No. 86107-2

(King County Superior Court No. 10-2-41119-4 SEA)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN RINGHOFER

Appellant,

v.

LINDA K. RIDGE,

Respondent.

APPELLANT'S REPLY BRIEF

RICHARD M. STEPHENS, WSBA No. 21776

GROEN STEPHENS & KLINGE LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
Telephone: (425) 453-6206

MONIQUE A. MILES, ESQ.
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 742-1823

Attorneys for Appellant, Martin Ringhofer

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INTRODUCTION

This appeal involves a case of first impression concerning whether a state statute and court rule, RCW 2.36.072(4) and GR 18(d) respectively, can deprive a member of the public of his constitutional right to access court records without the Court first requiring the person seeking closure of the records to rebut the public's presumptive right to access court records by presenting facts that would justify denial of access.

Prior to Appellant Martin Ringhofer's (Ringhofer) suit against Respondent Linda K. Ridge (Court Administrator), he requested access to King County court records, namely, pretrial juror qualification information under the Public Records Act (PRA). CP 91. The PRA applies to government records, but not to court records. The Court Administrator flatly denied his PRA request stating that the PRA did not apply to court records and that access to such information is governed by GR 31(k), GR 18(d), and RCW 2.36.072(4) (a state statute and two court rules governing the use of court records). CP 99.

Eight months after Ringhofer filed suit, the Court Administrator conceded that there was a strong presumption in favor of access to court records, but argued that the presumption did not apply to the records sought by Ringhofer because the records in question were not court records and only court records are subject to the presumption. CP 134.

These records cannot be both court records, not open under the PRA, and something other than court records, unprotected by constitutional and common law rights of access. The trial court's grant of summary judgment was improper for the following reasons: the records at issue are court records for purposes of the constitution and common law, the Court Administrator failed to meet her burden of rebutting the presumptions in favor of the public's right to access court records; and Ringhofer met his burden of proving that he is eligible for mandamus, injunctive, and declaratory relief.

Ringhofer respectfully requests that the court resolve this issue of law and grant him access to the pretrial juror qualification information.

ARGUMENT

I.
THE RECORDS RINGHOFER SEEKS ARE RECORDS THAT ARE SUBJECT TO THE OPEN COURT PROVISIONS OF THE FIRST AND SIXTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE WASHINGTON STATE CONSTITUTION

A. Ringhofer Seeks Court Records

The Court Administrator argues that the information about potential jurors solicited by the Court, received by the Court, analyzed by the Court, used for selecting potential jury pools in Court proceedings and maintained by the Court are nonetheless something other than court records. The constitutional presumptions of openness of court records

should not be circumvented by an unreasonably narrow definition of "court record."

It appears that the Court Administrator's primary argument is that this information is not contained in a "court record" because it does not relate to a particular and solitary court proceeding, as does the more personally invasive questioning during *voir dire*. Such *voir dire* records are clearly open to the public, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), but they relate to a single particular trial.

This limitation of public access only to information from a "single particular trial," as opposed to potential jury pools, frustrates the policies and purposes inherent in the constitutional presumptions of openness in the operation of the courts. For instance, if information about prospective jury pool participants were outside the constitutional protection of openness of the state courts, the public would not be able to access records that might show whether certain groups of peers were being excluded from jury pools.

While the requested records may shed light on proper or improper voter registration, they also shed light on the communities from which potential jurors are solicited. If in fact, in the entire membership of certain neighborhoods are being excluded from potential service as jurors, that clearly would have an impact on the administration of justice. *See Duren*

v. Missouri, 439 U.S. 357 (1979). Similarly, if groups of persons were reporting themselves ineligible to serve as jurors when they are in fact eligible, that too has an impact on the administration of justice. The Court should reject the Court Administrator's argument that openness of court proceedings and records only extends to processes that are tied to particular cases.

The only case cited by the Court Administrator as an example where records (although presumably kept within the corners of the Court house walls) were not court records related to a judge's personal working notes is *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003). However, there are other reasons why a judge's notes should not be made available to the public.

> [M]ost judges keep personal bench notes to remind them of aspects of their cases. A compilation of the judge's past sentences serves as nothing more than a memory aid. As such, files of a particular judge's past sentences supplement the judge's thought processes in the determination of a reasonable, consistent sentence within the sentencing guidelines. The Wisconsin Court of Appeals, addressing a similar attempt to access the sentencing court's handwritten notes, held that "even though the personal notes of a court are work related, they are nevertheless a voluntary piece of work completed by the trial court for its own convenience and to facilitate the performance of its duties."
> . . . .
> **Disclosure of such notes would intrude upon a judge's subjective thoughts and deliberations** and would actively discourage the judge from giving advance thought to a particular sentence.

Beuhler, 115 Wn. App. at 919-20 (citations omitted) (emphasis added).

The Court Administrator also relies heavily on this Court's recent decision in *Tacoma News, Inc., v. Cayce*, 172 Wn.2d 58, 256 P.3d 1179 (2011), regarding public access to proceedings that were at one time within the courthouse, but the records were maintained elsewhere. Resp. Br. at 22. In *Cayce*, this Court found that a deposition was not open to the public despite it having occurred at the courthouse, because a deposition is not used in the court's judicial process (unless and until submitted by one of the parties). The Court Administrator asserts that the Court has established a requirement that the "place and process have historically been open" and "public access 'plays a significant positive role in the function of the particular process.'" 172 Wn.2d at 72-73 (citations omitted).

The Court Administrator asserts that Ringhofer has not proven the "place" and "process" elements because the "place" is the people's residences where they fill out the form and the process is filling out the form and returning it to court. Resp. Br. at 22-23.

The "place and process" test may have no applicability to the present case because of the unique facts of a deposition occurring in the courthouse. Nevertheless, the "place" at issue is not where the records originated, but where the records are maintained. Here, the prospective

juror information is maintained by the court. Deposition transcripts are typically maintained by counsel for the parties. But, if the deposition transcript is filed with the court, it becomes a public record. The same is true with the prospective juror information—once it is submitted to the court, it should be treated as a court record.

Additionally, the deposition process at issue in *Cayce* may or may not have any relevance to the administration justice. It is not uncommon for a deposition to never be used by the court for any purpose. The selection of the pool of potential jurors, however, is a process which is critical to the administration of justice.[1]

The jury summons is a necessary link in the chain of procedures needed to impanel a fair and impartial jury since the pool of jurors directly influences the trials that follow. RCW 2.36.095; *see Duren v. Missouri*, 439 U.S. 357 (1979). A critical part of the King County Superior Court jury summons is the Juror Qualification Form, where the potential juror must circle a reason for disqualification pursuant to RCW 2.36.072(4) if one or more applies, and must also make note of his or her new address if it is different from the address to which the summons was mailed. The

[1] That Appellant seeks to provide information to those involved in the maintenance of voter registration records does not determine whether this information is open to the public. Given there is no suggestion that Appellant intends to use the information for nefarious reasons, his reasons for seeking the information should not bar the availability of this information. The decision in *Cayce* rightfully did not depend upon the reason that the Tacoma News wanted this information or wanted to write on this subject.

superior court is solely responsible for processing the jury summons, maintaining juror information, and processing the responses executed (or lack thereof) from jurors.

Contrary to the Court Administrator's argument, *State v. Mendez*, 157 Wn. App. 565, 238 P.3d 517 (2010), *petition for review granted and remanded*, 257 P.3d 1113 (2011), supports Ringhofer's argument that both the phrases, "in connection with" and "related to" are broad and encompass documents maintained by the Court, such as juror qualification information or jury questionnaires. Resp. Br. 13, 14; *Mendez,* 157 Wn. App. at 581-82 (stating that the billing records of attorneys who were appointed to represent a criminal defendant, were to be considered court records subject to public disclosure because they were maintained by the court in a case management system that is related to a judicial proceeding); *see also Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 777, 246 P.3d 768 (2011) (citations omitted) (emphasizing that documents that are part of judicial activity are documents governed by court rules regarding disclosure).

Preliminary juror qualification information directly influences judicial proceedings. As such, these records are court records subject to the constitutional and open court provisions contained in the First and

Sixth Amendments to the U.S. Constitution, Article I, Section 10 of the Washington Constitution, and the common law.

B. GR 31 supports the conclusion that the record are court records because of the statutory canon *expresio unius est exclusio alterius* in regard to GR 31 (c)(4)'s definition of "court records."

Expresio unius est exclusio alterius (the express mention of one thing excludes all others) is a canon of statutory construction, which provides that items not on a list are assumed not to be covered by the statute. *State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343, 347 (2003). However, sometimes a list in a statute is illustrative, not exclusionary. This is indicated by an inclusionary word such as "includes" or "such as."

In light of the canon, the trial court erred in accepting the Court Administrator's argument that the records requested were not court records when it dismissed this action because the definition of what is <u>not</u> a "court record" provided in the latter part of GR 31(c)(4) is expressly limited to two narrow categories of documents: (1) the working notes and papers of a judge and (2) documents that are not actually maintained by the court, although the court has access to them. The juror qualification information does not fit under either of these narrow categories.

Furthermore, the documents expressly listed in GR 31(c)(4) as examples of what <u>are</u> court records, contain inclusive wording, namely

"includes, but is not limited to." Therefore the pretrial juror qualification information does fall under the court record category.

II.

NO PROCEDURAL OBSTACLES EXIST TO RESOLUTION OF THIS CASE

Ringhofer moved for summary judgment under CR 56 because this case depends entirely upon the interpretation of law. The Court Administrator does not dispute that summary judgment was not appropriate in this case.

However, the Court Administrator argues that Ringhofer is not entitled to summary judgment because he cannot meet the high burden required for mandamus, injunctive relief or declaratory relief. Resp. Br. 10, 11. Nevertheless, the Court Administrator did not argue, either in the Superior Court or in this Court, that any particular procedural route was improper in this case. Hence, Ringhofer will not repeat the elements for mandamus, injunctive relief and declaratory relief

However, the Court Administrator's argument on the "high burden" relies on *Walker v. Munro,* 124 Wn.2d 402, 410, 879 P.2d 920 (1994), where this Court dismissed the case and refused to issue a writ of mandamus because the law in dispute had not yet been enacted and the state officers' duties were discretionary. Resp. Br. 10. The case essentially contained a ripeness problem. The Court Administrator also

cites *Brown v. Owen*, 165 Wn.2d 706, 725, 206 P.3d 310 (2009). This Court dismissed the case and refused to issue a writ of mandamus mandating that the lieutenant Governor and President of the Senate forward a Senate bill to the House of Representatives because the officers' duties were discretionary and the matter concerned a political question.

In contrast to *Walker* and *Brown*, in the present case, both RCW 2.36.072(4) and the constitutional provisions are well-established. A writ of mandamus could issue because the constitutional question is ripe to be decided. The Court Administrator has a nondiscretionary duty under the United States and Washington Constitutions and common law to provide access to court records to members of the public who properly seek them, and who have constitutional and common law rights to access the court records, such as Ringhofer. The Court Administrator has failed to perform such duties in compliance with the law.

III.

THE PRESUMPTIONS OF OPEN ACCESS TO COURT RECORDS CANNOT BE OVERCOME IN THE ABSENCE OF A FACTUAL BASIS FOR DENYING ACCESS

The limitations contained in RCW 2.36.072 (4) and GR 18(d) [2] cannot operate to deprive the public of constitutional rights before the

[2] Both state that information provided to the court for preliminary determination of qualification for jury duty may only be used for the term such person is summoned and may not be used for another purpose.

Court Administrator meets her mandatory burden to overcome the constitutional[3] presumptions favoring the public right of access to court records, described below:

A. First Amendment Presumption

"Jury questionnaires are presumptively open under the First Amendment." *State v. Coleman*, 151 Wn.App. 614, 619 n.6, 214 P.3d 158 (2009), *appeal after remand*, 160 Wn. App. 1047 (2011) (holding that the jury list was subject to public disclosure because there were no findings rebutting the presumption of openness). Moreover, the **entire jury selection process** is presumptively open to the public. *Id.* at 620. This presumption is also supported by federal Supreme Court precedent. *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501 (1984) (the *voir dire* of prospective jurors must be open to the public under the First Amendment).

In this case, the Court Administrator did not meet any burden of proof for rebutting the presumption in favor of openness. She failed to provide any factual basis for an overriding interest that would support a conclusion that closure is both essential to preserve higher values and is narrowly tailored to serve that interest.

[3] The Supremacy Clause contained in Article VI, Clause 2 of the United States Constitution, establishes that the U.S. Constitution, U.S. Treaties, and Federal Statutes are "the supreme law of the land." The clause mandates that all courts follow federal law when a conflict arises between federal and state law.

B. Sixth Amendment Presumption

The Court Administrator did not address the Sixth Amendment in her brief to the Court. The U.S. Supreme Court held that the Sixth Amendment right to a public trial can be invoked by members of the public under the First Amendment. *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721, 723, 175 L.Ed.2d 675, 679 (2010). Voir dire information is presumptively open to the public. *Id.* at 723.

The Court of Appeals applied *Presley* when it recognized the public's presumptive right to an open proceeding. *State v. Paumier*, 155 Wn. App. 673, 685, 230 P.3d 212 (2010), *review granted*, 169 Wn. 2d 1017, 236 P.3d 206 (2010) (finding that the trial court violated the public's right to an open proceeding after it failed to consider alternatives to closure and did not make appropriate findings explaining why closure was necessary before shutting out the public). The Court of Appeals also recognized that the Sixth Amendment is intended to foster public understanding and trust in the judicial system and to apply the check of public scrutiny on judges. *Coleman,* 151 Wn.App. at 619-620 (public's right to an open proceeding applied to *voir dire*).

In the present case, the trial court did not consider any alternatives to closure or make appropriate findings explaining why closure was

necessary before prohibiting Ringhofer from accessing the requested court records.

C. Article I, Section 10 of the State Constitution Presumption

The State Constitution expressly guarantees that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Art. I, § 10. The Court interpreted this section as clearly establishing a right of access to court proceedings. *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30, 36, 640 P.2d 716 (1982). This Court also held that the public's constitutional right to the open administration of justice extends beyond the taking of a witness's testimony at trial **to pretrial proceedings**. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The Court of Appeals also held that Article I, Section 10 gives the public and the press a right to open and accessible court proceedings. *State v. Vega*, 144 Wn. App. 914, 916-17, 184 P.3d 677 (2008).

Again, neither the Court Administrator, nor the trial court, established facts that would support reasons the juror qualification records should be withheld to protect other interests.

D. Common Law Presumption

In response to Ringhofer's argument that a standard principle of statutory construction calls for statutes that are in derogation of the common law to be construed narrowly, the Court Administrator argues

that RCW 2.36.072(4) and GR 18(d) are clear in that they prohibit release of the information. In taking that position, the Court Administrator gives the Court little choice but to determine whether the application of the rule and statute were constitutional in the context of this case.

The common law right should be given greater weight, given the constitutional underpinnings of that right. Both the United States Supreme Court and this Court recognize a common law right to inspect court records, based on the importance of a citizen's desire to keep a watchful eye on the workings of public agencies and a publisher's intention to publish information concerning the operation of government. *United States v. James*, 663 F. Supp. 2d 1018, 1020 (W.D. Wash. 2009) (recognizing a strong presumption in favor of the common law right of the public to inspect and copy judicial records); *Nast v. Michels,* 107 Wn.2d 300, 303-304, 730 P.2d 54 (1986) (decision was in response to an argument that there was both a common law and a constitutional basis for the right to review court records); *In re Application of National Broadcasting Co.,* 653 F.2d 609, 612 (D.C. Cir. 1981) (recognizing that the existence of the common law right of the public to access court records serves the important function of ensuring the integrity of judicial proceedings).

A party seeking to overcome the presumption in favor of access to court records must provide specific facts to support findings justifying compelling reasons that outweigh the general history of access and the public policies favoring disclosure. *Foltz v. State Farm Mut. Auto. Ins. Co.,* 331 F.3d 1122, 1135 (9th Cir. 2003). The Court Administrator has given no such compelling reasons.

Whether GR 18(d) or RCW 2.36.072(4) are unconstitutional on their face or unconstitutional in every factual scenario is beyond the scope of this case. To the extent RCW 2.36.072(4) and GR 18(d) are interpreted to prohibit disclosure of the information sought by Ringhofer, such interpretation would conflict with the court's interpretation of Article I, Section 10 as protecting and ensuring the right of public access to court records and court proceedings. *Coleman*, 151 Wn.App. at 620.

In this case, the Court Administrator failed to meet her duty to articulate compelling reasons supported by specific facts that outweigh the general history of access and the public policies favoring disclosure. The trial court erred in allowing the Court Administrator to avoid engaging in the thorough legal analysis required by the First Amendment and Sixth Amendment of the U.S. Constitution; Article I, Section 10 of the Washington Constitution; and the common law.

Ringhofer urges this Court to affirm that the First Amendment and Sixth Amendment of the U.S. Constitution; Article I, Section 10 of the Washington Constitution; and the common law, operate to allow him access to the pre-trial juror qualification records where the records show that no attempt was made by the Court Administrator to support factual findings that disclosure should not be allowed.

IV.

RINGHOFER'S REQUEST FOR DISCLOSURE PROMOTES IMPROVEMENT OF THE JUDICIAL SYSTEM OR JURY SELECTION PROCESS

The Court Administrator implies that Ringhofer did not seek the disclosure of the records for a reason involving the monitoring or improvement of the judicial system or jury selection process. Rep. Br. 23-25. This conclusion ignores the record in this case. Appellant has argued in his Petition, Motion for Summary Judgment, and Brief in Opposition to The Court Administrator's Motion for Summary Judgment--that the release of the requested juror qualification information will encourage judicial transparency and the integrity of the juror selection process. CP 2; CP 64; CP 111.

By its very nature, monitoring juror qualification responses by comparing them with the state voter database would yield information that might prove valuable to the court if people are falsely disqualifying

themselves to get out of jury service. Only through the effective screening of potential jurors are fair and impartial juries impaneled.

But as discussed above, Ringhofer's personal reasons for accessing the information, whether it be judicial transparency or accuracy of voter registration, should be irrelevant to whether he has a constitutional right to access these records.

CONCLUSION

This case presents original legal issues that concern the constitutionally protected rights of persons who seek to access juror qualification records maintained by the courts. Restrictive application of GR 18(d) and RCW 2.36.072(4) without first requiring the challenger to rebut the constitutional and common law presumptions, stands in contravention of well-established United States Supreme Court precedent and the precedent of this Court.

Ringhofer was deprived of his constitutional rights when the lower court denied him access to the court records he requested based on limiting provisions in RCW 2.36.072(4) and GR 18(d), without first requiring the Court Administrator to submit facts to rebut the constitutionally-based presumptions favoring the public's access to pre-trial court records.

Ringhofer urges this Court to reverse the superior court decision and declare that RCW 2.36.072(4) and GR 18(d) do not overcome his constitutional right to access juror qualification information.

RESPECTFULLY submitted this 14th day of November, 2011.

GROEN STEPHENS & KLINGE LLP

By: *s/ Richard M. Stephens*
Richard M. Stephens, WSBA #21776

Monique A. Miles, Esq.
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
202-742-1823

Attorneys for Appellant

DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am an employee of Groen Stephens & Klinge LLP of Bellevue, Washington.

On November 14, 2011, a true and correct copy of the foregoing document was placed in envelopes, which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington, for delivery to the following persons:

Thomas Kuffel
King County Prosecuting Attorney
CIVIL DIVISION
King County Administration Bldg.
500 4th Ave., Ste. 900
Seattle, WA 98104-2316
thomas.kuffel@kingcounty.gov

Rob McKenna
Attorney General of Washington
PO Box 40100
Olympia, WA 98504-0100

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 14th day of November, 2011 at Bellevue, Washington.

s/ Linda Hall
Linda Hall