

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 11, 2015, 12:12 pm
BY RONALD R. CARPENTER
CLERK

No. 85996-5

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK DAVID RUSSELL,

Petitioner.

Filed *E*
Washington State Supreme Court

MAY 20 2015

Ronald R. Carpenter
Clerk *b/h*

**BRIEF OF *AMICUS CURIAE* OF THE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON**

Margaret Pak Enslow, WSBA
#38982
Enslow Martin PLLC
701 Fifth Ave., Suite 4200
Seattle, Washington 98104
Tel (206) 262-8220
Fax (206) 262-8001
margaret@enslowmartin.com

Nancy Talner, WSBA #11196
ACLU of Washington Foundation
901 Fifth Ave., #630
Seattle, WA 98164
Tel (206) 624-2184
talner@aclu-wa.org

*Attorneys for Amicus Curiae
American Civil Liberties Union of Washington*



ORIGINAL

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS 1

II. INTRODUCTION..... 1

III. ISSUES PRESENTED..... 3

IV. STATEMENT OF THE CASE..... 3

V. ARGUMENT 5

 A. The Right to a Public Trial Applies to All Parts of
 the Jury Selection Process Relating to Discretionary
 Determinations about Requests for Hardship
 Excusal..... 5

 B. The Analysis of What Constitutes Voir Dire for
 Purposes of the Open Courts Analysis Should Focus
 on the Level of Discretion Exercised in Narrowing
 the Jury Pool. 7

 C. Transparency and Public Accountability are
 Important for All Discretionary Parts of Jury
 Selection, Particularly Hardship Excusals. 9

 D. Even Under the “Experience and Logic” Test,
 Determination of Hardship Excusals is Part of Jury
 Selection and Implicates the Public’s Right to an
 Open Trial. 14

 E. The Open Courts Violations Here are Structural
 Errors that Can be Raised for the First Time on
 Appeal. 18

VI. CONCLUSION 18

TABLE OF AUTHORITIES

Constitutional Provisions

Art 1 § 10.....	9
Art 1 § 22.....	9

Federal Cases

<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991).....	5
<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986)	6
<i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S.Ct. 1444, 20 L. Ed. 2d 491 (1968).....	6
<i>Georgia v. McCollum</i> , 505 U.S. 42, 112 S.Ct. 2348, 120 L. Ed. 2d 33 (1992).....	7

Washington Cases

<i>In Re Coggin</i> , 182 Wn.2d 115, 340 P.3d 810 (2014).....	6, 8
<i>In re Pers. Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	6
<i>State v. Frawley</i> , 181 Wn.2d 452, 334 P.3d 1022 (2014).....	5, 7
<i>State v. Irby</i> , 170 Wn.2d 874, 246 P.3d 796 (2011).....	7
<i>State v. Njonge</i> , 181 Wn.2d 546, 334 P.3d 1068 (2014).....	5, 7, 18
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 309 P.3d 326 (2013).....	6, 16
<i>State v. Shearer</i> , 181 Wn.2d 564, 334 P.3d 1078 (2014).....	7, 8, 12, 13
<i>State v. Slerf</i> , 181 Wn.2d 598, 334 P.3d 1088 (2014).....	2, 7, 8, 13, 14, 18
<i>State v. Smith</i> , 181 Wn.2d 508, 334 P.3d 1049 (2014).....	7, 14
<i>State v. Wilson</i> , 174 Wn.App. 328, 298 P.3d 148 (2013).....	11
<i>State v. Wise</i> , 176 Wn.2d 1, 288 P.3d 1113 (2012).....	5, 7, 8

Revised Code of Washington

RCW 2.36.070	10
RCW 2.36.072(4).....	10
RCW 2.36.080	16
RCW 2.36.100	12
RCW 2.36.165	15

Rules of Appellate Procedures

RAP 2.5(a).....18

General Rules

GR 28(b)(1).....12

Other Authorities

Washington State Jury Commission Report (2000) 15
Frequently Asked Questions, Washington Courts website 15
Alex Fryer, *Worry Duty - When The Jury Summons Arrives, It's Those
with Secure Incomes Who Answer - And Employers With Full Pay Polices
Who Foot the Bill*, The Seattle Times, July 7, 1997 15
Christine Caulfield, *Economic Blues Could Make For Whiter Juries*, Law
360, October 9, 2008 16

I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington (“ACLU” or “*Amicus*”) is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters, dedicated to the preservation of civil liberties. The ACLU strongly supports the constitutional requirement that court proceedings generally should be open to the public, and it recognizes the importance of having juries which reflect the diversity of our community. It also recognizes the occasionally competing civil liberties interests—including privacy and the right to an impartial jury—involved in public access to court proceedings. The ACLU has participated in numerous cases involving access to public records and court proceedings as *amicus curiae*, as counsel to parties, and as a party itself. The ACLU also has participated in legislative and rule-making procedures surrounding access to a wide variety of public records and proceedings.

Amicus has reviewed the documents and pleadings in this case and is familiar with the issues and arguments raised by the parties.

II. INTRODUCTION

This Court granted review only as to the public trial issues raised by Appellant. *Amicus* argues that the failure to conduct discretionary portions of the jury selection process in open court proceedings, absent a particularized determination of the need for a closed hearing, violates the

“open courts” requirement of the Washington Constitution, Art. 1, section 10.

There are numerous reasons why it is essential to conduct jury selection in public. Conducting these proceedings in public is a form of accountability for the judiciary, improves public trust in the judicial system, and allows the public to see how important decisions contributing to the lack of jury diversity are being made.

While there is a general consensus that jury selection must be done in open court, the courts in recent cases discussed below vary in their interpretation of what constitutes jury selection for purposes of the open courts requirement. This Court’s recent open courts decisions have provided some guidance but have not dispositively addressed the issue in this case. In the case most analogous to the present one, the deciding fifth vote from Justice Wiggins appeared to agree with the four dissenting justices that any part of juror selection based on individual examination of case-specific factors must be done in open court. *State v. Slert*, 181 Wn.2d 598, 334 P.3d 1088, 1094 (2014) (4-4-1 decision).¹

The specific open court violation at issue here is the determination of hardship requests, based on juror questionnaires, in the jury room and hallway outside the presence of the public. Though the excusals were announced in open court, the discussion and determination of those

¹ This case is also analogous to *State v. Schierman*, No. 84614-6 (King 06-1-06563-4 SEA) in which the ACLU also submitted an amicus brief. Oral argument for *State v. Schierman* occurred on May 5, 2015.

excusals were not. *Amicus* urges this Court to recognize the importance of making all discretionary aspects of the jury selection process open to the public.

III. ISSUES PRESENTED

1. Does the discussion among the judge, attorneys and defendant occurring in the jury room and hallway, removed from public view in the courtroom, regarding discretionary determination of hardship excusals implicate the public trial right?
2. Is the open courts violation a structural error?

IV. STATEMENT OF THE CASE

Appellant Frederick Russell was found guilty of vehicular homicide and vehicular assault in 2007. The Court of Appeals affirmed his conviction in April 2011. With regard to the public trial issues raised by Appellant, the Court of Appeals found that excusal of jurors after discussion with attorneys and the criminal defendant outside of open court was ministerial, and did not implicate the public right to trial. This Court accepted limited review of Appellant's case on the public trial issues only. The facts below are based on the parties' briefing and the Court of Appeals' unpublished decision.

On the first day of jury selection, before the initial jury panel was brought into the court room, the trial judge stated in open court that the court would meet with counsel and Appellant in the jury room to discuss

hardship requests based on the juror questionnaires. The court took a recess and after the venire panel arrived, the trial judge stated in open court that he had met with counsel and Appellant to review the juror questionnaires for “severe hardship” requests that would result in jurors being automatically excused. The judge then excused 14 jurors for hardship and informed the remaining panel that other jurors who listed possible hardships would be individually questioned before he made a decision on their requests. After administering the juror oath, the judge questioned those jurors in open court. He advised the jury that counsel and Appellant would discuss the remaining hardship requests in the hallway. The hallway conference was on the record. The judge then resumed questioning in open court in the presence of the jury panel and Appellant and dismissed additional jurors for hardship.

On the second day of jury selection, an additional 15 prospective jurors were summoned. Before the jurors arrived in the courtroom, the judge, counsel and Appellant met in the jury room to discuss hardship requests. After the jurors arrived in the courtroom, the judge excused seven of the new jurors for hardship. The judge questioned several more jurors regarding hardship and several more potential jurors were excused. No *Bone-Club* hearings took place.

V. ARGUMENT

A. **The Right to a Public Trial Applies to All Parts of the Jury Selection Process Relating to Discretionary Determinations about Requests for Hardship Excusal.**

This Court has long held that a public trial is “a core safeguard in our system of justice.” *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). “Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open.” *Id.* “People not actually attending trials can be confident that courts are observing standards of fairness, knowing that because anyone is free to attend, established procedures are being followed and deviations will become known.” *State v. Frawley*, 181 Wn.2d 452, 466, 334 P.3d 1022 (2014) (C. Johnson, J., lead opinion). An open and accessible trial “deters perjury and other misconduct ... provides for accountability and transparency ... [and] allows the public to see, firsthand, justice done in its communities.” *State v. Wise*, 176 Wn.2d at 5; *see also Arizona v. Fulminante*, 499 U.S. 279, 294-95, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991) (violation of the guarantee of a public trial requires reversal, even without a showing of prejudice, because “the values of a public trial may be intangible and unprovable in any particular case”).

“The right to a public trial includes the right to a public voir dire.” *State v. Njonge*, 181 Wn.2d 546, 559, 334 P.3d 1068 (2014). This Court has noted that “[t]he guaranty of open criminal proceedings extends to the

process of juror selection, which is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quotations and citations omitted). “The act of dismissing jurors is a critical part of a criminal trial and, if not undertaken in a fair and open manner, fraught with potential for undermining trust in the judicial system.” *State v. Saintcalle*, 178 Wn.2d 34, 41-42, fn. 1, 309 P.3d 326 (2013). Voir dire is a critical part of the court process, and how parties and judges treat it is a matter of substantial public concern. *See In Re Coggin*, 182 Wn.2d 115, 126, 340 P.3d 810 (2014) (Stevens, J., dissenting).

More specifically, “[t]he petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.” *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). Consistent with that critical function, jury selection must be free from improper discrimination on the part of prosecutors, judges and even defense counsel because the harm of discrimination “extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.” *Batson*, 476 U.S. at 87; *see also Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.

Ed. 2d 33 (1992) (prohibiting racially motivated peremptory strikes by defense counsel).²

B. The Analysis of What Constitutes Voir Dire for Purposes of the Open Courts Analysis Should Focus on the Level of Discretion Exercised in Narrowing the Jury Pool.

Lower courts and indeed this Court itself continue to debate the scope of the open courts doctrine derived from article I, section 22 and article I, section 10 of the Washington State constitution. *See State v. Smith*, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014) (J.M. Johnson, J.). This Court has recently issued numerous opinions on open courts and has accepted review of additional open courts cases, but a number of issues remain unresolved. *See, e.g., State v. Slert*, 181 Wn.2d 598, 334 P.3d 1088 (2014); *State v. Njonge*, 181 Wn.2d 546, 334 P.3d 1068 (2014); *State v. Frawley*, 181 Wn.2d 452, 334 P.3d 1022 (2014); *State v. Shearer*, 181 Wn.2d 564, 334 P.3d 1078 (2014).

It is clear that, in general, voir dire or jury selection must be conducted in open court. *See, e.g., State v. Shearer*, 181 Wn.2d. at 566 (noting Court's prior holdings in *Wise* and *Paumier* that a defendant's right to a public trial applies to the jury selection process). "We have repeatedly held that the public trial right applies to jury selection.

² The public's right is closely tied to the defendant's right to be present at all times that are critical to criminal proceedings. The United States Supreme Court and this Court affirmed that the process of jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free of ethnic, racial or political prejudice, which the public also has a strong interest in. *See State v. Irby*, 170 Wn.2d 874, 883-884, 246 P.3d 796 (2011). In this case, Appellant was present during the closed door determinations of hardship excusals.

Specifically, it is well established that the public trial right in voir dire proceedings extends to the questioning of individual prospective jurors.” *In Re Coggin*, 182 Wn.2d 115, 118, 340 P.3d 810 (2014) (lead opinion). “It is not necessary to engage in a complete ‘experience and logic test’ [for questioning of potential jurors in chambers] because ‘it is well settled that the right to a public trial also extends to jury selection.” *State v. Wise*, 176 Wn.2d 1, 12, 288 P.3d 1113, fn. 4 (2012).

However, courts have grappled with defining the boundaries of what exactly constitutes “voir dire” or jury selection. Some have characterized portions of the jury selection process that they consider unnecessary to occur in open court as “administrative,” “purely legal,” or something akin to a “side bar.” The lower appellate court in this case characterized the discussions of hardship requests in the hallway as a “side bar” conference that “did not involve resolution of disputed facts.” *See State v. Russell*, 2011 WL 1238303, *22 (Div. 3 April 5, 2011). These distinctions, however, provide little guidance going forward. *See State v. Slert*, 181 Wn.2d at 615 (Stephens, J., dissenting) (noting that determinations to excuse potential jurors based on responses to written case-specific questionnaires was not an “administrative” excusal that could be done in closed court); *State v. Shearer*, 181 Wn.2d 564, 574, 334 P.3d 1078 (2014) (rejecting state’s argument that closure was “ministerial or administrative matter”).

Amicus urges the Court to reject an analysis focused on the location and procedure utilized in favor of one that more appropriately

considers the level of discretion exercised. Under this approach, the right to public trial should apply to the parts of the jury selection process where important factual matters relating to substantive and discretionary narrowing of the jury pool are discussed. Focusing on these facts provides a better form of open courts analysis for evaluating decisions regarding narrowing of the jury pool.

C. Transparency and Public Accountability are Important for All Discretionary Parts of Jury Selection, Particularly Hardship Excusals.

The public's right to open court proceedings would suffer a severe blow if this Court were to hold that important factual questions regarding juror hardship excusals can routinely be discussed in ways that are hidden from public view, without a *Bone-Club* analysis. Transparency and public accountability require airing in open court the evaluation and determination of factual questions relating to excusals for hardship, whether based on questioning jurors in court, juror questionnaires, emails or other out-of-court processes. Requiring consideration of hardship excusals in open court serves as an essential check on potential misconduct and fosters public confidence in the judicial process, whereas dismissal of jurors in closed proceedings undermines that confidence. Excusing about 21 potential jurors based on closed door discussions removed that part of jury selection from public oversight and cast doubt on the integrity of the proceedings. Public oversight over every part of the selection is essential to the public trial and public access guarantees. It is

unknown whether the reasons for dismissing the jurors in this case were valid or not, because the public had no opportunity to view that part of the process; that is precisely the harm that art. 1, § 10 is designed to prevent.

To illustrate why hardship excusals involving discretionary determination of important factual matters should be considered in open court, it is helpful to first examine the types of juror excusal for which an open court proceeding is not necessary. Jury selection begins with a general screening process that eliminates from jury service those who do not meet statutory requirements: that the individual is at least 18 years old, a United States citizen, a resident of the county in which he or she is to serve, able to communicate in English, and not convicted of a felony or had civil rights restored. *See* RCW 2.36.070. If the facts are clear that a potential juror lacks these statutory qualifications, excusal may occur outside of open court. Excusing a potential juror based on a sworn declaration that she is under the age of 18, for example, does not involve any discretion. That excusal is mandatory. Likewise, a potential juror who submits a sworn written statement that he is not a United States citizen need not be factually challenged and excused in open court. These mandatory excusals can be characterized as “administrative” or “ministerial” acts that do not implicate the public trial right. They do not involve a discretionary narrowing of the jury pool that would be susceptible to bias or prejudice. RCW 2.36.072(4) (upon receipt of a written declaration under oath that the potential juror lacks the statutory

qualifications, the potential juror “shall be excused from appearing in response to the summons”).

Case law similarly recognizes the kind of excusals or postponements of jury service for undue hardship and/or public necessity which are more administrative than discretionary, and need not occur in open court. For example, in *State v. Wilson*, 174 Wn.App. 328, 331, 298 P.3d 148 (2013), the Court of Appeals held that a bailiff’s excusal of two jurors for solely illness-related issues was “administrative” and it occurred before the defendant’s right to a public trial and right to be present was triggered. The jurors in that case were rescheduled for jury service at a later date, not per se “excused.” *Id.* at 332. Another example of a proper “administrative” excusal would be a juror who submits a sworn declaration and letter from a physician describing a medical condition that prevents the juror from serving (for example, a highly contagious disease or ongoing chemotherapy treatment).³ The decision to postpone jury service for those reasons involves little discretion, and therefore has less potential to be susceptible to bias or prejudice. Nor do decisions on these matters implicate important questions of jury diversity.

In contrast, when the issue is juror excusals for reasons other than illness or clear lack of statutory qualification, the court’s exercise of discretion after consideration of important fact questions is involved. The judge or her designee may not excuse a person except upon a showing of

³ If a judge’s designee were making the postponements or excusals, he or she must be operating under specific written guidelines that allow such decisions. *See* GR 28(b)(1).

undue hardship, extreme inconvenience, public necessity, or any other reason deemed sufficient by the court. RCW 2.36.100; GR 28(b)(1) (authorizing judge to delegate authority to disqualify, postpone or excuse a potential juror based on specific written criteria). Any decision to excuse that juror based on a factual determination and discretion, other than those for illness or clear lack of statutory qualification, should be made by a judge or her designee in the presence of the defendant and the public. For example, a juror who claims undue hardship for economic reasons should have to explain the circumstances of the request. The judge (or the designee acting under specific written instructions) will have to make a factual determination on the extent of the hardship, determine whether it goes beyond mere inconvenience and then exercise discretion in deciding whether or not to excuse that juror.

This Court has expressed support for a rule stating that juror excusals involving a discretionary determination of factual matters should occur in open court. In *State v. Shearer*, 181 Wn.2d 564, 574, 334 P.3d 1078 (2014) (lead opinion), this Court held that an in-chambers discussion of whether a potential juror was disqualified for prior criminal conviction implicates the public trial right. During the trial of defendant Henry Grisby, a question arose as to whether one juror had a prior criminal conviction that would disqualify him from jury service. *Id.* at 568. The judge held an in-chambers conference with the potential juror, the attorneys and defendant. It was off the record and not preceded by a *Bone-Club* analysis. *Id.* Even though the defense ultimately used a

peremptory challenge on this potential juror, this Court held that the in-chambers discussion on the juror's statutory qualification was voir dire that must occur in open court. *Id.* at 573. This Court stated, "The general purpose of the in-chambers discussion was to determine whether the juror had a felony conviction, but there is no record of what occurred in chambers. ... *Paumier* is controlling, and thus the trial court was required to do a *Bone-Club* analysis prior to closing the courtroom." *Id.* at 574; *see also id.* at 578 (Gonzalez, J., concurring in part and dissenting in part) ("I agree with this court and the court below that Grisby's conviction must be reversed. There is simply nothing in the record or our general experience that shows a compelling reason justified taking the juror in question back into chambers."). The factual determination on whether the potential juror was statutorily disqualified had to occur in open court.

Applying this analysis from *Shearer*, the Court of Appeals' ruling in this case cannot stand. When the court below made the categorical statement that "the discussions regarding hardship did not involve resolution of disputed facts," it overlooked the fact that the hardship excusals in this case involved discretionary determinations of factual matters. *See State v. Russell*, 2011 WL 1238303, *22 (Div. 3 April 5, 2011). The jurors were excused for reasons unknown to the public. Simply because their sworn information provided to the Court was in writing does not take their excusals out of the voir dire process. *See State v. Slett*, 181 Wn.2d at 618 (Stephens, J., dissenting) (four justices) ("putting the questions in writing does not change this"). This Court

should conclude that the hardship excusals here involved discretionary factual matters narrowing the jury pool which implicated the public trial right.

D. Even Under the “Experience and Logic” Test, Determination of Hardship Excusals is Part of Jury Selection and Implicates the Public’s Right to an Open Trial.

Even under the experience and logic test, dismissal of jurors for hardship is a proceeding to which the right to public trial attaches. The experience prong asks “whether the place and process have historically been open to the press and general public.” *State v. Smith*, 181 Wn.2d at 514. Historically, “courts have a centuries-old tradition of selecting jurors in public precisely because we need to see and hear how they respond to questioning.” *See State v. Slert*, 181 Wn.2d at 618 (Stephens, J., dissenting) (four justices); *id.* at 610 (Wiggins, J., concurring in result) (indicating that in-chamber discussion and excusal of jurors based on written questionnaire was *voir dire*).

The logic prong is also satisfied here because, as noted above, allowing the public to observe all discretionary acts that narrow the jury pool, and purported grounds supporting those acts, is essential to maintaining public confidence in the system. Important information about the jury system is presented during the portion of jury selection when hardship excusals are considered. This is when the public can see how many jurors request excusal because of the economic hardship of jury service, and the resulting impact on diversity of the jurors who end up

serving. As the Washington State Jury Commission Report noted 15 years ago, and as this Court's resources for jurors state, most jurors in Washington are paid only \$10 per day for jury service and their employer is not required to pay their wages while they are on jury duty. Washington State Jury Commission Report (2000), *available at* https://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf at 23; Frequently Asked Questions, Washington Courts, *available at* http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.faq#Q9. Although employers may not fire an employee for missing work due to jury service, employers are not required to pay an employee's wages while the employee is gone for jury duty. RCW 2.36.165. Some employers pay an employee's regular salary while the employee is on jury duty, but "hourly workers are conspicuously absent in most juries." See Alex Fryer, *Worry Duty - When The Jury Summons Arrives, It's Those with Secure Incomes Who Answer - And Employers With Full Pay Polices Who Foot the Bill*, The Seattle Times, July 7, 1997, *available at* <http://community.seattletimes.nwsourc.com/archive/?date=19970707&slug=2548378>. Economic hardship claims by jurors have clear impacts on the diversity of the jury, since they tend to exclude entire occupations and economic groups from juries. The Washington State Jury Commission Report, *supra* at 3, recognized this problem.

The lack of economic diversity on Washington juries is not the only problem relevant to public confidence in the court system revealed in the hardship excusal portion of jury selection proceedings. Washington

statutes state that no citizen may be excluded from jury service on account of race, color, religion, sex, national origin or economic status. RCW 2.36.080. Yet the hardships posed by jury service often result in exclusion and loss of diversity as to all the categories listed in the statute. If the public were able to see all parts of jury selection, they would observe many parents of young children (likely more women than men) and low-wage workers (disproportionately young and racial minorities) all asking to be excused from jury duty. These excusals are known to decrease the diversity of juries, resulting in juries which do not function as well and reduce public confidence in the court system. *See, e.g.,* Christine Caulfield, *Economic Blues Could Make For Whiter Juries*, Law 360, October 9, 2008, available at <http://www.law360.com/articles/72230/economic-blues-could-make-for-whiter-juries> (discussing how in difficult economic times, “the composition of jury pools will suffer, resulting in juries that are disproportionately white and homogeneous. ... When juries don’t represent the communities from which they are drawn, the system loses the appearance of legitimacy and communities lose faith in the system Studies show that a heterogeneous jury also makes for a more just jury, one that deliberates more thoughtfully and more thoroughly Diverse juries also provide a greater variety of perspectives and make better decisions,”)

Further demonstrating the reasons “experience and logic” support conducting hardship excusals in open court, Justice Wiggins in his opinion

in *Saintcalle*, *supra*, 178 Wn.2d at 49-50, explained that lack of diversity in Washington juries poses constitutional problems as well as statutory ones:

We should also recognize that there is constitutional value in having diverse juries, We have juries for many reasons, not the least of which is that it is a ground level exercise of democratic values. The government does not get to decide who goes to the lockup or even the gallows. Ordinary citizens exercise that right as a matter of democracy. In England, the jury developed into juries of one's peers, coming from one's community. This is the grand heritage of the jury system. But equally fundamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury.

Justice Gonzales's opinion in *Saintcalle* also explained why lack of diversity among the jurors selected to serve is so important:

Yet inclusion and diversity should be considered extremely important goals of the jury system at a systemic level, in addition to the fundamental requirement of impartiality. *See* WASHINGTON STATE JURY COMM'N, *supra*, at 3. As the lead opinion rightly points out, such inclusion and diversity is highly beneficial, advancing fairness and the appearance of fairness, and promoting more effective and reflective juries. ... Increased diversity and inclusion on juries also has the potential to motivate civic engagement in the community. *See* Andrew E. Taslitz, *The People's Peremptory Challenge and Batson: Aiding the People's Voice and Vision Through the "Representative" Jury*, 97 IOWA L. REV. 1675, 1709-10 (2012) (discussing "one of the largest studies on juries and democracy").

As these authorities demonstrate, hardship excusals involving discretionary determination of factual matters relating to issues implicating jury diversity are not merely "ministerial or administrative"

but instead involve the most important aspects of the jury selection process. Thus compelling “experience and logic” support conducting all discretionary phases of the jury selection process, including consideration of hardship excusals, in open court, since public access plays a significant positive role in the functioning of the process. *See Slert, supra*, 181 Wn.2d at 604 (defining the “logic” prong of the experience and logic test).

E. The Open Courts Violations Here are Structural Errors that Can be Raised for the First Time on Appeal.

This Court has reiterated that an open courts violation is a structural error, meaning prejudice is presumed *per se* in the violation. This Court recently affirmed that “We continue to hew to our well-reasoned and long-standing precedent and hold that a defendant’s failure to contemporaneously object to a public trial violation does not preclude appellate review under RAP 2.5(a).” *State v. Njonge*, 181 Wn.2d 546, 555, 334 P.3d 1068 (2014).

VI. CONCLUSION

Amicus urges this Court to hold that all parts of jury selection that involve discretion, including hardship excusals, must occur in open court. The act of dismissing jurors is a critical part of a criminal trial and, if not undertaken in a fair and open manner, is fraught with potential for undermining trust in the judicial system. The reasons many jurors are

unable to serve due to hardship, resulting in juries that do not reflect the diversity of the community, is a matter of substantial public concern.

Respectfully submitted this 11 th day of May, 2015.

By Margaret Pak Enslow

Margaret Pak Enslow,
WSBA # 38982
ENSLOW MARTIN PLLC

Nancy Talner, WSBA # 11196
ACLU OF WASHINGTON
FOUNDATION

Attorneys for *Amicus Curiae* ACLU of
Washington

CERTIFICATE OF SERVICE

I, Margaret Pak Enslow, certify under penalty of perjury that true and correct copies of the above attached document were delivered as follows, with the parties' agreement to accept email service:

Dennis W. Morgan, WSBA #5286
120 West Main
Ritzville, WA 99169
Tel: (509) 659-0600
nodblspk@rcabletv.com

Attorney for Appellant

Melanie Tratnik, WSBA #25576
Kristin Jensen
WA State Attorney General's Office
800 Fifth Ave., Suite 2000
Seattle, WA 98104
Tel: (206) 464-6430
MelanieT@atg.wa.gov
KristinJ@atg.wa.gov

Noah Purcell, WSBA #43492
Solicitor General
WA State Attorney General's Office
1125 Washington Street SE
Olympia, WA 98504
(360) 753-2536
noahp@atg.wa.gov

Attorneys for Respondent

Executed at Seattle, Washington, this 11th day of May, 2015.


Margaret Pak Enslow

OFFICE RECEPTIONIST, CLERK

To: Margaret Pak Enslow
Cc: nodblspk@rcabletv.com; melanieT@atg.wa.gov; kristinj@atg.wa.gov; noahp@atg.wa.gov;
Nancy Talner; David Martin
Subject: RE: 85996-5, State v. Russell

Received 5-11-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Margaret Pak Enslow [mailto:margaret@enslowmartin.com]
Sent: Monday, May 11, 2015 12:10 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: nodblspk@rcabletv.com; melanieT@atg.wa.gov; kristinj@atg.wa.gov; noahp@atg.wa.gov; Nancy Talner; David Martin
Subject: 85996-5, State v. Russell

Dear Clerk of the Court,

Attached please find the ACLU of Washington's Motion to File Amicus Curiae Brief and Brief of Amicus Curiae of the ACLU of Washington in the above referenced matter. Counsel for the parties have agreed to accept service by email, and are cc'd here.

Thank you,
Margaret