

FILED  
June 13, 2016  
Court of Appeals  
Division I  
State of Washington

No. 73553-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MAXIMO BERNAL-ROSAS,

Appellant.

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

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**REPLY BRIEF**

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## A. REPLY ARGUMENT

**THE RESPONDENT’S CITED CASES DO NOT DECIDE THIS CASE BECAUSE WASHINGTON CASELAW HAS REQUIRED THAT, AT MINIMUM, AN AFTER-THE-FACT ORAL OR WRITTEN RECORD OF THE PROCEEDING MUST BE MADE IN ORDER TO SATISFY THE PUBLIC TRIAL GUARANTEE.**

1. **First, the unrecorded nature of the sidebar objection to misconduct in closing is the violation itself, thus its absence from the record is not a bar to appeal.** The Respondent contends that the public trial error may not be appealed because it is not manifest, assessing the issue under RAP 2.5(a)(3)’s provision that an appellate court may refuse to review an error not raised below except where it is constitutional and manifest. BOR, at pp. 1, 11-12. The argument initially seems to be premised on a notion that appellant Mr. Bernal-Rosas is challenging the trial court’s ruling on his counsel’s objection to the State’s shifting of the burden of proof in closing argument. See BOR, at pp. 11-12.

But the appellant is challenging the incident as a public trial violation. AOB, at pp. 1-2. Further, the Respondent’s argument conflates RAP 2.5(a) concepts of waiver versus manifest error, with the error itself. The fact that the sidebar went both unmemorialized

(such as by the trial court placing the sidebar discussion on the record a few moments after the fact, as is customary) and unrecorded (contemporaneously, by the court stenographer, or later by document filed), is the very error complained of.

These facts further demonstrate why the Respondent's cited cases do not compare to Mr. Bernal-Rosas' circumstance, because in those cases, there was such recording or filing. See infra.

**2. The public trial guarantee was violated where the matter at sidebar concerned an objection to existing constitutional misconduct committed by a party, not a preventative objection raised to preclude the jury from being exposed to an evidentiary matter.** As argued in Mr. Bernal-Rosas' Opening Brief, (a) the cases of State v. Love and State v. Smith do not establish that there was no public trial right implicated or that there was no closure, AOB, at pp. 5-6, 8-15; and (b) the particular set of factual circumstances in the appellant's case show both of the foregoing by occurrence of this sidebar, under the experience and logic test. AOB, at pp. 7-8, 14-15.

It is true that the Supreme Court indeed ruled in State v. Smith, 181 Wn.2d 508, 512, 518-19, 334 P.3d 1049 (2014), that

sidebars addressing evidentiary matters do not implicate the defendant's public trial right. Smith, at 518. But the case does not address sidebars involving challenges of the sort raised by the defendant in closing argument in the present case.

In addition, in Smith, the sidebar at issue was placed on the record by the court and parties shortly afterwards during the trial; together, these pivotal distinctions show both (a) that Smith has not categorized closing argument sidebars as unprotected by the public trial right; and (b) strongly suggests that closed proceedings with those dual characteristics in this case implicate the right, and establish a closure. See Smith, at 518.

Ultimately, the Smith Court's decision laid down the rule that to avoid implicating a defendant's constitutional right to a public trial, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record. State v. Smith, 181 Wn. 2d 516-20.

In the case sub judice, the unrecorded proceeding below, during which the court addressed issues of unconstitutional prosecutorial misconduct, rather than routine evidence issues of the

sort that arise multiple times in all trials, constituted a closure of a proceeding that was required to be open. Mr. Bernal-Rosas's right to a public trial was violated. See also State v. Love, 183 Wn. 2d 598, 599-602, 354 P.3d 841 (2015) (no closure where for-cause challenges at sidebar were on the record in the presence of the court reporter and available for scrutiny by transcript, thus comporting with the public trial right's "minimum" guarantee).

Further, the Respondent's cited case of Speight is inapposite as it involves the questioning of individual prospective jurors in chambers (understood to be a public trial violation) which nevertheless did not merit reversal because the supplicant there was a personal restraint petitioner subject to the added requirement of actual and substantial prejudice, imposed on collateral attacks. In re Speight, 182 Wn. 2d 103, 106, 340 P.3d 207 (2014) (citing In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992)).

The additional cases contained within the State's cite to Speight actually demonstrate the correctness of Mr. Bernal-Rosas' argument, that the recording or memorializing of a bench ruling is

the crucial distinction that avoids a public trial violation. See BOR, at pp. 13-14).

In conclusion, the Smith Court's reasoning in this evolving area of Washington case law, that the distinction between secretive, hidden proceedings, versus publicly accessible proceedings, was crucial to both the question whether the public trial right was implicated, and whether there was a closure.

## **B. CONCLUSION**

Based on the foregoing and on his Opening Brief, the appellant, Mr. Maximo Bernal-Rosas, requests that this Court of Appeals reverse his convictions.

DATED this 13th day of June, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS.

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Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13<sup>TH</sup> DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273</p>	<p>(X) U.S. MAIL ( ) HAND DELIVERY ( ) AGREED E-SERVICE VIA COA PORTAL</p>
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**SIGNED** IN SEATTLE, WASHINGTON THIS 13<sup>TH</sup> DAY OF JUNE, 2016.

X \_\_\_\_\_ 

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