No. 89321-7

No. 41902-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARTIN ARTHUR JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki L. Hogan

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Martin Jones' wife was arrested for Driving While Under the Influence (DUI). One of the troopers involved in the arrest was subsequently shot and injured. The trooper focused solely on Martin Jones, Ms. Jones' husband as his assailant. Honoring his repeated requests, investigators showed the trooper a Department of Licensing (DOL) photograph of Mr. Jones, whom the trooper identified as his assailant. Mr. Jones was subsequently charged with attempted first degree murder of a police officer with a firearm.

During trial, the court, without the presence of the attorneys, Mr. Jones, or the public, chose the four alternate jurors from the 16 sitting jurors, violating the First, Sixth, and Fourteenth Amendments of the United States Constitution as well as article I, section 22 of the Washington Constitution. The trial court also excluded relevant evidence proffered by Mr. Jones challenging the trooper's observations of his assailant and challenging the Washington State Patrol's (WSP) investigation, violating Mr. Jones' Sixth Amendment right to present a defense. Finally, the trial court violated Mr. Jones' Fourteenth Amendment right to due process when it admitted the single photo identification procedure used to identify Mr. Jones, which was impermissibly suggestive *per se*, and where

the trooper's identification of Mr. Jones was not otherwise reliable. Mr. Jones submits his conviction must be reversed.

B. ASSIGNMENTS OF ERROR

1. Mr. Jones' constitutionally protected right to be present was violated when the trial court selected the four alternate jurors out of the 16 jurors without Mr. Jones being present.

2. The trial court's act of selecting the alternate jurors in the absence of the parties, the public, and Mr. Jones violated Mr. Jones' right to a public trial and the public's right to open proceedings.

3. The trial court violated Mr. Jones' right to due process by admitting Trooper Johnson's identification of him because it was an impermissibly suggestive procedure and the identification was not otherwise reliable.

4. In the absence of substantial evidence, the trial court erred in entering finding of fact 3 in its Order on Defendant's Motion to Suppress Eyewitness Identification.

5. In the absence of substantial evidence, the trial court erred in entering findings of fact 4(a) through (e) in its Order on Defendant's Motion to Suppress Eyewitness Identification.

6. In the absence of substantial evidence, the trial court erred in entering finding of fact 5 in its Order on Defendant's Motion to Suppress Eyewitness Identification.

7. In the absence of substantial evidence, the trial court erred in entering finding of fact 6 in its Order on Defendant's Motion to Suppress Eyewitness Identification.

8. The trial court violated Mr. Jones' constitutionally protected right to present a defense and confront and cross-examine witnesses by excluding relevant evidence concerning Trooper Greene's observations prior to the shooting of Trooper Johnson.

9. The trial court erred in entering its Order on State's Motion To Exclude Evidence Of Other Suspects.

10. The trial court violated Mr. Jones' constitutionally protected right to present a defense and confront and cross examine witnesses by excluding relevant evidence from WSP supervisor Chris Sewell which was critical of WSP's investigation.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment as well as article I, section 22 guarantees a defendant the right to be present during jury selection. Here, the trial court selected the four alternate jurors from the entire panel of 16 jurors in private in the absence of counsel, Mr. Jones, or the public. Did the trial court violate Mr. Jones' right to be present necessitating reversal of his conviction?

2. The right to a public trial is guaranteed by both the Sixth Amendment of the United States Constitution and article I, sections 10 and 22 of the Washington Constitution. In addition, under the First Amendment, the public has a right of access to trial proceedings. A violation of this right is not susceptible to a harmless error analysis. Given the trial court's method of choosing the alternate jurors in private in the absence of counsel, Mr. Jones, and the public, must this Court reverse the ensuing conviction for a violation of Mr. Jones' right to a public trial and the public's right to access to the courts?

3. The Fourteenth Amendment to the United States Constitution guarantees a criminal defendant a fair trial. Admission of an identification that is the result of an impermissibly suggestive single photo identification violates due process. Was the act of

showing Trooper Johnson a single photo of Mr. Jones impermissibly suggestive and was the trooper's subsequent identification of Mr. Jones not otherwise reliable, entitling Mr. Jones to reversal of his conviction for a violation of his constitutionally protected right to due process?

4. As a part of the right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution, the defendant has the right to present relevant, admissible evidence and cross-examine witnesses. Here, the trial court excluded Trooper Greene's observation of a person who did not match the identification of Mr. Jones just prior to the shooting which would have tested Trooper Johnson's subsequent identification of Mr. Jones. Did the trial court's order excluding this relevant evidence prevent Mr. Jones from presenting a defense, thus entitling him to reversal of his convictions?

5. Did the trial court's order excluding testimony from Chris Sewell, a WSP supervisor, who was critical of the WSP investigation, also prevent Mr. Jones from presenting a defense, thus requiring reversal of his convictions?

D. STATEMENT OF THE CASE

On February 12, 2010, at about 11:55 pm, Washington State Trooper Jesse Greene saw a 2000 Dodge minivan driving above the speed limit. RP 871-75. Trooper Greene stopped the minivan and contacted the driver, identified as Susan Jones. RP 876-78. The minivan was registered to appellant, Martin Jones. RP 882.

The trooper noted indications of intoxication which led him to believe Ms. Jones was driving while under the influence of alcohol (DUI). RP 880-81. The trooper took Ms. Jones through field sobriety tests, and then arrested her for DUI. RP 886.

While Trooper Greene was busy with Ms. Jones, Trooper Scott Johnson arrived to assist Trooper Greene. RP 886, 2787. When the troopers asked Ms. Jones if there was someone who could pick up the minivan, she replied "Marty." RP 2794. Trooper Johnson wrote "Marty" on his hand as a reminder to himself. RP 2795. When the troopers asked Ms. Jones who "Marty" was, she became belligerent and Trooper Greene decided to impound the minivan. RP 888, 2797. This caused Ms. Jones to become angrier and uncooperative. RP 888, 2798. Trooper Greene left with Ms. Jones and took her to the Long Beach Police Department to process her arrest. RP 890, 2798.

George Hill, who owned a Pacific County towing company, arrived shortly thereafter to tow the minivan. RP 2805. While Mr. Hill was readying the minivan to be towed, Trooper Johnson noticed a man approach at a brisk pace, walk past him, and contact Mr. Hill. RP 2808-09. Trooper Johnson stated he saw the man's face as he walked by and the man looked angry and upset. RP 2811. This man asked Mr. Hill what was going on, and Mr. Hill replied that he was engaged in a DUI impound. RP 1310. The man turned and began to walk away. RP 1311.

Trooper Johnson intercepted the man and asked if there was anything with which he could help him. According to the trooper, the man answered "No" in an angry tone and walked on. RP 2816.

Trooper Johnson began to inventory the interior of the minivan as part of the impound process. RP 2821. With Mr. Hill watching, Trooper Johnson began to inventory Ms. Jones' wallet on the hood of the minivan. RP 2824. Mr. Hill saw a man approach from behind Trooper Johnson and grab a hold of him. RP 1315. Hill heard a popping sound and smelled gunpowder. RP 1315. Hill chased the man a short distance, then returned to assist Johnson. RP1315-17.

Trooper Johnson stated he felt an arm grab him around his chest and push him forward. Then he felt something pressed to the back of his head. RP 2825-26. He heard a noise and then felt like something hit him in the back of the head. RP 2826. The trooper knew he had been shot. RP 2826. The shooter did not say anything to the trooper either before or after shooting him. RP 2827. The trooper took cover, stated he made eye contact with the man, and shot at him twice, missing both times. RP 2832. The man briskly walked away. RP 2832.

Mr. Hill contacted the trooper's dispatcher, who in return notified local law enforcement. RP 2837. Long Beach police officers arrived, and one of the officers took Trooper Johnson to Ocean Beach Hospital in Ilwaco. RP 942, 1034-39. The emergency room doctor there diagnosed a penetrating gunshot wound to the back of Trooper Johnson's head consistent with a small caliber weapon. RP 933. The doctor had the trooper transferred to the Oregon Health Sciences University Hospital (OHSU) for further treatment. RP 937. At OHSU, the doctors determined the fragment was resting against the trooper's skull but that there was no evidence of a skull fracture or brain injury. RP 1795.

The investigation into the shooting led to the detention of Mr. Jones. RP 1282-84. While detained, the police had Mr. Hill attempt to determine whether Mr. Jones was involved in the shooting by engaging in a "show-up" of Mr. Jones. RP 1374, 3138. Mr. Hill told the officers Mr. Jones was *not* the shooter. RP 1374, 3145. A sketch artist provided a sketch of the person Mr. Hill stated contacted him when he was preparing to tow the minivan, which did not resemble Mr. Jones. RP 1738-41.

While at OHSU, Trooper Johnson was shown a number of photographs of potential suspects. Trooper Johnson was shown a single photograph by Portland Police officers, which the trooper was unable to identify. RP 1258-62. At that time, the trooper told the Portland officers he believed the shooting had something to do with the minivan being towed. RP 1267. Trooper Johnson was also shown photographs provided by members of the Department of Corrections (DOC), once again none of whom he could identify. RP1510-16.

The trooper asked for a photograph of Ms. Jones' husband. RP 1575. According to the DOC community corrections officer charged with showing the trooper the DOC photos, Trooper Johnson made numerous requests to see a photo of Mr. Jones,

including as soon as he first arrived at OHSU. RP 1560-61. Trooper Johnson told Trooper Hodel, who was part of the investigation, that Ms. Jones was arrested for DUI, she was very angry about it, and may have called her husband. RP 1579. Johnson told Hodel to keep that information to himself. RP 1579. Hodel referred the request to his superiors. Ultimately, when shown a single Department of Licensing (DOL) photo of Mr. Jones, Trooper Johnson identified him as his assailant. RP1551.

Mr. Jones was subsequently charged with attempted first degree murder with a firearm and also with knowing the victim was a police officer. CP 1184-85. Following a lengthy jury trial, Mr. Jones was convicted as charged and sentenced to an exceptional sentence of 600 months. CP 1155-63; RP 4091-94, 4134-35.

E. ARGUMENT

1. MR. JONES HAD THE CONSTITUTIONALLY PROTECTED RIGHT TO BE PRESENT WHEN THE TRIAL COURT SELECTED THE FOUR ALTERNATE JURORS FROM THE ENTIRE PANEL OF 16 SITTING JURORS

A total number of 16 jurors were selected to hear the evidence, with the four alternates to be selected from the entire 16 prior to deliberations. At the end of closing arguments, the trial court told the jury and the parties it would put all 16 names in a wheel and select the four jurors who would be designated alternate jurors:

> As I explained back in early January we seated 16 in case there was a family emergency, or some unforeseen event that would occur that would require a juror to be excused. There are still 16 of you in the box today near the end of the trial.
>
> [The selection of alternates] will be random. The box to be spun looks a little like an old fashioned bingo, but it's wooden. Pam has all 16 of your juror numbers, and after all of the closing arguments she will tell me which four numbers have been selected at random. We don't know now. We are still hoping that there is no unexpected emergency between now and Thursday morning, but it's still a possibility.

RP 3808.

At the conclusion of testimony and just prior to closing arguments, the trial court announced to the parties the names of

the four alternate jurors. It came to light at that time that the trial court's lower bench had selected the alternate jurors using the designated wheel during the break, in the absence of Mr. Jones, the attorneys, and the public:

> We talked about it yesterday, we talked about it in January. At the outset of this trial we seated four alternates. I think the attorneys and I are as surprised as everyone else that there are still 16 of you in the box. *But at this time at the break of 3:00, four numbers were pulled randomly,* and at this time I am temporarily excusing these four jurors:

RP 4061 (emphasis added).

Prior to sentencing, Mr. Jones timely moved for a new trial on the basis of the violation of his right to be present during the selection of the alternate jurors. CP 1286-1300.

> It was always my understanding, and again, we will have to listen to the record and so forth, but I know the Court talked about the jurors, the alternate jurors would be selected using the hopper, and names would be picked out. There was never any indication that this would be done out of the presence or without anybody being given any notice. And we did not find out about this until we came into court. We went through closing arguments, and then the jury was about to be sent out and the Court announced that the selection had already been made.
>
> So we don't know for sure, we know that the Court said that the Judicial Assistant selected the alternate jurors during the lunch hour, but we don't know if that was something that the Court instructed the Judicial Assistant to do, and if so, whether the Court was

> present or just the Judicial Assistant present, or whether there were any other witnesses present, or the Court Reporter present.

RP 4110-11. The court denied the motion without comment. RP 4116.

a. A defendant has the right to be present during jury selection. A defendant has a fundamental right to be present at all critical stages of the proceedings. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *State v. Irby,* 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011).

> The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, e.g., *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge. . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.*, at 105-106, 108, 54 S.Ct., at 332, 333; see also *Faretta v. California*, 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 2533, n. 15, 45 L.Ed.2d 562 (1975).

United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (Stevens, J., concurring).

In Washington, the importance of safeguarding the right to be present at trial has been recognized since territorial days. *State v. Walker*, 13 Wn.App. 545, 556, 536 P.2d 657 (1975); *Shapoonmash v. United States*, 1 Wash.Terr. 188 (1862).

The Washington Supreme Court has recognized that the jury selection process is a critical stage of the proceedings at which the defendant has a right to be present. *Irby*, 170 Wn.2d at 884-85.

This Court reviews whether a defendant's right to be present was violated *de novo*. *Id.* at 880.

b. <u>The court's action in selecting the alternate jurors from the entire jury panel was done in the absence of the attorneys and Mr. Jones</u>. Mr. Jones submits the trial court's act of selecting the alternate jurors was a continuation of the jury selection process and as a result, this was a critical stage of the proceedings at which he had a right to be present.[1]

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[1] The decision in *Irby* was issued during the trial here and the parties immediately became aware of it. RP 1857. The parties and the trial court noted the procedure used in *Irby* in determining hardships by email was the same as used in Mr. Jones' matter. RP 1858-59. Mr. Jones waived his right to be present *nunc pro tunc* during the email discussions between the trial court and the attorneys regarding the hardship determinations of some of the prospective

In *Irby*, jurors were sworn and given a questionnaire to complete. After all of the questionnaires had been submitted, in an email to the parties, the trial court suggested several jurors be excused for hardships. Mr. Irby agreed to the dismissal of all of the trial court's suggested jurors, while the State agreed to seven of the potential jurors and objected to dismissing the remaining ones. In another email, the court agreed to dismiss the seven jurors to which the parties agreed. The court noted it would notify these seven jurors and told the parties they need not appear the following day. There was nothing in the record indicating Mr. Irby had been present during any of this process nor any record that he had been consulted. The Court of Appeals reversed Mr. Irby's aggravated first degree murder conviction, finding his constitutionally protected right to be present during a critical stage of the proceedings had been violated.

The Supreme Court affirmed, agreeing that jury selection was a critical stage of the proceedings at which the defendant had a fundamental right to be present under both the United States and Washington Constitutions. *Irby,* 170 Wn.2d at 884-85. The Court rejected the State's argument, similar to that made by the State

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jurors. RP 1863-67. That waiver did not cover the error in selecting the alternate jurors.

before the trial court, that the trial court's process was akin to a sidebar or chambers conference:

> The State likens the "e-mail exchange" between the trial judge and counsel for the parties to a sidebar or chambers conference, proceedings that our court and other courts have said that a defendant has no due process right to attend. We disagree with the State's analogy to those sorts of proceedings. In our judgment, the e-mail exchange was a portion of the jury process. We say that because the 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.

Id. at 882. Further, the Supreme Court ruled that the State failed in its burden of proving beyond a reasonable doubt that the error was harmless, and thus affirmed the Court of Appeals. *Id.* at 886-87. Since the selection of the alternate jurors here was part of jury selection, Mr. Jones had a right to be present. *Id.* at 884-85.

More importantly, the *Irby* Court also noted that under art. I, § 22 of the Washington Constitution, a defendant has a broader right to be present than under the federal Constitution. *Id.* at 885 fn 6. Under the Washington Constitution, the right of the defendant to be present does not turn on whether the hearing is a "critical stage" of the proceedings, but instead whether the defendant's "substantial rights may be affected." *Irby,* 170 Wn.2d at 885, *citing*

State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914).[2] This right is not conditioned on what the defendant might do at this hearing or whether his presence would have aided the defense. *Id.* at 885 fn. 6. The right turns only on whether his "substantial rights may be affected" at that stage of the trial. *Id.*

The selection of the alternate jurors affected the substantial rights of Mr. Jones given the importance of jury selection noted by Washington courts. As a consequence, Mr. Jones' right to "appear and defend in person" was violated when the trial court selected the alternate jurors in his absence. Const. art. I, § 22. Mr. Jones is entitled to reversal of his convictions.

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[2] A *Gunwall* analysis is unnecessary when the court has already determined that the state constitution warrants an inquiry on independent state grounds, as the Court indicated in *Irby*. *See State v. Williams-Walker*, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1996).

2. THE COURT'S SELECTION OF THE ALTERNATE JURORS FROM THE JURY PANEL AS A WHOLE IN PRIVATE ALSO VIOLATED MR. JONES' RIGHT TO A PUBLIC TRIAL AND THE PUBLIC'S RIGHT TO OPEN PROCEEDINGS[3]

In the motion for a new trial based upon the trial court's selection of the alternate jurors during a break in private, Mr. Jones also objected to the process on the basis that it was conducted when the courtroom was not open:

> Not only was the defendant not present, and we would allege that this is a very critical part of the trial, *but also in terms of the courtroom not being open to the public.*

RP 4110 (emphasis added).

a. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings. Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through

[3] The Supreme Court in *Irby* found it unnecessary to decide the claim that the trial court violated Mr. Irby's right to a public trial in light of its reversal on alternate grounds. *Irby*, 170 Wn.2d at 887.

Colonial times). "A trial is a public event. What transpires in the court room is public property." *State v. Coe*, 101 Wn.2d 364, 380, 679 P.2d 353 (1984), *quoting Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947).

Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . "); Const. article I, section 22 ("In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury . . ."). In addition, the public also has a vital interest in access to the criminal justice system. U.S. Const. amend. I (the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial); Const. art. I, § 10: ("Justice in all cases shall be administered openly, and without unnecessary delay."). These provisions provide the public and the press a right to open and accessible court proceedings. *State v. Easterling,* 157 Wn.2d 167, 174, 137 P.3d 825 (2006). "The public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia,* ___ U.S. ___, 130 S.Ct. 721, 724-25, 175 L.Ed.3d 675 (2010).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id., *quoting In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community concern or outrage concerning violent crimes. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. *Press-Enterprise I*, 464 U.S. at 508. Openness thus "enhances both the basic fairness of the

criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 501. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court:

> We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The federal constitution "resolves any question about what a trial court must do before excluding *the public* from trial proceedings, including *voir dire*." *State v. Paumier,* 155 Wn.App. 673, 685, 230 P.3d 212,(emphasis added), *review granted,* 169 Wn.2d 1017 (2010), *citing Presley, supra.*

> By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier's *and the public's* right to an open proceeding.

Paumier, 155 Wn.App. at 685. (emphasis added).[4]

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[4] The Supreme Court heard argument on May 3, 2011, and a decision is pending.

b. The trial court was barred from selecting the alternate jurors absent the public or Mr. Jones. The presumption of open, publicly accessible court hearings may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to preserve that interest." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), *citing Press-Enterprise I*, 464 U.S. at 510; *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009); *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); *see also Presley*, 130 S.Ct. at 724 (circumstances in which the right to an open trial may be limited "will be rare," and, "the balance of interests must be struck with special care").

The trial court must articulate an "overriding interest" justifying any limit on public access, "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Strode*, 167 Wn.2d at 227. In order to protect the defendant's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Easterling*, 157 Wn.2d at 175. The five criteria are "*mandated* to

protect a defendant's right to [a] public trial." *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2004) (emphasis in original).

To determine if closure is appropriate, the trial court is required to consider the following factors and enter specific findings on the record to justify any ensuing closure: (1) The proponent of closure must show a compelling interest and, if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given an opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests; and (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wn.2d at 258-59; *see also Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982) (same). The trial court "must ensure" that the "five criteria are satisfied" *before* closing court proceedings. *Strode*, 167 Wn.2d at 227. *See also Waller,* 467 U.S. at 45 (the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper).

The requirements for protecting the public's right to open courtrooms "mirrors" the requirements used in criminal cases.

Easterling, 157 Wn.2d at 175. The court may not close the courtroom without "first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Id*, *citing Bone-Club*, 128 Wn.2d at 258-59; and *Ishikawa*, 97 Wn.2d at 37; *see also Easterling*, 157 Wn.2d at 174-75 (trial court must "*resist a closure motion except under the most unusual circumstance.*") (emphasis in original).

A member of the public is not required to assert the public's right of access in order to preserve this issue for appeal. *Easterling*, 157 Wn.2d at 176 n 8. Further, the court has an *independent duty* to assure the public's right to an open courtroom. *Presley,* 130 S.Ct. at 724-25.

Here, the court conducted crucial aspects of the judicial process while excluding the public and Mr. Jones from the courtroom during its selection of the alternate jurors. The trial court did this without considering either the public's or Mr. Jones' constitutionally protected right to open proceedings, thus violating those rights.

c. Mr. Jones is entitled to reversal of his conviction and remand for a new trial. The presumptive remedy for a public trial right violation is reversal and remand for a new trial. *Orange,* 152 Wn.2d at 814; *Easterling*, 157 Wn.2d at 179-80. In *Easterling*, the court rejected the possibility that a courtroom closure may be *de minimus*, even for a limited closure applicable to a limited hearing for a separately charged co-defendant. 157 Wn.2d at 180 ("a majority of this court has never found a public trial right violation to be *de minimus.*"); *accord, State v. Erickson*, 146 Wn.App. 200, 211, 189 P.3d 245 (2008); *State v. Duckett*, 141 Wn.App. 797, 809, 173 P.3d 948 (2007). The *Easterling* Court further emphasized, "[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." *Easterling*, 157 Wn.2d at 181; *State v. Frawley*, 140 Wn.App. 713, 721, 167 P.3d 593 (2007).

The trial court's error in selecting the alternate jurors in the absence of the public, Mr. Jones, and the attorneys requires reversal of his conviction and remand for a new trial.

3. TROOPER JOHNSON'S IDENTIFICATION OF MR. JONES WAS IMPERMISSIBLY SUGGESTIVE AND WAS OTHERWISE NOT RELIABLE VIOLATING MR. JONES' RIGHT TO DUE PROCESS

Mr. Jones moved to suppress Trooper Johnson's identification of him in the single photograph procedure that was used. CP 845-67. The parties stipulated to the facts that the trial court could consider in ruling on the motion. (A copy of the parties' stipulation is attached in Appendix A).

Trooper Johnson wrote the name "Marty" on his hand when Ms. Jones told the troopers "Marty" could come and retrieve her car prior to their decision to impound. App. A at 1. While being treated at OHSU, Trooper Johnson was shown several photographs, including at least one photo montage of potential suspects, none of which he identified as his assailant. App. A at 3. During this period, Trooper Johnson asked several times to see a picture of Ms. Jones' husband, Martin Jones. App. A at 4. Ultimately, Trooper Johnson was shown a poor quality photograph of Mr. Jones from which he was unable to make an identification, but requested a clearer copy. App. A at 4. Once shown a clear copy of Mr. Jones' DOL picture, which included Mr. Jones' name and identifying information, the trooper identified Mr. Jones as his

assailant. App. A at 4. Trooper Jones was later shown a photo montage, which included the same DOL photo of Mr. Jones without his name showing. App. A at 5.[5] The trooper told the officers Mr. Jones' photo looked "similar" to the person who shot him. App. A at 5.

The trial court denied the motion to suppress the identification, implicitly finding the single photograph identification procedure suggestive, but excusing it based upon "exigent circumstances." CP 1238-39. After applying the *Brathwaite/Biggers* factors, the court further found there was not a substantial likelihood of irreparable misidentification by Trooper Johnson of Mr. Jones. CP 1240-41.[6]

a. An out-of-court court identification violates due process when it is so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. An accused person has the due process right to a fair trial, and this right includes the guarantee that the evidence used to convict him will

[5] The original instructions to one of the officers conducting the montage was to show just one photo to Trooper Johnson. RP 1718. The officer felt uncomfortable with that process, feeling it would taint the investigation, and produced a montage instead. RP 1718-19.

[6] The trooper did not tell the officers conducting the photo montage that he had previously identified Mr. Jones from his DOL photo. App A at 5 ; RP 1726. One of the officers stated he would not have shown Trooper Johnson the montage had he known the trooper had made a prior identification. RP 1726.

meet elementary requirements of fairness and reliability in the ascertainment of guilt or innocence. *Chambers v. Mississippi,* 410 U.S. 284, 310, 93 S.Ct. 1038, 35 L.Ed.2d 297(1973). "[R]eliability [is] the lynchpin in determining admissibility of identification testimony" under a standard of fairness that is required under the Due Process Clause of the Fourteenth Amendment. *Manson v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

A pretrial identification procedure violates due process if it is "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." *State v. Vickers,* 148 Wn.2d 91, 118, 59 P.3d 58 (2002), *quoting State v. Linares,* 98 Wn.App. 397, 401, 989 P.2d 591 (1999), *review denied,* 140 Wn.2d 1027 (2000).

"The presentation of a single photograph is, *as a matter of law*, impermissibly suggestive." *State v. Maupin,* 63 Wn.App. 887, 896, 822 P.2d 355 (1992) (emphasis added). Thus, given that the single photograph identification was impermissibly suggestive, the only question remaining is whether Trooper Johnson's identification was otherwise reliable despite the suggestive identification procedure.

b. Application of the *Brathwaite/Biggers* factors requires suppression of Trooper Johnson's identification of Mr. Jones. In *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court reaffirmed that a conviction based upon eyewitness identification will be set aside if the "identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Id.* at 197 (citation omitted). But the court found that an identification can nonetheless be admissible if it is otherwise reliable. *Id.* The Court identified a test to ascertain whether, under the "totality of the circumstances," an identification is reliable despite the suggestive procedures. *Id.* at 199-200.

The factors to be considered include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Biggers,* 409 U.S. at 193. *See also Manson v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Washington utilizes the *Brathwaite/Biggers* test to determine the admissibility of an impermissibly suggestive identification. *Vickers,* 148 Wn.2d at 118.

Here, Trooper Johnson's identification was not otherwise reliable. The evidence showed the trooper was predisposed to identify Mr. Jones as the assailant as he believed the person who shot him was the husband of the driver of the van, based upon his claim that the driver, Ms. Jones, was angry when told her car was to be impounded. The trooper continually asked to see a photo of Mr. Jones.

Further, even though he was an experienced state trooper, employed for 27 years, who should have known a single photo identification was improper, he short-circuited the process by demanding to be shown a single photograph of Mr. Jones. In fact, the trooper was shown two photos of Mr. Jones, the first of poorer quality, before he was shown the DOL copy of Mr. Jones' photo. To make matters worse, the DOL photograph had Mr. Jones' name and identifying information on it. None of the other photos shown to the trooper of other possible suspects contained their name and identifying information on it. This was akin to the police telling a victim, this is the guy, then asking the victim to look at the picture.

The inescapable conclusion to draw from these facts was that Trooper Johnson was predisposed to believe Mr. Jones was his assailant, thus his identification of Mr. Jones in the single

photograph procedure was a *fait accompli.* Under the *Biggers* standard, the trooper's identification of Mr. Jones was not otherwise reliable.

Further, this Court must also suppress the photo montage and the sketch, both conducted *after* Trooper Johnson had made his identification from the single photograph. The montage process and the sketch were impermissibly tainted as indicated by the one officer who claimed he would not have shown Trooper Johnson the montage had he known the trooper had already made a prior identification.

c. Trooper Johnson's in-court identification of Mr. Jones was tainted by the impermissibly suggestive out-of-court identification. An in-court identification is inadmissible and violates due process where it is the result of an impermissibly suggestive procedure. *State v. Vaughn,* 101 Wn.2d 604, 609-10, 682 P.2d 878 (1984). The witness may make an in-court identification only if the State shows by clear and convincing evidence that the in-court identification has a basis independent of the pretrial procedure. *State v. Redmond,* 75 Wn.2d 62, 65, 448 P.2d 938 (1968). Here the State cannot make such a showing.

As has been argued, after demanding to see a photograph of Mr. Jones several times, Trooper Johnson was shown a single photo of Mr. Jones on two separate occasions, with the best quality photograph also containing Mr. Jones' name and identifying information. This single photo viewing undoubtedly influenced his identification of Mr. Jones as his assailant, thus tainting the identification. As a consequence, the in-court identification was tainted by the pretrial identification and should have been suppressed.

d. The error in admitting the unreliable identification requires reversal of Mr. Jones' conviction. A constitutional error is presumed prejudicial. *Maupin,* 128 Wn.2d. at 924. The State bears the heavy burden of proving beyond a reasonable doubt that the jury would have reached the same result absent the error. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Easter,* 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State must point to sufficient untainted evidence in the record to inevitably lead to a finding of guilt. *Id.*

Absent the identification by Trooper Johnson of Mr. Jones as his assailant, there was little independent evidence proving that Mr. Jones assaulted Trooper Johnson. Without the identification, the

State's case was entirely circumstantial and weak at best given the fact the tow driver, Mr. Hill, was unable to identify the assailant despite being at the scene at the time of the shooting. Further, the State never located the firearm used. Thus, the State's case rested entirely on the trooper's identification of Mr. Jones.

The error in admitting Trooper Johnson's identification was not harmless and Mr. Jones is entitled to reversal of his conviction.

4. THE TRIAL COURT'S REFUSAL TO ADMIT RELEVANT EVIDENCE VIOLATED MR. JONES' RIGHT TO DUE PROCESS AND RIGHT TO A FAIR TRIAL

Trooper Greene's testimony: Trooper Greene stopped Ms. Jones's van. While the trooper was still in his car just prior to getting out and contacting Ms. Jones, he saw an individual walk by his car. His description of this person matched the description provided by Mr. Hill of the assailant. Trooper Greene provided this description to investigators upon returning to the scene of the shooting.

In his statement to investigators, Trooper Greene noted that when he stopped Ms. Jones and was parking his patrol car:

> I noticed a gentleman pass by my location on the sidewalk, which would have been on my right, walking north on State Route 103. He came from behind me. As he passed, I noticed he had uh, like a gray, um,

> sweatshirt, uh possibly hooded I, I can't recall if it was hooded or not, but I want to say it was. Um, had, like a black too, dark blue, beanie on his head. Or – you know – knit cap. I think he was about, he's a white male. Probably about 5'11" um, and appeared to kind of had, uh, a little scruff on his face.

CP 1289. Further, Trooper Greene told the defense during their interview that he could not rule out that the person he saw was the shooter. CP 1290. Trooper Greene was subsequently taken to several roadblocks to attempt to identify individuals detained by other police officers based upon Greene's and Hill's identifications. CP 1289-90.

Prior to trial, the State moved to preclude the defense from eliciting Trooper Greene's observation at trial, arguing it constituted "other suspect" evidence and the defense had not met the criteria for its admission. CP 527-36; RP 397-400. The defense noted the rationale for why Greene's testimony was relevant:

> The Trooper Greene identification, we have a person who walks by, you know, maybe 15 minutes before the incident wearing the same clothing as identified by Mr. Hillman [Hill?]. So, we either have a situation where it's the same person, or it's a person wearing the same clothes. But I think under any circumstances it's relevant to ask Trooper Greene, as you are making the stop, or you are doing the DUI physicals on Mrs. Jones, was there anybody else in the vicinity. Yes, a man walked by. Well, what did the man look like? Because very many of the police that we have talked to have told us that nobody else

> was on the street that evening, that the streets were basically vacant. The bars hadn't gotten out yet, or maybe there was some people congregating around some of bars [sic], but the bars were not in close vicinity to where the event took place.
>
> . . .
>
> This would be very relevant also because if the same person walked by 15 to 20 minutes earlier, it might help to exclude [Mr. Jones], given phone calls and other evidence.

RP 406-08.

The trial court agreed with the State and excluded the trooper's observation on the basis that it was "other suspects" evidence. CP 1242-43; RP 410.

The defense moved for a new trial following Mr. Jones' conviction, based upon the trial court's refusal to allow Trooper Greene's observation of the person who matched the description given by Mr. Hill. CP 1286-1300; RP 4107-09.

> By the same token, the fact that Trooper Greene saw a person that matched George Hill's description was very relevant in terms of the defense put up by the Defendant in this case, and certainly where an alibi defense that by itself is implicit that something other than the Defendant, there is another suspect out there, and it's our view that this prevented us from receiving a fair trial, especially insofar as the jurors should have been able to hear that Trooper Greene was allowed to go out to the various roadblocks, and various people were stopped and he was trusted to say, no, that isn't the suspect. That suspect can be released.

> So certainly, the powers that be on the evening in question believed that Trooper Greene saw the suspect based upon the clear descriptions given by Trooper Greene and by George Hill that matched each other.

RP 4108-09. The trial court denied the defense motion. RP 4116.

Chris Sewell's testimony: Prior to the testimony of Sara Trejo, the Washington State Patrol (WSP) latent fingerprint examiner, the defense gave notice that it intended to impeach Ms. Trejo with an email by her supervisor, Chris Sewell, that criticized the investigation, describing it as haphazard. RP 2536. The State moved to bar this testimony as impeachment on a collateral matter. RP 2537-38. The trial court agreed and granted the State's motion. RP 2538.

During its case-in chief, the defense sought to call Mr. Sewell to testify regarding the integrity of the WSP investigation.

> What is specifically referred to here is not just personal concerns, it's mislabeled evidence. It's communications breakdowns.
>
> . . .
>
> This has to do with more significant problems regarding the evidence, and perhaps to make a perfect record we would ask for a right to have Mr. Sewell come in here and explain himself, why he thinks that it would be appropriate for him to tell underlings that they shouldn't document their problems with their case. And it can be dealt with some other time, not in the case file.

> If a detective has said this to patrol officers, don't document problems in the case, it would be obvious. He can't do it. So it seems to me that this is just as obvious. We had foreseen this as a potential problem in the case and made a motion to not have the crime lab involved here, and the State decided they wanted the crime lab to do it. They have to pay the price of letting the jury hear that the crime lab was trying to bury some of the evidence about problems in the case.
>
> . . .
>
> The prejudice to the State's case is fair prejudice because they chose to – the crime lab, understanding that there might be a potential for conflict. And here, I have never seen email before by anybody, let alone somebody from the crime lab saying you don't necessarily have to put it in the case file. I have never seen anything like that, so it seems to me it goes a long way.

RP 3038-44. The trial court granted the State's motion to exclude Mr. Sewell's testimony. RP 3045.

a. Mr. Jones was constitutionally entitled to present a defense which included admission of any relevant evidence which did not substantially prejudice the State. It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The right to present evidence in one's defense is a fundamental element of due process of law. *United States v. Whittington,* 783 F.2d 1210, 1218 (5th Cir., 1986), *citing Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct.

1920, 18 L.Ed.2d 1019 (1967); *State v. Ellis,* 136 Wn.2d 498, 527, 963 P.2d 843 (1998). The right to present a defense includes the right to confront and cross-examine witnesses on relevant evidence to show bias, motive, or lack of credibility. *Davis v. Alaska,* 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Further, this right includes, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *accord Washington,* 388 U.S. at 19 ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts . . . [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

The Washington Constitution provides for a right to present material and relevant testimony. Art. I § 22; *State v. Roberts,* 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. *Id.*

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19.

The evidence sought to be admitted by the defendant need only be of "minimal relevance." *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010). ER 401 provides that evidence is relevant if it makes a fact "of consequence to the determination of the action" more or less probable. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory,* 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). To be relevant, the evidence need provide only "a piece of the puzzle." *Bell v. State,* 147 Wn.2d 166, 182, 52 P.3d 503 (2002).

"[I]f [the evidence is] relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden,* 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The State's interest in excluding prejudicial

evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be barred only "if the State's interest outweighs the defendant's need." *Id.* "[T]he integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow,* 99 Wn.2d 1, 14, 659 P.2d 514 (1983). For evidence of *high* probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Id.* at 16.

b. Trooper Greene's observations of a person matching the description of the shooter provided by Mr. Hill walking on the road prior to the shooting was relevant evidence, not "other suspects" evidence, and should have been admitted. The testimony of Trooper Greene regarding the person he observed in the area of the traffic stop prior to the shooting of Mr. Jones, and who matched the description of the assailant provided by Mr. Hill, was not "other suspects" evidence but evidence that tested the State's theory that Mr. Jones, and Mr. Jones alone, shot the trooper.

Trooper Greene would have testified he saw someone that matched the subsequent description of the assailant provided by

Mr. Hill, walking in the area of his traffic stop of Ms. Jones prior to the shooting. Given Trooper Greene's information, his superiors sent him around to various roadblocks erected after the shooting to determine whether people being detained matched this description. This was not "other suspects" evidence as characterized by both the State and the trial court.

Washington permits a criminal defendant to present evidence that another person committed the crime when he can establish "a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party." *State v. Downs,* 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Rehak,* 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *cert. denied,* 508 U.S. 953 (1993). That foundation requires a clear nexus between the person and the crime. *State v. Condon,* 72 Wn.App. 638, 647, 865 P.2d 521 (1993).

> In the classic other suspects case, the defendant blames the specific crime for which he has been charged on someone else. That was not what happened in this case.

State v. Hawkins, 157 Wn.App. 739, 751, 238 P.3d 1226 (2010). Trooper Greene's observation was not "other suspects" evidence

but rather evidence that casted doubt upon the State's entirely circumstantial case.

A lesser foundational restriction applies to cases involving circumstantial proof of crime:

> [I]f the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.

State v. Clark, 78 Wn.App. 471, 563, 898 P.2d 854, 858 (1995).

In reality, Trooper Greene's testimony was relevant evidence sought to be admitted by Mr. Jones. Evidence is admissible when it is relevant. ER 401. Relevant evidence is any evidence that has a tendency to make the existence of a fact more or less probable. *Id.*

Thus, the defense wished to use Trooper Greene's observation of this other person simply to question the reliability of Trooper Johnson's identification and question the theory proffered by the State. *See State v. Lord*, 128 Wn.App. 216, 223, 114 P.3d 1241, 1245 (2005), *aff'd*, 161 Wn.2d 276 (2007) ("[T]he State was not attempting to divert suspicion to a different victim or suspect; nor was the State trying to prove that the young men had seen

Shannon rather than Tracy. Rather, the State used the photograph simply to question the reliability of the three young men, who thought they had seen Tracy Parker on the road the day after her murder, though it was only for 10 seconds and they were not even sure about the date."). The prosecution theory was that there was no other person who could have committed the crime - a theory that Mr. Jones was entitled to rebut once the prosecution relied upon it. This was particularly true given the identification given by Mr. Hill which conflicted with Trooper Johnson's identification and which the State did not want to admit in its case-in-chief because it did not fit its theory of the case.

Helpful on this issue is the decision in *State v. Maupin,* 128 Wn.2d 918, 928, 913 P.2d 808 (1996). In *Maupin,* the Supreme Court found that it was error to exclude testimony that would have shown that a kidnapped and murdered child was seen with another person after the time Maupin was accused of abducting and killing her. *Maupin,* 128 Wn.2d at 928. The Court found the evidence in *Maupin* was contradictory to the State's theory of events and thus material in determining if Maupin was the last person to be seen with the victim. *Id.*

> Unlike any of the *Downs* line of cases, and contrary to the State's argument, Brittain's testimony was neither evidence of another's motive nor mere speculation about the possibility that someone else might have committed the crime. Instead, Brittain would have testified he saw the kidnapped girl with someone other than the defendant after the time of kidnapping. Although the State correctly notes this testimony would not necessarily have exculpated Maupin, as he may have been acting in concert with the persons Brittain claimed to have seen, *it at least would have brought into question the State's version of the events of the kidnapping.* An eyewitness account of the kidnapped girl in the company of someone other than Maupin after the time of the kidnapping certainly does point directly to someone else as the guilty party, as *Downs* requires.

Id. (emphasis added). The evidence sought to be admitted in *Maupin* is extremely similar to that sought to be admitted here as Trooper Greene's observation was material to the question of whether Mr. Jones was the only person observed by the troopers that night, and thus the only person who could have shot Trooper Johnson.

c. <u>Chris Sewell's testimony regarding his criticism of the Washington State Patrol crime lab's investigation was relevant to impeach the inference raised by the State that the investigation was error-free</u>. The trial court barred the defense from impeaching one of the WSP investigators with Mr. Sewell's email, which the investigator received among others. The trial court also barred any

testimony from Mr. Sewell criticizing the WSP investigation. This evidence was relevant to Mr. Jones' defense and its exclusion violated his right to present a defense.

The evidence against Mr. Jones was almost entirely circumstantial except for the questionable identification by Trooper Johnson. The WSP investigated the shooting of a WSP trooper, an apparent conflict of interest. The apparent conflict was emphasized by the shoddy nature of the investigation as detailed by the critical email by Mr. Sewell, a supervisor at the WSP crime lab. Barring the defense from presenting any information from Mr. Sewell, either by questioning the lab employees about the email or presenting the testimony of Mr. Sewell, created the false impression with the jury that the investigation was flawless, when the reality was it was far from it. Mr. Jones' defense was based in part on pointing out the less than stellar investigation, thus casting doubt upon the opinion of the lab employees that Mr. Jones was the assailant of Trooper Johnson. Barring this critical evidence effectively eviscerated his defense, thus violating his Sixth Amendment right to present a defense and cross-examine witnesses.

d. The court's error in refusing to admit Trooper Greene's observation and Mr. Sewell's testimony was not a harmless error. A violation of the right to present a defense requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. *Ritchie*, 480 U.S. at 58; *Chapman*, 386 U.S. at 21-24; *Jones,* 168 Wn.2d at 725.

The State cannot meet its burden here. Once again, the State's case against Mr. Jones was based entirely on the identification of Mr. Jones by Trooper Johnson. The remaining evidence was entirely circumstantial. The proffered testimony of Trooper Greene would have cast serious doubt upon Trooper Johnson's identification and the State's theory that Mr. Jones was the only person who could have shot the trooper that night because he was the only person in the area around the time of the shooting.

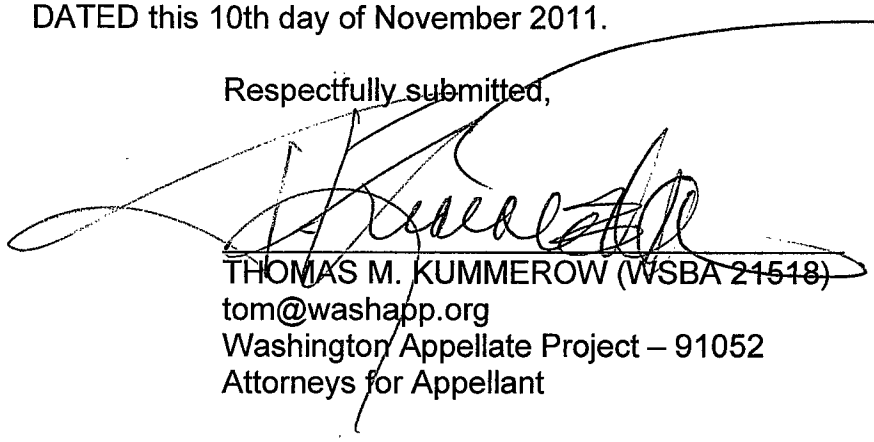
Further, the remaining evidence consisted of circumstantial evidence largely from the WSP crime lab. The testimony of Mr. Sewell and the impeachment of the lab employees with his email would have cast serious doubt on the lab's conclusions that Mr. Jones was Trooper Johnson's assailant. The error in barring this testimony was not a harmless error, and Mr. Jones is entitled to reversal of his convictions.

F. CONCLUSION

For the reasons stated, Mr. Jones requests this Court reverse his conviction and remand for a new trial.

DATED this 10th day of November 2011.

Respectfully submitted,



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APPENDIX A

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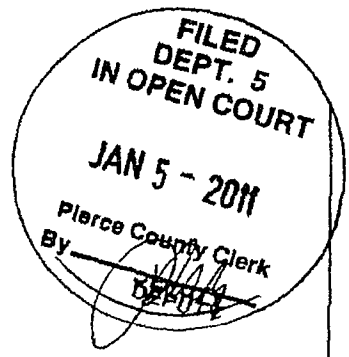


STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

THE STATE OF WASHINGTON, Plaintiff, v. MARTIN ARTHUR JONES, Defendant.	NO. 10-1-03735-9 STIPULATED FACTS RE: DEFENSE MOTION TO SUPPRESS IDENTIFICATION OF DEFENDANT

1. On February 13, 2010, at approximately 12:40 a.m., Washington State Patrol (WSP) Trooper Scott Johnson ("Trooper Johnson") was shot in the city of Long Beach, WA, while attempting to impound a vehicle owned by the defendant and his wife. Defendant's wife, Susan Jones, had been stopped for speeding, arrested for DUI, and transported to the Long Beach Police Department, by another trooper, Trooper Greene. Trooper Johnson arrived at the scene of the traffic stop to back-up Trooper Greene, and then wait for a tow truck after Trooper Greene departed with Mrs. Jones.

2. Trooper Johnson made the notations "Marty" and the Jones' home telephone number on his hand prior to the shooting. Trooper Johnson made these notations on his hand after the defendant's wife told him that she wanted Trooper Johnson to call her husband "Marty" and she provided the phone number.

3. It was dark at the time of the shooting; however, there was some street lamp lighting, as well as lighting from Trooper Johnson's vehicle (headlights and emergency lights) and a tow truck (running lights, headlights).

4. Prior to the shooting, a white male approached Trooper Johnson's location as Trooper Johnson was preparing to impound the defendant's vehicle. The white male was agitated. The white male talked to the tow truck operator, George Hill, and inquired as to what Hill was doing. Hill responded that he was towing the vehicle. Defendant

appeared angry and walked away. Trooper Johnson observed this interaction. Trooper Johnson intercepted the white male and asked if he could help him. The white male responded, "no." Several minutes later, Trooper Johnson was grabbed from behind and shot in the head. The shooting was witnessed by George Hill. George Hill chased after the assailant for a short distance, but returned after the assailant turned on George Hill and Hill also heard Trooper Johnson call out that he had been shot. Hill returned to the tow truck. Trooper Johnson had taken cover behind the tow truck. Trooper Johnson observed the same man he had talked to minutes earlier return to the scene of the shooting, the sidewalk on the passenger side of the Jones van. Trooper Johnson and the man looked at each other momentarily and then Trooper Johnson fired his service weapon at the man. The man fled and Trooper Johnson fired a second shot as the man fled. George Hill reported that the person who shot Trooper Johnson was the same white male that contacted Hill and Trooper Johnson minutes prior to the shooting.

5. Trooper Johnson watched the shooter flee. Trooper Johnson watched the shooter run southbound on SR 103, and then east on S. 13th St. Trooper Johnson reported this information to WSP dispatch immediately after the shooting, prior to his transport to the hospital. Trooper Johnson reported this information to WSP dispatch immediately after the shooting, prior to his transport to the hospital. ~~Approximately 2 hours after the shooting, a K9 unit tracked a scent from the location of the shooting on SR 103 and then south on SR 103 and east on S. 13th St.~~

6. Defendant Martin Jones is a 5'10", white male. Defendant was 45-years-old on 2/13/10. ~~On 2/13/10, defendant had a medium build and short, clean-cut, brown hair.~~ Defendant's booking photo from 2 days later (2/15/10) is attached.

7. George Hill immediately called WSP Dispatch and reported the crime. This call was received at 12:42 a.m. WSP called out the shooting over the radio at 12:42 a.m.

8. Long Beach Police officers at their station only blocks away arrived in less than one minute. Trooper Johnson was alert and immediately stated (and was captured on video stating), "I got a good look at him."

9. Trooper Johnson was immediately transported by a police officer to Ocean Beach Hospital in Ilwaco, WA. Ocean Beach Hospital received Trooper Johnson at 12:45 a.m. on 2/13/10.

10. WSP Sgt. Jody Metz responded to the hospital and talked to Trooper Johnson at 12:58 a.m., approximately 18 minutes after the shooting. Trooper Johnson described the assailant as a white male; short brown hair; approximately 5'10"-5'11", approximately 40-years-old. Trooper Johnson described the assailant's clothing and the direction that he fled. Sgt. Metz reported that Trooper Johnson told her that he "saw him and would be able to recognize him."

11. Sgt. Metz returned to Ocean Beach Hospital and talked to Trooper Johnson between 3:00-3:30 a.m. on 2/13/10. Trooper Johnson provided a more detailed description of the shooting. Trooper Johnson told Sgt. Metz that he paid "diligent attention" to the shooter, prior to the shooting, because he was so angry that the vehicle was being impounded.

12. Trooper Johnson was transported from Ocean Beach Hospital to Oregon Health Sciences University Hospital (OHSU) in Portland, Oregon. Trooper Johnson departed Ocean Beach Hospital at approximately 3:15 a.m. and arrived at OHSU at 5:19 a.m.

13. Firefighter/Paramedic Matt Beaulaurier was in the ambulance with Trooper Johnson. Trooper Beaulaurier reported that Trooper Johnson told him that he did not get a good look at the shooter "during the shooting as he was trying to take cover."

14. Trooper Johnson was in a hospital bed recovering at OHSU from 5:19 a.m. on 2/13/10 to 12:00 noon on 2/15/10 (about 2½ days). Trooper Johnson still had the notation "Marty" and a phone number written on his hand. WSP placed a guard at Trooper Johnson's room 24/7 for security. At times, troopers or officers from other agencies were tasked with presenting photographs to Trooper Johnson to view to assist in the investigation that was taking place in Long Beach.

15. At 10:55 a.m. on 2/13/10, detectives from the Portland Police Bureau showed Trooper a single photograph of a white male. Trooper Johnson responded that the man looked like the shooter, but he could not be 100% sure. Trooper Johnson further reported that the man in the photograph had longer hair than the shooter.

16. After showing Trooper Johnson the photograph, the Portland detectives interviewed Trooper Johnson. Trooper Johnson described the shooter as a "relatively good looking" white male, 37-42-years-old, well built, approximately 6' tall, and appeared to not have recently shaved but was otherwise clean-cut. Trooper Johnson described the assailant's clothing, consistent with what he told Sgt. Metz. The Portland detectives reported that Trooper Johnson said he "did not get a good look at the suspect's face, but mostly saw a side profile." Trooper Johnson described his encounter with the shooter prior to the shooting. Trooper Johnson told the Portland detectives that the suspect had "an angry look on his face" during their first encounter. Trooper Johnson reported that he conversed with the shooter but the shooter would not look at him.

17. At 4:30 p.m. on 2/13/10, Trooper Johnson told Trooper Hodel that he would like to see a photograph of Susan Jones' husband.

18. At 5:20 p.m. on 2/13/10, Trooper Johnson was shown a sketch that was compiled based upon information from George Hill. Trooper Johnson reported that the sketch did not look like the shooter.

19. At 6:15 p.m., Trooper Johnson was presented with a black-and-white, faxed copy of the defendant's DOL photograph. The fax was of very poor quality and Trooper Johnson could not make any identifications from the photo due to its poor quality. Trooper Johnson requested a clear copy.

20. At 7:00 p.m., Trooper Johnson was shown a photograph of a white male (not the defendant). Trooper Johnson stated the man in the picture was not the shooter.

21. At 7:10 p.m., Trooper Johnson repeated to Trooper Hodel that he would really like to see a photograph of Susan Jones' husband.

22. At 10:30 p.m., WSP Trooper Layman showed 5 or 6 single photographs of white men to Trooper Johnson (none were the defendant). Trooper Johnson responded that none of the men were the shooter.

23. On 2/14/10 at 11:41 a.m., Department of Corrections officer Jeff Frice arrived at the hospital with a laptop in the event investigators in Long Beach needed to e-mail photographs to present to Trooper Johnson. Frice was at the hospital from 11:40 a.m. to approximately 4:00 p.m.

24. Frice showed Trooper Johnson single photographs of 6 white men throughout the day, none of whom were the defendant. Trooper Johnson stated each time that the man in the photo was not the shooter.

25. A DOL photograph of Martin Jones was e-mailed to Frice at 2:43 ~~am~~ pm. on 2/14/10. At approximately 3:45 p.m. on 2/14/10, Frice showed Trooper Johnson a clear color photograph of the defendant's DOL photo, which ~~have~~ included the defendant's name. Frice reported that Trooper Johnson looked at the photo and said, "I hate to say it, but that's him," identifying the defendant as the person who shot him. Trooper Johnson told Frice that the defendant's hair looked different then in the DOL photo and the defendant had "some scruff" the night of the shooting, but the man in the photograph was the person who shot him. Defendant's DOL photo is attached.

26. A sketch artist from Thurston County Sheriff's Office, Deputy Mitch King, was flown to Portland by WSP aircraft on 2/14/10. Flight logs show that Deputy King arrived at the Portland airport at approximately 3:00 p.m. Sometime between approximately 3:30 p.m. and 7:45 p.m., Deputy King met with Trooper Johnson for several hours and gathered information necessary to draft a composite sketch. Afterwards, Deputy King went to another area of the hospital and completed the sketch. The sketch was received at the command post in Long Beach at 7:45 p.m. on 2/14/10. For purposes of this motion, the parties stipulate that the sketch artist met w/ Trooper Johnson after Frice showed Trooper Johnson the DOL photo of Martin Jones. The sketch is attached.

27. At 10:58 p.m. on 2/14/10, Clark County Sheriff's Detectives presented a photo montage to Trooper Johnson. These detectives were unaware that Trooper Johnson had identified the defendant as the shooter earlier that day. Trooper Johnson was in pain at the time but agreed to look at the montage. Defendant's DOL photograph, the same photograph shown to Trooper Johnson earlier in the day, was one of six photographs in the montage. Trooper Johnson identified the defendant's photograph as the shooter. The detectives wrote that Trooper Johnson said that the defendant's photograph "looks very much similar to the gentleman I saw." Trooper Johnson also said his best view of the subject was a profile of the man's face as the man walked past him. Trooper Johnson's identification was reported to investigators in Long Beach. The montage is attached.

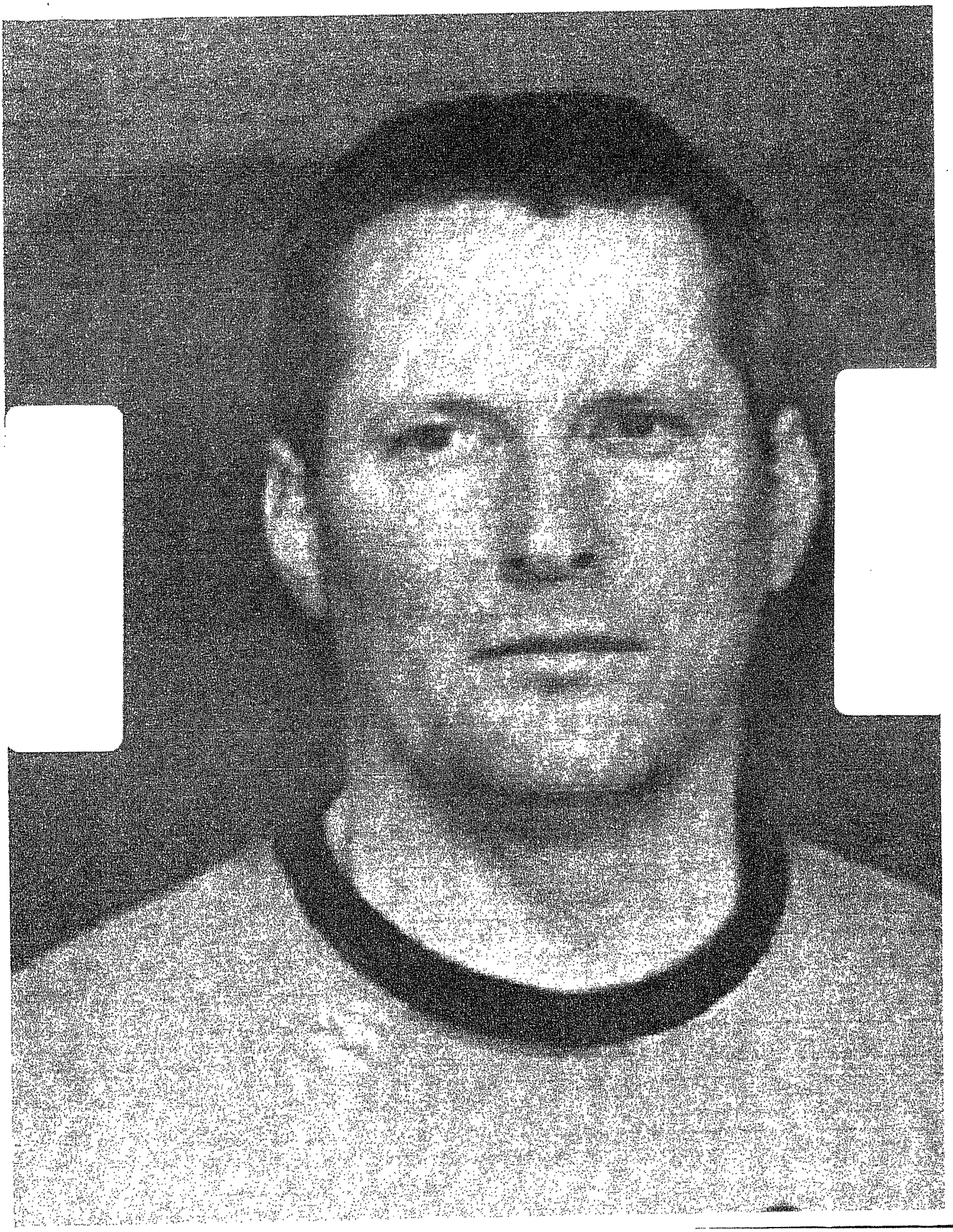
28. Since his release from the hospital on 2/15/10, Trooper Johnson has said that he has no doubt that the defendant is the person who shot him.

DATED this 5th day of January, 2011.

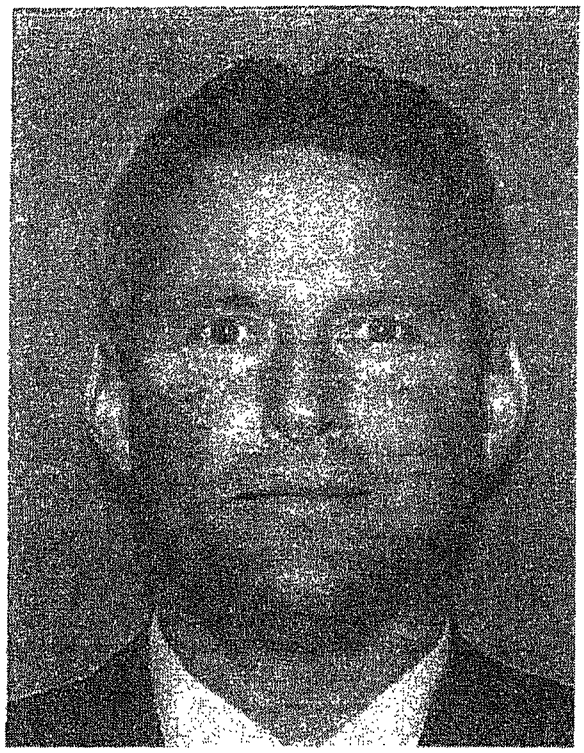
By signing below, the parties agree that the court may consider the above stipulated facts in deciding the defendant's motion to suppress eyewitness identification

JOHN HILLMAN, WSBA #25071
Assistant Attorney General
Attorney for Plaintiff

DAVID ALLEN, WSBA # 500
Attorney for Defendant



Department Of Licensing – IDL System



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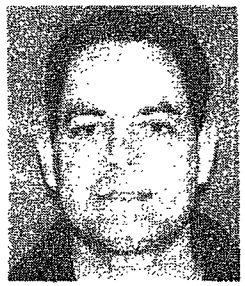

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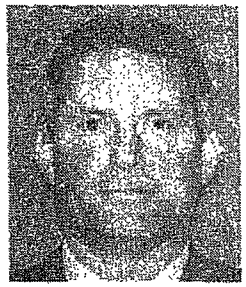

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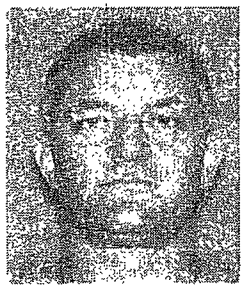

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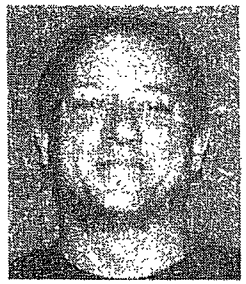

INSTRUCTIONS TO BE READ TO WITNESS: Carefully review all the photographs before you make any decisions. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards, and moustaches may be easily changed. Also, photographs may not depict the true complexion of a person. When you have looked at all of the photos, answer the questions below. Do not tell other witnesses that you have or have not identified anyone.

Question #1: DO YOU SEE ANYONE YOU RECOGNIZE?

ANSWER: _____

Questions #2: IF THE ANSWER TO QUESTION #1 WAS YES, IDENTIFY BY NUMBER, THE PHOTO(S) YOU RECOGNIZE.

ANSWER: _____

Question #3: FROM WHERE TO YOU RECOGNIZE THE PERSON(S) IDENTIFIED?

ANSWER: _____

Question #4: DO YOU HAVE ANY ADDITIONAL COMMENTS?

ANSWER: _____

_____
NAME OF WITNESS (PRINT)

_____
SIGNATURE OF WITNESS / DATE

CASE NUMBER: _____

_____
OFFICER'S SIGNATURE DEPT. ID#

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 41902-5-II
	)	
MARTIN JONES,	)	
	)	
APPELLANT.	)	

DECLARATION OF SERVICE ON APPELLANT

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF NOVEMBER, 2011, I CAUSED A TRUE COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE FILED BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARTIN JONES 348031 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF NOVEMBER, 2011

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

November 10, 2011 - 4:06 PM

Transmittal Letter

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Case Name: STATE V. MARTIN JONES
Court of Appeals Case Number: 41902-5

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Ann M Joyce - Email: **ann@washapp.org**

A copy of this document has been emailed to the following addresses:
johnh5@atg.wa.gov