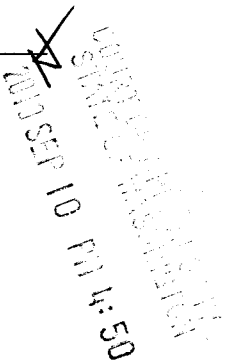
No. 66202-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE



STATE OF WASHINGTON,

Respondent,

v.

RANDY WHITMAN,

Appellant.

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

SUPPLEMENTAL BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. The State bears the burden of proving the closure of the proceedings comports with constitutional requirements.

The Supreme 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. *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 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. Thus, the State must prove that where the public is excluded from a hearing the right to public proceedings was not violated.

Despite this well-established rule, the State urges the Court to require Mr. Whitman shoulder the burden of proving the closure was unconstitutional. Supplemental Brief of Respondent at 5 (citing In *re the Personal Restraint of Yates*, 177 Wn.2d 1, 29, 296 P.3d 872, 886 (2013)) The State misreads the holding of *Yates*. The burden of proof the Court was speaking of there was a petitioner's burden in a personal restraint petition to bring forth *prime facie* evidence of an error in order to justify either relief or a reference hearing. *Id.* at 27-31. In addressing that

question, the Court simply relied on its previous holding that sealed jury questionnaires did not amount to a court closure. *Id.* (citing *State v. Beskurt*, 176 Wn.2d 441, 293 P.3d 1159 (2013)). The State's reading of *Yates* would eliminate any presumption of openness. In *Yates*, the Court did not purport to overrule its long-settled rule that the party supporting closure bears the burden of proving the closure accords with constitutional requirements.[1] The State as the party defending the closure bears the burden of proving the closure comports with constitutional requirements. The State has not met that burden.

2. **The trial court denied Mr. Whitman of 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 *Ishikawa*. *State v. Bone-Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995). The court's consideration of

[1] The State also cites to *State v. Wilson*, 174 Wn. App. 328, 341, 298 P.3d 148 (2013) to support its claim. Supplemental Brief of Respondent at 5-6. But the cited portion of *Wilson* does not address which party bears the burden nor does it address the long-settled rule that a party seeking to close a proceeding bears the burden. Even if it did, the Court of Appeals could not overturn the Supreme Court.

these criteria must occur on the record. *State v. Easterling*, 157 Wn.2d 167, 175-76, 137 P.3d 825 (2006). 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. *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). The 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.)

The State contends 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 to consolidate an additional offense for trial "necessarily impact[ed] the posture and fairness [Mr. Whitman's] 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.

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. 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

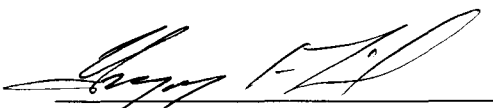
of their responsibility to the accused and the importance of their functions. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Resolution of evidentiary disputes, what will be admitted and what will not, is crucial to the outcome of any trial. That determination is a critical function of a judge and one to which the public trial right logically extends.

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.

B. CONCLUSION

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

Respectfully submitted this 10th day of September, 2013.



GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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RANDY WHITMAN,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL 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:

[X]	HILARY THOMAS, DPA WHATCOM COUNTY PROSECUTOR'S OFFICE 311 GRAND AVENUE BELLINGHAM, WA 98225	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF SEPTEMBER, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711