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STATE OF WASHINGTON
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SUPREME COURT NO. 86072-6
COURT OF APPEALS NO. 63869-6-I

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH NJONGE,

Respondent.

SUPPLEMENTAL PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. IDENTITY OF PETITIONER AND DECISION BELOW

The State of Washington seeks review of the published opinion in State v. Njonge, 161 Wn. App. 568, 255 P.3d 753 (2011).

The State previously filed a timely petition for review. That petition was deferred pending the resolution of public trial cases pending before this Court. The issues presented by this case have been affected by the rule adopted by this Court in State v. Sublett, No. 84856-4 (Nov. 21, 2012), one of a group of public trial cases decided on the same day. The State is supplementing its petition to reflect that the new rule has a significant effect on the analysis of the issues in this case and constitutes additional grounds for acceptance of review.

B. SUPPLEMENTAL ISSUES PRESENTED FOR REVIEW

1. The public trial issue in this case relates to juror requests to be excused for hardship. It is well settled that consideration of juror hardship excuses is an administrative matter, which may even be delegated to court staff or the court clerk. Under State v. Sublett, No. 84856-4 (Nov. 21, 2012), applying a test based on experience and logic, the consideration of hardship excuses would not fall with the definition of a proceeding that is subject to the

requirements of a public trial. Thus, the Court of Appeals erred in concluding that any closure that occurred violated Njonge's right to a public trial. Review should be granted in this case to correct that error and to make clear that this Court's holdings in State v. Rice¹ (that hardship excusals are administrative) and in Sublett are consistent and are not undercut by its intervening decision in State v. Irby,² so that trial courts can continue to handle hardship excuses as an administrative matter.

2. The Court of Appeals concluded that there was a de facto closure of the courtroom based on the words of the judge regarding limited space. Spectators did appear and were admitted before any matters beyond hardship excuses were considered. The State has sought review of the conclusion that Njonge established a closure. Based on the Sublett analysis, juror hardship excuses are not subject to the requirements of a public trial, so the Court of Appeals erred in holding that Njonge established that a closure occurred that violated this right.

¹ 120 Wn.2d 549, 844 P.2d 416 (1993).

² 170 Wn.2d 874, 246 P.3d 796 (2011).

C. **STATEMENT OF THE CASE**

A statement of the case was provided in the original petition for review and is incorporated by reference here.

D. **SUPPLEMENTAL REASONS WHY REVIEW SHOULD BE ACCEPTED**

This conviction was reversed based on the conclusion of the Court of Appeals that there was a closure of the trial during the trial court's consideration of some juror hardship excuses. Consideration of juror hardship excuses is an administrative matter. Under the rule adopted by this Court in State v. Sublett, No. 84856-4 (Wa. S.Ct. Nov. 21, 2012), a test based on experience and logic, the consideration of hardship excuses would not fall with the definition of a proceeding that is subject to the requirements of a public trial.

Njonge's murder conviction was reversed because the Court of Appeals concluded that remarks of the trial judge on June 2, 2009, may have led some spectators that day to believe that the courtroom would not be open the next morning when hardship excuses of jurors were reviewed. Njonge, 161 Wn. App. at 578-79. The Court of Appeals held that this was a closure in violation of

public trial requirements. WA Const. art. I, § 22; Njonge, 161 Wn. App. at 580.

The result in the Court of Appeals is in conflict with this Court's decision in Sublett and this Court should reject the extension of the public trial right to the facts in this case.

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

Under RAP 13.4(b)(1), this Court will accept review if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court. The holding of the Court of Appeals, reversing this murder conviction for violation of the right to a public trial, conflicts with the recent decision of this Court in State v. Sublett, 84856-4 (Nov. 21, 2012), defining the limits of that right. This case provides the opportunity for the Court to provide needed guidance as to the relationship between the Court's recent public trial jurisprudence and application of existing statutes and court rules regarding juror hardship excuses.

The Court of Appeals held that there was a violation of Njonge's right to a public trial based on its conclusion that during

consideration of juror hardship excuses the courtroom was closed.³ Njonge, 161 Wn. App. at 572-80. However, 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, 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 lead opinion 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* [~~State v. Bone-Club~~, 128 Wn.2d 254, 906 P.2d 325 (1995)] factors must be

³ The record reflects that only juror hardship excuses were considered during the time before the trial court explicitly stated that spectators were admitted. 6/3/09RP 2-55. At the beginning of the morning, the court also referred to a legal ruling it had previously made and explained that it had read authorities provided by the parties and was not changing its ruling. 6/3/09RP 4-6.

considered before the proceeding may be closed to the public.

Sublett, lead opinion, slip opin. at 14 (footnote omitted).

Justice Stephens, concurring, agreed that the determination of whether an event is a proceeding subject to public trial requirements depends on analysis of the factors of experience and logic. Sublett, J. Stephens concurring opinion, slip opin. at 1, 7-8. Thus a seven-member majority (made up of the lead opinion and the members concurring with Justice Stephens) concluded that not every part of a trial is a proceeding subject to the requirement of public trial and that proceedings that have not historically been a part of public trial proceedings are not subject to that requirement.

Excusing prospective jurors for hardship reasons is an administrative action within the discretion of the trial court. RCW 2.36.100 establishes the bases for excusing prospective jurors for hardship (as opposed to for cause⁴ or upon a peremptory challenge⁵) and vests the discretion for accomplishing this task solely with the court. That excusals for hardship are an administrative responsibility of the court is further illustrated by the fact that the court may delegate the function of excusing

⁴ RCW 4.44.150-4.44.200; CrR 6.4(c).

⁵ CrR 6.4(e).

prospective jurors for hardship to court staff or the court clerk. GR 28(1) provides that "[t]he judges of a court may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service." In State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993), this Court upheld the delegation of this function to a clerk's office, in an aggravated murder case where the court clerk's office excused many of the prospective jurors summoned for reasons of hardship.

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 performed by court staff or clerks before the prospective jurors ever reach the courtroom, in accordance with applicable statutes and court rules. This has been standard practice for decades. Thus, the experience within the court system is that hardship excusals 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.

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 Irby majority 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 potential 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. The issue of whether hardship challenges may continue to be handled

administratively, and may be delegated to court staff as authorized by GR 28 and Rice, or whether every juror who requests a hardship excuse must appear in court to be questioned and excused in the presence of the defendant and the public, is critically important to management of the jury system in every court in this state. Issues regarding the procedures for hardship excuses of jurors will likely be explored in a capital case pending in this Court, State v. Conner Schierman, No. 84614-6.

Under this court's holding in Rice, 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. Under this Court's analysis in Sublett, the Court of Appeals in the case at bar erred in concluding that a 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. Review should be granted in this case to make clear that the holdings in Rice and Sublett are consistent and are not undercut by Irby, so that trial courts can continue to handle hardship excuses as an administrative matter.

2. BASED ON THIS COURT'S HOLDING IN SUBLETT, THE COURT OF APPEALS ERRED IN CONCLUDING THAT LIMITED PUBLIC ACCESS DURING HARDSHIP EXCUSES WAS A CLOSURE FOR PURPOSES OF PUBLIC TRIAL REQUIREMENTS.

The Court of Appeals concluded that there was a de facto closure of the courtroom based on the words of the trial judge regarding limited space. Spectators did appear and were admitted before any matters beyond hardship excuses were considered. The State has sought review of the conclusion that Njonge established a closure. Based on the Sublett analysis, juror hardship excuses are not subject to the requirements of a public trial, so the Court of Appeals erred in holding that Njonge established that a closure occurred that violated this right.

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 578-79. 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 that day, and left. However, the record is clear that spectators were admitted for the

afternoon session on June 3, 2009, before any matters beyond hardship excuses were considered. 6/3/09RP 2-55.

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. The State has previously argued that this Court should reject the conclusion that any part of voir dire was closed. Further, under Sublett, 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.

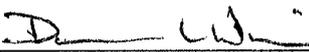
E. CONCLUSION

For the foregoing reasons, this Court should grant review.

DATED this 3rd day of December, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

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 Petition for Review, 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.

U Brame
Name
Done in Seattle, Washington

12/3/12
Date

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Good morning:

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The certificate of service is attached to the document.

I have sent via separate email the Motion to File Supplemental Petition for Review.

Thank you.

Donna Wise

Senior Deputy Prosecuting Attorney

WSBA #13224

King County Prosecutor's Office

W554 King County Courthouse

Seattle, WA 98104

206-296-9674

E-mail: Donna.Wise@kingcounty.gov

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