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SUPREME COURT NO. 86072-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH NJONGE,

Respondent.

**PETITIONER'S ANSWER TO AMICUS CURIAE BRIEF FILED
BY WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

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 ORIGINAL

TABLE OF CONTENTS

	Page
A. INTRODUCTION	1
B. ARGUMENT	2
1. THE AMICUS INCORRECTLY CLAIMS THAT CONSIDERATION OF JURORS' HARDSHIP EXCUSES HISTORICALLY HAS OCCURRED IN OPEN COURT.....	2
2. RESPONDING TO THE POLICY CONCERNS CITED BY THE AMICUS DOES NOT REQUIRE EXPANDING THE SCOPE OF THE CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL	4
C. CONCLUSION	8

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Press-Enterprise Co. v. Superior Court, 478 U.S. 1,
106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).....3

Washington State:

In re Pers. Restraint of Yates, 177 Wn.2d 1,
296 P.3d 872 (2013).....1, 3

State v. Beskurt, 176 Wn.2d 441,
293 P.3d 1159 (2013).....7

State v. Devin, 158 Wn.2d 157,
142 P.3d 599 (2006).....3

State v. Rice, 120 Wn.2d 549,
844 P.2d 416 (1993).....1, 3

State v. Sublett, 176 Wn.2d 58,
292 P.3d 715 (2012).....2, 3, 4, 7

State v. Wilson, 174 Wn. App. 328,
298 P.3d 148 (2013).....3, 4

State v. Jones, 175 Wn. App. 87,
303 P.3d 1084 (2013).....3, 4

Other Jurisdictions:

Commonwealth v. Gordon, 422 Mass. 816,
666 N.E.2d 122 (1996).....3

Statutes

Washington State:

RCW 2.36.070.....7
RCW 2.36.100.....1, 2

Rules and Regulations

Washington State:

GR 281, 2
GR 317

A. INTRODUCTION

The Washington Association of Criminal Defense Lawyers (WACDL) has filed an amicus curiae brief limited to a single theme: the policy reasons that it would be beneficial to the justice system for a judge to hear in open court all requests to be excused from jury service by reason of hardship. However, the scope of the constitutional right to a public trial is not determined by the potential helpfulness of personal information that could be obtained from citizens who have a sufficient sense of obligation that they respond to a court summons to serve, but who ask to be excused because of conflicting obligations or because jury service will be physically or financially difficult. The legislature and this Court recognize that not every citizen is able to serve as a juror; both have provided for jurors to be excused for various reasons of hardship. RCW 2.36.100; GR 28.

Twenty years ago, this Court approved the delegation of excuses for hardship to a court clerk who has been provided judicial guidelines. State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993). The court reaffirmed that holding earlier this year. In re Pers. Restraint of Yates, 177 Wn.2d 1, 22, 296 P.3d 872 (2013).

Thus, the historical and current practice of the Washington court system is that consideration of hardship excuses is an administrative matter that often does not occur in open court. Under the rule adopted by a majority of this Court in State v. Sublett,¹ the consideration of hardship excuses does not fall within the scope of the constitutional right to a public trial.

B. ARGUMENT

1. THE AMICUS INCORRECTLY CLAIMS THAT CONSIDERATION OF JURORS' HARDSHIP EXCUSES HISTORICALLY HAS OCCURRED IN OPEN COURT.

The claim of amicus WACDL, that “[h]istorically, all phases of jury selection have been open to the public,” is simply inaccurate. Amicus cites no authority for the proposition that consideration of hardship excuses historically has been open to the public and cites no case that endorses it.

Amicus WACDL contends that the right to public trial extends to consideration by a court clerk of any hardship requests² but does not acknowledge that RCW 2.36.100 and GR 28(1) authorize the delegation of hardship excusals to court staff and

¹ 176 Wn.2d 58, 292 P.3d 715 (2012). Detailed discussion of the test adopted is contained in the Petitioner’s Supplemental Brief and will not be repeated here.

² Amicus WACDL brief at 5.

county clerks. See Supp. Brief of Petitioner at 15-16. This Court has upheld that delegation of authority³ and amicus has made no argument that those holdings are incorrect and harmful, as is necessary before this Court will abandon an established rule. State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006).

Amicus WACDL does not address the cases cited by petitioner that apply the Press-Enterprise⁴ test adopted by a majority of this Court in State v. Sublett⁵ and conclude that the right to a public trial is not implicated by consideration of hardship excuse requests: State v. Wilson, 174 Wn. App. 328, 298 P.3d 148, 156-57 (2013), where outside court a bailiff excused jurors who were ill; and Commonwealth v. Gordon, 422 Mass. 816, 823-24, 666 N.E.2d 122 (1996), where a judge conducted colloquies in a closed courtroom with potential jurors concerning requests to be excused.

The single case amicus WACDL cites in support of the proposition that consideration of hardship requests historically has been open to the public is State v. Jones, 175 Wn. App. 87, 303

³ Rice, 120 Wn.2d 549; Yates, 177 Wn.2d at 22.

⁴ Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).

⁵ 176 Wn.2d at 73 (lead opinion), 136, 141 (Stephens, J., concurring).

P.3d 1084 (2013). Jones did not address juror hardship requests – the issue was whether the choice of which seated jurors would serve as alternates, conducted by a drawing by court staff during a recess at the close of trial, is within the scope of the right to a public trial.⁶ Id. at 91.

The Court of Appeals in Wilson, supra, carefully applied the experience and logic test to hardship excusals. 174 Wn. App. at 336-47. It correctly concluded that jury selection is a separate concept than voir dire, and that the public trial right historically has not attached to excusing jurors for reason of hardship. Id. at 343-45. Thus, hardship excuses fail the experience prong of the Sublett test and no public trial right is implicated. Id. at 346.

**2. RESPONDING TO THE POLICY CONCERNS
CITED BY THE AMICUS DOES NOT REQUIRE
EXPANDING THE SCOPE OF THE
CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.**

Most of the WACDL amicus brief is devoted to persuading this Court that it is important to allow public scrutiny of every juror hardship request, to ensure that juries are comprised of a fair

⁶ Applying the experience prong of the Sublett test, the court concluded that it is both the historic and current practice in Washington to select alternate jurors as part of voir dire in open court. 175 Wn. App. at 101.

cross-section of the community. That purpose will not be served by concluding that the constitutional right to a public trial extends to every hardship request by a juror summoned for service. The difficulties in obtaining a jury venire that reflects a cross-section of the community are not related to the granting of hardship requests to individual jurors; these difficulties are the consequence of practical difficulties in contacting potential jurors, economic challenges of the court system and the jurors summoned, and the choices of individual jurors to participate or not. Moreover, the information obtained from jurors making hardship requests will not provide the information WACDL is seeking, unless detailed questions about race, ethnicity, national origin, actual family income, personal medical problems, the need to provide care to other family members (e.g. disabled persons, children), and other very personal matters are demanded of each juror in open court and preserved in the court record.

Amicus WACDL contends that efforts to increase diversity proposed by defense attorney Hong Tran cannot be implemented without a record of “who does not appear, who seeks to be excused, the reasons for the request and the judicial ruling.” WACDL Amicus Brief at 5. This assertion is flawed in three

respects. First, there will be no information relating to diversity available for those who do not appear; there will be very little information about jurors who do not ask to be excused, since the latter usually do not provide information about their financial means, medical problems, or their race, ethnicity, or national origin. So it will be impossible to compare the demographic characteristics of those who serve with the characteristics of those who do not.

Second, Tran mentions many efforts to increase juror diversity, but only two have had some success: a Pennsylvania county obtaining parishioner lists from local churches, and threatening potential jurors who do not appear with arrest or other sanctions. WACDL Amicus Brief App. 1 at 8. The former effort actually would appear to introduce a religious bias into the jury venire. Third, none of the proposals relates to the exercise of discretion in granting hardship excusal requests.

Some of the possible ways to increase diversity proposed by Tran include paying jurors higher compensation for jury service, paying for interpreters to allow non-English-speaking persons to serve, allowing those with felony convictions whose civil rights have not been restored to serve, and allowing noncitizens to serve. Id. at 8-10. The cost and effect of the first proposal is obvious: any

person who would lose income when serving as a juror is less likely to serve, although all wage-earners, not just working-class persons, are affected by the minimal compensation provided. The courts do not inquire into the details of financial hardship when considering such a claim, and maintaining that information as public records would run afoul of GR 31(j). See State v. Beskurt, 176 Wn.2d 441, 448, 293 P.3d 1159 (2013) (individual juror information, other than name, is presumed to be private). As to the last three of these proposals, it is clear that each would result in more jurors becoming eligible to serve. The extent to which diversity would be served depends on the type of diversity being surveyed. In any event, none of the people affected by the last three proposals are currently eligible to serve, so none of these proposals has any relationship to hardship requests. See RCW 2.36.070.

While making efforts to ensure a fair cross-section of the community is represented in the jury pool is the responsibility of the courts, there is no correlation between that effort and the constitutional guarantee of a public trial. Even if this policy consideration satisfied the logic prong of the Sublett test, the right to a public trial is not implicated unless both prongs are satisfied. Sublett, 176 Wn.2d at 73, 136, 141-42. Because the historic and

current practice of the courts does not include consideration of all juror requests for hardship excuses in open court, the experience prong of the test has not been satisfied and the right to a public trial is not implicated.

C. CONCLUSION

For the reasons set forth in all of petitioner's briefing, this Court should reverse the decision of the Court of Appeals and remand to the Court of Appeals for resolution of the remaining issues raised in the Court of Appeals but not previously addressed.

DATED this 3rd day of October, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, properly stamped and addressed envelopes directed to CASEY GRANNIS, the attorney for the appellant, and to the attorneys for amici, at their respective addresses listed below, containing a copy of the Petitioner's Answer to Amicus Curiae Brief Filed By Washington Association of Criminal Defense Lawyers, in STATE V. JOSEPH NJONGE, Cause No. 86072-6, in the Supreme Court for the State of Washington.

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



Name
Done in Seattle, Washington

10-03-13
Date

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To: Wise, Donna
Subject: RE: State v. Njonge, No. 86072-6, Petitioner's Answer to Amicus of WACDL

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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.

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Good morning:

Please accept for filing the attached document (Petitioner's Answer to Amicus Curiae Brief Filed by Washington Association of Criminal Defense Lawyers) in

State v. Joseph Njonge, No. 86072-6

The certificate of service is attached to the document.

Thank you.

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