

No. 89571-6  
COA No. 263541-III

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IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

STATE OF WASHINGTON

*Respondent,*

v.

JERRY ALLEN HERRON

*Petitioner,*

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ANSWER TO AMICUS

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ORIGINAL

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## ARGUMENT IN RESPONSE TO AMICUS WAPA

**Summary of Amicus's Issues.** Amicus WAPA recognizes that Mr. Herron did not waive any rights under article 1, section 10 of the State's constitution. Amicus argues instead that Mr. Herron may not remain silent in the face of an infringement of section 10 and claim after trial that an error occurred. Separately, Amicus echoes the State's assertion that the remedy for a section 10 error is confined to release of a transcript, not a new trial. Finally, Amicus argues that the state's prosecutor is the representative of the public and, for purposes of section 10, the prosecutor's determination to waive the public's right cannot be challenged by a defendant.

### **I. HERRON WAS NOT ADVISED OF THE PUBLIC'S RIGHTS UNDER § 10 AND FURTHERMORE HE HAS NO POWER TO CURTAIL THE PUBLIC'S RIGHT TO AN OPEN TRIAL**

The trial transcripts reveal that Mr. Herron was fully advised of his rights under section 22. Nothing, however, was said to Mr. Herron regarding the public's rights to the open administration of justice under section 10. At each step the trial court was clear that the topic was a defendant's personal right to secure an impartial jury. RP 6/15/07 104-05.

Amicus WAPA notes that there is a conflict between the rights protected by section 10 and section 22. Amicus at 5. Herron agrees: section 10 concerns the appearance of legitimacy and fairness through an open court; section 22 concerns juror impartiality. The two protections are at times in conflict. WAPA's arguments fail, however, insofar as both Amicus and the State assume that no aspect of section 10 protects the defendant. Mr. Herron's Supplemental Brief argued that the policies justifying public access to criminal trials are intended in part to benefit both parties, including the defendant. Two leading public access cases note that the public's access serves interests shared by the public and by the litigants.

Openness thus enhances both the *basic fairness* of the criminal trial and *the appearance of fairness* so essential to public confidence in the system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S., at 569-571, 100 S.Ct., at 2823-2824.

*Press-Enter. Co. v. Superior Court of Cal., River. Cnty.*, 464 U.S. 501, 508 (1984) (emphasis added); and *see State v. Paumier*, 176 Wn.2d 29, 37 (2012) ("The right to a public trial is a unique right that is important to both the defendant and to the public.")

[I]n the broadest terms, public access to criminal trial permits the public to participate in and serve *as a check upon the judicial*

*process* — an essential component in our structure of self-government.”

*United States v. Alcantara*, 396 F.3d 189, 195 (2<sup>nd</sup> Cir. 2005).

**II. THE REMEDY FOR AN ARTICLE I, SECTION 10 VIOLATION WILL DEPEND UPON THE INTERESTS AFFECTED AND MAY INCLUDE VACATION OF THE PROCEEDING AND REMAND**

As for the remedy under section 10, each case will turn on its facts, but Amicus WAPA is incorrect in stating that the only remedy for a violation of the public’s open court rule is release of a transcript. In *Alcantara*, the court did not furnish a mere transcript, it vacated the in-chambers proceeding in its entirety.

Amicus WAPA asserts that retrial only compounds the harm to the public. Amicus at 3. This is untrue. Vindicating open court provisions broadly benefits the public. In the aggregate, the risk of retrial will force trial courts to behave more cautiously when closing their courtrooms. A trial judge will not be inclined to accept a limited waiver from a defendant on the open record and then, on its own, broaden the waiver’s scope once in closed session. Retrial will chill the inclination to casually alter a defendant’s waiver. Retrial directly promotes the values set forth in the federal and Washington State cases vindicating open courts.

There is no question that the remedy of a new trial is expensive and, given the delays inherent in a criminal appeal and remand, can harm the state's legitimate interests. The extraordinary appellate delay in this case, however, was not engineered by Mr. Herron. The serial stays delaying Mr. Herron's appeal — lasting some 8 years — could not have been anticipated. Extraordinary relief, moreover, is warranted in a case such as this where the trial court unilaterally enlarged the purpose of the requested closed court conference to include matters wholly beyond the defendant's limited waiver.

### **III. ARTICLE I, SECTION 10 RIGHTS ARE NOT INVESTED WITHIN PROSECUTORIAL DISCRETION**

Amicus WAPA asserts that the prosecutor is the public's chosen representative in a criminal case, implying that this role extends for all purposes including the exercise of art. I, section 10. Amicus at 5. This assertion is supported by citation to *State v. Walker*, 182 Wn.2d 463, 476 (2015), but the extension of the rule in *Walker* to art. I, section 10 is contrary to 30 plus years of open court litigation. Were Amicus correct, media outlets would be shut out of any suit to force disclosure of closed proceedings. In any instance where the public sought to keep a court open, or sought records from a closed

proceeding, the prosecutor would simply assert that his or her judgment was exercised on behalf of the public, the public's right was waived, and the issue closed.

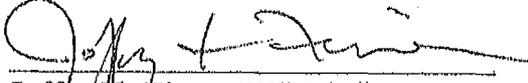
In point of fact, the federal courts have specified that before a transcript can be sealed, "[the court] must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible." *Phoenix Newspapers v. United States District Court of the District of Arizona*, 156 F.3d 940, 949 (9<sup>th</sup> Cir. 1998). The court in *Phoenix Newspapers* concluded: "As the Supreme Court has observed, '[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and society as a whole.'" *Phoenix Newspapers*, 156 F.3d at 951 (citing *Globe Newspaper*, 457 U.S. 596, 606 (1981)).

### CONCLUSION

For the reasons set forth above, Jerry Herron respectfully asks this Court to vacate the conviction and remand for new trial.

DATED THIS 5th day of May, 2015.

Law Offices of JEFFRY K FINER



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Jeffrey K. Finer, WSBA #14610  
Attorney for Jerry Herron

CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 5th day of May, 2015, I caused the foregoing *Answer to Amicus*, to be served, via USPS, postage prepaid and via email, on the following:

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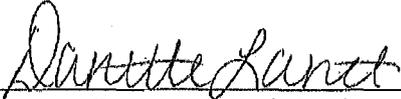
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DATED this 5th day of May, 2015.

  
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Please see attached Answer to Amicus for filing in the above-referenced case on behalf of:

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Above all, watch with glittering eyes the world around you, because the greatest secrets are always found in the most unlikely places.

~Roald Dahl

