

No. 37244-4-II

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

---

STATE OF WASHINGTON,  
Respondent,  
v.  
DOUGLAS McDONALD,  
Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 JUL -9 PM 4:54

FILED  
COURT OF APPEALS  
DIVISION II  
08 JUL 10 11:30  
STATE OF WASHINGTON  
BY [Signature]

---

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

---

BRIEF OF APPELLANT

---

GREGORY C. LINK  
Attorney for Appellant

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

**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENT OF ERROR..... 1

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR ..... 1

D. STATEMENT OF CASE..... 2

E. ARGUMENT..... 3

THE TRIAL COURT IMPERMISSIBLY CONDUCTED  
A PORTION OF JURY VOIR DIRE IN PRIVATE  
WITHOUT FIRST EXPLAINING THE NECESSITY  
OF CLOSING THE PROCEEDINGS, THUS  
DENYING McDONALD AND THE PUBLIC THEIR  
RIGHTS TO A PUBLIC TRIAL ..... 3

a. The federal and state constitutions provide the  
accused the right to a public trial and also  
guarantee public access to court proceedings..... 3

b. Washington courts must apply a five-part test  
when addressing a request for full or temporary  
exclusion of the public from a trial ..... 7

c. The trial court did not apply the five-part *Bone-  
Club* test before questioning jurors in chambers..... 9

d. The court similarly violated the public’s right of  
access ..... 13

e. Reversal is required ..... 14

F. CONCLUSION ..... 15

## TABLE OF AUTHORITIES

### **United States Constitution**

U.S. Const. Amend. I.....	1, 4, 5
U.S. Const. Amend. VI .....	1, 4

### **Washington Constitution**

Const. Art. I, § 10 .....	1, 4
Const. Art. I, § 22 .....	1, 4

### **Washington Supreme Court**

<u>Allied Daily Newspapers v. Eikenberry</u> , 121 Wn.2d 205, 848 P.2d 1258 (1993) .....	6, 8, 14
---	----------

<u>Dreiling v. Jain</u> , 151 Wn.2d 900, 93 P.3d 861 (2004) .....	8
---	---

<u>Federated Publications Inc. v. Kurtz</u> , 94 Wn.2d 51, 615 P.2d 440 (1980) .....	4
---	---

<u>In re Oliver</u> , 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) .....	5
--	---

<u>In re Personal Restraint of Orange</u> , 152 Wn.2d 75, 100 P.3d 291 (2004) .....	7, 8, 12
--	----------

<u>Seattle Times Co. v. Ishikawa</u> , 97 Wn.2d 30, 640 P.2d 716 (1982) .....	passim
--	--------

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

<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005) .....	7, 9
--	------

<u>State v. Coe</u> , 101 Wn.2d 364, 679 P.2d 353 (1984) .....	4
--	---

<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006) .....	passim
---	--------

### **Washington Court of Appeals**

<u>State v. Duckett</u> , 141 Wn.App. 797, 173 P.3d 948 (2007) .....	9
--	---

State v. Frawley, 140 Wn.App. 713, 167 P.3d 713 (2007)..... 9, 14

**United States Supreme Court**

Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947) ..... 4

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) ..... 3, 5

Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461(1938)..... 10

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ..... 6, 7

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) ..... 3, 5

Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed2d 31 (1984)..... 7, 8

A. SUMMARY OF ARGUMENT

Douglas McDonald contends the trial court erred and deprived him of his right to a public trial by questioning ten jurors in private during jury selection without first finding compelling reasons and following the constitutional requirements for closing this portion of the trial to the public.

B. ASSIGNMENT OF ERROR

The court denied Mr. McDonald his right to a public trial and the public's right to open court proceedings as guaranteed by the First and Sixth Amendment, as well as Article I, §§ 10 and 22 of the Washington Constitution.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The right to a public trial as protected by the federal constitution and the express guarantees of the Washington Constitution mandates that the court may not close any portion of a court proceeding to the public without first completing a specific on-the-record inquiry and explanation of the reasons for the courtroom closure. In the case at bar, the court did not conduct any on-the-record explanation of the courtroom closure before holding a portion of the jury voir dire in its private chambers. Did the court's

improper closure of the courtroom violate the federal and state constitution and require reversal?<sup>1</sup>

D. STATEMENT OF CASE

Mr. McDonald was charged with one count of vehicular homicide stemming from an accident that resulted in the death of Michael Jines. CP 71-72

Prior to the initiation of jury selection the court asked the attorneys if either objected to conducting portions of voir dire in the court's chambers. RP Vol. VI. 8. Neither attorney voiced an objection. Id. The court then asked if any "members of the public" objected to such a procedure. Id. No objections were voiced. Id.

The court did not explain to Mr. McDonald that he had a constitutional right to a public trial, including voir dire, nor did the court obtain a personal waiver from Mr. McDonald of that right. The court similarly failed to identify or explain the public's right to open proceedings. The court simply said:

. . . . You're all looking at me like, what is he talking about? Well, I'll explain.

I think it's Division III of the Court of Appeals out of Spokane, wrote a decision that said that to not ask people if they object, and then to do that, is to violate the open court proceedings, and as such they booted the case over there because of it. And so, we're all

---

<sup>1</sup> A similar issue is presently pending before the Supreme Court in State v. Strode, 80849-0, to be argued June 10, 2008.

trying to be mindful of that particular case and give people the opportunity to object if they see fit.

Id. at 8-9

During jury selection, the court conducted individual voir dire of ten prospective jurors in chambers. RP Vol. V. 11-24, 40-42.

While the record indicates defense counsel was present during this private voir dire, it does not plainly indicate Mr. McDonald's presence.

The jury convicted Mr. McDonald of vehicular homicide. CP 22-23.

E. ARGUMENT

THE TRIAL COURT IMPERMISSIBLY CONDUCTED A PORTION OF JURY VOIR DIRE IN PRIVATE WITHOUT FIRST EXPLAINING THE NECESSITY OF CLOSING THE PROCEEDINGS, THUS DENYING McDONALD AND THE PUBLIC THEIR RIGHTS TO A PUBLIC TRIAL

a. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings. Public criminal trials are a hallmark of the Anglo-American justice system. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality) (outlining history of

public trials from before Roman Conquest of England through Colonial times). “A trial is a public event. What transpires in the court room is public property.” State v. Coe, 101 Wn.2d 364, 380, 679 P.2d 353 (1984) (quoting Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947)).

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .” Article I, § 22 of the Washington Constitution also guarantees “[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial.”

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. Art. I, § 10; see U.S. Const. Amend. I. This clear constitutional provision entitles the public and the press to openly administered justice. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by Article I, § 5, which establishes the freedom of every person to speak and publish on any topic. Federated

Publications, 94 Wn.2d at 58. In the federal constitution, the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial. Globe Newspaper, 457 U.S. at 603-05; Richmond Newspapers, 448 U.S. at 580 (plurality).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary 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 requirement of a public trial is for the benefit of the accused; that the public may see he 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.

Id., quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. Globe Newspaper, 457 U.S. at 606; Richmond Newspapers, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community concern or outrage concerning violent crimes. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509, 104 S.Ct. 819,

78 L.Ed.2d 629 (1984) (Press-Enterprise I). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. Press-Enterprise I, 464 U.S. at 508. Openness thus “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” Id. at 501. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court.

We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The right to a public trial includes the right to have public access to pre-trial proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (public trial right includes pre-trial hearing regarding co-defendant’s interest in pleading guilty); In re Personal Restraint of Orange, 152 Wn.2d 75, 812, 100 P.3d 291

(2004) (public trial right applies to jury voir dire); Bone-Club, 128 Wn.2d at 257 (public trial right at pre-trial suppression hearing).

b. Washington courts must apply a five-part test when addressing a request for full or temporary exclusion of the public from a trial. In order to protect the accused's constitutional right to a public trial, 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." Easterling, 157 Wn.2d at 175

The constitutional right to a public trial is not waived by counsel's failure to object. Id. at 176 n.8 ("explicitly" holding "a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection."); State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005). 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.Ed2d 31 (1984), citing Press-Enterprise I, 464 U.S. at 510. Moreover, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. Id.

A Washington court faced with a request for closure must perform a weighing test based upon the five criteria adopted in Bone-Club and Ishikawa, which mirrors the Waller decision. Bone-Club, 128 Wn.2d at 259-60. The test requires:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
4. The court must weigh the competing interests of the proponent of closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting Eikenberry, 121 Wn.2d at 210-11); accord, Dreiling v. Jain, 151 Wn.2d 900, 913-15, 93 P.3d 861 (2004) (test applied to motion to seal information filed in support of civil motions); Orange, 152 Wn.2d at 806-07; Ishikawa, 97 Wn.2d at 37-39.

c. The trial court did not apply the five-part *Bone-Club* test before questioning jurors in chambers. In State v. Frawley, 140 Wn.App. 713, 167 P.3d 713 (2007), the Court of Appeals reversed a first degree murder conviction because a trial court conducted part of jury voir dire in chambers. There was no discussion of the reasons for conducting individual voir dire in a closed courtroom in that case. Id. at 718, 720.

The defendant in Frawley waived his right to be present during voir dire, but did not affirmatively, intelligently, or voluntarily waive his right to a public trial. Id. at 720. The trial court “did not go through the Bone-Club requirements on the record, nor did it enter specific findings justifying the closure.” Id. at 721.

Frawley refused to determine on appeal whether the Bone-Club factors would have been met since the trial court had not done so. Id. The court ruled that it would be an inappropriate exercise of appellate review. Id. The Supreme Court also rejected requests to conduct the Bone-Club analysis for the first time on appeal in Bone-Club and Brightman. Bone-Club, 128 Wn.2d at 261; Brightman, 155 Wn.2d at 518.

A similar error occurred in State v. Duckett, 141 Wn.App. 797, 173 P.3d 948 (2007). In a case involving multiple rape

allegations, the court told prospective jurors that it would discuss privately issues regarding sexual abuse and media exposure. Id. at 801. The court ruled that any time the trial court closes portions of the proceedings to the public, including jury selection, its failure to engage in the necessary analysis is an error that cannot be cured by an appellate court's post hoc justifications. Id. at 804-05.

In the case at bar, the court conducted a portion of the jury voir dire in the judge's chambers, outside of the public courtroom, in response to a juror's claim that he had a private issue. 1RP 7, 40-41. The defense did not seek this private conference, nor did the prosecution. Both the prosecutor and defense attorney stated they had no objection to court's proposed procedure. RP Vol. VI. 8.

Bone-Cub held:

an opportunity to object holds no "practical meaning" unless the court informs potential objectors of the nature of the asserted interests. Ishikawa, 97 Wn.2d at 39. The motion to close, not Defendant's objection, triggered the trial court's duty to perform the weighing procedure.

128 Wn.2d at 261. This standard is consistent with the requirement that the waiver of a constitutional right be "an intentional relinquishment or abandonment of a known right or privilege."

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461(1938).

Here, the court did not inform Mr. McDonald of the nature of the right at stake nor even inquire as to whether he personally objected to the court's proposed procedure. More importantly there is no indication on the record that either Mr. McDonald or the public generally understood the nature of the rights at stake. Defense counsel's statement that he did not object to in-chambers voir dire does not constitute a waiver by Mr. McDonald of his constitutional rights.

In any event, the presence of an objection to closed proceedings is merely one of five factors the trial court must consider before closing the proceedings. Bone-Club makes clear the motion to close and not an objection triggers the trial court's duty to engage in the analysis. If a party's acquiescence alone is sufficient to warrant closing of proceedings, the remaining Ishikawa factors are rendered meaningless in a substantial number of cases.

Prior to privately questioning the individual juror, the court did not identify a compelling interest as required by the first Bone-Club factor. No party sought private questioning of jurors. The court did not discuss whether there was a serious and imminent threat that required private questioning of the jurors.

Contrary to the remaining Bone-Club factors, the court did not make any finding that the proposed closure was the least restrictive method available for protecting the unidentified interests potentially threatened. Having failed to identify any compelling interests at stake, the court did not weigh the public's right of access and the importance of a public trial against the need for closure. Because there was no finding that the closure was necessary to serve a compelling interest, there can be no finding that the closure was no longer than necessary to serve this unidentified interest. The trial court did not even identify the various interests in open proceedings. All interests must be identified for the court to engage in the meaningful weighing required by the constitution.

The Supreme Court has ruled unequivocally that jury selection is not exempt from public trial requirements. Orange, 152 Wn.2d at 804. The court may not conduct voir dire in private without first discussing the need to do so on the record and weighing the necessary Bone-Club factors. Easterling, 157 Wn.2d at 175; Orange, 152 Wn.2d at 804. Here, the trial judge made no effort to comply with the constitutional prerequisites to conducting private proceedings before questioning the juror in private. Thus,

the court violated the constitutional requirement of open court proceedings.

d. The court similarly violated the public's right of access. The requirements for protecting the public's right to open courtrooms "mirrors" the requirements used in criminal cases. Easterling, 157 Wn.2d at 175. The court may not close the courtroom without "first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order." Id. (citing Bone-Club, 128 Wn.2d at 258-59; and Ishikawa, 97 Wn.2d at 37); see Easterling, 157 Wn.2d at 174-75 (trial court must "*resist a closure motion except under the most unusual circumstance.*" Emphasis in original).

A member of the public is not required to assert the public's right of access in order to preserve this issue for appeal. Easterling, 157 Wn.2d at 176 n.8. In Easterling, the Supreme Court reversed a criminal conviction due to the trial court's closure of the courtroom during a pre-trial hearing that solely involved the co-defendant, whose case had previously been severed from the defendant. Id. at 178, 180 n.11. The trial court in Easterling erred by not articulating the necessary grounds for closing the courtroom, even absent any objection to the courtroom closure. Id.

In Easterling, there was no objection to the courtroom closure yet the court's failure to articulate a sufficiently compelling reason for closing the hearing to the public violated both the public's and the defendant's rights to an open and public trial. Id. at 179.

This decision to close a part of a criminal trial to the public runs afoul of the article I, section 10 guarantee of providing open access to criminal proceedings. It also runs contrary to this court's consistent position of strictly protecting the public's and the press's right to view the administration of justice. Accord Eikenberry, 121 Wn.2d 205; Ishikawa, 97 Wn.2d 30.

Easterling, 157 Wn.2d at 179.

Easterling held the public has a right to access court proceedings unless there is a compelling need for closure. Generic, and even reasonable, concerns for juror privacy do not trump the constitutional right of public proceedings. Frawley, 140 Wn.App. at 10.

e. Reversal is required. The remedy for a violation of the public's right of access is remand for a new trial. Easterling, 157 Wn.2d at 179-80. In Easterling, the court rejected the possibility that a courtroom closure may be de minimus, 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

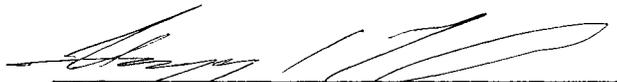
has never found a public trial right violation to be de minimus.”).  
Where a portion of the proceedings are fully closed to the public,  
the closure is not trivial or de minimus and requires reversal. Id. at  
174, 180 n.12. Furthermore, “[t]he denial of the constitutional right  
to a public trial is one of the limited classes of fundamental rights  
not subject to harmless error analysis.” Id. at 181.

The trial court’s error in conducting private voir dire requires  
reversal of Mr. McDonald’s conviction.

F. CONCLUSION

This court must reverse Mr. McDonald’s conviction and  
remand this matter for a new trial.

Respectfully submitted this 8<sup>th</sup> day of July, 2008.



---

GREGORY C. LINK - 25228  
Washington Appellate Project – 91052  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 37244-4-II
v.	)	
	)	
DOUGLAS MCDONALD,	)	
	)	
Appellant.	)	

**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 9<sup>TH</sup> DAY OF JULY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MONTY DALE COBB, DPA  
MASON COUNTY PROSECUTOR'S OFFICE  
PO BOX 639  
SHELTON, WA 98584-0639

(X) U.S. MAIL  
( ) HAND DELIVERY  
( ) \_\_\_\_\_

[X] DOUGLAS MCDONALD  
313844  
WASHINGTON STATE PENITENTIARY  
1313 N 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

(X) U.S. MAIL  
( ) HAND DELIVERY  
( ) \_\_\_\_\_

FILED  
COURT OF APPEALS  
DIVISION II  
08 JUL 11 AM 11:30  
STATE OF WASHINGTON  
DEPT. OF CORRECTIONS

**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF JULY, 2008.

X \_\_\_\_\_ 

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 JUL -9 PM 4:54