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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

UNTERS LOVE,  
Appellant.

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ON APPEAL FROM DIVISION ONE OF THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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AMICUS BRIEF OF THE  
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS

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## I. IDENTITY AND INTEREST OF AMICUS

WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 1,000 members—private criminal defense lawyers, public defenders, and related professionals—committed to preserving fairness and promoting a rational and humane criminal justice system. This Court invited WACDL to provide amicus briefing in this case.

## II. ISSUE PRESENTED

Whether the use of sidebar conferences, inaudible to the venire panel, the criminal defendant, and any member of the public, to hear and decide challenges to prospective jurors—both peremptory and for cause—violates the state constitutional guarantee of open and public trials.

## III. SUMMARY OF THE FACTS

This Court granted review of this matter on January 6, 2015. That same day, this Court deferred consideration of six other cases pending the decision in this case.<sup>1</sup> Counsel for amicus has reviewed the Petition and appellate court briefing in *Love* and reviewed the petitions in the six other cases.

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<sup>1</sup> *State v. Harvey*, No. 87290-2, *State v. Strickland and Kirby*, No. 90240-2, *State v. Urquijo*, No. 90345-0, *State v. Thrower*, No. 90591-6, *State v. Thomas*, No. 90593-2, *State v. Fitzgerald*, No. 90717-0.

The actual questioning of prospective jurors in *Love* and in the deferred cases appears to have been uniformly conducted on the record in open court up until the time the parties were called upon to exercise challenges for cause or the allotted peremptory challenges. At that point, in each of the cases, the judge called counsel to a “sidebar”—that is, an area outside the hearing of anyone but counsel and the judge—where challenges to specific jurors were made and decided.

In *Love*, the defendant was not called to this private area. In some of the deferred cases, the defendant was included. *See, e.g., Urquito*, No. 90345-0, *Kirby*, No. 90240-2. In *Love*, the challenges for cause at the bench appear to have been recorded by a court reporter. But, the peremptory challenges do not appear to have been recorded in *Love* or in any of the deferred cases. In *Love*, it appears that a written record was later filed identifying which party struck which juror. CP 111.

#### IV. ARGUMENT

The parties and the appellate courts below in this case, and in the deferred cases, all agree that the “experience and logic test” is the correct method for deciding whether the public trial right attaches when a judge permits the use of sidebar conferences that are inaudible to the venire panel, the criminal defendant, and any member of the public, to hear and decide challenges to prospective jurors. This test asks if, under

considerations of experience and logic, “the core values of the public trial right are implicated.” *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). In *Sublett*, this Court explained that the experience and logic test was taken from *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (“*Press II*”). The experience prong asks, “whether the place and process have historically been open to the press and general public.” *Sublett*, 176 Wn.2d at 73 (citing *Press II*, 478 U.S. at 8). 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. *Id.*

A. THE EXPERIENCE PRONG STRONGLY SUPPORTS THE CONCLUSION THAT JUROR CHALLENGES MUST BE MADE IN A MANNER AUDIBLE TO THE DEFENDANT, THE MEMBERS OF THE VENIRE, AND THE PUBLIC

*The “Experience” Prong*

The experience prong of the test ostensibly focuses on historical context and practice. Under the experience prong, an examining court is to inquire “whether the place and process have historically been open to the press and general public.” *State v. Slert*, 181 Wn.2d 598, 605, 334 P.3d 1088 (2014) (quoting *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012)). In other words, the court’s task is to determine whether the

aspect of the trial under examination was “traditionally subject to public review and discussion.” *Id.* at 606.

However, in practice, the inquiry is somewhat broader than that. *See, e.g., Sublett*, 176 Wn.2d at 98 (Madsen, J., concurring) (describing history as only “one source of guidance”). In numerous published decisions, Washington courts have examined “experience” not only through the lens of history, but also through the lens of modern-day rules and practices. For example, in *Sublett*, the court looked to current Washington State Criminal Rules and recently published state court decisions for guidance on the experience prong. *See id.* at 75-77. Other cases have followed suit, looking to recent case law, *see, e.g., State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049, 1053-54 (2014); federal practice, *see, e.g., Slert*, 181 Wn.2d at 606-07; local procedural rules, *see, e.g., State v. Jones*, 175 Wn. App. 87, 100-01, 303 P.3d 1084 (2013) (Wiggins, J.P.T.); treatises, *Smith*, 181 Wn.2d 508, 334 P.3d at 1053-54; pattern jury instructions, *see, e.g., Jones*, 175 Wn. App. at 99; and current and former rules, code provisions, and statutes, *see, e.g., id.; Sublett*, 176 Wn.2d at 75-77. Many of these considerations are relevant here and are examined below.

1. Modern Day and Historical Practice: Statutes and Rules

For the most part, Washington's statutes on jury selection do not offer many clues about whether juror challenges have historically been exercised in open court. However, to the extent they are relevant, they suggest openness.

RCW 2.36 and 4.44 provide the framework for jury selection in Washington courts. RCW 2.36 is not especially helpful here because it does not establish rules for peremptory or for-cause challenges, nor do any of its provisions contain anything else of relevance to the experience prong. *See* RCW 2.36.

On the other hand, RCW 4.44 is more relevant, even though none of its provisions explicitly address whether juror challenges must be done in open court. *See, e.g.*, RCW 4.44.130 ("Either party may challenge the jurors. The challenge shall be to individual jurors, and be peremptory or for cause."); RCW 4.44.140 ("A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude the juror."). Several of the provisions in RCW 4.44 suggest that juror challenges should be done in open court.

Notably, the primary provision addressing peremptory challenges fails to authorize juror challenges done at sidebar or in any other secretive

manner. *See* RCW 4.44.210 (“Peremptory challenges, how taken”).

Indeed, the statute is silent on this point:

The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted.

*Id.* This seems neutral enough and indeed, it would appear at first glance that this statute has nothing to offer that is relevant to the experience prong. But statutes must be read in context. *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (stating requirement that statutes be read “*in pari materia*”); *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). Here, the context of this statute necessarily includes Article I, §10 of the Washington State Constitution, under which “[j]ustice in all cases shall be administered openly....” Const. art. I, § 10. This provision strongly commits our state to the open administration of justice. *See Sublett*, 176 Wn.2d at 145 (Wiggins, J., concurring in result). In light of Article I, §10, and in light of the fact that the rest of jury selection is presumptively open, it would be expected that any permissible deviation from openness would need to be explicitly authorized, or would at least be mentioned somewhere in the statutory scheme. Yet here it is not, and its absence is conspicuous.

Washington's criminal rule on juror challenges is no different. Again, the rule does not authorize juror challenges to be done in secret or at sidebar:

Peremptory Challenges—How Taken. After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted.

CrR 6.4. Once again, the rule is silent on whether challenges must be done in open court. As such, the rule must be interpreted in the context of Article I, § 10, and therefore challenges should be "administered openly." *See Campbell & Gwinn*, 146 Wn.2d at 11.

One final provision suggests that openness is the norm for juror challenges. Under RCW 4.44.250, juror challenges must be made part of the record:

The challenge, the exception, and the denial may be made orally. The judge shall enter the same upon the record, along with the substance of the testimony on either side.

RCW 4.44.250. Although this provision does not require that juror challenges be made openly, it does mandate that they be entered into the record, implying that juror challenges are "traditionally subject to public review and discussion." *Sfert*, 181 Wn.2d at 606.

Overall, Washington's juror challenge statutes suggest that peremptory and for-cause challenges must be done in open court and may not be taken at sidebar.

## 2. Historical Practice: Case Law

After statutes and rules, examining case law is the best way to research the historical practice of juror challenges. It is necessary to examine case law because there are few detailed records of juror challenges outside of published appellate court decisions.

As luck would have it, there are numerous Washington State Supreme Court decisions discussing juror challenges—many of which contain key clues about whether challenges were historically done in open court. To identify these cases, the undersigned conducted a broad search on the legal research database “Westlaw Next” for any Washington State Supreme Court case including the words “peremptory” or “for cause” in the same sentence as the word “challenge,”<sup>2</sup> and examined each case individually to determine whether juror challenges were conducted in the open or in secret.<sup>3</sup>

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<sup>2</sup> As a Boolean search, this is expressed as: (peremptory or “for cause”) /s challenge.

<sup>3</sup> This approach may omit several of the early decisions, which occasionally use varying terminology such as “implied bias” and “actual bias.” However, as seen below, this approach is over-inclusive in other respects.

The first result is from 1859. *Clarke v. Washington Territory*, 1 Wash. Terr. 68, 70 (1859). In the hundred years that follow, there are an additional 115 results.

Not surprisingly, many of these decisions are unhelpful. In 67 of them, it is not evident from the appellate opinion whether juror challenges were done in the open, at sidebar, or in any other specific manner.<sup>4</sup> This

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<sup>4</sup> See *Rose v. State*, 2 Wash. 310, 311-12, 26 P. 264 (1891); *State v. Moody*, 7 Wash. 395, 396-97, 35 P. 132 (1893); *State v. Coella*, 3 Wash. 99, 103, 28 P. 28 (1891); *State v. Gile*, 8 Wash. 12, 15, 35 P. 417 (1894); *State v. Eddon*, 8 Wash. 292, 305-06, 36 P. 139 (1894); *State v. Voorhies*, 12 Wash. 53, 54, 40 P. 620 (1895); *State v. Krug*, 12 Wash. 288, 302, 41 P. 126 (1895); *State v. Holedger*, 15 Wash. 443, 447-48, 46 P. 652 (1896); *State v. Carey*, 15 Wash. 549, 551, 46 P. 1050 (1896); *State v. Straub*, 16 Wash. 111, 119, 47 P. 227 (1896); *State v. McCann*, 16 Wash. 249, 251, 47 P. 443 (1896); *State v. Moody*, 18 Wash. 165, 169, 51 P. 356 (1897); *State v. Lattin*, 19 Wash. 57, 61, 52 P. 314 (1898); *Horst v. Silverman*, 20 Wash. 233, 233-34, 55 P. 52 (1898); *State v. Harras*, 22 Wash. 57, 58, 60 P. 58 (1900); *Piper v. City of Spokane*, 22 Wash. 147, 149, 60 P. 138 (1900); *McCorkle v. Mallory*, 30 Wash. 632, 637, 71 P. 186 (1903); *State v. Champoux*, 33 Wash. 339, 352, 74 P. 557 (1903); *State v. Clark*, 34 Wash. 485, 491, 76 P. 98 (1904); *State v. Riley*, 36 Wash. 441, 447, 78 P. 1001 (1904); *Creech v. City of Aberdeen*, 44 Wash. 72, 73, 87 P. 44 (1906); *State v. Gohl*, 46 Wash. 408, 411, 90 P. 259 (1907); *State v. Marfaudille*, 48 Wash. 117, 119, 92 P. 939 (1907); *In re City of Seattle*, 52 Wash. 226, 229-30, 100 P. 330 (1909); *Hoyt v. Indep. Asphalt Paving Co.*, 52 Wash. 672, 677, 101 P. 367 (1909); *State v. Pilling*, 53 Wash. 464, 465, 102 P. 230 (1909); *State v. Barnes*, 54 Wash. 493, 502, 103 P. 792 (1909); *State v. Montgomery*, 57 Wash. 192, 196, 106 P. 771 (1910); *State v. Clark*, 58 Wash. 128, 131, 107 P. 1047 (1910); *Lasttyr v. City of Olympia*, 61 Wash. 651, 654, 112 P. 752 (1911); *State v. Phillips*, 65 Wash. 324, 326, 118 P. 43 (1911); *State v. Cohen*, 72 Wash. 109, 110, 129 P. 891 (1913); *Jennings v. Puget Sound Traction, Light & Power Co.*, 76 Wash. 15, 17, 135 P. 468 (1913); *Crandall v. Puget Sound Traction, Light & Power Co.*, 77 Wash. 37, 39-40, 137 P. 319 (1913); *State v. Johnston*, 83 Wash. 1, 3, 144 P. 944 (1914); *Beach v. City of Seattle*, 85 Wash. 379, 384, 148 P. 39 (1915); *State v. Sullivan*, 97 Wash. 639, 641, 166 P. 1123 (1917); *State v. Vane*, 105 Wash. 170, 173, 177 P. 728 (1919); *State v. Lathrop*, 112 Wash. 560, 561, 192 P. 950 (1920); *State v. Muller*, 114 Wash. 660, 661, 195 P. 1047 (1921); *State v. McDonald*, 114 Wash. 696, 697, 195 P. 1048 (1921); *State v. Pettilla*, 116 Wash. 589, 591-92, 200 P. 332 (1921); *State v. Mahoney*, 120 Wash. 633, 641-42, 208 P. 37 (1922); *State v. Riley*, 126 Wash. 256, 263, 218 P. 238 (1923); *State v. Larkin*, 130 Wash. 531, 532, 228 P. 289 (1924); *State v. Elder*, 130 Wash. 612, 613-14, 228 P. 1016 (1924);

fact is frequently unclear in the Supreme Court's opinions. For example, in *Beach v. City of Seattle*, 85 Wash. 379, 384, 148 P. 39 (1915), the court addresses a for-cause challenge, but it is unclear whether the challenge was conducted in open court:

In his examination on his voir dire, Louis Benson, who had been called as a juror, answered questions as follows:

“Q. Have you any prejudice against young people attending social dances? A. Yes, sir; I have. Q. And the fact, if it occurred in this case, that these people were returning from a social dance would prejudice you, would it? A. It would.”

The respondent interposed a challenge for cause. On further examination, and after much explanation by counsel, the juror finally stated in substance that, while he was decidedly opposed to dances, if it appeared that the fact that respondent was injured in no manner grew out of her having attended a dance, he would not lay that up against her, but would “go according to the law and the testimony.”

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*McMahon v. Carlisle-Pennell Lumber Co.*, 135 Wash. 27, 28, 236 P. 797 (1925); *State v. Willis*, 135 Wash. 312, 312, 237 P. 711 (1925); *Woodbury v. Hoquiam Water Co.*, 138 Wash. 254, 256, 244 P. 565 (1926); *State v. Schmidt*, 141 Wash. 660, 662-63, 252 P. 118 (1927); *State v. Tracey*, 142 Wash. 612, 618, 254 P. 234 (1927); *Collins v. Barmon*, 145 Wash. 383, 388, 260 P. 245 (1927); *State v. Galbraith*, 150 Wash. 664, 667, 274 P. 797 (1929); *Rich v. Campbell*, 164 Wash. 393, 394-95, 2 P.2d 886 (1931); *State v. Miller*, 168 Wash. 687, 688, 13 P.2d 52 (1932); *Washington v. City of Seattle*, 170 Wash. 371, 373, 16 P.2d 597 (1932); *State v. Patterson*, 183 Wash. 239, 240, 48 P.2d 193 (1935); *Catarau v. Sunde & D'Evers Co.*, 188 Wash. 592, 596-97, 63 P.2d 365 (1936); *Pub. Util. Dist. No. 1 of Douglas Cnty. v. Wash. Water Power Co.*, 20 Wn.2d 384, 393, 147 P.2d 923 (1944); *State v. Tharp*, 42 Wn.2d 494, 499, 256 P.2d 482 (1953); *Johnson v. Howard*, 45 Wn.2d 433, 445, 275 P.2d 736 (1954); *Snyder v. Gen. Elec. Co.*, 47 Wn.2d 60, 66-67, 287 P.2d 108 (1955); *State v. Farley*, 48 Wn.2d 11, 15, 290 P.2d 987 (1955); *Coats v. Lee & Eastes, Inc.*, 51 Wn.2d 542, 546, 320 P.2d 292 (1958); *State v. Griffith*, 52 Wn.2d 721, 732, 328 P.2d 897 (1958); *Murray v. Mossman*, 52 Wn.2d 885, 887, 329 P.2d 1089 (1958).

Over the appellant's resistance the court sustained the challenge.

*Beach*, 85 Wash. at 384. Cases like this cannot be used as reliable indicators of historical practice. Other decisions are unhelpful for other reasons: In 19 of them, peremptory and for cause challenges are barely mentioned,<sup>5</sup> and in 14 others, they are mentioned but no challenges were actually made, or at least none are identified in the court's opinion.<sup>6</sup>

Nevertheless, a striking pattern emerges if the Court looks past these unhelpful cases. The search revealed 15 cases from 1859 to 1959—  

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one hundred years of appellate decisions—in which juror challenges were

<sup>5</sup> See *State ex rel. Barnard v. Bd. of Educ. of City of Seattle*, 19 Wash. 8, 14, 52 P. 317 (1898); *State v. Yourex*, 30 Wash. 611, 619, 71 P. 203 (1903); *Elston v. McGlaulin*, 79 Wash. 355, 359, 140 P. 396 (1914); *State v. Duncan*, 124 Wash. 372, 373, 214 P. 838 (1923); *State v. Lindberg*, 125 Wash. 51, 55, 215 P. 41 (1923); *State v. Williams*, 132 Wash. 40, 46, 231 P. 21 (1924); *State v. Baker*, 150 Wash. 82, 98, 272 P. 80 (1928); *Strickland v. Rainier Golf & Country Club*, 154 Wash. 206, 210, 281 P. 491 (1929); *State v. Schafer*, 156 Wash. 240, 247, 286 P. 833 (1930); *Strickland v. Rainier Golf & Country Club*, 156 Wash. 640, 642, 287 P. 900 (1930); *State v. Patrick*, 180 Wash. 56, 58, 39 P.2d 390 (1934); *State v. Hunter*, 183 Wash. 143, 152, 48 P.2d 262 (1935); *Lienhard v. Nw. Mut. Fire Ass'n*, 187 Wash. 47, 54, 59 P.2d 916 (1936); *State v. Blackley*, 191 Wash. 23, 36, 70 P.2d 799 (1937); *State v. Morgan*, 192 Wash. 425, 429, 73 P.2d 745 (1937); *State v. Leuch*, 198 Wash. 331, 333, 88 P.2d 440 (1939); *State v. Carlsten*, 17 Wn.2d 573, 579, 136 P.2d 183 (1943); *State v. McCollum*, 17 Wn.2d 85, 149, 141 P.2d 613 (1943); *State v. Washington*, 39 Wn.2d 517, 519, 236 P.2d 1035 (1951).

<sup>6</sup> See *Clarke v. Washington Territory*, 1 Wash. Terr. 68, 70 (1859); *White v. Territory*, 1 Wash. 279, 284, 24 P. 447 (1890); *Marsh v. Degeler*, 3 Wash. 71, 72, 27 P. 1073 (1891); *State v. Bokien*, 14 Wash. 403, 410, 44 P. 889 (1896); *State v. Everitt*, 14 Wash. 574, 576, 45 P. 150 (1896); *State v. Lewis*, 31 Wash. 75, 77-78, 71 P. 778 (1903); *Abby v. Wood*, 43 Wash. 379, 382, 86 P. 558 (1906); *Colfax Nat. Bank v. Davis Implement Co.*, 50 Wash. 92, 93, 96 P. 823 (1908); *Cathey v. Seattle Elec. Co.*, 58 Wash. 176, 182, 108 P. 443 (1910); *State v. Elliott*, 68 Wash. 603, 605, 123 P. 1089 (1912); *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 481-82, 135 P. 233 (1913); *Newell v. Loeb*, 77 Wash. 182, 190-91, 137 P. 811 (1913); *State v. Lloyd*, 138 Wash. 8, 14, 244 P. 130 (1926); *State v. Collins*, 50 Wn.2d 740, 744, 314 P.2d 660 (1957).

conducted in open court. In these cases, there are either quotations from the record, descriptions of the action in trial court, or other circumstances that permit an inference<sup>7</sup> that the challenges were done in the open or were otherwise placed on the record. See *McAllister v. Wash. Territory*, 1 Wash. Terr. 360, 362-63 (1872) (on the record); *State v. Biles*, 6 Wash. 186, 187-88, 33 P. 347 (1893) (open court); *State v. Murphy*, 9 Wash. 204, 205-08, 37 P. 420 (1894) (open court); *State v. Wilcox*, 11 Wash. 215, 219-20, 39 P. 368 (1895) (judge examines juror in open court); *State v. Rutten*, 13 Wash. 203, 204-08, 43 P. 30 (1895) (open court); *Poncin v. Furth*, 15 Wash. 201, 202-05, 46 P. 241 (1896) (on the record and perhaps impliedly in open court); *State v. Royse*, 24 Wash. 440, 452-54, 64 P. 742 (1901) (open court); *State v. Boyce*, 24 Wash. 514, 519-20, 64 P. 719 (1901) (open court); *State v. Vance*, 29 Wash. 435, 459-64, 70 P. 34 (1902) (open court); *State v. Stentz*, 30 Wash. 134, 135-37, 70 P. 241 (1902) (open court); *State v. Cronney*, 31 Wash. 122, 126, 71 P. 783 (1903) (court examines jurors and rules on challenges in open court); *Denham v. Washington Water Power Co.*, 38 Wash. 354, 355, 80 P. 546 (1905) (open

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<sup>7</sup> Every effort was made to make inferences in an unbiased manner, but there may nevertheless be room for disagreement with respect to some of these cases. Likewise, many of the 67 cases classified above as "unclear" arguably give rise to an inference that challenges were done in open court, although none of those cases contain any indication that challenges were done in secret.

court); *State v. Kinney, et al.*, 45 Wash. 165, 167, 87 P. 1123 (1906) (open court); *State v. Jahns*, 61 Wash. 636, 637-38, 112 P. 747 (1911) (open court); *State v. Moser*, 37 Wn.2d 911, 917, 226 P.2d 867 (1951) (open court).

On the other hand, the search revealed only one decision in which juror challenges were conducted in secret. That decision did not come until 1942 in a case where the court permitted the attorneys to conduct for-cause challenges at sidebar. *Popoff v. Mott*, 14 Wn.2d 1, 9, 126 P.2d 597 (1942).

Taken as a whole, this examination permits only one conclusion to be drawn from the first one hundred years of appellate decisions on this topic: In the early part of the state's history, juror challenges were typically done in the open. In the view of amicus, this Court could rest its decision on this analysis alone. In an effort to further aid this Court, amicus has examined the other sources of "experience."

### 3. Federal Practice

Federal practice, unlike the cases discussed above, is equivocal on this point. It appears that some federal judges hear juror challenges in open court, while others do not. A Federal Judicial Center study from 1982 is instructive. *See* JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS, Federal Judicial Center, 14-18 (June

1982). In the study, several federal judges share their methods of hearing juror challenges in their courtrooms. *Id.* Some of these judges hear peremptory and for-cause challenges in open court, while others hear challenges at sidebar or using a similarly secretive procedure. *Id.*

Federal case law supports this diversity of practices. For example, the United States Supreme Court has acknowledged that, in some federal courts, juror challenges take place in open court. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Along these same lines, some federal courts have recognized that there is a limited right to be present for juror challenges that take place in open court. *Benitez v. Senkowski*, No. 97 CIV. 7819 (DLC), 1998 WL 668079, \*8 (S.D.N.Y. Sept. 17, 1998) (citing cases). On the other hand, other federal decisions assume that sidebar challenges do not violate the defendant's right to a public trial (although these decisions generally do not analyze the issue in any depth). *See, e.g., United States v. Reyes*, 764 F.3d 1184, 1189-93 (9th Cir. 2014).

More locally, there are no rules in the Western or Eastern Districts of Washington mandating that juror challenges be done in open court. *See* W.D. Wash. Local Rules LCR 47; E.D. Wash. Local Rules LCR 47. This suggests that federal district court judges in Washington are permitted to hear juror challenges in open court but are not required to do so.

Taken as a whole, it is difficult to conclude anything but that federal practice varies from court to court and judge to judge, and is, therefore, not especially useful in studying the experience prong.

#### 4. Local Procedural Rules

Local procedural rules are a different story: they provide excellent guidance on how Washington courts treat this issue. As noted above, local procedural rules are pertinent to any analysis of the experience prong. *See, e.g., Jones*, 175 Wn. App. at 100-01.

In Kitsap County Superior Court, “[a]ll peremptory challenges shall be exercised in open court.” KITSAP COUNTY SUPERIOR COURT LOCAL RULE 47(a)(5). This mandate is clear and does not permit judges or litigants to engage in secretive challenges. Likewise, “[c]hallenges for cause must be made when they are discovered”—in other words, during the course of voir dire, which is presumptively open. *See id.* 47(a)(4)(D).

Other counties have similar rules. In Jefferson County, “[p]eremptory challenges shall be open unless on motion or for good cause shown.” JEFFERSON COUNTY SUPERIOR COURT LOCAL RULE 38.2(c). In Kittitas County, peremptory challenges must be “exercised in open Court” even if they occur at sidebar. KITTTITAS COUNTY SUPERIOR COURT LOCAL RULE 47 (“Unless good cause is

show[n], all peremptory challenges shall be exercised in open Court at the side bar by marking the challenged juror's name on a form to be provided by the Court.”). In Asotin County, Columbia County, and Garfield County, the courts follow a rule under which jurors are struck directly from the jury box and replaced immediately, implying that challenges are made openly and are not secretive. ASOTIN, COLUMBIA, AND GARFIELD COUNTY SUPERIOR COURT LOCAL RULE 47, LOCAL CRIMINAL RULE 6.3.

Other counties have hybrid rules that, nevertheless, require some degree of openness. *See, e.g.*, BENTON AND FRANKLIN COUNTY LOCAL RULE 47 (describing a process that is largely open despite preserving secrecy where possible); FERRY, PEND OREILLE, AND STEVENS COUNTY LOCAL RULE 47 (requirement that challenges be noted “silently” implies that challenges cannot be made in chambers or otherwise outside of open court). In Grant County, the judge has discretion to direct that for-cause challenges take place “openly or at sidebar.” GRANT COUNTY SUPERIOR COURT CIVIL RULE 47, LOCAL CRIMINAL RULE 1.1. Still other counties attempt to preserve secrecy to the extent possible without compromising the open administration of justice called for in Article I, § 10. *See* COWLITZ COUNTY SUPERIOR COURT LOCAL RULE 47; YAKIMA COUNTY

SUPERIOR COURT LOCAL RULE 47. Only a handful of Washington courts encourage secrecy in any form, and even those do not specify that juror challenges should be completely closed—only that steps should be taken to ensure secrecy. *See* KLUCKITAT AND SKAMANIA COUNTY SUPERIOR COURT CIVIL RULE 9.VI (applies only to civil trials); SPOKANE COUNTY SUPERIOR COURT LOCAL RULE 47(e)(9) (“The exercise or waiver of peremptory challenges shall be noted secretly on the jury list.”).<sup>8</sup>

All in all, local superior court rules provide compelling evidence that Washington courts favor open juror challenges and disfavor off-the-record challenges.

## 5. Treatises

Discussion of juror challenge openness under Washington law is rare in the literature but, once again, the authority that does exist suggests that, at least in Washington, challenges are customarily made in open court. Specifically, the Washington Practice treatise on criminal law reports that “[p]eremptory challenges are exercised orally by counsel.” 13 WASH. PRAC. § 4111, 208 (2004). The same section of that treatise describes a juror challenge process that could only be conducted openly,

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<sup>8</sup> This case was tried in Spokane County.

and there is no mention of permissible secrecy. *Id.* at 207-09. This provides additional evidence that the ordinary practice in the state is to conduct juror challenges in open court.

#### 6. Pattern Jury Instructions

The Washington Pattern Jury Instructions are not especially helpful in analyzing the experience prong, but they do suggest that openness is at least partially mandatory. The Criminal Pattern Jury Instructions (and the documents attached thereto) do not mention whether juror challenges must be made in open court. *See, e.g.*, 11A WASH. PRAC. Appendix A at 762, Appendix B at 783. However, the Civil Pattern Jury Instructions do, at least to an extent. The materials appended to the civil instructions state that “[c]hallenges for cause should be made whenever the grounds for the challenge arise. The challenge and the court’s ruling must be made on the record...” 6A WASH. PRAC. Appendix C at 677. This further corroborates the notion that juror challenges are “traditionally subject to public review and discussion.” *Stert*, 181 Wn.2d at 606.

B. THE LOGIC PRONG STRONGLY SUPPORTS THE CONCLUSION THAT THE EXERCISE OF JUROR CHALLENGES MUST BE MADE IN A MANNER AUDIBLE TO THE DEFENDANT, THE MEMBERS OF THE VENIRE, AND THE PUBLIC

Washington's public policy regarding jury selection is set forth by statute:

(1) It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with chapter 135, Laws of 1979 ex. sess. to be considered for jury service in this state and have an obligation to serve as jurors when summoned for that purpose.

(2) It is the policy of this state to maximize the availability of residents of the state for jury service. It also is the policy of this state to minimize the burden on the prospective jurors, their families, and employers resulting from jury service. The jury term and jury service should be set at as brief an interval as is practical given the size of the jury source list for the judicial district. The optimal jury term is two weeks or less. Optimal juror service is one day or one trial, whichever is longer.

(3) A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

RCW 2.36.080.

Logic dictates that the courts of this state cannot discharge their duty to protect the right of jurors to participate in the civic process, to preserve the defendant's right to participate in jury selection, and to ensure that our justice system is free from any taint of bias when jury challenges

are made secretly, without justification on the record and, in some cases,  
without attribution to a particular party.

Public access plays a significant positive role in the functioning of jury selection even when it comes to peremptory challenges. Although the denial of a peremptory challenge may not always be an issue of constitutional dimension, it is, nevertheless, an important right. It has been said that the peremptory challenge

occupies “an important position in our trial procedures,” *Batson*, 476 U.S. at 98 [106 S.Ct. at 1724], and has indeed been considered “a necessary part of trial by jury,” *Swain v. Alabama*, 380 U.S. at 219 [85 S.Ct. at 835]. Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of “eliminat[ing] extremes of partiality on both sides,” *ibid.*, thereby “assuring the selection of a qualified and unbiased jury,” *Batson*, 476 U.S. at 91, 106 S.Ct. at 1720.

*United States v. Annigoni*, 96 F.3d 1132, 1140 (9th Cir. 1996) (alterations in original) (quoting *Holland v. Illinois*, 493 U.S. 474, 484, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990)).

This Court’s decision in *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326, *cert. denied*, 134 S.Ct. 831, 187 L.Ed.2d 691 (2013), confirms that the act of dismissing jurors is a critical part of a criminal trial and, if not undertaken in a fair and open manner, is fraught with potential for undermining trust in the judicial system. More specifically,

[t]he petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.

*Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491, *reh'g denied*, 392 U.S. 947, 88 S.Ct. 2270, 20 L.Ed.2d 1412 (1968)). Consistent with that critical function, jury selection must be free from improper discrimination by prosecutors, judges, and even defense counsel, because the harm of discrimination “extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.” *Batson*, 476 U.S. at 87; *see also Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (prohibiting racially motivated peremptory strikes by defense counsel). There can be little doubt that prosecutors and defense attorneys would be less likely to engage in impermissible discriminatory practices and behaviors if challenges are exercised in open court. This, in turn, encourages juror attendance and fosters the perceived and actual integrity of our justice system. In this way, “public access plays a significant positive role in the functioning” of our judiciary with respect to juror challenges. *See Sublett*, 176 Wn.2d at 73.

This Court has also recognized that discriminatory jury selection “undermine[s] public confidence in the fairness of our system of justice,” *Saintcalle*, 178 Wn.2d at 41-42 (lead opinion) (quoting *Batson*), and “offends the dignity of persons and the integrity of the courts.” *Id.* at 42. Since, as the Court emphasized in *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), open and accessible court proceedings serve as an essential check on potential misconduct and foster public confidence in the judicial process, the dismissal of jurors in closed proceedings undermines that confidence. While there is no evidence in these cases that potential jurors were dismissed because of race or other improper reasons, it is the very lack of public oversight during part of the selection process that defeats the public trial and public access guarantees and casts doubt on the integrity of the proceedings. In a closed proceeding, there is no way to tell if discrimination has occurred or not.

And, the failure to conduct these proceedings on the record makes appellate court oversight and correction unlikely. Some jurists have opined that in-chambers voir dire can protect the defendant’s right to a fair and unbiased trial by encouraging potential jurors to be more forthcoming in responding to voir dire. But that addresses only one, hopefully rare, concern—juror dishonesty. It does not protect the defendant if the honest

juror demonstrates bias but the trial court refuses to exclude him or her in a secret unrecorded proceeding.

If there is no record, there is little the defendant can do. Just last month, the Court of Appeals held that a defendant could not show that his public trial right was violated regarding for-cause juror challenges because he had not provided a sufficient record to demonstrate that a party actually challenged jurors for cause at sidebar. *State v. Jackson*, No. 44279-5-II, 2014 WL 7172230, \*1 (Wash. Ct. App. Dec. 16, 2014). The Court noted:

The sidebar conference was not recorded, and neither the trial court nor counsel ever stated on the record what had occurred in the conference. Counsel for both parties apparently made peremptory challenges, and the struck juror list shows which party made the challenges and in what order. The struck juror list also shows that two more jurors—jurors 10 and 32—were dismissed for cause. But the record does not disclose whether either party made for-cause challenges of those two jurors or whether the trial court merely announced that it had dismissed them *sua sponte*. Jackson was not present at the sidebar conference, although he was in the courtroom.

*Id.*

This demonstrates that it is impossible to properly review juror challenges if those challenges are conducted in secret and no record is preserved. Indeed, there is no way even to tell if error has been properly preserved for appeal. Ending secret, off-the-record sidebars will play a positive role in insuring that the defendant is included in every aspect of

jury selection. It will also play a positive role in insuring that the courts have discharged their duty to provide impartial jurors from a cross-section of the community.

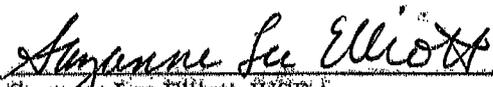
#### V. CONCLUSION

Based upon the forgoing analysis of "experience and logic," this Court must hold that the use of sidebar conferences, inaudible to the venire panel, the defendant, and any member of the public, to hear and decide challenges to prospective jurors—both peremptory and for cause—violates the state constitutional guarantee of open and public trials.

DATED this 12<sup>th</sup> day of February, 2015.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by email and by First Class United States Mail, postage prepaid, one copy of the foregoing brief on the following:

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