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Division III  
State of Washington  
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NO. 34816-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

CARLOS HERNANDEZ,

Appellant.

---

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

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APPELLANT'S REPLY BRIEF

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**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY ..... 1

    1. **Because the courtroom was closed during jury selection without analysis and without Carlos Hernandez’s waiver of his right to a public trial, a new trial is required** ..... 1

    2. **Reversal is required on the separate basis that the trial court violated Mr. Hernandez’s constitutional right to be present** ..... 5

B. CONCLUSION ..... 8

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

*State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) ..... 1

*State v. Frawley*, 181 Wn.2d 452, 334 P.3d 1022 (2014) ..... 3

*State v. Herron*, 183 Wn.2d 737, 356 P.3d 709, 712 (2015)..... 3

*State v. Lormor*, 172 Wn.2d 85, 257 P.3d 624 (2011)..... 2

*State v. Njonge*, 181 Wn.2d 546, 334 P.3d 1068 (2014) ..... 2, 4

*State v. Shearer*, 181 Wn.2d 564, 334 P.3d 1078 (2014) ..... 1, 2, 3, 4

*State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012)..... 1, 5

**Washington Court of Appeals Decision**

*State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008)..... 2

**Decisions of Other Courts**

*California v. Ebert*, 244 Cal. Rptr. 447,  
199 Cal. App. 3d 40 (Cal. Ct. App. 1988) ..... 5

*State v. Lopez*, 271 Conn. 724, 59 A.2d 898 (Conn. 2004) ..... 5

A. ARGUMENT IN REPLY

**1. Because the courtroom was closed during jury selection without analysis and without Carlos Hernandez’s waiver of his right to a public trial, a new trial is required.**

If a courtroom is closed without the court having conducted the five-part *Bone-Club* analysis and finding closure favored, the error is structural and the only remedy is a new trial. *State v. Wise*, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012); *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Here, the courtroom was closed when the deputy bailiff turned away four spectators during jury selection, wrongly believing the courtroom to be too full to allow in any members of the public. RP 105, 107, 113-14. The court did not conduct a *Bone-Club* inquiry prior to the spectators being excluded. *State v. Shearer*, 181 Wn.2d 564, 566, 334 P.3d 1078 (2014) (“If the trial court fails to engage in that [*Bone-Club*] analysis, closing the questioning to the public violates the defendant's right to a public trial.”). A *Bone-Club* inquiry—had one been undertaken—would not have resulted in closure of the courtroom because once the error was discovered, the court reopened the courtroom to spectators. RP 106, 111. But this occurred only after closed proceedings took place.

The bailiff's action in turning away spectators effectuated a courtroom closure because "the courtroom [was] completely and purposefully closed to spectators." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Contrary to the State's contention, an unconstitutional closure does not turn on whether the "trial court request[s] for anyone to leave or be kept out." Resp. Br. at 3. "[A] court need not *order* a closure to violate the public trial guaranty." *State v. Njonge*, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014). Rather, a closure occurred here because spectators were excluded from entering the courtroom (by the bailiff) during a portion of voir dire.

Closure of the courtroom during voir dire is structural error not subject to a "de minimis" threshold or harmlessness analysis. *Shearer*, 181 Wn.2d at 572-73. In *Shearer*, for example, unconstitutional violations took place where voir dire of single jurors were held outside the public view. *Id.* at 567-68, 574-75. Here, too, a portion of voir dire was closed to the public and, therefore, a structural error occurred.

The State misreads case law to argue to the contrary. The State relies on a Court of Appeals opinion to argue the closure does not require reversal because it was "brief and inadvertent." Resp. Br. at 3-4 (citing *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008)).

But, Division Two found a constitutional, structural courtroom closure error in *Erickson* and reversed and remanded for a new trial. 146 Wn. App. at 211. This case does not support the State's argument.

Mr. Hernandez never waived his right to an open courtroom. A defendant may only be found to have waived the right to a public trial through an "an affirmative and unequivocal personal expression of waiver." See *State v. Herron*, 183 Wn.2d 737, 743-44, 356 P.3d 709, 712 (2015) (quoting *State v. Frawley*, 181 Wn.2d 452, 461-62, 334 P.3d 1022 (2014) (plurality opinion)). The record contains no affirmative or unequivocal personal expression of a waiver by Mr. Hernandez. See RP 105-15 (no analysis of *Bone-Club* factors, no personal expression of waiver from defendant).

Critically, our courts have repeatedly held that failing to object to a closure does not waive the right to a public trial. *Shearer*, 181 Wn.2d at 569-72 (rejecting State's argument that defendant should be required to object to preserve closure error for review); *Njonge*, 181 Wn.2d at 554-55 (same and discussing long line of cases).

The State seeks to event a new rule to avoid reversal. Resp. Br. at 4-6. The State argues that defense counsel's failure to move for a mistrial waives the unconstitutional courtroom closure. *Id.* The State's

similar argument was rejected recently by the Supreme Court. *Shearer*, 181 Wn.2d at 570-71 (rejecting State’s argument that rule should be amended so that trial courts have the opportunity to correct closure errors; relying on extensive precedent). As the Court noted in *Shearer*, a defendant is apprised of his rights through the court’s conducting of a *Bone-Club* analysis that includes the nature of the asserted interests requiring a closure. 181 Wn.2d at 571. The defendant has no duty to object to or correct an error when the court fails to adhere to its duty under *Bone-Club*. *Id.*

The State continues to try to shift the burden from the court to defendants. However, “it is the trial court’s responsibility, not the defendant’s, to ensure that the *Bone-Club* factors are considered prior to a courtroom closure.” *Shearer*, 181 Wn.2d at 571. The State seeks to event an “invited remedy” rule without any authority and contrary to the weight of authority holding a defendant need not object to preserve a courtroom closure error. *See* Resp. Br. at 4-6. The argument should be rejected.

The courtroom was closed for a portion of jury selection without consideration of the public trial right and without Mr. Hernandez’s

prior knowledge or waiver. A new trial is required. *Wise*, 176 Wn.2d at 15.

**2. Reversal is required on the separate basis that the trial court violated Mr. Hernandez's constitutional right to be present.**

As discussed in the opening brief, Mr. Hernandez's constitutional right to be present was violated when the trial court considered his retained attorney's motion to withdraw without Mr. Hernandez's presence, input and knowledge. Op. Br. at 7-12.

The State concedes the alleged error is structural. Resp. Br. at 7. However, the State argues the issue is moot because the prejudice to Mr. Hernandez cannot be cured. Resp. Br. at 7-8. But a structural error requires reversal without regard to the harm or prejudice caused. *E.g.*, *State v. Lopez*, 271 Conn. 724, 59 A.2d 898, 899, 906 (Conn. 2004) (“We conclude that the trial court's denial of the defendant's constitutional right to be present during the inquiry in question constituted a structural error warranting the automatic reversal of his conviction without a specific showing of harm or prejudice.”); *California v. Ebert*, 244 Cal. Rptr. 447, 199 Cal. App. 3d 40 (Cal. Ct. App. 1988) (reversal required as structural error because the effect of the loss of counsel cannot be measured). Structural errors infect the

entire trial process and the very framework within which the trial proceeded. *E.g., Lopez*, 59 A.2d at 903 (discussing U.S. Supreme Court case law). Mr. Hernandez remains under the effect of that fundamentally flawed trial process so long as his resulting conviction stands. Thus, the matter is not moot.

The record is also sufficient for this Court's review. The issue on appeal does not depend upon or refer to the contents of the sealed documents the State claims as necessary. Resp. Br. at 8-9. Rather, Mr. Hernandez argues the order sealing the proceedings from Mr. Hernandez's view and presence was improper. The information and records relied upon in the appeal are the same to which the State and Mr. Hernandez had access to below.

Notably, the State does not explain how it was able to respond to Mr. Hernandez's motion for a new trial without accessing the documents it now claims are critical for review, yet review now requires those same documents. *See* CP 71-75 (motion to dismiss); CP 76-93 (State's response). As it was able to do then, the State is able to respond and the Court is able to decide the issue without reviewing the sealed documents filed by John Crowley.

Furthermore, the State cites no authority that would indicate Mr. Hernandez has waived the attorney-client privilege. The issue on appeal does not waive that privilege. Mr. Hernandez is not alleging his attorney was ineffective. Mr. Hernandez raises a constitutional right to be present issue that does not depend upon any waiver of privilege and his appeal addresses no facts or argument supporting waiver.

Moreover, the trial court denied the State's request to unseal and the State has not appealed that ruling. CP 309. The Court should not allow the State to use Mr. Hernandez's appeal to collaterally attack the trial court order.

Mr. Hernandez's right to be present was denied when his retained attorney's motion to withdraw was considered *ex parte*, without any notice to Mr. Hernandez, without any evidence from him, and without his knowledge. The Court should reverse.

B. CONCLUSION

The Court should reverse and remand because the closure of the courtroom during jury selection violated Washington's constitutional right to a public trial. In the alternative the Court should reverse because Mr. Hernandez was denied the right to be present at his retained attorney's motion to withdraw.

DATED this 8th day of February, 2018.

Respectfully submitted,

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	)	
APPELLANT.	)	

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