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NO. 86216-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

HENRY GRISBY, III,

Respondent.

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

CORRECTED
SUPPLEMENTAL BRIEF OF RESPONDENT GRISBY

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 ORIGINAL

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES FOR WHICH REVIEW WAS GRANTED..... 1

C. STATEMENT OF THE CASE..... 2

D. SUPPLEMENTAL ARGUMENT 3

 1. Because the trial court unilaterally closed voir dire without any analysis of the effect on the public trial right, Mr. Grisby’s constitutional right to a public trial right was violated 3

 2. As this Court has consistently held, appellate review of a courtroom closure does not depend upon an affirmative, contemporaneous objection from the accused because the trial court bears the burden of ensuring compliance with the constitutional mandate 7

 3. The Court should continue to hold the constitutional right to a public trial is not subject to a de minimis exception..... 11

 a. A courtroom closure cannot be de minimis 11

 b. If the Court adopts a de minimis exception to the public trial right, the closure here should not be considered de minimis 13

 4. The Washington Constitution’s explicit mandates that trials be open to the public provide broader protection than the federal constitution..... 14

 a. The text of Washington’s provisions and its significant variances from the federal public trial right..... 14

 b. State constitutional history and preexisting state law also indicate Washington’s guarantee should be applied more broadly 16

c. Structural differences and this State’s concern for proceedings in its own courts also dictate that the state constitutional right be interpreted independently from its federal counterpart 18

E. CONCLUSION 19

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Allied Daily Newspapers v. Eikenberry,
121 Wn.2d 205, 848 P.2d 1258 (1993)..... 5

Dreiling v. Jain,
151 Wn.2d 900, 93 P.3d 861 (2004)..... 18

Federated Publ'ns, Inc. v. Kurtz,
94 Wn.2d 51, 615 P.2d 440 (1980)..... 18

In re Pers. Restraint of Morris,
176 Wn.2d 157, 288 P.3d 1140 (2012)..... 8, 9

In re Pers. Restraint of Orange,
152 Wn.2d 795, 100 P.3d 291 (2004)..... 4, 5, 8

Rufer v. Abbott Laboratories,
154 Wn.2d 530, 114 P.3d 1182 (2005)..... 18

Seattle Times Co. v. Ishikawa,
97 Wn.2d 30, 640 P.2d 716 (1982)..... 18

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

State v. Brightman,
155 Wn.2d 506, 122 P.3d 150 (2005)..... 5, 6, 8, 12

State v. Collins,
50 Wn.2d 740, 314 P.2d 660 (1957)..... 10

State v. Easterling,
157 Wn.2d 167, 137 P.3d 825 (2006)..... passim

State v. Gocken,
127 Wn.2d 95, 896 P.2d 1267 (1995)..... 19

State v. Gunwall,
106 Wn.2d 54, 720 P.2d 808 (1986)..... 14, 18

<i>State v. Lormor</i> , 172 Wn.2d 85, 257 P.3d 624 (2011).....	4
<i>State v. Marsh</i> , 126 Wash. 142, 217 P. 705 (1923)	7, 18
<i>State v. Momah</i> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	8, 10, 11
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	9
<i>State v. Paumier</i> , 176 Wn.2d 29, 288 P.3d 1126 (2012).....	passim
<i>State v. Ray</i> , 130 Wn.2d 673, 926 P.2d 904 (1996).....	8
<i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987).....	19
<i>State v. Strode</i> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	passim
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	passim
<i>State v. Wise</i> , 176 Wn.2d 1, 288 P.3d 1113 (2012).....	passim
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	18

United States Supreme Court Decisions

<i>Berger v. United States</i> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	9
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).....	5, 15
<i>In re Oliver</i> , 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948).....	4

<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).....	10
<i>Presley v. Georgia</i> , 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).....	4, 9
<i>Press-Enterprise Co. v. Superior Court</i> , 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).....	5, 6
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	6, 12

Decisions of Other Courts

<i>Keddington v. State</i> , 19 Ariz. 457, 462, 172 P. 273 (1918).....	10
------------------------------------------------------------------------	----

Constitutional Provisions

Const. art. I, § 10.....	passim
Const. art. I, § 22.....	3, 15, 17, 19
Const. art. I, § 35.....	5, 19
Const. art. IV.....	19
U.S. Const. amend. I.....	15
U.S. Const. amend. VI.....	4, 15, 18, 19

Rules

Rule of Appellate Procedure 2.5.....	7
--------------------------------------	---

Other Authorities

Black’s Law Dictionary (9th ed. 2009).....	8
Jennifer Friesen, 1 <i>State Constitutional Law: Litigating Individual Rights Claims and Defenses</i> (4th ed. 2006).....	16
The Journal of the Washington State Constitutional Convention 1889 (Beverly Paulik Rosenow, ed., 1999).....	16

A. INTRODUCTION

During jury selection in Henry Grisby's criminal trial, the court closed proceedings to the public by holding individual voir dire in chambers. The court conducted no analysis prior to the closure and there is no record of the closed proceedings because the court reporter was also excluded. The closure violated the constitutional guarantee of a public and open trial. The Court of Appeals properly reversed.

B. ISSUES FOR WHICH REVIEW WAS GRANTED

1. Whether the Court of Appeals opinion should be affirmed in reversing and remanding for a new trial because the trial court held a portion of voir dire in chambers, closed from the public and without a court reporter, without considering any aspect of the public trial right, all in violation of Mr. Grisby's constitutional right to an open trial?

2. The Court has repeatedly rejected, including within the last year, the notion that an accused must affirmatively object to a closure to preserve the issue for appeal. Should the Court follow longstanding precedent where it comports with the presumption of prejudice arising from violations of the public trial right as well as the trial court's obligation to safeguard the constitutional guarantee?

3. Should this Court continue to reject the State's request for a de minimis exception, in particular where the trial court did not weigh

competing interests, entertain objections, or consider alternatives, where there is no record of the in-chambers proceedings, and where the limited other record indicates the secret proceedings related to the fairness of the proceedings and the administration of justice?

C. STATEMENT OF THE CASE

Mr. Grisby was charged with a Violation of the Uniform Controlled Substances Act. CP 1-5. At the end of the first afternoon of voir dire, after the panel had been excused but on the record in open court, the court informed counsel it intended to question a prospective juror, Mr. Lemmons, about a possible 1978 conviction. Voir Dire 3/10/10RP 54-56. No one suggested that the questioning should or would be conducted in private. *See id.* The next morning, the proceedings began with the court sua sponte directing juror 18, counsel and Mr. Grisby into chambers.

The court: I was going to ask juror number 18, if you and counsel and Mr. Grisgsby [sic] would come into chambers for a moment?

COURT, COUNSEL, JUROR 18 MEET IN CHAMBERS

(Off the record discussion)

The court: I apologize for the interruption.

Volume 1 RP 25; *see* Voir Dire 3/11/10RP 3. There was no further discussion of the in-chambers conference. *Id.*

Mr. Grisby appears to have later struck in open court the privately-questioned prospective juror. *See* Voir Dire 3/11/10RP 38 (striking juror that audio identifies as 18 and appearing to be referenced by the court as Lemmons); *see* CP 57-58 (minutes indicating Lemmons did not sit on jury). Because the trial court closed voir dire without analysis, without findings, and without any hint that it considered the right to a public trial and because there was no record of the in-chambers proceedings, the Court of Appeals reversed Mr. Grisby's conviction and remanded for a new trial. *State v. Grisby*, No. 65564-7-I, 167 Wn. App. 1005 (Mar. 12, 2012).

D. SUPPLEMENTAL ARGUMENT

The Court's public trial case law is long and well-settled. The Court of Appeals applied it appropriately in reversing Mr. Grisby's VUCSA conviction. This Court should affirm the Court of Appeals.

1. **Because the trial court unilaterally closed voir dire without any analysis of the effect on the public trial right, Mr. Grisby's constitutional right to a public trial right was violated.**

The Washington Constitution mandates that criminal proceedings be open to the public without exception. Article I, section 10 requires that "Justice in all cases shall be administered openly." Article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to

. . . a speedy public trial.” These provisions serve “complementary and interdependent functions in assuring the fairness of our judicial system.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The federal constitution also guarantees the accused the right to a public trial. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *State v. Sublett*, 176 Wn.2d 58, 71-72, 292 P.3d 715 (2012); *State v. Wise*, 176 Wn.2d 1, 11-12, 288 P.3d 1113 (2012); *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

The public trial guarantee ensures “that the public may see [the accused] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” *Bone-Club*, 128 Wn.2d at 259 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). “Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is

open.” *Wise*, 176 Wn.2d at 5. “Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Open public access provides a check on the judicial process that is necessary for a healthy democracy and promotes public understanding of the legal system. *Sublett*, 176 Wn.2d at 142 n.3 (Stephens, J. concurring); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). Openness deters perjury and other misconduct; it tempers biases and undue partiality. *Wise*, 176 Wn.2d at 5. In particular, “a closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals.” *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing *Orange*, 152 Wn.2d at 812); accord Const. art. I, § 35 (victims of crimes have right to attend trial and other court proceedings).

To protect this constitutional right to a public trial, this Court has repeatedly held that a trial court may not conduct secret or closed proceedings “without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying

the closure order.” *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to “preserve higher values” and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting *Press-Enterprise*, 464 U.S. at 510). When the record “lacks any hint that the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted” and reversal is required. *Brightman*, 155 Wn.2d at 515-16; *accord Easterling*, 157 Wn.2d at 181 (“The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.”).

This case thus mirrors *Strode*, where this Court reversed after voir dire was closed without any analysis of the public trial right and without a record supporting the basis for the closure.¹ 167 Wn.2d at 231. Likewise, the analysis here should follow that in *Wise* and *State v. Paumier*, where this Court reversed because individual voir dire was held in chambers without any analysis of the public trial right or the *Bone-Club* factors.

¹ The record available for review here is even more deficient than in *Strode*, where the record contained some detailed content and procedure of the in-chambers proceedings. 167 Wn.2d at 224, 228 (in-chambers voir dire addressed whether prospective jurors had any personal experience with sexual abuse; setting forth procedure adhered to during closed proceedings).

Wise, 176 Wn.2d at 9-20; *Paumier*, 176 Wn.2d 29, 35-36, 288 P.3d 1126 (2012). Violation of the public trial right is presumed prejudicial and requires reversal and remand for a new trial. *See, e.g., Wise*, 176 Wn.2d at 17-19.²

2. As this Court has consistently held, appellate review of a courtroom closure does not depend upon an affirmative, contemporaneous objection from the accused because the trial court bears the burden of ensuring compliance with the constitutional mandate.

As recently as last year, in *Wise* and *Paumier*, this Court rejected the State's argument that appellate review of public trial violations should be procedurally barred unless the defendant makes a contemporaneous, affirmative objection. *Compare Wise*, 176 Wn.2d at 15-16; *Paumier*, 176 Wn.2d at 36-37 with *Petit. for Review* at 1, 5-7. Ninety years ago, in *State v. Marsh*, this Court explicitly held that the accused could raise a constitutional claim of courtroom closure for the first time on appeal. 126 Wash. 142, 144-47, 217 P. 705 (1923). Since *Marsh* and after implementation of Rule of Appellate Procedure 2.5, this Court has reviewed alleged courtroom closures in an extensive line of cases without

² Although Mr. Grisby is not required to show prejudice, the appearance of fairness undoubtedly was affected by the court announcing there were unresolved questions regarding a prospective juror's capacity to serve but then posing those, and perhaps unknown other, questions in private, particularly when the defendant later removed that juror. Moreover, if the court had conducted a *Bone-Club* analysis it would have recognized the available alternative procedure of questioning the juror in open court after removing the remainder of the panel.

requiring a contemporaneous objection. *E.g.*, *Wise*, 176 Wn.2d at 15-16; *Paumier*, 176 Wn.2d at 36-37; *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 162, 166, 288 P.3d 1140 (2012); *Strode*, 167 Wn.2d at 226; *State v. Momah*, 167 Wn.2d 140, 154-55, 217 P.3d 321 (2009); *Easterling*, 157 Wn.2d at 172; *Brightman*, 155 Wn.2d at 514-15; *Orange*, 152 Wn.2d at 800, 801-03, 814; *Bone-Club*, 128 Wn.2d at 257, 261; *see Sublett*, 176 Wn.2d at 143 (Stephens, J. concurring) (noting the Court has “repeatedly and conclusively rejected a contemporaneous objection rule in the context of the public trial right” and citing cases). Not only is this rule correct, but stare decisis compels it be followed here. A bedrock of our common law system, the adherence to “things decided” assures a unified justice system in which decisions of this state court of last resort remain reliable and binding. *See, e.g.*, Black’s Law Dictionary (9th ed. 2009) (defining stare decisis); *State v. Ray*, 130 Wn.2d 673, 677, 926 P.2d 904 (1996).

Requiring a defense objection to preserve a public trial error runs contrary to the allocation of responsibility for ensuring public proceedings. *Bone-Club* properly placed responsibility on the trial court to ensure that at least five factors are weighed on the record prior to closing a court proceeding. *Bone-Club*, 128 Wn.2d at 261. More recently, this Court reaffirmed, “The determination of a compelling interest for courtroom closure is ‘the affirmative duty of the trial court, not the court of appeals.’”

Strode, 167 Wn.2d at 228-29 (quoting *Bone-Club*, 128 Wn.2d at 261).

Thus, it is the trial court's responsibility to ensure the *Bone-Club* procedures are followed prior to any courtroom closure.³

Moreover, a contemporaneous objection rule is not warranted because a defendant cannot forfeit the public's article I, section 10 right to a public trial. *Strode*, 167 Wn.2d at 229-30 (citing *Bone-Club*, 128 Wn.2d at 261). Courts are independently obligated to "ensure the public's right to open trials is protected." *Id.* at 230 n.4; see *Presley*, 130 S. Ct. at 724-25 ("The public has a right to be present whether or not any party has asserted the right," and therefore, "trial courts are required to consider alternatives to closure even when they are not offered by the parties."). A member of the public is not required to assert the public's right of access to preserve this issue for appeal. See *Easterling*, 157 Wn.2d at 176 n.8, 179. Thus, "an on-the-record *Bone-Club* analysis protects both the defendant's and the public's right to an open trial." *Wise*, 176 Wn.2d at 16 (citing *Easterling*, 157 Wn.2d at 174-75).⁴

³ If the parties bear any burden to assure adherence to the public trial right, prosecutors, as quasi-judicial officers, logically bear a heavier burden than the accused. See *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

⁴ Although the State's argument pertains to forfeiture rather than waiver, it bears noting that an accused cannot be found to have waived the right to a public trial without having been informed of that right. *Morris*, 176 Wn.2d at 167. An on-the-record examination of the *Bone-Club* factors provides a defendant with that knowledge and opportunity to object, but did not occur here.

As this Court has held, requiring appellants like Mr. Grisby to prove prejudice would constitute an impossible procedural hurdle. *E.g.*, *Wise*, 176 Wn.2d at 18-19. An appellant cannot show with certainty what members of the public might have objected had they had the opportunity, what compelling interests the movant would have asserted for closing the courtroom, what members of the public might have contributed, or how the questions and answers or testimony would have differed had they been provided in public. *Id.* Moreover, the values of a public trial may be intangible and unprovable in any particular case yet serve to harm the system as a whole. *Id.* at 16-17 & n.10. Relatedly, because appellate courts review alleged violations of the public trial right de novo, a contemporaneous objection requirement would not aid appellate review like an on-the-record *Bone-Club* analysis does. *See id.* at 9.

Finally, mere silence, as occurred here and in *Strode*, 167 Wn.2d at 229, *Paumier*, 176 Wn.2d at 35-36, and *Wise*, 176 Wn.2d at 15-16, is distinct from the accused's active participation in the courtroom closure, which occurred in *Momah*, 167 Wn.2d at 155.⁵ In *Momah*, the defendant

Sublett, 176 Wn.2d at 143-44 (Stephens, J. concurring); *see Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (courts indulge every reasonable presumption against waiver of a constitutional right).

⁵ The defendant also actively participated in the closure in *Keddington v. State*, relied on by the State. *Compare* Appellee's Resp. Br. at 14, 15; Petit. for Review at 5-6 with 19 Ariz. 457, 458, 462, 172 P. 273 (1918). *Keddington*, like *State v. Collins*, 50 Wn.2d 740, 747-48, 314 P.2d 660 (1957), is

“affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning” and the court effectively considered the *Bone-Club* factors. 167 Wn.2d at 146, 151-52, 155. On the contrary, here the trial court instructed the parties that individual questioning would occur in chambers, without any request from Mr. Grisby, without any opportunity for input, and without any analysis.⁶

3. The Court should continue to hold the constitutional right to a public trial is not subject to a de minimis exception.

a. A courtroom closure cannot be de minimis.

This Court also has rejected previously the State’s argument for a de minimis exception to the constitutional public trial right. *Compare e.g., Sublett*, 176 Wn.2d at 149 (Wiggins, J. concurring); *Strode*, 167 Wn.2d at 230; *Easterling*, 157 Wn.2d at 180 *with* Petit. for Review at 1, 9-10. As in other structural error contexts, a violation of the public trial right mandates reversal because where no record is made and no weighing and balancing performed it is impossible for an appellate court to determine prejudice. Thus, in *Easterling*, the court rejected the possibility that a courtroom

inapposite also because the court considered only a partial closure. 19 Ariz. at 459, 464 (stating different rule would likely result where closure is full); Appellee’s Resp. Br. at 13-17 (relying on *Collins*). Here, the entire public, including the press and court reporter, was excluded.

⁶ If the Court overrules its longstanding precedent and requires proof of prejudice, the practical, identifiable consequences of the error are set forth in note 2, *supra*, and also include harm to the system as a whole. *Wise*, 176 Wn.2d at 17.

closure may be de minimis, even for a limited closure applicable to a limited hearing for a separately charged co-defendant. 157 Wn.2d at 180 (“a majority of this court has never found a public trial right violation to be de minimus”). Similarly, in *Paumier*, the closed voir dire proceedings were not de minimis where the court questioned four jurors in chambers about “personal health issues, criminal history, and familiarity with the defendant or the crime.” 176 Wn.2d at 32-33, 37; *accord Wise*, 176 Wn.2d at 7-8, 20 (court’s decision to question 10 prospective jurors in chambers, but on the record, about personal health matters, relationships with witnesses or other law enforcement officers, and criminal history requires reversal).

A de minimis exception would also thwart the purpose of the constitutional open court guarantee, which serves to “ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *Strode*, 167 Wn.2d at 226 (quoting *Brightman*, 155 Wn.2d at 514). The mandate that justice be administered openly “embod[ies] a ‘view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.’” *Id.* (quoting *Waller*, 467 U.S. at 46 n.4). Because even a temporary closure contravenes these principles, closing part of voir

dire “is a structural error that cannot be considered harmless.” *Id.* at 223; accord, e.g., *Easterling*, 157 Wn.2d at 181.

- b. If the Court adopts a de minimis exception to the public trial right, the closure here should not be considered de minimis.

If the Court nonetheless creates an exception to the constitutional right to a public trial for de minimis closures, that exception should not extend to the case at bar. Here the trial court unilaterally took proceedings into chambers, excluding the public and the court reporter without weighing or discussing any of the *Bone-Club* factors and apparently without giving any consideration to the public trial right. Not only is there no record of the considerations meriting closure but there is no record of the ensuing in-chambers proceedings. Therefore, it cannot be said the closed proceedings “had nothing to do with the truth-seeking function of the trial” or were merely “ministerial.” *Petit. for Review* at 3, 6. What little record there is, showing the court was interested in the prospective juror’s criminal history and Mr. Grisby ultimately struck the individually-questioned prospective juror, suggests precisely the opposite—this closure addressed matters central to the fairness of Mr. Grisby’s criminal trial and the public’s understanding of the criminal justice system.

4. The Washington Constitution's explicit mandates that trials be open to the public provide broader protection than the federal constitution.

Washington's public trial guarantee is broader than that provided under the federal constitution. The opinions of this Court render that clear, as does a state constitutional analysis pursuant to *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).⁷ Washington's guarantee that trials be held openly also appears broader than that of any other State. Accordingly, Washington courts should accord only marginal weight to foreign federal and state case law regarding the right to a public trial in other courts. Moreover, a state constitutional analysis demonstrates that our framers did not intend a procedural bar or a triviality exception to the open administration of justice.

a. The text of Washington's provisions and its significant variances from the federal public trial right.

The first and second *Gunwall* factors—the textual language of Washington's public trial right and its distinctions from the corresponding federal provision—demonstrate Washington's public trial right protects more broadly than the federal counterpart.

⁷ *Gunwall* sets forth six nonexclusive factors to guide the Court in determining whether a state constitutional provision affords greater rights than a similar federal provision: (1) the textual language of the state constitution, (2) significant differences in the texts of parallel provisions, (3) state constitutional history, (4) preexisting state law, (5) structural differences between the state and federal constitutions and (6) matters of particular state or local concern. 106 Wn.2d at 61-62.

Unlike the federal constitution, the Washington constitution contains two explicit and unqualified mandates that all criminal trials be conducted openly. Article I, section 22 provides that “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial.” Const. art. I, § 22. In addition, article I, section 10 provides that “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, § 10. These two provisions serve “complementary and interdependent functions in assuring the fairness of our judicial system.” *Bone-Club*, 128 Wn.2d at 269. “Article I, section 10’s broad mandate for openness must inform our interpretation of the right to a public trial under article I, section 22.” *Sublett*, 176 Wn.2d at 147 (Wiggins, J. concurring).

On the other hand, the federal constitution lacks the explicit and complementary article I, section 10 guarantee. Rather, the Sixth Amendment provides that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial” and the First Amendment has been interpreted to implicitly guarantee public access to criminal trials. U.S. Const. amends. I, VI; *Globe Newspaper*, 457 U.S. at 603-05. Not only is the explicit guarantee of article I, section 10 unmatched in the federal constitution, but “article I, section 10 is unique among [all] American constitutions.” *Sublett*, 176 Wn.2d at 145 (Wiggins, J.

concurring); *accord* Jennifer Friesen, 1 *State Constitutional Law: Litigating Individual Rights Claims and Defenses* § 6.07[2] (4th ed. 2006). It “strongly commits Washington to the open administration of justice.” *Sublett*, 176 Wn.2d at 145 (Wiggins, J. concurring).

The text of our constitution and the differences between our public trial provisions and those of the federal constitution compel a broader interpretation of the public trial right in Washington state courts.

- b. State constitutional history and preexisting state law also indicate Washington’s guarantee should be applied more broadly.

History demonstrates our founders intended Washington’s protection to be broad. The initial proposition for article I, section 10 read, “No court shall be secret but justice shall be administered openly and without prejudice, completely and without delay and every person shall have remedy by due course of law for injury done him in his person, property or reputation.”⁸ But the drafters ultimately adopted only the open administration of justice language and added the phrase “in all cases,” providing “a standalone open administration of justice clause that was entirely unique to our constitution when it was adopted.” *Sublett*, 176 Wn.2d at 146-47 (Wiggins, J. concurring). In adopting article I, section

⁸ The Journal of the Washington State Constitutional Convention 1889 at 499 (Beverly Paulik Rosenow, ed., 1999). Article I, section 22’s initial proposal included the right to a “speedy public trial.” *Id.* at 510-12. That language remained in subsequent proposals and was ultimately adopted. *Id.*

10 alongside article I, section 22, our drafters also rejected the federal constitution's structure. Washington's commitment to the open administration of justice was unparalleled.

In addition, existing state law shows this Court should continue to interpret Washington's public trial guarantee independently of the federal constitution. "This court has strictly watched over the accused's and the public's right to open public criminal proceedings." *Easterling*, 157 Wn.2d at 174. In Washington, a motion to close proceedings must be resisted "except under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. For example, in *Easterling*, this Court held the defendant's right to a public trial under the Washington Constitution was violated when the trial court heard a co-defendant's severance motion and motion to dismiss in a courtroom closed to Mr. Easterling, his attorney, and the public despite a lack of objection from Mr. Easterling and over the State's argument that the closure was trivial. 157 Wn.2d at 177, 180 & n.12 (based on our state constitution's dual provisions, the Court distinguished federal cases that held federal courtroom closures de minimis under the Sixth Amendment). A review of preexisting law demonstrates this Court's position has been consistent. *E.g.*, *Paumier*, 176 Wn.2d at 32-37 (holding individual voir dire of four prospective jurors in chambers without reviewing *Bone-Club* factors constitutes a structural error

requiring reversal); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 32, 640 P.2d 716 (1982) (holding heightened presumption of openness applicable to trials applies to dispositive motions filed in criminal cases);⁹ *Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 54-57, 615 P.2d 440 (1980) (applying state constitution to decide case more broadly than “procedurally and factually indistinguishable” U.S. Supreme Court case under the Sixth Amendment); *Marsh*, 126 Wash. at 145, 147.

- c. Structural differences and this State’s concern for proceedings in its own courts also dictate that the state constitutional right be interpreted independently from its federal counterpart.

The fifth factor, differences in structure between the state and federal constitutions, always supports an independent analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *Gunwall*, 106 Wn.2d at 66.

Finally, with regard to the sixth factor, the manner of conducting criminal trials, and the need to protect the accused’s and public’s right to open trials in Washington courts, is chiefly a matter of state concern. *E.g.*,

⁹ *Ishikawa* was applied to dispositive motions in civil trials in *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004), and to non-dispositive motions and records in *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 548-50, 114 P.3d 1182 (2005), where the Court reasoned, “There is good reason to diverge from federal open courts jurisprudence where appropriate. While our state constitution has an explicit open courts provision, there is no such counterpart in the federal constitution, and much of the federal right is grounded in common law.”

Const. art. IV (setting forth the administration of state courts); Const. art. I, § 35 (granting victims a meaningful role in state system not guaranteed under the federal constitution); *State v. Gocken*, 127 Wn.2d 95, 105, 896 P.2d 1267 (1995) (protecting double jeopardy rights of Washington citizens is matter of state concern). Our founders made this clear by adopting two complementary and interdependent constitutional provisions to guarantee the public trial right, which are distinct from the singular provision in the Bill of Rights. *Compare* Const. art. I, §§ 10, 22 *with* U.S. Const. amend. VI. This factor also weighs in favor of an independent state constitutional analysis because there is no need for national uniformity on the conduct of criminal trials in state courts as long as the minimum guarantees of the federal constitution are satisfied. *See State v. Schaaf*, 109 Wn.2d 1, 16, 743 P.2d 240 (1987) (concluding there is no need for national uniformity in juvenile justice systems).

In sum, Washington's unique and powerful guarantee of open criminal trials warrants a broader application of the right to public trials in Washington and minimizes the persuasive value of federal and out-of-state case law in this setting.

E. CONCLUSION

Henry Grisby's trial court failed to consider his and the public's right to public voir dire when the court unilaterally closed proceedings and

moved them in chambers without even a court reporter. Neither this Court nor any member of the public can determine what occurred in chambers or why a secret proceeding was required. A new, public trial is required.

DATED this 23RD day of October, 2013.

Respectfully submitted,

/s/ Marla L. Zink
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Washington Appellate Project
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Petitioner,)	
)	NO. 86216-8
v.)	
)	
HENRY GRISBY III,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **CORRECTED SUPPLEMENTAL BRIEF** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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