NO. 86107-2

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

SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN RINGHOFER,

Petitioner,

v.

LINDA K. RIDGE,

Respondent.

BRIEF OF RESPONDENT LINDA K. RIDGE

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A. ISSUES PRESENTED

1. Does a member of the public have a right under GR 31 and at common law (to the extent different from GR 31) to access information that individuals receiving a jury summons self-report to the Superior Court about their qualifications to serve as jurors when dissemination of that information is prohibited by GR 18(d) and RCW 2.36.072(4)?

2. Do GR 18 and RCW 2.36.072 deny state and federal constitutional public trial and access to justice rights when the information requested is unrelated to a judicial proceeding?

B. FACTS AND LEGAL BACKGROUND

1. Nature of the Case

This case involves an action brought by Martin Ringhofer (Petitioner) for an order directing the King County Superior Court, through Linda Ridge, its deputy chief administrative officer (Respondent), to provide him with written information that individuals receiving a jury summons self-report to the court about their qualifications to serve as jurors. Petitioner wants to compare this information against the qualification information in voter registration records -- the qualifications for jury service overlap to a degree with the qualifications to vote -- to determine whether individuals who are not qualified to serve as jurors are also improperly registered to vote.

RCW 2.36.072 and General Rule (GR) 18 instruct the Superior Court to obtain qualification information from individuals, signed under penalty of perjury, and use it to "preliminarily determine" whether they are qualified for jury duty prior to their appearance at the court identified in the summons. The statute and court rule specifically restrict further dissemination of these responses except to notify the county auditor of a change of address for non-delivery of a summons. Presumably, the restriction is intended to encourage people to be honest in their disclosures. To date, the Legislature and the Supreme Court (in its rulemaking capacity) have chosen not to make this qualification information more broadly available.

Accordingly, Petitioner is not entitled to receive it notwithstanding the election-related policy objectives he wishes to promote.

2. Framework for Jury Source List and Master Jury List Creation

Annually, as authorized by chapter 2.36 RCW and GR 18, the Washington State Department of Information Services provides the King County Superior Court with a jury source list. The Department of Information Services creates the list by merging the list of King County registered voters and the list of licensed drivers and identicard holders who reside in the County. GR 18(b) (defining jury source list as the

product of merging these lists); RCW 2.36.010(8) (same). The methodology for merging the lists is set forth in an appendix to a Supreme Court Order that is published at the end of GR 18, and includes criteria for addressing known or suspected duplicated names. *See* GR 18 (appendix to Supreme Court Order).

From the jury source list, the Superior Court may create a smaller, master jury list, from which prospective jurors may be summoned. RCW 2.36.055; GR 18 (appendix to Supreme Court Order). The statute also permits courts to forego creating a separate master jury list, and to simply summon jurors off the larger jury source list. *See* RCW 2.36.010(9) (master jury list may be an exact duplicate of the jury source list). In either case, the designation of jurors summoned for jury duty must be random. GR 18 (appendix to Supreme Court Order) (designation of persons on master jury list to be summoned "shall be random"); RCW 2.36.065 (selection of master jury list and jury panels shall be "fair and random").

3. Process for Preliminarily Determining Juror Qualifications

In Washington state, a person is deemed competent to serve as a juror, unless that person:

(1) Is less than eighteen years of age;
(2) Is not a citizen of the United States;

(3) Is not a resident of the county in which he or she has been summoned to serve;
(4) Is not able to communicate in the English language; or
(5) Has been convicted of a felony and has not had his or her civil rights restored.

RCW 2.36.070.

Pursuant to GR 18(d) each superior court is required "to establish a means to preliminarily determine by written declaration signed under penalty of perjury by each person summoned, the qualifications set forth in RCW 2.36.070 of each person summoned for jury duty prior to the person's appearance at the court to which the person is summoned to appear." *See also* RCW 2.36.072(1) (same, except the statute allows for the declaration to also be made by electronic signature).

If the declarant responds that he or she does not meet one or more of the statutory qualifications, that person is to be excused from appearing in response to the summons. RCW 2.36.072(4). A sample copy of a jury summons issued by King County Superior Court containing the qualifications section is included as Attachment A to this brief. *See also*, CP 179-80.

4. Limitations on the Use of Preliminary Juror Qualification Information

Both GR 18 and RCW 2.36.072 expressly limit the use of self-reported juror qualification information:

> Information so 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 any other purpose*. Provided, *that the court*, or its designee, *may report* a change of address or nondelivery of summons of persons summoned for jury duty to the county auditor.

(emphasis supplied). GR 18(d); RCW 2.36.072(4).[1]

5. Petitioner's Request for "Non-Juror" Information

On February 22, 2010, Mr. Ringhofer submitted a public records request to the King County Department of Judicial Administration ("DJA")[2] for juror qualification information self-reported under RCW 2.36.072 and GR 18. CP 91. He asked for the names and addresses of prospective jurors who were disqualified from jury service in King County between January 1, 2008 and December 31, 2009 due to age, citizenship, residency, inability to communicate in the English language, felony conviction, or any other reason for disqualification. CP 91.

Petitioner advised that his request was "for information on persons who were 'disqualified' from jury service, thus they are not properly 'jurors' whose names and addresses would be barred from disclosure under the Court General Rules." (Emphasis supplied). CP 91.

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[1] For the Court's convenience, copies of GR 18 and RCW 2.36.072 in their entirety are included as Attachments B and C to the end of this brief.

[2] Under the King County Charter, the department of judicial administration is an executive branch agency administered by the Superior Court clerk, who is appointed and serves at the pleasure of a majority of the Superior Court judges in the county. The

Teresa Bailey, deputy director for DJA, advised Petitioner that the Public Records Act, chapter 42.56 RCW, does not apply to the courts. CP 32. She also informed Petitioner that while DJA keeps the master jury list, the preliminary juror disqualification process is administered by the King County Superior Court, not DJA. CP 32. She then referred him to Respondent, a Superior Court employee, and provided him with Respondent's contact information. CP 32.[3]

Eight months later, on October 16, 2010, Petitioner sent an e-mail to Ms. Ridge for records, which he again characterized as "non-juror" information. Petitioner sought:

(1) "a list of the names and addresses of 'non-juror information' who were disqualified from jury service in the King Count[sic] jurisdiction for the time period . . . from January 1, 2008 to December 31, 2009, for any of the five reasons listed in RCW 2.36.070[;]"

(2) "the names and addresses of non jurors who were disqualified from jury service from the time period ranging [during the above time period] because of having indicated other reasons for disqualification[;]" and

(3) "the individual's stated reasons from self-disqualification, and provide the total number of potential jurors on your master lists for 2008 and 2009 and the number of summons you sent to prospective jurors for both years."

CP 37-38; 96-97.

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department performs the statutory and court rule functions of the Superior Court clerk. King County Charter § 350.20.20.

Petitioner explained to Respondent that he was concerned about voting by unauthorized individuals and that the purpose for his request was to use the "non-juror" information to educate the public on voting enforcement issues:

> Requestor has good cause for requesting this non-juror information. Requestor is concerned about unauthorized individuals influencing statewide elections. He wants to use the non-juror information to educate the public on voting enforcement issues.
>
> Disclosure of the information is in the public interest because it will significantly contribute to public understanding of the operations and activities of the government, in regards to voter enforcement. The data should be released to promote government transparency, so that it can be use[d] to educate the public about the real concern of unauthorized voting.

CP 37; 96.

Respondent wrote Petitioner back and explained that GR 18(d) and RCW 2.36.072 restricted her from releasing the requested juror disqualification information. CP 40-41; 99-100. In her letter she quoted the language from both the statute and court rule that information concerning the qualification requirements in RCW 2.36.070 "'may only be used by the court for the term such person is summoned and may not be used for any other purpose.'" CP 40; 99.

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[3] On February 25, 2010, Petitioner sent a second request to DJA clarifying his earlier request and, again, Ms. Bailey referred him to Respondent. CP 35.

Though Respondent was prohibited by the statute and court rule from providing Petitioner with specific information on disqualified individuals, in an effort to be responsive she did provide him with data on the total number of persons summoned and a list showing the number of disqualified individuals in each RCW 2.36.072 category during the specified time period. CP 42; 101. Respondent also informed Petitioner that the master jury source list containing only names and addresses was available for public viewing in the Superior Court clerk's office, citing GR 31(k) (access to master jury source list). CP 40; 99.

Respondent received no further correspondence from Petitioner.

6. Procedural History

On November 29, 2010, Petitioner filed a "Petition For Writ Of Mandate[,] Complaint For Declaratory Relief And Petition Under GR 31." CP 1-8. (*Ringhofer v. Ridge*, Cause No. 10-2-41119-4 SEA). Petitioner asserted that he had a right to access preliminary juror qualification information based on the common law right of access to court records, the open courts and public trial rights expressed in Article 1, Section 10 of the Washington Constitution, and the First and Sixth Amendments to the U.S. Constitution, and the right to access juror information in GR 31(j) (access to juror information) and GR 31(k) (access to master jury source list). *Id.*

Because Respondent is a King County Superior Court employee, the case was assigned to a Snohomish County Superior Court judge, the Honorable Ronald Castleberry. The parties filed cross-motions for summary judgment. CP 17-62; 63-83.

In his summary judgment materials, Petitioner submitted a 6-page declaration with attached exhibits explaining at great length his concerns and beliefs on the subject of ineligible persons participating in state and local elections, and the steps he has taken to investigate voter fraud in Washington State. CP 84-109. In this election-related narrative, Petitioner made two passing references to his goal of promoting "the integrity of the juror selection process" and "judicial transparency". CP 85, lns 4 and 7-8.[4]

On May 10, 2011, the trial court granted Respondent's motion for summary judgment and denied Petitioner's cross-motion for summary judgment. CP 166-68. *See also* CP 184

This appeal follows. CP 169.

[4] Under the Washington Constitution, all persons: [1] eighteen years of age and older, [2] who are citizens of the United States, and [3] who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except [4] convicted felons and persons declared mentally incompetent, are entitled to vote. Article VI, Section 1; Article VI Section 3. Of these criteria, [1], [2] and [4] directly overlap with the juror qualification requirements in RCW 2.36.070.

C. ARGUMENT

1. Standard of Review and Summary of Argument

An appellate court reviews a summary judgment *de novo*, engaging in the same inquiry as the trial court. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006) (citing *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005)). Summary judgment is proper when the pleadings, affidavits and other documentation on file, taken together, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c).

As to his request for mandamus and injunctive relief, Petitioner's burden is high. Mandamus is an extraordinary remedy. *Walker v. Munroe*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). A petitioner seeking a writ of mandamus must show that (1) the party subject to the writ has a clear duty to act; (2) the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law; and (3) the petitioner is beneficially interested. RCW 7.16.160, .170. Further, the duty to act must be ministerial in nature rather than discretionary. *Brown v. Owen*, 165 Wn.2d 706, 725, 206 P.3d 310 (2009).

Petitioner's request for declaratory relief regarding the constitutionality of a statute or court rule also involves a high burden. It is well-established that when analyzing the constitutionality of a statute, a court must begin with the presumption that a legislative act is constitutional, and the party challenging the constitutionality has the burden of proving it unconstitutional beyond a reasonable doubt. *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.2d 1 (2010).

As explained more fully below, Petitioner cannot meet the high burden required for mandamus, injunctive or declaratory relief, nor is he entitled to relief under the common law, as codified in GR 31 ("Access to Court Records"). As a matter of law, the information received by the Superior Court and used to preliminarily determine juror qualification is not a "court record" under GR 31(4)(c) because it does not relate to any particular judicial proceeding.

However, even if such "non-juror" data (to use Petitioner's term), fell within the definition of a court record, GR 31(c)(8) provides that access is not available when restricted by state law or court rule. State law (RCW 2.36.072(4)) and court rule (GR 18) specifically prohibit the dissemination of juror qualification information.

The same result occurs under the common law right to access court records -- to the extent such a right exists outside of the access principles stated in GR 31. Both the Legislature and Supreme Court have restricted access to the information Petitioner seeks.

Neither do RCW 2.36.072 and GR 18 infringe upon Petitioner's state and federal constitutional rights to access judicial proceedings. These rights do not extend to preliminary information that is not related to or maintained in connection with a proceeding.

Accordingly, Respondent did what the law required when she declined Petitioner's request for juror disqualification information. The trial court properly dismissed this action with prejudice and this Court should do the same.

2. Petitioner Does Not Have a Common Law Right to Access Preliminary Juror Qualification Information.

a. The Requested Information is not a Court Record under GR 31.

In Washington, the common law right to access court records is codified in GR 31 ("Access to Court Records"). The rule reflects the policy of our courts "to facilitate access to court records as provided by article I, section 10 of the Washington State Constitution." GR 31(a). It broadly states that "[t]he public shall have access to all court records

except as restricted by federal law, state law, court rule, court order, or case law." (emphasis added). GR 31(d)(1).

The term "court records" includes documents, information, exhibits, calendars, dockets, orders, judgments and numerous other records. GR 31(c)(4). However, GR 31 limits the definition of "court records" to only those documents that are "in connection with" or "related to" a "judicial proceeding." GR 31(c)(4)(i) and (ii).[5]

It is undisputed that the preliminary determination of juror qualification was not connected with or related to any judicial proceeding. At the time the determination is made, the persons responding have not yet been assigned to sit in the jury pool for any particular case. Indeed, they have not even reported to the courthouse, nor are they required to since, by law, they are ineligible to serve.

Furthermore, the two cases cited by Petitioner validate Respondent's point. *See State v. Mendez*, 157 Wn. App. 565, 580-82, 238

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[5] GR 31(c)(4) states in its entirety:

> "Court record" includes, but is not limited to: (i) Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any index, calendar, docket register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding. Court record does not include data maintained by or for a judge pertaining to a particular case or party, such as personal notes and communications, memoranda, drafts, or other working papers, or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered into the records.

P.3d 517 (2010), *petition for review granted and remanded*, 172 Wn.2d 1004 (2011), and *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 776, 246 P.3d 768 (2011) .

Mendez held that in a motion to unseal under GR 15, billing records of attorneys appointed to represent an indigent criminal defendant are "court records" under GR 31(c)(4) because they were "maintained by the court **in connection with a judicial proceeding**." (emphasis added). *Id.* at 582 . *Yakima County* held that documents maintained by the judiciary, such as attorney invoices submitted to the trial court for reimbursement at public expense for attorney fees, experts and other associated costs of defense, and worksheets or spreadsheets maintained by a Superior Court administrator's office to track such payments are not subject to the Public Records Act. *Id.* at 776.

The common thread in both of these cases is not the type of documents held by the court, but the fact that the records were held in connection with a judicial proceeding -- specifically, a capital murder case. In contrast, the preliminary qualification responses submitted under GR 18 and RCW 2.36.072 have no connection with any particular judicial proceeding. The only reason they are required at all is because the statute and court rule require that an administrative process be established to

screen out persons who by law are ineligible to serve. The preliminary juror information therefore does not qualify as a "court record."

b. Petitioner's Common Law Access Cases are Inapposite.

In addition, the common law access cases cited by Petitioner -- both to the trial court and in his briefing here -- are easily distinguishable from the present case. All involve court records that are connected to or related to a specific, pending judicial proceeding. At issue in *United States v. James*, 663 F.Supp. 1018 (W.D.Wash. 2009), was a plea agreement and sentencing memorandum. *In re Application of National Broadcasting Co.*, 653 F.2d 609 (D.C.Cir. 1981) and *Nixon v. Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed. 2d 570 (1978), concerned video and audiotapes introduced into evidence and played to the jury during criminal trials. *See also, In re McClatchy Newspapers, Inc.,* 288 F.3d 369 (9th Cir. 2002) (letters submitted by defendant to reduce sentence); *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003) (discovery, summary judgment motion, and other documents filed in the case); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006) (deposition testimony and documents attached to dispositive motions); *Hagestand v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995)(copies of pleadings filed in civil case); *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665 (9th Cir. 2010) (documents attached to a

cross motion for summary judgment); *Phoenix Newspapers v. U.S. District Court*, 156 F.3d 940 (9th Cir. 1998) (sealed transcripts from closed hearings in criminal case).

Furthermore, while Petitioner correctly cites *Nast v. Michels*, 107 Wn.2d 300, 305-07, 730 P.2d 54 (1986) for the proposition that there is a common law right of access to court case files, that decision does not hold that all judicial branch records are subject to disclosure under the common law. On the contrary, in *Beuhler v. Small*, 115. Wn.App. 914, 918, 64 P.3d 78 (2003), the Court of Appeals held that a judge's notes regarding his sentencing decisions, although work related, were not subject to disclosure under the PRA or the common law right of access.[6] *See also* GR 31(c)(4) (court record does not include judge's personal notes and communications, memoranda, drafts, or other working papers relating to a particular case or party).

The preliminary juror qualification information, therefore, is not subject to disclosure under the common law.

c. Even if a Court Record, GR 31(d) Prohibits Disclosure.

Even assuming for argument's sake that Petitioner is correct and preliminary juror qualification responses are court records, GR 31(d)(1)

[6] Notably, the Court also held that the judge's work file did not constitute a case record or transcripts of criminal proceedings or exhibits that would trigger the

exempts from public access court records "restricted by ... state law [and]court rule[.]" Here, GR 18 and RCW 2.36.072 mandate that juror qualification information may only be used for the purpose of preliminarily determining juror qualification and may not be used for any other purpose. *See* GR 18(d); RCW 2.36.072(4). The lone exception is for address-related data that may (not "must") be reported to the county auditor, the chief elections officer in the county. RCW 2.36.072(4); GR 18(d). Disseminating juror qualification information to Petitioner to conduct research on voting registration records is not allowed under the statute or rule.

On several occasions, the Legislature has considered and rejected proposals to make preliminary juror qualification information more broadly available, such as for use in determining voter registration eligibility. Proposed bills were introduced in 2008, 2010 and 2011 that would have amended RCW 2.36.072 by requiring Superior Courts to send the county auditor and the secretary of state a list of jurors disqualified due to age, citizenship, residency, and felony conviction. *See* H.B. 3159, 60th Leg., Reg. Sess., Sec. 1 (Wash. 2008); S.B. 6527, 61st Leg., Reg. Sess. (Wash. 2010); and S.B. 5855, 62nd Leg., Reg. Sess. (Wash. 2011). CP

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presumption of openness under article I, section 10 of the Washington Constitution. *Buehler*, 115 Wn.App. at 920-21.

44-54. Had it been adopted, the 2011 proposed bill would have specifically required Superior Courts to create and maintain a list of all disqualified prospective jurors and make it open for public inspection.[7] CP 54.

Finally, Petitioner argues for application of the principle that statutes in derogation of the common law are to be strictly construed. Petitioner's Opening Brief at 17. However, the common law does not allow one to simply ignore statutory text. Unambiguous statutes are to be read in conformity with their obvious meaning, without regard to earlier common law. *City of Federal Way v. Koenig,* 167 Wn.2d 341, 351, 217 P.3d 1172, 1176 (2009) (citing *State ex rel. Madden v. Pub. Util. Dist. No. 1,* 83 Wn.2d 219, 222, 517 P.2d 585 (1973), *cert. denied*, 419 U.S. 808, 95

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[7] Sponsored by Senator Roach, Senate Bill 5855 would have made the following amendment to RCW 2.36.072:

> (4) ... Information provided to the court for preliminary determination of statutory qualification for jury duty may only be used ((~~for the term such person is summoned and may not be used for any other purpose, except that~~)) by the court, or designee, ((~~may~~)) to report a change of address or nondelivery of summons of persons summoned for jury duty to the county auditor, and to create and maintain the list described in subsection (5) of this section.
>
> (5) The court shall create and maintain a list of names of all prospective jurors who have been disqualified in accordance with RCW 2.36.070 for the following reasons: (a) Is less than eighteenyears of age; (b) is not a citizen of the United States; (c) is not a resident of the county in which he or she has been summoned to serve; or (d) has been convicted of a felony and has not had his or her civil rights restored. The list shall be open for public inspection, and the court shall provide to the office of the secretary of state and apporpriate county election official on a monthly basis the name of any declarant who does not meet the qualifications set forth in RCW 2.36.070(1) through (3) and (5).

S.Ct. 20, 42 L.Ed.2d 33 (1974)). There is no ambiguity in the scope of GR 18 or RCW 2.36.072.

d. Other Election Statutes do not Expand Disclosure of Preliminary Juror Qualification Information

Notwithstanding the Legislature's clear direction that juror qualification information "not be used for any other purpose", Petitioner cites a number of election statutes that he argues demonstrate a legislative intent that juror qualification information be used to clear the voter registration rolls of non-citizen voters. Petitioner's Opening Brief, 21-22. On closer review, these statutes demonstrate no such legislative intent.

The cited statutes all relate to voter registration and the requirement that voters be U.S. citizens before registering to vote. The existence of these statutes demonstrates that the Legislature has taken steps to try to ensure that only U.S. citizens register to vote, not that it expects juror qualification information to be used to check the voter rolls. *See e.g.*, RCW 29A.08.010(1) (potential voters must sign an oath declaring that they are citizens); RCW 46.20.155 (vehicle licensing agents shall ask voter registration applicants if they are U.S. citizens).

Petitioner also argues that RCW 29A.08.125 evidences legislative intent that the juror disqualification information be used by the Secretary

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CP 54.

of State to investigate the voter registration rolls. The statute does not stand for that proposition.

RCW 29A.08.125(5) requires the statewide voter registration database to be coordinated with other government databases within the state, including the department of corrections, the department of licensing, the department of health, the county auditors, and the administrative office of the courts. Petitioner appears to argue that reference to the administrative office of the courts ("AOC") is a reference to the juror disqualification information.

In fact, the Legislature did not require AOC to create a database of juror disqualification information and there is no evidence that AOC has actually created such a database. Nor has the Legislature required the Secretary of State to perform any type of list maintenance on the statewide voter registration database with respect to juror disqualification information. Had it intended to do so, it would have instructed the Secretary of State to perform the same comparison for disqualified jurors as required for felons, duplicate voters, and deceased persons. *See* RCW 29A.08.520 (comparison of voter database to list of felons required twice per year); RCW 29A.08.610 (ongoing list maintenance required to detect voters with multiple registrations); RCW 29A.08.510 (comparison of voter database to list of deceased persons required).

In short, no statute commands the Secretary of State to cross-check juror qualification information self reported to a Superior Court, and no statute commands a Superior Court to forward juror qualification information to the Secretary of State. On the contrary, in order to promote honest disclosures, the Legislature has instructed Superior Courts not to use such information for any purpose other than making a preliminary determination of juror qualification. Petitioner's desire for broader disclosure in this area is a policy, not a legal issue.

3. Access to Preliminary Juror Qualification Information Does Not Implicate Federal or State Constitutional Rights to Access Judicial Proceedings and Court Records.

Petitioner lastly argues that if RCW 2.36.072 and GR 18(d) indeed prohibit his access to the preliminary juror disqualification information, they are unconstitutional. This fallback argument also fails.

a. The First Amendment

The First Amendment to the U.S. Constitution gives the public and the press a presumptive right of access to criminal jury trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). This right has been extended to include many aspects of the judicial process. *See, e.g. Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct.2735, 92, L.Ed.2d 1 (1986) (" *Press-Enterprise II*")

(finding First Amendment right of access to transcripts of pretrial suppression hearings); *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (" *Press-Enterprise I* ") (voir dire examination of potential jurors); *United States v. Simone*, 14 F.3d 833 (3rd Cir. 1994) (post-trial hearings to examine allegations of juror misconduct).

As the Supreme Court recently stated, however, "[t]his right is not all inclusive[.]" *Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, ___, 256 P.2d 1179, 1187 (2011). "Whether the right exists at a particular stage of the proceedings or to a given class of documents generally depends on whether there has been a historic tradition of accessibility ('whether the place and process have historically been open') and whether the traditional public access 'plays a significant positive role in the functioning of the particular process,' for example, in the way that determinations that public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system." *Id.* (quoting *Press-Enter.Co.*, at 8, 10, 106 S.Ct. 2735).

Petitioner cites to no evidence under the first prong of the test that the "place" and "process" in this case have historically been open to the public. The "place" is the location where the person receiving the summons fills out the qualification declaration, presumably in most cases

the person's residence. The "process" here is completing the declaration and returning it to the Superior Court. Once that occurs, the process is completed as the disqualified person, by law, cannot sit on a jury.

There is also no basis for concluding that public access would play a particularly significant positive role in the actual functioning of the process for preliminarily juror disqualification. Unlike a judicial proceeding, in which public access serves to ensure that the judge is following established proceedings and deviations, if any, are known, the judge has no role in the preliminary qualification process. Indeed, at the point the process is completed, the declarant has not even been assigned to a case. Although Petitioner makes a passing reference to promoting judicial transparency, it is important to recognize that Petitioner himself is not seeking the preliminary juror qualification information in order to observe or check the judicial system. He has clearly stated that he wants the information to check the state voter registration system.

The cases relied on by Petitioner also do not support his argument that GR 18 and RCW 2.36.072 are unconstitutional (let alone unconstitutional beyond a reasonable doubt). In general, courts have only extended the First Amendment qualified right to open proceedings in criminal trials to juror questionnaires used by parties during the jury selection process. *See State v. Coleman*, 151 Wn.App. 614, 619, 214 P.3d

158 (2009) (recognizing qualified right to access juror names, addresses and questionnaires); *State v. ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 781 N.E.2d 180 (2002). As these cases explain, however, written jury questionnaires are the functional equivalent of oral questioning that occurs during *voir dire* examination, a part of the criminal trial that is presumptively open to the public. *Id.* ("[t]he fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import.") (quoting *Copley Press, Inc. v. Superior Court*, 228 Cal.App.3d 77, 89, 278 Cal.Rptr. 443 (1991)).

Petitioner erroneously equates the preliminary qualification information sent in by persons receiving a jury summons, with the jury questionnaires used by attorneys as part of actual jury selection in a specific, pending case. Unlike juror *voir dire*, the juror qualification information is not related to any judicial proceeding, and is only required to be retained by the court for a limited time and solely for administrative purposes. Indeed, according to Petitioner's own request and his declaration in the trial court, the information is "non-juror" data that he intends to use, not to monitor the fairness of any jury trial or apply the check of public scrutiny on judges, but to compare it against election records. The emphasis Petitioner now places on the goal of promoting

judicial transparency is completely dwarfed by the election-related purposes he announced in his declaration.

Accordingly, Petitioner is not entitled to relief as a matter of law under the First Amendment.[8]

b. Article I, Section 10

Article I, section 10 of the Washington Constitution states, "[j]ustice in all cases shall be administered openly, and without unnecessary delay."[9] This provision guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). It applies to trials, pretrial hearings, transcripts of pretrial hearings or trials, exhibits introduced at pretrial hearings and voir dire proceedings. *Seattle Times v. Eberharter*, 105 Wn.2d 144, 155, 713 P.2d 710 (1986); *State v. Duckett*, 141 Wn.App. 797, 173 P.3d 948 (2007) (citing *State v. Easterling*, 157 Wn.2d 167 174, 137 P.3d 825 (2006); *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) (*voir dire* proceeding). The right of access also applies to summary judgment and other dispositive motions

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[8] Petitioner basically makes the same argument under the Sixth Amendment right to a public trial. Although jury *voir dire* is part of a public trial, *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721, 175 L.Ed.2d 675, 679 (2010), this case does not involve *voir dire* and there is no "trial" at the point in time that the declarants return preliminary juror responses to the Superior Court.

[9] A related provision, article I, section 22, guarantees criminal defendants the right to a speedy, public trial.

that adjudicate the substantive rights of the parties, like a full trial. *Dreiling*, 151 Wn.2d at 910, 918 (motion to terminate shareholder derivative action with the scope of article I, section 10).

Conversely, our appellate courts have declined to find a right of access in matters that are not trials or pretrial hearings or do not involve documents introduced into the court record. *Tacoma News, Inc. v. Cayce*, *supra* (transcript of deposition to preserve testimony taken in a courtroom with the trial judge present was not subject to disclosure under article 1, section 10 because the deposition was mere discovery -- it never became part of the decision-making process).

In *Eberharter*, likewise, this Court found no public right of access to judicial proceedings relating to the criminal investigatory process, such as search warrant affidavits in unfiled criminal cases. *Eberharter*, 105 Wn.2d at 156-57. S*ee also*, *Buehler v. Small,* 115 Wn. App. 914, 921, 64 P.3d 78 (2003) (no constitutional right to access a judge's notes as they were not part of any case record and did not constitute transcripts of criminal proceedings or exhibits).

In this instance, the preliminary juror disqualification information requested by Petitioner is obviously not part of a trial, motion or pre-trial proceeding. Indeed, it is not even related to a "court case." At the time

jurors are preliminarily disqualified, they have not yet been assigned to sit in the jury pool for a particular case.

Conversely, the article I, section 10 case law cited by Petitioner involves cases which have proceeded well past the preliminary determination of juror eligibility. *State v. Coleman*, 151 Wn.App. at 621, discussed above, involved jury questionnaires completed by members of the venire during the voir dire process in a criminal proceeding. *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006) involved the trial court's decision to close a pretrial hearing when considering a codefendant's motion to sever. *State v. Vega*, 144 Wn.App. 914, 916, 184 P.3d 677 (2008), *review denied*, 165 Wn.2d 1024 (2009), held that the defendant's public trial right under article I, section 22 was not violated when the trial court questioned individual jurors apart from the other jurors about matters that may taint the other jurors. Lastly, *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982), reversed a trial court decision to close a hearing in a criminal trial.

All of these cases relate to activities occurring within a specific pending criminal proceeding. None purport to extend the reach of the constitutional right of access to preliminary information that is not related to or maintained in connection with a criminal proceeding. Accordingly,

there is no conflict between the state constitution and GR 18 and RCW 2.36.072.

4. GR 31(j) Does Not Apply to Preliminary Juror Disqualification Information.

Although not now mentioned by Petitioner, he argued below that the trial court should permit him access to the preliminary juror disqualification information pursuant to GR 31(j). However, that rule does not apply in this instance. GR 31(j) applies "[a]fter conclusion of a jury trial" and therefore, on its face, is only germane to jurors who were called to serve for that jury trial. It does not apply to jurors who were preliminarily disqualified from service under RCW 2.36.072, before ever being assigned to sit in any jury pool.

E. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court affirm the trial court's summary judgment order dismissing Petitioner's petition with prejudice.

DATED this 5th day of October, 2011.

RESPECTFULLY submitted,

By: _____
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