

No. 42268-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jacob Hubble,**

Appellant.

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Lewis County Superior Court Cause No. 10-1-00516-6  
The Honorable Judge Nelson Hunt

## **Appellant's Reply Brief**

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## ARGUMENT

### **I. THE TRIAL JUDGE SHOULD NOT HAVE HELD CLOSED PROCEEDINGS WITHOUT A *BONE-CLUB* ANALYSIS.**

Criminal cases must be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). Closure may be justified only after analysis of the five *Bone-Club* factors and consideration of all reasonable alternatives. *Bone-Club*, at 258-259; *Presley*, 130 S.Ct., at 724-725.

Here, the court conducted closed hearings without analyzing the *Bone-Club* factors or considering alternatives. RP (11/18/10) 3-18; RP (11/18/10) 120. These closed proceedings violated the constitution. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club*, *supra*.

Respondent argues in favor of an exception to the *Bone-Club* rule. Brief of Respondent, pp. 7-12, citing *State v. Sadler*, 147 Wash. App. 97, 193 P.3d 1108 (2008) and *State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010).<sup>1</sup> The

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<sup>1</sup> The Supreme Court heard argument on *Sublett* in June of 2011.

Supreme Court has never recognized any such exception.<sup>2</sup> Instead, the Court has declared that the public trial right “applies to all judicial proceedings.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009).<sup>3</sup>

Because the closed proceedings violated the constitutional mandate that criminal trials be open and public, Mr. Hubble’s conviction must be reversed. *Bone-Club, supra*. The case must be remanded for a new trial. *Id.*

## **II. RESPONDENT’S CONCESSION REQUIRES REVERSAL FOR PROSECUTORIAL MISCONDUCT.**

Respondent concedes that the prosecutor “may have indirectly commented on [Mr.] Hubble’s right to remain silent.” Brief of Respondent, p. 15. In light of this concession, prejudice is presumed. *See, e.g. State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). Accordingly, Respondent must establish beyond a reasonable doubt that

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<sup>2</sup> *See, e.g. State v. Strobe*, 167 Wash.2d 222, 2230, 217 P.3d 310 (2009) (“This court, however, ‘has never found a public trial right violation to be [trivial or] *de minimis*’”) (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

<sup>3</sup> Respondent expresses concern that “nothing in regard to a trial could ever be done outside the presence of an open courtroom with a recorder present.” Brief of Respondent, p. 11. This is incorrect; the court can always close the courtroom, if closure is justified under *Bone-Club*. Furthermore, a court reporter is not essential to protect the requirement of an open and public trial (although the absence of an adequate record might affect other constitutional rights, including the right to appeal).

the error was trivial, formal, or merely academic, that it did not prejudice Mr. Hubble, and that it in no way affected the outcome. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). Furthermore, Respondent must prove that any reasonable jury would have found Mr. Hubble guilty, and that the evidence is so overwhelming it necessarily leads to conviction. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

Respondent has failed to establish harmlessness under these standards. The jury heard two different versions of events—that propounded by Mr. Allison, and that presented by Mr. Hubble and Ms. Culberg. By drawing attention to Mr. Hubble’s exercise of his right to remain silent, the prosecutor tilted the balance toward conviction. Jurors could have found Mr. Hubble’s testimony sufficient to raise a reasonable doubt; the prosecutor’s improper comment undermined that possibility.

Other than a passing assertion that the evidence was “overwhelming,” Respondent makes no effort to apply the constitutional test for harmless error. Brief of Respondent, p. 18. Respondent does not argue that the error was trivial, formal, or academic, that it was incapable of causing prejudice or affecting the outcome, or that any reasonable jury would have voted to convict. Brief of Respondent, pp. 15-18

Instead, Respondent erroneously suggests that the misconduct was provoked. Brief of Respondent, p. 16. This argument is misguided: defense counsel does not have the “power to ‘open the door’ to prosecutorial misconduct.” *State v. Jones*, 144 Wash.App. 284, 295, 183 P.3d 307 (2008). If the prosecutor believed defense counsel’s argument improper, he should have objected, rather than responding with misconduct.

The prosecutor should not have used Mr. Hubble’s silence against him in closing argument. The trial judge gave “additional credence to the argument” by overruling Mr. Hubble’s objection to the misconduct. *State v. Gonzales*, 111 Wash.App. 276, 283-284, 45 P.3d 205 (2002). The error was not harmless; accordingly, Mr. Hubble’s conviction must be reversed and the case remanded for a new trial. *Toth, supra*.

**III. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.**

Mr. Hubble rests on the argument set forth in the Opening Brief.

**CONCLUSION**

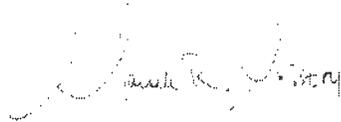
Mr. Hubble's conviction must be reversed and the case remanded.

Respectfully submitted on April 23, 2012,

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Jacob Hubble, DOC #793312  
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P.O. Box 1899  
Airway Heights, WA 99001

With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney  
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 23, 2012.



Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

**April 23, 2012 - 10:18 AM**

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