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**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I**

In re Personal Restraint Petition of  
ZAHID AZIZ KHAN,  
  
Petitioner.

NO. 66398-4-I  
PETITIONER'S SUPPLEMENTAL BRIEF

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**INTRODUCTION**

As requested by the Court, this brief addresses the application of *State v. Beskurt*, 176 Wn.2d 441, 293 P.3d 1159 (2013), and subsequent decisions to Mr. Khan's open and public trial claim.

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**ARGUMENT**

Zahid Khan's jury was selected after they were asked and answered questions in writing and orally. A sealed questionnaire supplemented voir dire. In other words, members of the public were only allowed access to part of the jury selection process. The questionnaire was never available to members of the public.

Although the right to a public trial is personal to Mr. Khan, he was never asked by counsel or the court if he wished to waive his right to a public trial through the use of a questionnaire. If asked, Mr. Khan would not have waived his right to an open and public trial.

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In his PRP, Khan framed two related claims: a violation of his right to an open and public trial through the use of confidential questionnaires without conducting a so-called *Bone-Club* hearing and without securing a waiver from Khan.

1           *Beskurt's Limited Direct Appeal Decision*

2           *Beskurt* did not hold, nor could it, that the right to an open and public trial is not  
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4 implicated by the use of “confidential jury questionnaires.”

5           Regardless of whether the right of access is premised on the Constitution or  
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7 common law, the openness of criminal trials has historically been recognized as an  
8 indispensable attribute of the Anglo-American legal system. *See Richmond Newspapers,*  
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10 *Inc. v. Virginia*, 448 U.S. 555, 569, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality  
11 opinion). Thus, “since the development of trial by jury, the process of selection of jurors  
12 has presumptively been a public process with exceptions only for good cause  
13 shown.” *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 505, 104 S.Ct.  
14 819, 78 L.Ed.2d 629 (1984). “The value of openness lies in the fact that people not  
15 actually attending trials can have confidence that standards of fairness are being  
16 observed ... [which] enhances both the basic fairness of the criminal trial and the  
17 appearance of fairness so essential to public confidence in the system.” *Id.* at  
18 508 (citation omitted). Both the state and federal constitutions and the common law  
19 recognize openness as the norm.  
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23           Clearly, the state and federal constitutions govern access to voir dire, which is  
24 traditionally and presumptively conducted in open court. So too, those constitutional  
25 protections extend to documents used to facilitate voir dire. Judicial documents are  
26 publicly accessible if they influence quintessential judicial functions.  
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1 All of jury selection is preemptively open. Closure is permitted, but only after the  
2 *Bone-Club* factors are addressed and satisfied. There can be no constitutional distinction  
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4 for the portion of jury selection conducted on paper.

5 Instead, *Beskurt* should be read much more narrowly. The *Beskurt* court noted:

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7 Nothing suggests the questionnaires substituted actual oral voir dire. Rather, the  
8 answers provided during oral questioning prompted, if at all, the attorneys' for  
9 cause challenges, and the trial judge's decisions on those challenges all occurred  
10 in open court. The public had the opportunity to observe this dialogue. The  
11 sealing had absolutely no effect on this process. The order was entered after the  
12 fact and after voir dire occurred; it did not in any way turn an open proceeding  
13 into a closed one.

14 The *Beskurt* court concluded that no closure occurred because the questionnaires  
15 were sealed after voir dire such that a member of the public had contemporaneous access  
16 to all of voir dire. *Id.* at 1162. Since there was no closure, the defendant's article I,  
17 section 22 right to a public trial was not violated. *Id.* at 1162–63. In short, “everything  
18 that was required to be done in open court was done.” *Id.*

19 This record in this case, a PRP where the court can remand for additional fact-  
20 finding, is much different. Here, the questionnaires were never available to the public—  
21 not before, during, or after trial. The questionnaires were not read aloud in court. As a  
22 result, part of voir dire was closed without any hearing preceding the closure. *Beskurt* is  
23 easily distinguished.  
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26 In addition, *Beskurt* did not raise nor decide whether the defendant waived his  
27 personal right to a public trial. That analysis is simple and is simply performed, here.  
28 Mr. Khan had a personal right to a public trial. That right was waived through the use of  
29 confidential, sealed questionnaires. There is no evidence in the record from which this  
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1 Court can find a voluntary waiver by Khan personally. Instead, the trial and post-  
2 conviction record read together unambiguously establishes both that Khan was never  
3 informed of his right and would not have waived it, if the proper inquiry had been made.  
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5 This Court can reach this issue and reverse by finding that Khan was harmed  
6 because of the involuntary “waiver” of a personal and fundamental constitutional right.  
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8 The State may argue that the use of confidential questionnaires requires a  
9 showing that any for-cause challenges were based on the jury questionnaires, as opposed  
10 to oral voir dire, which was open to the public. See *In re PRP of Yates*, 177 Wash.2d 1,  
11 296 P.3d 872 (2013). However, requiring such a showing of specific prejudice is  
12 contrary to “structural error” quality of an improper closure. If the federal constitution  
13 characterizes an improper closure as a structural error where showing of prejudice is  
14 never required, a state court cannot make a showing of prejudice required.  
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18 Instead, the only exception consistent with the constitution is to conclude that  
19 venirepersons who are never called to the jury box do not play any part in the voir dire  
20 or the trial. They fill out the questionnaire only as a prelude to their participation in voir  
21 dire. The questionnaire serves no function in the selection of the jury unless the person  
22 filling it out is actually called to be orally questioned. See *Copley Press, Inc. v. Superior*  
23 *Court*, 228 Cal.App.3d 77, 80, 278 Cal.Rptr. 443 (1991). However, copies of the jury  
24 questionnaires filled out by individuals who actually are “called to the jury box for oral  
25 voir dire,” *Copley Press*, 228 Cal.App.3d at 80, must be made available for public and  
26 press review during oral voir dire, and must be part of the record open to the public after  
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1 the conclusion of the trial. Because that did not happen here, a violation of the right to a  
2 public and open trial took place.  
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4 Likewise, because the Washington Supreme Court has repeatedly held that there  
5 are no *de minimis* trial closures, neither *Yates* nor *Beskurt* can be read to hold that only  
6 when a challenge for cause is based on “secret” information is the right to a public trial  
7 violated. The public interest in jury selection is not confined to challenges for cause.  
8 Otherwise, a jury could be selected and seated in private, as long as no challenges for  
9 cause were made (or where challenges for cause triggered public disclosure). Such a  
10 rule is not only absurd, it would conflict with the federal constitution.  
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### 13 CONCLUSION

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15 This Court should either reverse and remand for a new trial or should remanded  
16 for an evidentiary hearing.  
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18 DATED this 30<sup>th</sup> day of August, 2013.

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### 26 CERTIFICATE OF SERVICE

27 I, Jeffrey Ellis, certify that I served Charles Blackman, Deputy Prosecuting Attorney with  
28 a copy of the supplemental brief by sending him a copy by email on August 30, 2013.

29 August 30 2013//Portland, OR  
30 Date and Place

s/Jeffrey Ellis  
Jeffrey Ellis