAIRES; The WASHINGTON  
POST**

**IN RE: Access to JURY QUESTIONNAIRES; The WASHINGTON POST,  
Appellant.**

**No. 10-SP-1612.**

**Argued Sept. 20, 2011. -- January 19, 2012**

Before GLICKMAN and OBERLY, Associate Judges, and KING, Senior Judge.

Bruce D. Brown, with whom Laurie A. Babinski, Eric N. Lieberman, James A. McLaughlin, and Kalea S. Clark were on the brief, for The Washington Post. Patricia A. Heffernan, Assistant United States Attorney, with whom Ronald C. Machen Jr., United States Attorney, and Roy W. McLeese III, Amanda Haines, Fernando Sanchez-Campoamor, and Christopher Kavanaugh, Assistant United States Attorneys, were on the brief, for the United States. James Klein and Jonathan W. Anderson, Public Defender Service, filed a statement in lieu of brief for Ingmar Guandique. Bruce Gottlieb filed a brief for Allbritton Communications Company; Alm Media, LLC; American Society of News Editors; the Associated Press; Atlantic Media, Inc.; Dow Jones and Company, Inc.; Gannett Co., Inc.; Hearst Corporation; National Public Radio; The New York Times Company; The New Yorker; Newspaper Association of America; Radio Television Digital News Association; Reporters Committee for Freedom of the Press; Society of Professional Journalists; and Tribune Company, as amici curiae in support of The Washington Post.

Soon after the start of Ingmar Guandique's trial for the murder of Chandra Levy, The Washington Post ("The Post") sought access to the jury questionnaires completed by the sixteen empaneled jurors. When informal attempts to gain access were denied, The Post filed a motion to intervene, arguing that both the common law and the First Amendment create a presumption of public access to jury questionnaires used in voir dire. After the trial ended, the court issued an oral ruling denying access, concluding that disclosure of the jury questionnaires would discourage juror candor and intrude on juror privacy. The Post appealed. We hold that The Post, as a surrogate for the public, has a presumptive right of access to the jury questionnaires used in this case, and the trial court erred in not

recognizing that right. We further hold that the trial court erred by failing to exercise its discretion in making specific findings about the protectible privacy interests at stake and considering alternatives to complete closure. We therefore reverse and remand for further proceedings consistent with this opinion.

## I. Background

In the spring of 2001, a young congressional intern disappeared after going for a morning jog in Washington's Rock Creek Park. In October 2010, nearly a decade after Chandra Levy's highly publicized disappearance, Guandique stood trial for her murder. The circumstances of Chandra Levy's murder and the ensuing investigation were closely followed by The Post and other national media organizations. The coverage of her case captured the nation's attention. Not surprisingly, then, the trial court and the parties devoted considerable discussion to the process of selecting a fair and impartial jury in Guandique's trial. Several factors made the jury selection process more complex than it would have been in a less publicized case. First, of course, there was the volume of press coverage over the years, including an eight-part series in The Post looking into why Chandra Levy's case remained unsolved for so long. Sari Horwitz, Scott Higham & Sylvia Moreno, *Who Killed Chandra Levy?* Wash. Post, July 13–27, 2008. Guandique's defense counsel also identified relevant sensitive issues that might indicate an inability on the part of prospective jurors to be impartial, including attitudes about Latino ethnicity, illegal immigration, and gang affiliation.

Over the course of several months leading up to the trial, the court held at least five status hearings during which the parties discussed the use of comprehensive questionnaires to aid the jury selection process. The court recognized that the case was “unique” in the number of issues that had to be “confronted” during the selection process. At one hearing, the court acknowledged that “questionnaires would be very helpful” because of the complexity of the issues to be considered in selecting a jury for this closely watched murder case. The use of questionnaires was designed to streamline the selection process by eliminating some prospective jurors for cause based on their written answers, which would be reviewed prior to oral voir dire. As the trial court noted, “whatever follow-up questioning there is would be in some ways more limited than it might be if we didn't use [a] questionnaire because we've got all the information and hopefully we can sift through it.” Eventually, the court and the parties agreed to use a questionnaire consisting of fifty-five questions seeking routine demographic information, such as age, gender, educational background, and employment status, and also asking questions uniquely relevant to Guandique's trial, such as familiarity with Rock Creek Park, knowledge of local gang activity, and views on illegal immigration. The questionnaire identified prospective jurors only by their juror number; no personally identifiable information such as names, addresses, or social security numbers was sought.

Jury selection began on Monday, October 18, 2010. Members of the press were in attendance during the entire week of voir dire. On the first day, prospective jurors were questioned about preliminary issues that might disqualify them from jury service and were then asked to complete the questionnaire. Those prospective jurors not immediately

disqualified returned on Wednesday, October 20, 2010, for individual questioning based on their completed questionnaires.<sup>1</sup> The court made no oral promises of confidentiality regarding the questionnaires. However, a cover letter accompanying each questionnaire stated that the questionnaires would be “returned to the Clerk of the Court and kept in confidence, under seal, not accessible to the public or media.” The press was given a blank copy of the questionnaire at some point early in the process. Although it is not clear from the record, the parties do not dispute that the blank copy given to the press included the cover letter with the confidentiality promise. Voir dire continued until Friday, October 22, 2010. The following Monday, October 25, 2010, the jury was sworn and the trial began.

Soon after the trial began—the record does not indicate precisely when—The Post made several informal requests<sup>2</sup> to access the completed questionnaires of the sixteen empaneled jurors. These requests were denied. On November 3, 2010, in the middle of the government's case-in-chief, The Post and three other media organizations filed a motion for leave to intervene to access the juror questionnaires. In that motion, The Post argued that it was “presumptively entitled to contemporaneous access” to the jury selection process and that the court had no compelling reason for “the blanket refusal to disclose the questionnaires” when it could have made limited redactions to address any individual privacy concerns. The court did not schedule a hearing on the motion and made no immediate ruling. Nine days later, on November 12—now into the third day of the defense's case—the court gave counsel for the media intervenors a “brief, impromptu opportunity to be heard on the record” after it notified them that it would release juror information only on age, gender, education level, and occupation. Rejecting the argument that a blanket closure was constitutionally impermissible absent a compelling interest, the court refused to release the questionnaires mid-trial. The court cited concerns that the usefulness of such questionnaires would diminish if the court allowed “full access” and opined that, as a matter of “decency” and “etiquette” to the jurors who were promised confidentiality, the court could not release the questionnaires without first discussing the matter with them.

On November 16, the media organizations “filed a request for formal, on-the-record findings” from the court explaining its refusal to provide access to the jury questionnaires. Although neither the prosecution nor the defense opposed this request, it was not until November 24, two days after the jurors returned their guilty verdict against Ingmar Guandique, that the court held a formal hearing to explain its rationale for declining to release the completed questionnaires. At that hearing, the court began by noting how “unprecedented” press access had been at the trial, calling it the “broadest of any criminal trial in the Superior Court that I'm aware of.” The court also concluded that it was “atypical” that the press had heard all the individual questioning of prospective jurors. With this “backdrop” in mind, the court went on to justify its closure decision on the basis of promoting juror candor through a promise of confidentiality on written questionnaires and protecting juror privacy and a fair trial. The court stated that because of its “guarantee of privacy,” the questionnaires were more likely to elicit “full candor from the jury.” The court also indicated its belief that written rather than oral questioning would encourage more candid responses. Finally, based on an off-the-record discussion with the jurors in

the middle of trial, the court advised the parties that the jurors were opposed, “to a person,” to the release of their questionnaires. This, coupled with the questionnaire's promise of confidentiality, caused the court to say: “And so having told the jury that, I intend to live up to that promise unless the Court tells me that I have to do otherwise.” The Post appealed the court's oral ruling denying access to the completed questionnaires.

## II. Discussion

### A. The Post Made a Timely Request for Access to the Jury Questionnaires

The government concedes that the trial court's blanket promise of confidentiality was inappropriate, but it urges us to find The Post's intervention untimely without reaching the merits of the case. Although we ultimately find this argument unconvincing, we note that had The Post intervened earlier, we would not be faced with the dilemma of fashioning a remedy when contemporaneous access to the jury questionnaires is no longer possible.

The government's waiver argument does not work well in the context of the public's First Amendment right of access. As this court has explained, “[t]o the extent that [a common law and First Amendment right of access] exists, it exists today for the records of cases decided a hundred years ago as surely as it does for lawsuits now in the early stages of motions litigation.” *Mokhiber v. Davis*, 537 A.2d 1100, 1105 (D.C.1988). Certainly, it is when the trial is unfolding that the public's interest is greatest, but that interest does not necessarily end at the close of trial. This court has recognized the “special nature” of the public right of access to matters in litigation, finding that “[o]rdinary principles applicable to [filing a timely] intervention” are not wholly apposite. *Id.* at 1104. The right of public access is “a right that any member of the public can assert,” whether it is for the purpose of reporting on a trial as it unfolds or researching jury selection ten years later. See *id.* at 1105.

The government argues that The Post's intervention was untimely because the trial court had already promised the jurors that their questionnaires would not be released and this “promise of confidentiality could not be remedied mid-trial.” We disagree that once the promise was made there was no going back. The trial court could have explained to the jurors that the guarantee of confidentiality was made in error and that their questionnaires were subject to a constitutional presumption of disclosure unless they had particular privacy concerns, in which case they could request an *in camera* (but on-the-record) proceeding to discuss those concerns and whether they outweighed the presumption of access. That the trial court might have reconsidered making a promise of confidentiality had The Post intervened before the start of voir dire does not convert the court's promise into an acceptable one or prevent The Post from later asserting its rights.

The government also makes a peculiar plain-error argument, suggesting that The Post's motion to intervene was not preserved for appeal. As we have noted, The Post's motion to intervene could be made at any time, and so it was not forfeited when The Post failed to intervene at the earliest possible date. Moreover, the record demonstrates that the trial

judge was fully aware of The Post's request for access to the questionnaires and was not "taken by surprise" that disclosure of the questionnaires was an issue.

Accordingly, we reject the government's attack on the timeliness of The Post's challenge. We therefore turn to a de novo review of whether the First Amendment right of public access applies to the jury questionnaires used in this case.

#### B. The First Amendment Right of Access Applies to Jury Questionnaires Used in Voir Dire

The public's presumptive First Amendment right of access to criminal trials, including the jury selection process, is well settled. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*). This broad constitutional right of access is grounded in the history of public trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). As the Court observed in *Richmond Newspapers*, "throughout its evolution, the trial has been open to all who care to observe." *Id.* at 564-65. The value of public trials is undisputed. The presence of the public and the press at criminal trials "historically has been thought to enhance the integrity and quality of what takes place." *Id.* at 578. Open trials contribute to the "proper functioning" of the system by, for example, "discourag[ing] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id.* at 569. Not only does public access enhance just results, it also promotes the "appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508.

When it extended the First Amendment right of access to the voir dire examination of potential jurors, the Court noted the significance of jury selection both to the parties and to the proper functioning of the criminal justice system. *Press-Enterprise I*, 464 U.S. at 505. Historical evidence shows that attendance at trial was "virtually compulsory" for free members of the community because it was these members of the public who "render[ed] judgment." *Id.* Although it is now a six-to-twelve member jury—or a judge—that decides cases, the public-at-large has a valid interest in "learn[ing] whether the seated jurors are suitable decision-makers." *United States v. Blagojevich*, 612 F.3d 558, 561 (7th Cir.2010). Today, when "attendance at court is no longer a widespread pastime," the public relies on the press for firsthand accounts of the justice system at work. *Richmond Newspapers*, 448 U.S. at 572. Indeed, members of the press are treated as "surrogates for the public," *id.* at 573, and their access cannot be "foreclosed arbitrarily." *Id.* at 577.

That a significant part of voir dire in this case was conducted through written questionnaires and not orally is of no constitutional significance. We can think of no principled reason to distinguish written questions from oral questions for purposes of the First Amendment right of public access. Jury questionnaires merely facilitate and streamline voir dire; their use does not constitute a separate process. Every court that has decided the issue has treated jury questionnaires as part of the voir dire process and thus subject to the presumption of public access. See *In re South Carolina Press Ass'n*, 946 F.2d 1037, 1041 (4th Cir.1991) (applying the presumption of access to jury questionnaires); *United States v. McDade*, 929 F.Supp. 815, 817 n. 4 (E.D.Pa.1996) (finding that *Press-*

Enterprise I “encompass[es] all voir dire questioning-both oral and written”); In re Washington Post, 1992 WL 233354, at \*4 (D.D.C. July 23, 1992) (applying the presumption of access to jury questionnaires); *Bellas v. Superior Court*, 102 Cal.Rptr.2d 380, 386 (Cal.Ct.App. 2000) (following other courts that “make clear that the content of juror questionnaires [is] publicly accessible” unless the presumption is outweighed by a competing interest; the “limitation on access is tailored as narrowly as possible”; and “the trial court’s findings are articulated with enough specificity that a reviewing court can determine” whether access was properly limited); *Copley Press, Inc. v. Superior Court*, 278 Cal.Rptr. 443, 451 (Cal.Ct.App.1991) (“The fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import.”); *Stephens Media, LLC v. Eighth Judicial Dist. Court*, 221 P.3d 1240, 1249 (Nev.2009) (“[T]he use of juror questionnaires does not implicate a separate and distinct proceeding. [It is] merely a part of the overall voir dire process.”); In re *Newsday, Inc. v. Goodman*, 552 N.Y.S.2d 965, 967 (N.Y.App.Div.1990) (“[Q]uestionnaires completed by the petit jurors in this criminal action were an integral part of the voir dire proceeding.”); *Forum Commc'ns Co. v. Paulson*, 752 N.W.2d 177, 185 (N.D.2008) (holding that use of jury questionnaires “serves as an alternative to oral disclosure of the same information in open court”); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 188 (Ohio 2002) (“Because the purpose behind juror questionnaires is merely to expedite the examination of prospective jurors, it follows that such questionnaires are part of the voir dire process.”).

It is evident that the jury questionnaires here were used to facilitate the jury selection process by exposing any biases relating to, among other issues, Latino ethnicity, illegal immigration, and gang affiliation that otherwise would have been explored through oral questioning. The presumption, then, is that the completed questionnaires, as a part of voir dire, should be available to the press.<sup>2</sup>

Although the right of access is not absolute, the Court explained in *Press–Enterprise I* that “[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” 464 U.S. at 510. The Court directed specific procedures to be followed in considering whether the presumption has been overcome. The trial court must first “articulate . . . with the requisite specificity” the “protectible privacy interests” at stake and then consider whether alternatives to complete closure are available to protect those privacy interests. *Id.* at 513. “Absent consideration of alternatives to closure, the trial court [may] not constitutionally close the voir dire.” *Id.* at 511. To prevent unnecessary closure, the trial court should inform prospective jurors that if they are concerned about certain sensitive questions, they may affirmatively request “an opportunity to present the problem to the judge in camera but with counsel present and on the record.” *Id.* at 512. See also *Beacon Journal*, 781 N.E.2d at 189 (“[A]n individualized examination of each prospective juror’s circumstances is appropriate in considering the privacy interests of such jurors.”). Even then, a juror’s request to keep information private must be balanced against the “constitutional values sought to be protected by holding open proceedings.” *Press–Enterprise I*, 464 U.S. at 512. In the end, “[t]he trial judge should seal only such parts of

the transcript as necessary to preserve the anonymity of the individuals sought to be protected.” Id. at 513.

### C. The Trial Court Erred by Failing to Follow the Press–Enterprise I

#### Procedures in This Case

Having determined that the presumption of access applies to the jury questionnaires used in this case, we must now consider whether the trial court proceeded in accordance with Press–Enterprise I. That is, did the trial court articulate specific protectible privacy interests and consider alternatives to complete closure to protect those interests? The Press–Enterprise I procedures call for the “exercise of sound discretion by the court” to “minimize the risk of unnecessary closure” by ensuring that there exists a “valid basis” for concluding that disclosure will infringe a significant privacy interest. Press–Enterprise I, 464 U.S. at 512. It is clear from the record that the trial court failed to exercise this discretion. We have held that “[f]ailure to exercise choice in a situation calling for choice is an abuse of discretion.” *Johnson v. United States*, 398 A.2d 354, 363 (D.C.1979).

At the hearing on The Post's motion, the trial court explained that when it asked the jurors—in what appears to have been an off-the-record discussion—whether they would have a problem with disclosing their questionnaires, they advised that they were opposed, “to a person.” Yet the court cited no specific privacy interests raised by any particular juror and considered no alternatives to blanket closure.<sup>4</sup> We do not know whether the trial court posed a general question to the jurors about thoughts on disclosure or whether it made an individualized inquiry into the privacy interests at stake. The court's oral findings give us little to analyze. It is worth noting, however, as The Post points out, that several jurors spoke to the press after the verdict and voluntarily appeared on television and in the news. Evidently, the jurors were not opposed “to a person” to maintaining their privacy after the trial.

The trial court also expressed concerns about the effect of disclosure on juror candor.<sup>5</sup> The court believed that public disclosure would diminish the value of jury questionnaires as a tool to elicit candid responses and would result in decreased use of jury questionnaires in the future. The court had no problem keeping oral voir dire open to the public, however, and it cited no authority to suggest that disclosure of written answers would somehow affect a juror's response in a way that it would not in the context of oral voir dire. We agree with other jurisdictions that a generalized concern about juror candor is not enough to overcome the presumption of open access. See, e.g., *ABC, Inc. v. Stewart*, 360 F.3d 90, 102 (2d Cir.2004) (rejecting the trial court's “conclusory . findings” that “the presence of reporters at voir dire proceedings would have . chilled juror candor”); *Stephens Media*, 221 P.3d at 1253 (“[W]e caution district courts from hastily closing voir dire proceedings because of the possibility that the presence of the press would inhibit juror candor.”).

This is not to say that concerns about juror candor may never justify closure. It may be that in some cases the need for a “modest limitation on access” will override the presumption of openness. See *United States v. King*, 140 F.3d 76, 83 (2d Cir.1998) (upholding the

closure of jury questionnaires where “in this particular case of a defendant of unusually high visibility, already subject to extraordinarily hostile publicity, the airing of jurors' responses will significantly inhibit the candor necessary to assure a fairly selected jury and therefore a fair trial”). The Second Circuit upheld the limitations on access to jury questionnaires in the trial of boxing promoter Don King, *id.*, because the trial court made detailed findings that such a limitation was necessary to ensure candor in “the delicate area of possible racial bias.” *United States v. King*, 911 F.Supp. 113, 117 (S.D.N.Y.1995). Although that “delicate area” also was at play in Guandique's trial, the court made no specific individualized findings that publicity would impact the impartiality of prospective jurors and it considered no alternatives to blanket closure.

Finally, we reject the government's argument that the trial court's promise of confidentiality, although improper “as a matter of policy,” cannot be undone and that it would be unfair to disclose the questionnaires at this point. Promises of confidentiality in this context are not merely inappropriate; they are constitutionally unsound. Such a promise does not trump the First Amendment right of access. See *Beacon Journal*, 781 N.E.2d at 190 (“Constitutional rights are not superseded by the mere promise of a trial judge to act contrary to those rights.”).

### III. Remedy

Having determined that the trial court's blanket closure was improper, we now consider the appropriate remedy. The Post originally sought contemporaneous access to the jury questionnaires. We can do nothing about that. But, as we noted above, the public's interest in the case does not end with the verdict. The values underlying the First Amendment right of access—for example, the public trial as a check on the fair functioning of the criminal justice system—are served even after the verdict is in. This is especially true where, as here, the defendant's direct appeal of his conviction is pending in this court. Moreover, The Post, as a surrogate for the public, has an ongoing interest in the jury selection process as a general matter of civic interest.

Although literal compliance with *Press-Enterprise I* is not possible after the fact, we see no reason why, on remand, the trial court cannot rectify the mistake made when it promised the jurors that the completed questionnaires would be kept confidential. We therefore remand the case to the trial court to “unscramble the egg” broken when the court made a promise to the prospective jurors that could not be kept consistent with the constitutional command of *Press-Enterprise I*.

Before discussing the procedures to be followed on remand, we add a note about the trial court's promise of confidentiality. It is apparent that the trial judge was concerned with keeping his word (“I intend to live up to that promise unless the Court tells me that I have to do otherwise.”), and we empathize with his plight. At the same time, we see no reason why the trial court may not, if it so chooses, recall the jurors and advise them of this court's decision on appeal, holding that The Post's request for access to the completed questionnaires was wrongly denied. The trial court may then proceed with the procedures

mandated by Press–Enterprise I, explaining to the jurors that this court has ordered those procedures to be followed in this case.

Beyond that, we leave it to the trial court's discretion, in the first instance, to fashion the remand proceedings, although we must make clear what we believe is required. First and foremost, and in keeping with the teachings of Press–Enterprise I and its progeny, the trial court must start with the presumption that the completed jury questionnaires should be disclosed in their entirety. If the court finds that responses to any of the questions “touch [ ] on deeply personal matters” that may warrant redaction, the court should recall those jurors to provide them with an opportunity to raise any concerns they might have in camera and on the record. See Press–Enterprise I, 464 U.S. at 511. Ultimately, however, the decision to withhold any of the questionnaire responses remains the responsibility of the court. Accordingly, the questionnaires must be disclosed with any court-ordered redactions supported by specific individualized findings capable of appellate review.<sup>6</sup> These procedures will adequately protect both the public's right of access and any special privacy interests of the jurors.

Reversed and remanded.

#### FOOTNOTES

1. Tuesday, October 19, was a “gap day” when the parties reviewed the completed questionnaires.

2. The Post “made both oral and e-mail requests” through the Superior Court's public affairs officer, which The Post describes as “the customary procedure by which the news media seek court records in Superior Court.”

3. Relying on our decision in Mokhiber, the government urges us to decide this case on common law grounds, without reaching the First Amendment question. The principle of constitutional avoidance is inapposite here. It is well settled after Press–Enterprise I that, under the First Amendment, access to the jury selection process is presumed, and competing privacy interests or fair trial concerns do not warrant complete closure without considering alternatives. In Mokhiber, this court's holding relied on the common law in part because it was dealing with a civil proceeding. Mokhiber, 537 A.2d at 1107 n. 4. The Supreme Court has emphasized that “a right of access to criminal trials in particular” deserves special First Amendment protection. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982). We also noted in Mokhiber a distinction between judicial records, for which there is a common law right of access, and judicial proceedings, for which there is both a common law and a First Amendment right of access. Mokhiber, 537 A.2d at 1107 (declining to rely on the line of Supreme Court cases dealing with a First Amendment right of access to criminal proceedings because “we deal here with a question of access to court records, not to court proceedings”). That the jury questionnaires themselves are technically documents and not proceedings to attend does not alter application of the First Amendment right of access because, as we have said, the

questionnaires are part of the voir dire proceeding, not separate from it. Having so concluded, we cannot ignore clear authority on the application of the First Amendment.

4. The court earlier had agreed to a very limited disclosure of the jurors' age, gender, education, and occupation.

5. The issue of juror candor is treated as an interest that implicates a defendant's Sixth Amendment right to a fair trial. See, e.g., *ABC, Inc. v. Stewart*, 360 F.3d 90, 100-02 (2d Cir.2004); *In re South Carolina Press Ass'n*, 946 F.2d at 1042 (accepting the trial court's finding that "[i]f the voir dire is to serve its function as the safeguard of the defendant's sixth amendment rights, then clearly candor must be the hallmark of such a proceeding"). When a defendant's right to a fair trial is the competing interest, the proceeding at issue "shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986) (*Press-Enterprise II*). We think it important in this case that Guandique, represented by able trial counsel, expressed no objection to The Post's request for access to the jury questionnaires and reiterated that position in a statement filed with this court on appeal. With no objection from Guandique, it is difficult to conclude that disclosure would prejudice Guandique's right to a fair trial because, as the Second Circuit noted in *Stewart*, in which the government, not the defendant, sought closure, "[i]f openness would truly have jeopardized the fair trial rights of the defendants in this case, we imagine that the defendants, represented by experienced counsel, would have initiated the request for closure." 360 F.3d at 102.

6. We note, however, that the United States acknowledges that privacy interests are not implicated in all, or even most, of the questionnaire responses in this case, and our own reading of the questions leads us to the same belief. While we do not presume to prejudge the answer, we cannot help noting that it seems unlikely that the answers to the questions will raise serious privacy concerns of the magnitude needed to override the public's interest in a completely open voir dire process.

OBERLY, Associate Judge:

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for Amicus Curiae, Jeffrey Ellis @ [jeffreyerwinellis@gmail.com](mailto:jeffreyerwinellis@gmail.com), Suzanne Elliott @ [suzanne-elliott@msn.com](mailto:suzanne-elliott@msn.com), and to the attorney for the petitioner, Steven Witchley @ [steve@ehwlawyers.com](mailto:steve@ehwlawyers.com), containing a copy of the Respondent's Answer to Amicus Curiae Brief, in STATE V. TANER TARHAN, Cause No. 85737-7, in the Supreme Court, 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.

W Brame

Name

Done in Seattle, Washington

2/3/12

Date 2/3/12