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No. 66202-3-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDY WHITMAN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner, Randy Whitman asks this Court to grant review of the opinion of the Court of Appeals in *State v, Whitman*, 66202-3-I (October 7, 2013)

B. OPINION BELOW

After this Court remanded this matter the Court of Appeals once again affirmed Mr. Whitman's conviction. In its opinion, the court concludes experience and logic do not dictate that argument and rulings on evidentiary maters or substantive motions lie at the core of the public trial right. In doing so, the court elected not to follow this Court's prior decision in *State v. Easterling*, 157 Wn.2d 167, 175-76, 137 P.3d 825 (2006). Moreover, in a departure from this Court's established precedent, the Court of Appeals placed the burden of proof on the party objecting to the court closure.

C. ISSUES PRESENTED

1. To determine when a closure violates constitutional protections a court must ask whether the by "experience and logic" the substance of the hearing should be open to the public. By experience and logic, rulings on substantive motions together with the parties' arguments and the court's the consideration of and resolution of

evidentiary issues are matters that have occurred in the public courtroom and which lie at the heart of the public-trial right. Is the opinion of the Court of Appeals contrary to this Court's opinions and does it present a significant constitutional question such that review proper under RAP 13.4?

2. This Court's well-established precedent places the burden on the party seeking or defending the closure of a proceeding. Where the Court of Appeals placed the burden instead on the party objecting to closing the proceeding, is the opinion contrary to this Court's opinions and does it present a significant constitutional question such that review proper under RAP 13.4?

D. STATEMENT OF THE CASE

In October 1995, in the course of divorce proceedings from her then husband, Mr. Whitman, Catherine Jones obtained a no-contact order regarding Mr. Whitman. RP 42-43. In April 1996, despite the no-contact order, Ms. Jones and Mr. Whitman went to a party together. RP 46-47. Upon their return they became embroiled in an argument that became physical. RP 46. Mr. Whitman was arrested and charged with a felony violation of the no-contact order. CP 58. The State also

charged Mr. Whitman with felony harassment for several alleged telephone calls made in the months following the incident. Id.

Mr. Whitman apparently failed to appear for trial and the court issued a warrant. That warrant was finally served in 2009. Despite the passage of more than 14 years, and the absence of any intervening felony charges against Mr. Whitman, the State proceeded to trial in October 2011.

On the first day of trial, and without any explanation for doing so, the court heard, in chambers, the State's motion to join the two offenses for trial. RP 10-14. The court first determined that under ER 404(b) the could admit evidence of each crime as proof of the other.. Following that ruling that, the court granted the joinder motion over defense objection. RP 14.

A jury acquitted Mr. Whitman of the harassment charges, but convicted him of violating the no-contact order. CP 27-28.

Mr. Whitman appealed contending the trial court erred in conducting hearings on substantive motions in chambers. Mr. Whitman argued his case was controlled by *Easterling*. The Court of Appeals disagreed and affirmed. This Court granted Mr. Whitman's petition for review and remanded the matter to the Court of Appeals in light of the

Court's decision in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012).

On remand, Mr. Whitman again argued his case was controlled by *Easterling*. In its second opinion, the court again declined to apply *Easterling* suggesting it was no longer good law as it predated *Sublett*. The court again affirmed Mr. Whitman's conviction.

E ARGUMENT

1. **The trial court denied Mr. Whitman his right to a public trial.**

Article I, §sections 10 and 22 guarantee the public's right to open court proceedings and a defendant's right to a public trial. Because the closing of a courtroom for even a portion of trial implicates these rights, a trial court must first comply with the requirements of *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 37-38, 640 P.2d 716 (1982). *State v. Bone-Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995). The court's consideration of these criteria must occurn the record. *Easterling*, 157 Wn.2d at 175-76. Further, the court must enter specific findings regarding its consideration of the *Ishikawa* criteria. *Bone-Club*, 128 Wn.2d at 260.

To determine when a closure violates constitutional protections a court must ask whether by "experience and logic" the substance of

the hearing should be open to the public. *Sublett*, 176 Wn.2d at 73, .

This Court explained:

> The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks whether public access plays a significant positive role in the functioning of the particular process in question. If the answer to both is yes, the public trial right attaches and the *Bone-Club* factors must be considered before the proceeding may be closed to the public.

Id. at 73 (internal quotations and citations omitted.)

In the Court of Appeals the State contended that the right to public access has not historically applied to pretrial proceedings. Supplemental Brief of Respondent at 7. That contention simply ignores the weight of authority to the contrary.

> The public trial right extends beyond the taking of a witness's testimony at trial. It extends to pretrial proceedings. *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (public trial right extends to preliminary hearing); [*In re the Personal Restraint of Orange,* 152 Wn.2d 795, 812, 100 P.3d 291, (2004)] (public trial right extends to voir dire); *Bone–Club,* 128 Wn.2d at 257, 906 P.2d 325 (public trial right extends to pretrial suppression hearing). The public's constitutional right to the open administration of justice under article I, section 10 extends to pretrial motions to dismiss. [*Ishikawa,* 97 Wn.2d at 36].

Easterling, 157 Wn.2d at 174.

In *Easterling*, the Court found a motion to sever a codefendant's case "necessarily impact[ed] the posture and fairness of Easterling's trial." 157 Wn.2d at 180. Here the decision admit evidence of separate crimes as evidence to prove the other "necessarily impact[ed] the posture and fairness [Mr. Whitman's] trial." So too, the decision to consolidate an additional offense for trial alters the "the posture and fairness" of the trial." Rather than hear only evidence of a single charge, the court determined the jury could hear prejudicial evidence of an additional charge which occurred months after the first. RP 14. The court made that determination after hearing arguments from counsel and making an evidentiary determination. RP 12-14.

The Court of Appeals dismissed *Easterling* saying:

> It should be noted that [*Easterling*] was decided before *Sublett*. Thus, the supreme court did not apply the experience and logic test.

But the point of the experience test is to look at historical practices and holdings. By definition, the historical practices *Sublett* was referring to were those that preceded that decision and its adoption of the experience and logic test. *Easterling* conclusion that rulings which affect the fairness and posture of the proceedings impact the public trial right, is in all respects consistent with *Sublett*.

Having dismissed the precedential nature of *Easterling*, the opinion next concludes the issues at stake in ruling on motions under ER 404(b) and CrR 4.3 fail the logic prong. Again the logic prong asks whether asks whether public access plays a significant positive role in the functioning of the particular process in question. *Sublett*, 176

A court's consideration of evidentiary objections and its ultimate reasoning for admitting evidence over a party's objection lies at the heart of the concerns protected by the public's right to access. That is logic shows the public access plays a significant positive role in the functioning of the particular process in question. Resolution of evidentiary disputes, what will be admitted and what will not, is crucial to the outcome of any trial. That determination is a critical function of a judge and one to which the public trial right logically extends. Those determinations have historically been part of the public trial.

Among the purposes served by a public trial is to ensure a fair trial and to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A motion to consolidate additional counts, in essence, asks the court to admit additional evidence. Just as with the motion to sever in *Easterling*, the decision to

consolidate additional counts impacts the posture and fairness of the proceedings. Both by experience and logic a hearing on a contested motion to consolidate charges, with attendant consideration of evidentiary issues is subject to the public trial right.

The opinion of the Court of the Court of Appeals is contrary to *Easterling* and fundamentally misapplies *Sublett*. The opinion presents a significant question under Article I, section 10 and 22. This Court. should accept review under RAP 13.4.

2. **The party advocating for closure of a proceeding must bears the burden of proving the closure of the proceedings comports with constitutional requirements.**

This Court has long held that because court proceedings are presumptively open the burden of justifying a closure rests on the party seeking to close the proceedings. *Ishikawa*, 97 Wn.2d at 37-38, 640 P.2d 716 (1982) (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59, 569-70, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)); *Dreiling v. Jain*, 151 Wn.2d 900, 909, 93 P.3d 861 (2004). In *State v. Richardson*, 177 Wn.2d 351, 360, 302 P.3d 156 (2013), the Court extended that logic to place the burden on a party opposing a motion to unseal a court record. Because the State is advocating to exclude the public from the

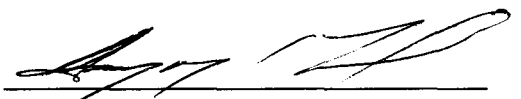
proceedings at hand, the State must prove the right to public proceedings was not violated.

Despite this well-established rule, the Court of Appeals, at the State's urging required Mr. Whitman shoulder the burden of proving the closure was unconstitutional. Opinion at 3. That conclusions is directly at odds with a number of this Court's opinions such as *Ishikawa*, *Dreiling*, and *Richardson*. That conclusion effectively permits a presumption of closure. The conclusion of the Court of Appeals presents a is contrary to this Court's decisions and presents a significant question under Article I, section 10 and 22. This Court. should accept review under RAP 13.4.

F. CONCLUSION

For the reasons above, this Court should grant review and reverse Mr. Whitman's convictions.

Respectfully submitted this 5th day of November, 2013.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 66202-3-I
Respondent,	)	DIVISION ONE
v.	)	
RANDY WHITMAN,	)	UNPUBLISHED
Appellant.	)	FILED: October 7, 2013

Cox, J. – In our first decision, filed on March 12, 2012, we rejected Randy Whitman's claim that the court violated his right to a public trial and affirmed his conviction for felony violation of a no-contact order. In State v. Sublett, decided on November 21, 2012, our supreme court rejected the rule we applied in our first decision and adopted a new test.[1] The supreme court then remanded this matter for reconsideration in light of Sublett.[2] Applying the new test, we affirm.

The facts are set forth in our earlier opinion and need not be repeated here. The parties, at our direction, have submitted supplemental briefing.

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[1] 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012).

[2] State v. Whitman, 177 Wn.2d 1004, 300 P.3d 340 (2013).

RIGHT TO PUBLIC TRIAL

Whitman argues that the trial court violated his constitutionally protected right to a public trial when, in chambers, it concluded that his two cases would be consolidated for trial.[3] Because public access plays a minimal role in the functioning of the proceeding at issue, we hold there was no violation of his right to a public trial.

Not every interaction between the court, counsel, and defendant will implicate the right to a public trial, or constitute a closure if closed to the public.[4] No Washington case law addresses whether a trial court's in-chambers conference regarding consolidation of two cases implicates a defendant's public trial right. To decide whether the right attaches to a particular proceeding, the Sublett court adopted the experience and logic test.[5]

"The first part of the test, the experience prong, asks 'whether the place and process have historically been open to the press and general public.'"[6] The second part of the test, the logic prong, "asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'"[7] "If the answer to both is yes, the public trial right attaches and the Waller or

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[3] Supplemental Brief of Appellant at 2-5.

[4] Sublett, 176 Wn.2d at 71.

[5] Id. at 72-73 (citing Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

[6] Id. at 73 (quoting Press, 478 U.S. at 8).

[7] Id. (quoting Press, 478 U.S. at 8).

Bone-Club factors must be considered before the proceeding may be closed to the public."[8] Whitman has the burden of satisfying the experience and logic test.[9]

In Sublett, the supreme court, in a plurality opinion, concluded that the public trial right did not attach to an in-chambers proceeding where the trial court answered a jury question with only counsel present.[10] Under the experience prong, the lead opinion looked to CrR 6.15, which addresses jury instructions.[11] The lead opinion explained that this "rule itself advances and protects those interests underlying the constitutional requirements of open courts with its directive to put the question, answer, and objections [to jury instructions] in the record."[12] "This rule is the only authority we can find governing this process, so, historically, we conclude that a proceeding in open court to discuss the question itself and any appropriate answer has not been required."[13]

Additionally, under the logic prong, the lead opinion concluded that "[n]one of the values served by the public trial right is violated under the facts of this case":

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[8] Id.

[9] Id. at 75, 78; see also In re Yates, 177 Wn.2d 1, 29, 296 P.3d 872 (2013) ("It is Yates's burden to satisfy the experience and logic test, which he fails to do.").

[10] Sublett, 176 Wn.2d at 70, 77.

[11] Id. at 75-77.

[12] Id. at 77.

[13] Id.

> No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists. The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record pursuant to CrR 6.15. Similarly, the requirement that the answer be in writing serves to remind the prosecutor and judge of their responsibility because the writing will become part of the public record and subject to public scrutiny and appellate review.[14]

The lead opinion explained that this proceeding was not "so similar to the trial itself," and it concluded that a closure or public trial right violation did not occur.[15]

Here, the in-chambers proceeding addressed whether separate charges with different cause numbers should be joined and tried together.[16] According to the report of proceedings, the attorneys and Whitman were present for this proceeding.[17]

Under the experience prong, it is not clear whether this type of proceeding has been historically conducted in an open courtroom. The State points to RCW 10.37.060 and CrR 4.3.1(a), which gives the trial court discretion to join multiple offenses against a defendant.[18] It argues that "[w]hile the State believes that motions to consolidate are probably generally heard in open court, the court rule permits the court on its own to order consolidation, so the rules contemplate that consolidation can occur without a public hearing."[19]

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[14] Id.

[15] Id.

[16] Report of Proceedings (Oct. 25, 2010) at 10.

[17] Id.

[18] Supplemental Brief of Respondent at 8-9.

[19] Id. at 9.

In contrast, Whitman cites a supreme court case, State v. Easterling, to support his contention that this type of proceeding has been historically conducted in an open courtroom.[20] There, the court concluded that co-defendant Anthony Jackson's motion to sever his charge from Ricko Easterling's charge should not have been heard in a courtroom closed to Easterling and the public.[21] The court reasoned that the motion "did pertain to, and was part of, Easterling's trial," and it "necessarily impact[ed] the posture and fairness of Easterling's trial."[22] It should be noted that this case was decided before Sublett. Thus, the supreme court did not apply the experience and logic test.

We conclude that neither of these arguments clearly establishes whether this type of proceeding—consideration of a motion to consolidate for trial—has been historically conducted in an open courtroom. But we need not decide that question. That is because under the logic prong, it is clear that public access to this proceeding would have played a minimal role in the functioning of this type of proceeding.

As the State points out, it is unclear how public access would have played a "significant positive role in the actual consolidation motion proceeding, particularly where the matter was addressed in open court" both before and after

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[20] Supplemental Brief of Appellant at 4 (citing State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006)).

[21] Easterling, 157 Wn.2d at 177-80.

[22] Id. at 179-80.

the in-chambers proceeding.[23] The record reflects that Whitman moved to join the charges in open court.[24] It also shows that the court entered the order joining the charges in open court, following the in-chambers discussion.[25]

Further, similar to Sublett, it appears that "[n]one of the values served by the public trial right is violated under the facts of this case."[26] During this in-chambers proceeding, no witnesses or testimony was involved. Consequently, there was no risk of perjury. Additionally, the appearance of fairness was satisfied because the court reporter was present and transcribed the in-chambers proceeding. Moreover, this transcript became part of the public record and is subject to public scrutiny and appellate review.

For these reasons, we conclude that Whitman has not established that a closure or public trial right violation occurred under the logic prong. Because Whitman fails to establish one of the prongs, the public trial right did not attach to the in-chambers proceeding.[27]

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[23] Supplemental Brief of Respondent at 9.

[24] Report of Proceedings (Oct. 25, 2011) at 3.

[25] Report of Proceedings (Oct. 26, 2011) at 22.

[26] Sublett, 176 Wn.2d at 77.

[27] Id. at 73.

Whitman contends that the public trial right extends to pretrial proceedings.[28] While the right may extend to many pretrial proceedings,[29] Whitman fails to show why the right attaches to the proceeding at issue in this case. Sublett makes clear that is the proper focus of the inquiry.[30] This argument is not helpful.

Whitman also argues that public access would have played "a significant positive role in the functioning of the particular process in question."[31] He asserts that "[a] motion to consolidate additional counts, in essence, asks the court to admit additional evidence."[32] But, as shown by the proceeding's transcript, the trial court did not admit any evidence during the in-chambers proceeding. Thus, it is unclear how public access would have played a "significant positive role" in this proceeding. For these reasons, this argument is not persuasive.

Finally, Whitman argues that the State bears the burden of proving that the closure of the proceedings comports with constitutional requirements.[33] But,

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[28] Supplemental Brief of Appellant at 3.

[29] See, e.g., State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (explaining that the public trial right attaches to a pretrial suppression hearing).

[30] Sublett, 176 Wn.2d at 72-73.

[31] Supplemental Brief of Appellant at 4.

[32] Id. at 5.

[33] Supplemental Brief of Appellant at 1-2.

as noted above, the supreme court has squarely placed the burden on petitioners to satisfy the experience and logic test.[34]

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

[34] See Sublett, 176 Wn.2d at 75, 78; In re Yates, 177 Wn.2d at 29.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 66202-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Hilary Thomas, DPA
Whatcom County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 6, 2013