

REC'D
JUL 02 2010
King County Prosecutor
Appellate Unit

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

**STATE OF WASHINGTON,
Respondent,**

V.

**JUAN ERAS - DUQUE,
Petitioner, Pro-Se.**

No. 64177-80-I

**SUPPLEMENT TO STATEMENT
OF ADDITIONAL GROUNDS
ALREADY FILED PURSUANT TO
RAP 10.10**

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COURT OF APPEALS
FILED UNIT

I. STATEMENT

I, Juan Eras-Duque have received the voir dire and opening statements in my case on June 21st, 2010¹. Summarized below are the supplemental additional grounds that were not addressed due to not receiving them until after I filed the Additional Grounds of King County Superior Court Case Number 08-1-04054-9 SEA. Appellant believes that the following (additional) issues have merit and should be addressed by this Honorable Court. Appellant's passion is that the Court will review this Supplement to his Statement of Additional Grounds for Review prepared by me when my appeal is considered.

¹ See Exhibit "A" Letter that accompanied voir dire and opening statements

II. SUPPLEMENTAL – GROUND ONE

PRIVATE QUESTIONING OF JURORS

FACTS

Prospective Juror # 29: Your Honor, it's a personal matter that I really want to talk about in private. 1RP 73.² Prospective Juror # 42: Okay. I would prefer to share that in private. THE COURT: Okay. We'll talk in private. 1RP 81.

The Court later stopped the voir dire and voiced this to the open court.

Okay. We're going to stop except for a couple of the jurors who I would ask to wait behind. And that's number 42, and Mr. Perkowsky number 29.

For everybody else, I'm going to ask you to go ahead and listen to Ms. Leuders about when to be back tomorrow morning. I want to remind you you can't talk about this case. When you go home and they want to know you you've been doing on jury duty, you just tell them that you met this judge that ordered you not to discuss your jury service until it's over. Tell them that as soon as it's over, you can talk about it all you want. Okay?

Keep yourself away from anything that reminds you of the topics in this case, newspapers articles, magazines, TV shows, anything that, for some reason makes you think about this case. Don't watch it or read it or let yourself be exposed to it.

Everybody have a real nice evening, and we'll look forward to seeing you tomorrow morning. Again, I'm going to ask everybody to leave the cards on your chairs, listen to Ms. Leuders, and be ready to come back tomorrow morning, except for number 42, and Mr. Perkowsky, number 29. Please stay where you are.

² 1 RP is Wednesday June 24, 2009; 2 RP is Thursday June 25, 2009.

(The following proceedings were held in open court outside the presence of the main jury panel.) **1RP 89.**

THE COURT: Number 42, can you just step into our jury room? We'll talk to you right after we've talked to number 29. Thank you very much.

(The following proceedings were held in open court in the presence of prospective juror number 29.)

THE COURT: Be seated, everybody.

All right. I really want to apologize to you, Mr. Perkowsky, because I think I mangled your name along the way. But tell me what the concern is about undue hardship.

PROSPECTIVE JUROR NUMBER 29: It's basically a financial hardship, your honor. I don't get paid for being here from work.

THE COURT: Okay.

PROSPECTIVE JUROR NUMBER 29: Going through financial difficulty.

THE COURT: No, that's sufficient, and go ahead and report to the main jury room tomorrow, but don't come back to my court because I'm excusing you from this panel.

PROSPECTIVE JUROR NUMBER 29: Okay.

THE COURT: Thank you. Let's bring number 42, Sherry.

PROSPECTIVE JUROR NUMBER 29: Thank you.

(The following proceedings were held in open court in the presence of prospective juror number 42.) **1RP 90-91.**

THE COURT: Hi. Come on in and seat yourself down anywhere at all.

PROSPECTIVE JUROR NUMBER 42: All right.

THE COURT: Tell me about the medical and physical condition that you didn't want to talk about in front of everybody else.

PROSPECTIVE JUROR NUMBER 42: Okay. I have a head disability called Asperger Syndrome.

THE COURT: Sure.

PROSPECTIVE JUROR NUMBER 42: And the main concern that I have is just how people will respond to me on the jury.

THE COURT: If you run into someone who's not courteous and helpful to you in any way, please notify Ms. Leuders. Okay? But that's definitely not a disqualification from being a very fine juror.

PROSPECTIVE JUROR NUMBER 42: yeah. I didn't mean to - -

THE COURT: No. Thank you for telling us about it.

PROSPECTIVE JUROR NUMBER 42: All right.

THE COURT: Thank you. And we'll see you tomorrow morning.

1RP 91.

PROSPECTIVE JUROR NUMBER 42: All right.

THE COURT: All right. Thanks.

(The following proceedings were held in open court outside the presence of the jury.) **1RP 92.**

Then later:

THE COURT: I am going to stop you.

All right. Finally we're going to take our real mid-morning break, folks. We took sort of an informal breather earlier.

What you want to do is leave your cards on your chairs. Leave any belongings you'd like to here. Leave any listening device here as well so everything's waiting for you when you came back. **2RP 63-64.**

Don't talk about this case, including your responses in the general questions or what the prosecutor's asking about. Listen to Ms. Leuders about when and where to be ready to come back.

I would ask number 13 and number 17 to wait, okay, while we excuse the rest of the panel to where ever Ms. Leuders is sending you.

Please rise for our panel.

(The following proceedings were held in open court in the presence of prospective juror number 17.)

THE COURT: Be seated, everybody.

Is the door closed? Thank you.

All right. Tell me what you think you know about this case. What came to mind? **2RP 64.**

That was the beginning of the private questioning of two prospective jurors. Later:

THE COURT: Thank you. We're going to excuse you to join the rest of the panel in this jury room behind me. I'll see you at the end of the break. Obviously don't talk about this discussion with anybody else.

PROSPECTIVE JUROR NUMBER 17: Okay.

THE COURT: Thank you. And Eileen, if you could bring in number 13.

(The following proceedings were held in open court in the presence of prospective juror number 13.) **2RP 66.**

Later:

THE COURT: Thank you. We're going to send you into the jury room behind you. We'll see you again after the break. Do not talk about what we talked about.

Please rise.

(The following proceedings were held in open court outside the presence of the prospective jury panel.)

THE COURT: And we'll see everybody at the end of the break.

2RP 68.

Then later at **2RP 88** prospective juror number 47 during questioning exclaimed to the court:

PROSPECTIVE JUROR NUMBER 47: I would prefer to discuss that with you and counsel and your honor - -

MR. MCCABE: And that's - -

PROSPECTIVE JUROR NUMBER 47: - - in chambers just because I don't want to taint the entire jury pool.

MR. MCCABE: And that is perfectly alright with me.

THE COURT: We'll talk about that at the next break. Thank you.

2RP 88.

When it came time to question the above juror the court said the following:

THE COURT: Thanks, everyone. We're going to take our break for lunch a little early so that you can hear from Mr. McCabe when we come back at 1:30.

Don't talk about this case, obviously, or research it in any way over the lunch hour. Feel free to leave any belongings you'd like behind. And remember to listen to Ms. Leuders about when to come back.

I am going to ask that juror number 47 remain behind. I'll excuse the rest of the panel.

Please rise for our panel.

(The following proceedings were held in open court in the presence of prospective juror 47 only.)

THE COURT: Be seated, everybody.

Okay. Mr. Holzapfel, tell me what your concern is about your ability to be fair. **2RP 106.**

THE COURT: Please rise for Mr. Holzapfel.

(The following proceedings were held in open court outside the presence of the jury.) **2RP 108.**

III. SUPPLEMENTAL ARGUMENT – GROUND ONE

TRIAL CLOSURE

- 1. HAS THE TRIAL COURT VIOLATED MR. ERAS-DUQUE'S CONSTITUTIONAL RIGHT TO OPEN AND PUBLIC TRIAL UNDER THE SIXTH AMENDMENT AND WASHINGTON CONSTITUTION ARTICLE I, § 22?**

Both article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee criminal defendants the right to a

public trial. **State v Brightman**, 155 Wn.2d 506, 514, 122 p.3d 150 (2005). In addition, article I, section 10 of the Washington Constitution secures the public's right to open and accessible proceedings. **State v Duckett**, 141 WA. App. 797, 803, 173 P.3d 948(2007) (justice in all cases shall be administered openly and without unnecessary delay) (quoting Wash. Const. Art. I, § 10). These provisions "assure a fair trial, foster public understanding and trust in the judicial system, and gives judges the check of public scrutiny." **Brightman**, 155 Wn.2d at 514. The guarantee of open criminal proceedings extends to jury selection, which is important "not simply to the adversaries but to the criminal justice system." **State v Coleman**, 151 WA. App. 614, 620(2009) (quoting **In re Pers. Restraint of Orange**, 152 Wn.2d 795, 804, 100 P.3d 291(2004)).

To determine whether the trial court violated Mr. Eras-Duque's right to a public trial, the court must decide whether the trial court's action amounted to a closure excluding the public. This case is much like the case in **State v Sadler**, 147 WA. App. 97(2008) (the court never asked anyone in the courtroom to leave the courtroom; nothing in the record shows that the trial court *affirmatively* excluded the public from the *Batson* hearing; and because counsel, the trial court, the defendant, two correctional officers, and the court reporter were present at the hearing). **Id.** at 112.

The case at bar is similarly situated. On three separate occasions the judge closed the courtroom. Once on the afternoon of the June 24th, 2009, **1RP 89-91**. Later, the next day **2RP 64**; and the third time was **2RP 106**. During the first closure Honorable Catherine Shaffer said the following:

Okay. We're going to stop except for a couple of the jurors who I would ask to wait behind. And that's number 42, and Mr. Perkowsky number 29.

For everybody else, I'm going to ask you to go ahead and listen to Ms. Leuders about when to be back tomorrow morning. I want to remind you you can't talk about this case. When you go home and they want to know you you've been doing on jury duty, you just tell them that you met this judge that ordered you not to discuss your jury service until it's over. Tell them that as soon as it's over, you can talk about it all you want. Okay?

Keep yourself away from anything that reminds you of the topics in this case, newspapers articles, magazines, TV shows, anything that, for some reason makes you think about this case. Don't watch it or read it or let yourself be exposed to it.

Everybody have a real nice evening, and we'll look forward to seeing you tomorrow morning. Again, I'm going to ask everybody to leave the cards on your chairs, listen to Ms. Leuders, and be ready to come back tomorrow morning, except for number 42, and Mr. Perkowsky, number 29. Please stay where you are.

(The following proceedings were held in open court outside the presence of the main jury panel.) **1RP 89.**

The court never asked anyone if there was any objection and clearly when a judge makes a request that the court is going to talk to them individually and the rest of you may go, people are going to get up and leave, even though she was generally speaking to the jury pool. This wording is clearly to the public and the venire members of the court. The court expressed clearly that those two jurors stay back and all of them to follow Ms. Leuders directions. Then all the jurors except No. 29 left the court room. **1RP 89.** He was questioned in private about a financial hardship being a juror would be. **1RP 90.** The court excused him and he left the courtroom. **1RP 90.** At this time the court then called in

number 42. **1RP 90.** Juror 42 told the court about his head disability called Asperger Syndrome. **1RP 91.** He was told that his disability was not excusable, and that he would make a fine juror. **1RP 91.**

The second time the private questioning took place was on June 25th, 2009. There the court said “I am going to stop you. All right. Finally we are going to take our real mid-morning break, folks. We sort of an informal breather earlier. I would ask number 13 and number 17 to wait, okay, while we excuse the rest of the panel to wherever Ms. Leuders is sending you. The following proceedings were held in open court in the presence of prospective juror number 17. **2RP 63-64.** He wanted to tell the court that he believes that he knows one of the witnesses in the case. **2RP 64-66.** He was then excused to join the rest of the panel in the jury room, and the clerk brought in number 13. **2RP 66.** This potential juror had the same reasoning for talking to the court; he believed that he knew someone named as a witness also. **2RP 66-67.** The court then told number 13 to go to the jury room, and that they will see him after the break. Then said: we’ll see everybody at the end of the break. **2RP 68.**

The third time the court closed the proceedings Honorable Shaffer said: “Thanks everyone. We’re going to take our break for lunch a little early . . . I am going to ask that juror number 47 remain behind.” **2RP 105-06.**

The following proceedings were held in open court in the presence of prospective juror 47 only. **2RP 106.** Here, the potential juror was concerned that he could not be fair and that he had known several county and city prosecutors and had dined with them and gone to Norm Malang breakfasts. **2RP 106-08.** He was excused for cause. **2RP 108.**

The court asked everyone to leave by telling people in the jury pool and the audience that they were breaking, but certain jurors were asked to stay behind, and the Court said:

1. Okay. We're going to stop except for a couple of the jurors who I would ask to wait behind. **1RP 89.**
2. I am going to stop you. All right. Finally we are going to take our real mid-morning break, folks. We sort of an informal breather earlier. **2RP 63-64.**
3. Thanks everyone. We're going to take our break for lunch a little early . . . I am going to ask that juror number 47 remain behind. **2RP 106.**

This clearly shows a closure of some kind by the language it presents overall to the courtroom. Further, when the general public hears the court state that they are going to stop and question someone in private, generally, people listen to the Judge and would leave as the jury was instructed to do. Especially so when the court instructs that they would like for a couple of jurors to wait behind after everyone has gone. This was done in violation of the State and Federal Constitution. There is no doubt that this was private questioning for the prospective jurors 13, 17, 29, 42, and 47. It is clear that the Court was speaking to the audience by her opening statement:

Okay. We're going to stop except for a couple of the jurors who I would ask to wait behind. And that's number 42, and Mr. Perkowsky number 29.

For everybody else, I'm going to ask you to go ahead and listen to Ms. Leuders about when to be back tomorrow morning . . .
. . . Everybody have a real nice evening, and we'll look forward to seeing you tomorrow morning.

1RP 89.

Court convened when prospective juror 42 is asked to step into our jury room. We'll talk to you right after we've talked to number 29. Thank you very much. **1RP 90.** When that conversation was finished, the court excused juror 29 to go to the main Jury room tomorrow, but don't come back to my court because I'm excusing you from this panel. **1RP 90.** Then Judge Shaffer said "let's bring number 42, Sherry." **1RP 90.** It ended with number 42 coming back the next day. **1RP 90.**

The same was repeated with prospective juror 13 and 17, same people, and same situation as juror 29 and 42, just a different day. **2RP 63-64.** However, this particular time the court used the following language:

"Be seated, everybody. 'Is the door closed?' Thank you."

2RP 64.

The Court talked to prospective juror 17 about the case. **2RP 64.** Then excused number 17 to join the rest of the panel in the jury room behind her. **2RP 66.** Then the clerk called the next juror and No. 13 entered the courtroom and the Court indicated to that Juror that there was an issue about knowing something about this case. Prospective Juror 13 said it is the name. **2RP 66-67.** The Court excused this juror after questioning by sending him into the jury room behind her. We'll see you again after the break. **2RP 68.**

Then the third closure was when prospective juror 47 asked to questioned in private and in chambers. **2RP 88.** The court then instructed:

"Thanks, everyone. We're going to take our break for lunch early . . . we come back at 1:30." I am going to ask that juror number 47 remain behind. (The following proceedings were held in open court in the presence of prospective juror 47 **only.**) (Emphasis added).

2RP 106.

These are all instances of trial closures. The last of this above outright tells this panel that “only” prospective juror 47 was in the courtroom besides the defendant, interpreter, and State and Defense counsel. **2RP 109**. Although these proceedings were said to be in open court, the language of the judge in telling people jurors and public alike that they are taking a break and they only want certain jurors left behind to be questioned is a form of closure. It is highly unlikely that the general public would stay behind after hearing the words the judge instructed to the courtroom. Clearly, this would cause a closure because the public would leave as the jurors left. It is safe to assume that this happened in this situation.

The above instances are clearly closure of the proceedings for juror privacy, thus violating the plainly articulated guidelines that every trial court must follow before it closes a courtroom to the public. **State v Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325(1995)** (In the *Bone-Club* case the Washington Supreme Court held that a courtroom may be closed to the public only when the criteria for closure identified in that case are satisfied). In **State v Strode, Washington Supreme Court Case No. 80849-0 (October 8, 2009)** is even more on point to this case due to being voir dire private questioning. There the trial court violated Strode’s right to a public trial by conducting a portion of jury selection in the trial judge’s chambers in unexceptional circumstances without first performing the required *Bone-Club* analysis. The Supreme Court held that this is a “structural error that cannot be considered harmless.” Therefore, remand for new trial is required. **State v Strode, Decision Oct. 2009 Case No. 80849-0.**

Again, the similarities of this case and the *Strode* case are unquestionably similar. In *Strode* the prospective jurors were asked questions outside of the presence of the other

jurors. The record in Duque's case is unclear as to who exactly were present during the private questioning other than the defendant and his counsel, the judge, prosecutor, transcriptionist, clerk of the court, and the juror being questioned. Like the Strode case the judge elicited this was in private. These addresses to the court and the members shows that the judge asked for privacy to question certain jurors.

These assumptions clearly point to three distinct courtroom closures short of saying it was closed. The venire panel is a public entity whether they are prospective jurors, visitors, or interested parties. If they are not present for portions of the trial when they are not actually "jurors" yet, what harm is it for them to be there. The public trial right applies to the evidentiary phases of the trial, *and to other adversary proceedings*. **State v Rivera, 108 WA. App. 645, 652-53, 32 P.3d 292 (2001) (quoting Ayala v Speckard, 131 F.3d 62, 69 (2nd Cir. 1997))**. The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of a trial; thus, "a defendant has a right to an open court whenever evidence is taken, during a suppression hearing . . . during voir dire," and during the jury selection process. **Rivera, at 653 (citing Press-Enter, Co., 464 US 501)**. A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts. See **Rivera, at 653** (neither public nor defendant had a right to be present when trial court addressed a juror's complaint about another juror's hygiene).

Even under **GR 16 (c) (1)** open access is presumed in courtroom photography and recording by the news media; any limitations on access "must be supported by reasons" found by the judge to be sufficiently compelling to outweigh that presumption.

The same is true for voir dire or any other proceeding in court. Under **State v Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995)**, there is a required inquiry to determine if the closure will unjustifiably interfere with the defendant's right to a public trial.

A. ACCESS TO WASHINGTON COURT PROCEEDINGS

Trial and court proceedings are public events, but in very rare circumstances they may be closed. In **Seattle Times Co. v Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982)**, the Washington Supreme Court set out circumstances and specific procedures that must be satisfied before closure and/or sealing of Washington court proceedings can be allowed. Those circumstances and procedures have been summarized as follows:

1. The proponent of closure or sealing must make some showing of the need for doing so, and where that need is based on a right other than an accused's right to fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method of curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Allied Daily Newspapers v Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993) (citing **Ishikawa, 97 Wn.2d at 37-39**). In **State v Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995)**, the court described these procedures as "a strict, well-defined standard" intended "[t]o assure careful, case-by-case analysis of a closure motion," and which

“clearly call [] for a trial court to resist a closure motion except under the most unusual circumstances.” **Id. at 258-59.**

The *Ishikawa* standards apply to both criminal and civil trials. See **Dreiling v Jain, 151 Wn.2d 900, 915, 93 P.3d 861 (2004); Cohen v Everett City Council, 85 Wn.2d 385, 388, 535 P.2d 801 (1975).**

The U.S. Supreme Court has consistently held that the public and press have a constitutional right to open court proceedings under the First and fourteenth Amendments.

In **Richmond Newspapers, Inc. v Virginia, 448 US 555, 573, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)**, the court recognized that criminal trials are presumptively open to the press and the public unless an “overriding” showing is made that “closure is required to protect the defendant’s superior right to a fair trial.” In **Globe Newspaper Co. v Superior Court, 457 US 596, 603, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982)**, the court reaffirmed *Richmond newspapers*, holding that “the press and general public have a constitutional right of access to criminal trials” and that this right may be denied only when it is shown that closure “is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.”

In **Press Enterprise Co. v Superior Court (Press Enterprise I), 464 US 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)**, The court held that voir dire proceedings are presumptively open to the public and press and that to overcome the presumption, a trial court “must”³ make specific findings that: (emphasis added).

³ **RAP 1.2(b)** The command “must” is used in the rules to emphasize that noncompliance will result “in more severe than usual sanctions. When a party fails to do what he or she “should,” the appellate court has wide discretion in fashioning a sanction. RAP 1.2(b), 18.9. When a party fails to do what he or she “must,” the failure is governed by RAP 18.8(b) or 1.2(b). **State v. Ashbaugh, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978).**

1. Closure is essential to preserve a higher value;
2. The order of closure is no broader than necessary; and
3. No less restrictive alternatives would adequately protect the specified interests.

In **Press Enterprise Co. v Superior Court (Press Enterprise II)**, 478 US 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), the court specifically applied these rules to preliminary hearings, allowing closure only if there is a “substantial probability that the defendant’s right to a fair trial would be prejudiced,” and required “specific, on the record findings,” demonstrating “closure is essential to preserve higher values and is narrowly tailored to serve that interest.” **Id. at 13-14.**

The Supreme Court has also recognized that the policies favoring open justice apply regardless of the nature of the proceeding, and that “historically both civil and criminal trials have been presumptively open.” **Richmond Newspapers, Inc.**, 448 US at 580 n. 17; see also **Id. at 559 (Stewart, J., Concurring)**; **Id. at 596 (Brennan, J., Marshall, J., concurring)**. A majority of the federal circuits follow this reasoning and found a First Amendment right to open proceedings and court records in a wide variety of civil cases.

The decisions of the U.S. Court of Appeals for the Ninth Circuit, which includes Washington and most of the western states, recognize this First Amendment right of access in a variety of contexts. See **U.S. v Brooklier**, 685 F.2d 1162 (9th Cir. 1982) (voir dire, suppression hearings, and transcript); **Associated Press v US District Court**, 705 F.2d 1143(9th Cir. 1983) (pre-trial hearings and documents); **CBS, Inc. v US District Court**, 765 F.2d 823 (9th Cir. 1985) (post trial memorandum on sentence reduction motion); **Seattle Times Co. v US district Court**, 845 F.2d 1513 (9th Cir. 1988) (Pretrial release proceedings and documents); **Oregonian Publ’g Co. v US District Court**, 920 F.2d 1462

(9th cir. 1990), cert. denied, 501 US 1210 (1991) (plea agreements and related documents). In each case the Ninth Circuit applied standards similar to those set out by the Supreme Court in **Press Enterprise I** emphasized that the proponent of closure must first show there is “a substantial probability” of “irreparable damage” to the defendant’s fair trial right if the proceedings are not closed – simply showing extensive publicity is not enough.

The record does not show that Mr. Duque waived this right, nor does it show that the trial court ever advised Duque of his right to a public trial or asked him to waive his right. Case law clearly and convincingly requires that the trial court ensure the defendant is aware of his right to public trial before waiver can occur. **Bone-Club, 128 Wn.2d at 261** (“[T]his court has held an opportunity to object holds no ‘practical meaning’ unless the court informs potential objectors of the nature of the asserted interests.” (quoting **Seattle Times Co. v Ishikawa, 97 Wn.2d 30, 39, 640 P.2d 716 (1982)**)).

The trial court’s affirmative speaking that the prospective jurors are speaking privately, without the jury/venire panel or public, has the same effect as excluding the public. These jurors were essentially isolated from the public eye, insulated to their matters being privately heard. The mere presence of counsel’s, court reporter, defendants, court staff, judge and security officer, and the juror who wanted his matters heard privately, by no means, demonstrates, that the public was entitled to attend.

A JURY SELECTION PROCESS IN A CRIMINAL TRIAL THAT IS CLOSED TO THE PUBLIC HARMS THE DEFENDANT AND TRIAL COURT’S FAILURE TO CONDUCT THE INQUIRY REQUIRED BY STATE V. BONE-CLUB, 128 Wn.2d 254(1995) IS A VIOLATION OF DUQUE’S’ CONSTITUTIONAL RIGHTS.

Generally, to protect these important rights, before a trial court may exclude the public from the courtroom, it must conduct the five-part *Bone-Club* inquiry and determine if the closure will unjustifiably interfere with the defendant's right to a public trial. **State v Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)**. If the proceeding is subject to the right to public trial, a trial courts failure to a conduct a *Bone-Club* inquiry before excluding the public "results in a violation of the defendant's public trial rights. **Id. at 515-16 (citing In re Pers. Restraint of Orange, 152 Wn.2d 795, 809, 100 P.3d 291 (2004)**. The defendant need show no prejudice resulting from a violation of this right; prejudice is presumed. **Bone-Club, 128 Wn.2d at 261-62 (citing State v Marsh, 126 Wash. 142, 147, 217 P. 705 (1923); State v Rivera, 108 WA. App. 645, 652, 32 P.3d 292 (2001)**. Furthermore, a defendant's failure to "lodge a contemporaneous objection" at the time of closure does not amount to a waiver of his right to a public trial. **Brightman, at 517 (citing Bone-Club, at 257)**. The remedy for a violation of article I, section 22 is remand for a new trial. **Rivera, at 652 (citing Bone-Club, at 261-62)**. Because the issue of whether Xxxxx's right to public trial has been violated is a question of law that this Court has established has joined with Division Three in disagreeing with the approach of Division One.

Division One takes a very different standpoint to what constitutes a violation of the right to a public trial. **State v Momah, 141 WA. App. 705, 171 P.3d 1064 (2007) review granted, 163 Wn.2d 1012 (2008)**.⁴ In that case, the trial court conducted individual questioning of certain jurors in chambers or in the jury room with the defendant, counsel,

⁴ The Supreme Court of Washington heard oral argument in this case on June 10, 2008 No. 81096-6, and decided on October 8, 2009 that Momah had waived this right due to counsel agreement to private questioning because of heavy publicity. *State v Strode*, No. 80849-0 was decided that same day on trial closure and found his right to be a structural error that cannot be deemed harmless.

and a court reporter present. *Id.* at 710-11. The court held that a defendant's right to a public trial is not triggered until the trial court explicitly orders the courtroom closed, citing *Brightman's* rule that "[o]nce the plain language of the trial court's ruling imposes closure, the burden is on the State to overcome the strong presumption that the courtroom was closed." *Momah*, 141 WA. App. at 714 (emphasis omitted) (alteration in original) (quoting *Brightman*, 155 Wn.2d at 516). But division One's analysis seems to foreclose any possibility that a defendant could prove that a courtroom was closed by other than an explicit ruling by the court. This is where the court joined Division three in strongly disagreeing with this approach. *State v Erickson*, 146 WA. App. 200, 207-08, 189 P.3d 245 (2008); see *State v Duckett*, 141 WA. App. 797, 809, 173 P.3d 948(2007); *State v Frawley*, 140 WA. App. 713, 720, 167 P.3d 593 (2007).

B. RIGHT TO OPEN AND PUBLIC TRIAL

(1) THE SIXTH AMENDMENT AND CONSTITUTIONAL ARTICLE ONE §§ 22 BOTH GUARANTEE CRIMINAL DEFENDANT'S THE RIGHT TO A PUBLIC TRIAL.

Article I, section 22 of the Washington Constitution ⁵ and the Sixth Amendment to the United States Constitution ⁶ both guarantee criminal defendants the right to a public trial. ⁷ *State v Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The right to an

⁵ Section 22 provides in relevant part:

In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

⁶ The Sixth Amendment provides in relevant: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

⁷ Article I, section 10 of the Washington Constitution gives the public and the press a right to open and accessible court proceedings. Section 10 provides: "Justice in all cases shall be administered openly, and without unnecessary delay." In *State v Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325(1995), our Supreme Court held that the same closure standards apply for both section 10 and section 22 rights.

open and public trial ensures that the defendant receives a fair trial, “in part reminding the officers of the court of the importance of their functions,” encouraging witnesses to come forward, and discouraging perjury. **Waller v Georgia**, 467 US 39, 46-47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); see **Brightman**, 155 Wn.2d at 514. Although the right to a public trial can serve the public or the defendant, the public’s right and the defendant’s right “serve complementary and interdependent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards.”⁸ **State v Bone-Club**, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

(2) A CRIMINAL DEFENDANT’S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL EXTENDS TO JURY SELECTION

Additionally, “it is well settled that the right to a public trial also extends to jury selection.” **Brightman**, 155 Wn.2d at 515 (citing **In re Pers. Restraint of Orange**, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (citing **Press-Enter. Co. v Superior Court of Calif.**, 464 US 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984))). “[A] closed *jury selection process* harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals.” **Brightman**, 155 Wn.2d at 515 (emphasis added) (citing **Orange**,

⁸ In **Waller**, the United States Supreme Court noted that “[t]he 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.*” **Waller**, 467 US at 46 (internal quotation marks omitted) (quoting **Gannett Co. v DePasquale**, 443 US 368, 380, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979)). As succinctly put by the California Court of Appeals, This benefit of public oversight or superintendence *accruing to a criminal defendant* as a result of the openness inherent in a truly public trial is largely lost if the only openness attending the trial proceedings (or any portion thereof) is to be found in an after-the-fact review of a cold written record of proceedings to which the public had no access. **People v Harris**, 10 Cal. App. 4th 672, 685, 12 Cal. Rptr.2d 758 (1992) (emphasis added).

152 Wn.2d at 812). In addition, “[t]he guaranty of open criminal proceedings extends to ‘[t]he process of juror selection’” because the jury selection process “‘is itself a matter of importance, not simply to the adversaries but to the criminal justice system.’” **Orange, 152 Wn.2d at 804** (emphasis added) (second alteration in original) (quoting **Press-Enter. Co., 464 US at 505**).

IV. CONCLUSION - ADDITIONAL GROUND ONE

MR. DUQUE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN OPEN AND PUBLIC TRIAL WHEN THE TRIAL COURT CONDUCTED “PRIVATE” VOIR DIRE WITHOUT FIRST CONDUCTING A *STATE V BONE-CLUB* ANALYSIS.

The trial court closed the courtroom during a portion of jury selection. In all, these private conversations and exclusions of the public or venire panel cover 11 pages of the transcript of voir dire. **1RP 89-92; 2RP 63-66; 2RP 105-08**. Prior to closing the courtroom, the trial court failed to conduct a hearing as required. There was not any explicit exclusion of the public, but by the judge’s own words and that of the prospective jurors wanting to talk to the court privately should help this court to see that it was closed to the public, and all of the above occasions constituted a courtroom closure without the required findings and considerations and this court should reverse and remand for new trial in accordance to those violations of Mr. Duque’s Constitutional rights to a public trial.

Respectfully submitted this 27th, day of June, 2010.

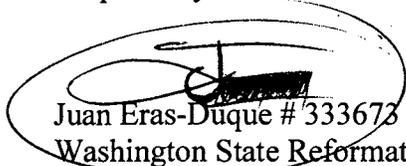

Juan Eras-Duque # 333673
Washington State Reformatory
Post Office Box 777
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EXHIBIT "A"

Exhibit "A"

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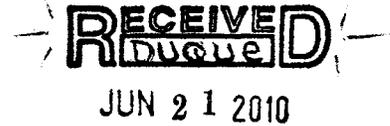
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June 18, 2010/18 de junio 2010

Juan Eras-Duque - 333673
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Monroe, WA 98272

RE: *State v. Eras-Duque*, COA No. 64177-8-I

Estimado Señor:

Encontrará adjunta copia del Informe Literal de los Procedimientos ("las transcripciones") de la selección del jurado (voir dire) y de las declaraciones iniciales (opening statements). Creo que ya tiene todas las transcripciones.

Atentamente,


Jennifer Winkler
Abogada

WASHINGTON COURT OF APPEALS
DIVISION ONE

No. 64177-8-0-I

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JUAN ERAS-DUQUE,
Defendant/Petitioner, Pro-Se.

AFFIDAVIT OF SERVICE
BY MAILING

I, Juan Eras- Duque, being first sworn upon oath, do hereby certify that I have served the following documents:

1. Supplemental to Statement of Additional Grounds for Review already filed Pursuant to RAP 10.10

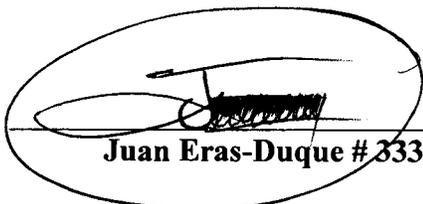
Upon:

Washington Court of Appeals
Division One
Attn: Richard D. Johnson, Court Administrator
600 University St.
One Union Square,
Seattle, WA 98101-1176

By placing same in the United States Mail by Institution Legal Mail process at:

Monroe Correctional Complex
Washington State Reformatory
PO BOX 777
16700 - 177th Avenue SE
Monroe, WA 98272-0777

On this 28th day of June, 2010.



Juan Eras-Duque # 333673

Affidavit pursuant to 28 USC 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980);
Affidavit sworn as true and correct under penalty of perjury and has full force of law and
does not have to be verified by Notary Public.

FILED
DIV #1
COURT OF APPEALS
STATE OF WASHINGTON
2010 JUL -2 PM 4:25