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SUPREME COURT NO. 86072-6  
COURT OF APPEALS NO. 63869-6-1

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH NJONGE,

Respondent.

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**SUPPLEMENTAL BRIEF OF PETITIONER –  
STATE OF WASHINGTON**

---

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**A. ISSUES PRESENTED**

1. Does a challenge to the possible exclusion of some members of the public from review of jurors' hardship excuses constitute an issue of manifest constitutional error that may be raised for the first time on appeal?

2. Has Njonge preserved his public trial claim for appellate review where there was no contemporaneous objection?

3. Has Njonge established that he was deprived of a public trial where the record does not establish that the courtroom was closed to the public?

4. Is consideration of requests for juror hardship excuses an administrative matter that is not, in experience and logic, a proceeding subject to the constitutional guarantee of a public trial?

**B. STATEMENT OF THE CASE**

Defendant Joseph Njonge was charged with the murder of 75-year-old Jane Britt, which occurred on March 18, 2008. CP 1-4.

His jury trial began on June 1, 2009. 1RP 1.<sup>1</sup> He was convicted of murder in the second degree. CP 65.

The trial judge made several comments indicating that there would be limited room for spectators at the start of jury selection. The day before voir dire began, in addressing exclusion of witnesses during voir dire, the judge said "we are in very cramped quarters for jury selection, and I think about the only place for visitors to sit is going to be in a little anteroom out there...with what we are going to do about trying to get enough just to do this in one meeting." 1RP 46. Later that day the court addressed observers:

You are certainly welcome to observe. Tomorrow when we have the jury selection, there will not be room for all of you. What we are going to do to allow people to observe is check with the fire marshall ... and make sure that we can keep those first swinging doors open. And if we can do that, then we will allow some people to observe if they wish to do so during jury selection by sitting in that kind of entry hall, if we can do that.

But, otherwise, as you can see, we are already putting chairs up here to accommodate the jury. We may be able to have chairs out there; we may not. We may be able to have the doors open without chairs. We are going to find that out. The chance of all you being able to be here and observe are slim to none during the jury selection process.

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<sup>1</sup> The verbatim report of proceedings will be referred to in this brief as it was in the State's brief in the Court of Appeals, as follows: 1RP: June 2, 2009; 2RP: June 3, 2009; 3RP: June 4, 2009 – pretrials and voir dire; 4RP: June 4, 2009 – trial testimony; 5RP: June 8, 2009; 6RP: June 9, 2009; 7RP: June 10, 2009; 8RP: June 11, 2009; 9RP: June 15, 2009; 10RP: July 20, 2009.

1RP 105-06 (emphasis added).

The next day, the court began by briefly addressing the order in which jury matters would be handled (first hardship requests, then individual questioning of jurors who had heard about the case), the physical positions of Njonge and counsel during voir dire, the court's prior ruling that evidence regarding other suspects would not be permitted, the release of a juror who did not speak English, and the filing of juror questionnaires. 2RP 2-7. Then prospective jurors were brought into the courtroom. 2RP 8. There was no discussion of how members of the public were being accommodated in the courtroom. 2RP 2-8. No objections to the accommodation of spectators were voiced by either party. 2RP 2-9. No objections were lodged by any person in the courtroom and no person in the courtroom was asked to leave. 2RP 2-9. The court clerk's minutes reflect no order excluding anyone from the courtroom. CP 93-96.

There is no record that anyone who was present on June 2 appeared to observe court the next morning, or that anyone concluded that the courtroom was closed to the public, or was unable to enter, was turned away at the door, or was asked to

leave when jurors were brought into the courtroom. There is no record as to whether this courtroom normally conducts business with the door closed, or whether members of the public came in through a closed door on June 2, the day before.

Later on June 3, after some jurors were excused from service based on hardship, the prosecutor stated:

Some family members who are not witnesses stuck around this morning, hoping there might be some seats later, and your bailiff informed them at lunch since some people were excused there were some. ... We tried to figure out a spot that would be in a row that basically has no jurors. So that second row over there only has Juror 30. Is that okay with the court if they are in there?

2RP 54-55. The judge responded:

Actually, that seemed to be a better idea. We checked with the fire department. They wouldn't let us leave the doors open for visitors to come in. Let's move number 30 over next to 34, and then we can have visitors sitting in the second row there.

2RP 55. Thus, as jurors were excused for hardship, more spectators were accommodated. It is apparent that spectators were not permitted to be seated in the entryway to the courtroom.

On appeal, Njonge argued that his murder conviction must be reversed because his right to a public trial<sup>2</sup> was violated.<sup>3</sup> App.

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<sup>2</sup> U.S. Const. amend. VI; WA Const. art. I, § 22.

Br. at 7-23. The State argued that the record did not establish that the courtroom was closed to the public and thus, Njonge had not established either manifest constitutional error or a courtroom closure. Resp. Br. at 9-20.

Njonge's murder conviction was reversed because the Court of Appeals concluded that based on remarks of the trial judge on June 2 about space being limited, some observers may have—the next day—seen a closed courtroom door and concluded that the courtroom was closed to the public. State v. Njonge, 161 Wn. App. 568, 578-79, 255 P.3d 753 (2011).

**C. ARGUMENT**

The Court of Appeals erred in finding that there was a closure of the trial warranting reversal. The possibility that a spectator from June 2 appeared on June 3 and misunderstood that the courtroom was closed was not closure of the courtroom, where the record does not establish that the public actually was excluded.

Further, if there was a de facto closure based on limited space in the courtroom, it was only during consideration of juror

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<sup>3</sup> In the Court of Appeals, Njonge raised additional issues but those issues were not addressed by the Court in light of the grant of a new trial on the basis of deprivation of Njonge's right to a public trial. Njonge, 161 Wn. App. at 580.

hardship excuses. Under the rule adopted by this Court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), a test based on experience and logic, the consideration of hardship excuses is an administrative matter that would not fall within the definition of a proceeding that is subject to the requirements of a public trial.

**1. RAP 2.5(a)(3) SHOULD BE APPLIED TO THE RIGHT TO A PUBLIC TRIAL, AS IT IS TO OTHER CONSTITUTIONAL RIGHTS.**

Recent decisions holding that any claimed courtroom closure may be raised on appeal, even if there was no objection below, are based on a case superseded by RAP 2.5(a)(3) and are incorrect and harmful. This Court should correct course and apply RAP 2.5(a)(3) to public trial claims.

Ordinarily, an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is truly constitutional, and manifest. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). "Failure to object deprives the trial court of [its] opportunity to prevent or cure the error." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The defendant must show both a constitutional error and actual prejudice to his rights. Id. at 926-27. To demonstrate actual

prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." Id. at 935.

Recent cases that have concluded that public trial claims are exempt from the rule rely upon a pre-rule case, State v. Marsh, 126 Wn. 142, 217 P. 705 (1923). See State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (citing Marsh only); State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005) (citing Bone-Club only). Courts did allow some constitutional claims to be raised for the first time on appeal in criminal cases at the time of the decision in Marsh but the Rules of Appellate Procedure replaced that common law practice with RAP 2.5(a). State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257 (1999).

The adoption of RAP 2.5(a)(3) by this Court limited the ability of a defendant to obtain review of a claim of constitutional error, as under that rule, simply identifying a constitutional issue is no longer sufficient to obtain review of an issue not litigated below. State v. Scott, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988). Review is not warranted if either the record from the trial court is insufficient to determine the merits of the constitutional claim, or if the defendant

does not establish practical and identifiable consequences in the trial. WWJ, 138 Wn.2d at 602-03.

As three justices of this court recently concluded, this Court should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). State v. Beskurt, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013) (Madsen, J., concurring). The Court in Bone-Club did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court should be corrected.

Respect for stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, the rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in at least three respects: the trial court is denied the opportunity to correct any error; if the claim of error is valid and could have been corrected, the public is unnecessarily denied the opportunity to view the original court proceedings; if the claim of error is valid and could have been corrected, a retrial may be required that should have been unnecessary. The costs of reversal are substantial: it forces jurors, witnesses, courts, the prosecution,

and the defendants to repeat a trial that has already once taken place; the passage of time may render retrial difficult, even impossible; it compromises the prompt administration of justice. United States v. Mechanik, 475 U.S. 66, 72, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986). It may in theory entitle the defendant only to retrial, but in practice it may bestow complete freedom from prosecution. Id. The societal costs of reversal are a necessary consequence when an error has deprived a defendant of a fair determination of guilt or innocence but the balance of interest tips the other way when an error has had no effect on the outcome of the trial. Id.

Njonge did not object to the remarks of the trial court on the day before the alleged closure, to the procedures on the day of the alleged closure, or to the number of members of the public who were able to view proceedings that morning. The record does not establish that members of the public believed that the courtroom was closed. Absent any record on the subject, under RAP 2.5(a), Njonge has failed to show that constitutional error occurred, or that the error was manifest, that is, that it had any practical effect on the trial.

**2. CONTRARY TO SUPREME COURT PRECEDENT,  
THE COURT OF APPEALS REVERSED  
WITHOUT EVIDENCE THAT THE PUBLIC WAS  
EXCLUDED.**

When a courtroom closure is claimed, this Court has reversed only upon a showing that the trial court actually issued an order closing the courtroom, or where it was clear that people were in fact excluded from the proceedings. State v. Marsh, 126 Wash. 142, 142-43, 217 P. 705 (1923); State v. Collins, 50 Wn.2d 740, 745-46, 314 P.2d 660 (1957); Bone-Club, 128 Wn.2d at 256-57; In re Personal Restraint of Orange, 152 Wn.2d 795, 801-03, 100 P.3d 291 (2004); State v. Brightman, 155 Wn.2d at 511; State v. Easterling, 157 Wn.2d 167, 171-73, 137 P.3d 825 (2006). The evidence here is that the court did not order a court closure. The court never ordered – orally or in writing, directly or indirectly – that the courtroom be closed. There is nothing in the record indicating that no spectators attended the morning of June 3 and it is clear that spectators were allowed by that afternoon. 2RP 2-8, 55.

The holding of the Court of Appeals was that "a closure as to those observers who heard the trial court's statements on the first day" was a full closure of the courtroom. Njonge, 161 Wn. App. at 578. This conclusion is premised on the assumption that some of

those observers returned on the next day, observed a closed door, concluded that they could not gain entry, and left. Or, the conclusion assumes that those warned of tight quarters would not return the next day; but the trial court never said seating would be completely unavailable, or that the courtroom would be closed. This Court should reject the finding that such speculation establishes a closure.<sup>4</sup>

The Ninth Circuit has held that "[t]he denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom." United States v. Shryock, 342 F.3d 948, 974 (9<sup>th</sup> Cir. 2003) (quoting United States v. Al Smadi, 15 F.3d 153, 155 (10<sup>th</sup> Cir. 1994) (citations omitted)).<sup>5</sup> That court quoted Justice Harlan's concurrence in Estes v. Texas, 381 U.S. 532, 588-89, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965):

Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats.... A public trial implies only that the court must be open to those who

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<sup>4</sup> This Court recently (and unanimously) agreed that an appellate court should not infer a court closure from an ambiguous record. Beskurt, 176 Wn.2d at 446 ("...there was nothing in the record indicating the questionnaires were unavailable for public inspection during the selection process.")

<sup>5</sup> But see Walton v. Briley, 361 F.3d 431 (7<sup>th</sup> Cir. 2004) (even without court order closing courtroom, public trial violated when trial was conducted and state's case was presented after business hours in a locked courthouse).

wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.

Shryock, 342 F.3d at 974. The Ninth Circuit concluded that the size of the courtroom did not amount to a closure where the public was allowed to use available seating. Id. at 974. The Third Circuit also has held that the public trial guarantee does not require that trial be held in a place big enough to accommodate every person who wants to attend. United States v. Koblj, 172 F.2d 919, 923 (3d Cir. 1949).

The Court of Appeals decision relies on Orange and Brightman but in both of those cases, the court explicitly excluded all spectators. Orange, 152 Wn.2d at 802; Brightman, 155 Wn.2d at 511. The Court in Brightman distinguished Shryock, noting that there was an affirmative ruling by the trial judge in Brightman excluding observers, not simply limited seating. Brightman, 155 Wn.2d at 517.

Further, in Collins, the Washington Supreme Court recognized that the trial court can regulate the number of spectators if a reasonable number of people are in attendance: "there can be no question of the right of a trial judge to direct that the courtroom doors be locked to prevent overcrowding...or to take

such action as may be necessary to prevent any interference with orderly procedure." Collins, 50 Wn.2d at 746.

Because the record is insufficient to determine whether any spectators were excluded and there was no court directive excluding all spectators, any closure is not apparent in the record. To obtain review of matters outside the record, Njonge should be required to present those claims in a personal restraint petition. State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

The Court of Appeals found a complete closure of the courtroom where the most that is established by the record is that not all observers could be accommodated. This Court should reject the conclusion that any part of voir dire was closed. As argued infra, under Sublett, even if there was a de facto closure the morning of June 3, there was not a closure for purposes of public trial requirements because the process involved (consideration of hardship excuses) is not a proceeding subject to public trial requirements.

**3. CONSIDERATION OF JUROR HARDSHIP  
EXCUSES IS NOT IN EXPERIENCE AND LOGIC  
A PROCEEDING SUBJECT TO THE  
REQUIREMENTS OF A PUBLIC TRIAL.**

The holding of the Court of Appeals conflicts with the recent decision of this Court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), defining the limits of that right. Under this Court's decision in Sublett, consideration of hardship excuses would not fall within the requirements of public trial because it is an administrative matter that historically, by statute and court rule, is not a public proceeding and because public access would not play a significant positive role in that process.

This Court in Sublett held that judicial consideration of the proper response to a question from the jury is not a proceeding included in the requirement of a public trial. The Court adopted a three-part analysis to determine whether the event at issue is such a proceeding:

The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." *Press II*, 478 U.S. at 8 [Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)]. The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* If the answer to both is yes, the public trial right attaches and the *Waller* [Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)] or *Bone-Club* factors must be

considered before the proceeding may be closed to the public.

Sublett, 176 Wn.2d at 73 (lead opinion)(footnote omitted), 136, 141-42 (Stephens, J., concurring); In re Pers. Restraint of Yates, 177 Wn.2d 1, 28-29, 296 P.3d 872 (2013). It is the defendant's burden to satisfy the experience and logic test. Yates, 177 Wn.2d at 29.

Excusing prospective jurors for hardship reasons is an administrative action within the discretion of the trial court; it is not a proceeding that historically has been open to the public. State v. Wilson, \_\_\_ Wn. App. \_\_\_, 298 P.3d 148, 156-57 (2013). RCW 2.36.100 establishes the bases for excusing prospective jurors for hardship (as opposed to for cause<sup>6</sup> or upon a peremptory challenge<sup>7</sup>) and vests the discretion for accomplishing this task solely with the court. That hardship excusals are an administrative responsibility of the court is further illustrated by the fact that the court may delegate the function of excusing prospective jurors for hardship to court staff or the court clerk. GR 28(1) provides that judges "may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service." This Court has upheld the delegation of this function to a

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<sup>6</sup> RCW 4.44.150-4.44.200; CrR 6.4(c).

<sup>7</sup> CrR 6.4(e).

clerk's office. State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993); Yates, 177 Wn.2d at 22.

Hardship screening involves the scheduling issues and other personal difficulties of individual jurors that arise because of the general responsibilities of serving as jurors, rather than the facts or legal issues of a specific case. Hardship excusals often are handled by court staff before prospective jurors ever reach the courtroom, in accordance with applicable statutes and court rules. Thus, the experience within the court system is that hardship excuses of jurors is not a process historically open to the public. Public access also would not play a significant positive role in the functioning of this process, where the personal situation of a prospective juror is unrelated to the facts of the case to be tried.

In his answer to the supplemental petition for review, Njonge argues that consideration of hardship cannot be separated from the remainder of jury selection, noting that during the consideration of hardships in this case, a juror voiced a personal reason for not wanting to sit as a juror, based on past experience with the persecution of women. Answer to Supp. Pet. at p. 7. The judge clearly refused to consider the juror's personal reluctance to consider the case, however, stating "I'm talking about hardship."

2RP 25. That this response raised a red flag as to possible bias does not convert the proceeding into one subject to public trial requirements. This Court addressed a similar issue when it concluded that sealing of juror questionnaires was not a closure that affected the right to a public trial, in State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159 (2013). The Court noted that questionnaires at most provided the attorneys with a framework for questioning that occurred in open court. Id. at 447. The Court observed that nothing suggested that the questionnaires substituted for actual voir dire in open court. Id. Likewise here, the trial court did not permit exploration of the issue raised. Any examination about the issue of this juror's potential bias would have to have been explored later, in open court.

This Court recently addressed the issue of a trial court handling via email some excusals of jurors for hardship and for cause, in State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011). The Court concluded that the email exchange was "a portion of the jury selection process," and therefore a critical stage, because "jurors were being evaluated individually and dismissed for cause," which "distinguishes this proceeding from other, ostensibly similar proceedings that courts have held a defendant does not have the

right to attend." Irby, 170 Wn.2d at 882. The majority then cited two cases that expressly hold that excusing prospective jurors for hardship is an administrative function, and not a critical stage. Id. (citing with approval Wright v. State, 688 So.2d 298, 300 (Fla. 1996), and Commonwealth v. Barnoski, 418 Mass. 523, 530-31, 638 N.E.2d 9 (1994)). However, the Irby majority then stated that it was error to excuse three jurors for hardship without questioning them in the defendant's presence. Irby, 170 Wn.2d at 886; see Irby, 170 Wn.2d at 887-899 (J. Madsen dissenting) (analyzing status of hardship excuses as administrative matter only).

Although Irby did not reach the public trial issue raised by the defendant in that case, the decision may give rise to arguments that requests for hardship excuses are a critical stage of voir dire instead of an administrative matter for the court. It is apparent, however, that the court was citing with approval the decisions holding that consideration of hardship excuses is not a critical stage of trial and that the error that was the basis of the court's decision was the trial court's consideration and grant of excuses for cause outside the courtroom. Irby, 170 Wn.2d at 882.

The Supreme Court of Massachusetts has concluded that the right to a public trial is not implicated by a trial court's

consideration of hardship challenges. Commonwealth v. Gordon, 422 Mass. 816, 823-24, 666 N.E.2d 122 (1996). That court relied on an analysis based on Press-Enterprise, supra, stating it was aware of no case in which it has been held that the right to public trial extends to proceedings concerning hardship excuses. Gordon, 422 Mass. at 823. It recognized a critical distinction between hardship colloquies and individual examination of prospective jurors as to their qualifications to serve. Id. at 824.

Under this court's holdings in Rice and Yates, hardship excusals are a purely administrative task addressed solely to the discretion of the court, or, if so delegated, to the discretion of the court clerk or staff. Based on this Court's decisions in Sublett and Yates, adopting the experience and logic analysis to determine the scope of the public trial right, the consideration of hardship excuses is not a proceeding subject to the requirement of a public trial. The Court of Appeals issued its decision before this Court's decision in Sublett; as a result, it erred in concluding that any closure that occurred only while hardship excuses were being considered was a violation of the right to public trial that required reversal of this conviction.

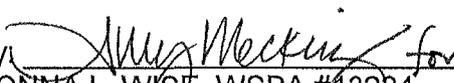
D. CONCLUSION

For the foregoing reasons, 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 19th day of June, 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, a properly stamped and addressed envelope directed to CASEY GRANNIS, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Supplemental Brief of Petitioner – State of Washington, in STATE V. JOSEPH NJONGE, Cause No. 86072-6, 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.



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Done in Seattle, Washington

06-19-13

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**Cc:** Meckling, Amy; Wise, Donna; 'grannisc@nwattorney.net'; 'Patrick Mayovsky'  
**Subject:** State of Washington v. Joseph Njuguna Njonge/Case # 86072-6

Submitted for filing in the above-referenced case, is the Supplemental Brief of Petitioner. Please let me know if you should have problems opening the attachment.

Thank you,

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