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Sup. Ct. No. 80727-2
COA No. 25043-1-III
Consolidated with No. 86513-2

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

BRIAN WILLIAM FRAWLEY,

Defendant/Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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 ORIGINAL

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I. ISSUE PRESENTED FOR REVIEW

Did the trial court violate Mr. Frawley's constitutional right to a public trial by excluding the public from private juror voir dire and general jury voir dire without first analyzing the *Bone-Club* factors?

II. STATEMENT OF THE CASE

The following facts are pertinent to the issues presented by Petitioner.

Prior to jury selection, the trial court proposed, and the parties agreed, to submit a questionnaire to the venire panel followed by individual voir dire in chambers of each prospective juror who answered "yes" to any of the questions in the questionnaire. RP 64-65, 423. In a colloquy with Mr. Frawley, the court indicated, "...we're trying to determine if there's potential pretrial publicity that would be damaging in this case; and we're trying to determine what experience people have had with these issues to, ultimately, make a decision whether they're the type of people that could be fair and impartial and be a member of this jury." RP 64-65.

The court suggested "jurors are willing and able to disclose more fully if members of the State aren't there, if the defendant isn't there...I honestly think the jurors answer more honestly and both sides need to

know that before you select those jurors.” RP 66. Mr. Frawley then orally agreed to waive his presence during the individual voir dire. RP 66-68.

After reviewing the results of the questionnaire, the court conducted individual voir dire in chambers of 35 prospective jurors over the course of two days in the presence of only the respective counsel and the court reporter. RP 424-25, 437, 462-74, 493-648, 651-857.

Challenges for cause were conducted and either granted or denied in chambers following the voir dire of each individual prospective juror. RP 427, 462-74, 493-648, 651-857. Eleven prospective jurors were stricken for cause. RP 857-58.

The court next proposed that the general voir dire and jury selection process be conducted without the public being present. “And the reason I have to do that is I don’t have any room to put the public in here. Otherwise, I’m going to have to locate a larger courtroom somewhere.” RP 859. Mr. Frawley then orally agreed to waive having the public present for the remainder of the voir dire process. RP 864-67.

The entire general voir dire and jury selection process was conducted without the public being present. RP 885-1036.

III. ARGUMENT

The trial court violated Mr. Frawley's constitutional right to a public trial by excluding the public from private juror voir dire and general jury voir dire without first analyzing the *Bone-Club*¹ factors.

A criminal defendant has a right to a public trial, including during the jury selection process. Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. WA Const. art 1, § 22; U.S. Const. amend. VI; *In re Personal Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

Additionally, the public and press have an implicit First Amendment right to a public trial. U.S. Const. amend. I; WA Const. art 1, § 10; *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006).

The guaranty of open criminal proceedings extends to “the process of juror selection,” which “is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). “[A]lthough the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court to resist a closure

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

motion except under the most unusual circumstances.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Even when only a part of jury voir dire is improperly closed to the public, it can violate a defendant’s constitutional public trial right. *Orange*, 152 Wn.2d at 812, 100 P.3d 291. “Moreover, the defendant’s failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right.” *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

“ ‘The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’ ” *Orange*, 152 Wn.2d at 806 (quoting *Waller*, 467 U.S. at 45, 104 S.Ct. 2210).

This Court requires compliance with five standards before the court can properly close any part of a trial to the public:

1. The proponent of closure or sealing must make some showing [of a compelling 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 258-89.

The holding in *Bone-Club* has been adopted verbatim in subsequent Supreme Court cases. *Orange*, 152 Wn.2d at 812, 100 P.3d 291; accord *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310, (2009), *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012). A trial court's failure to follow the five-step closure test violates a defendant's right to a public trial under section 22 of the Washington Constitution. *Id.* When the record “lacks any hint that the trial court considered [the defendant’s] public trial right as required by *Bone-Club*, [the court on appeal] cannot determine whether the closure was warranted.” *Brightman*, 155 Wn.2d at 518, 122 P.3d 150.

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. *Bone-Club*, 128 Wn.2d at 261-62, 906 P.2d 325; *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). “[P]rejudice

is presumed where a violation of the public trial right occurs.” *Bone-Club*, 128 Wn.2d at 261-62 (citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923)).

- a) Conducting a portion of the jury selection process in chambers effectively closes the courtroom.

The State argues that the trial court did not technically “close” the courtroom by holding portions of the individual voir dire in chambers. However, a de facto closure occurred as a result of the locations and physical conditions existing when jurors were individually questioned outside the courtroom in a room not ordinarily accessed by the public with the door closed. *Strode*, 167 Wn.2d at 233, fn. 1 (Fairhurst, J., concurring). This Court has also clearly stated that a trial court's in-chambers questioning of potential jurors is structural error. *In re Morris*, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012).

Moreover, conducting a portion of the jury selection process in chambers without a *Bone-Club* analysis violates the right to a public trial. *Strode*, 167 Wn.2d at 223. The constitutional guaranty of a public trial is for open criminal proceedings that the public may witness, not a guaranty that the public may sit in an empty courtroom while the court conducts

proceedings privately in chambers. *Press-Enter. Co.*, 464 U.S. at 505, 104 S.Ct. 819; *Bone-Club*, 128 Wn.2d at 259.

b) The two oral waivers did not abrogate the Court's responsibility to do a *Bone-Club* analysis before closing the courtroom to the public.

Next, the State argues that the two oral waivers given by Mr. Frawley negate the need for the trial court to analyze the *Bone-Club* factors. However, this argument fails for several reasons. It fails for the first waiver because Mr. Frawley only waived his right to personally be present at the individual voir dire held in chambers. He did not waive his right to a public trial.

The Washington Supreme Court dealt with this issue in *Morris*. In *Morris* the State attempted to circumvent the underlying public trial right violation by claiming that Morris implicitly waived his right to a public trial when he waived his right to be present at the individual voir dire held in chambers. *Morris*, 176 Wn.2d at 166. The Court noted that “[w]aiver of the right to be present, however, should not be conflated with waiver of the right to a public trial.” *Id.* (citing *State v. Duckett*, 141 Wn. App. 797, 805–07, 173 P.3d 948 (2007)). A defendant must have knowledge of a right to waive it. *Morris*, 176 Wn.2d at 167 (citing *Duckett*, 141 Wn. App.

at 806–07). Since there was no discussion of Morris' public trial right before the closure, the Court found that Morris did not waive his right to a public trial. *Id.*

Herein, the alleged waiver is indistinguishable from that in *Morris*. Mr. Frawley only waived his right to personally be present at the individual voir dire held in chambers, not his right to a public trial. The trial court did not discuss his right to a public trial. See RP 64-66. Therefore, he did not waive his right to a public trial.

The second oral waiver provided by Mr. Frawley concerning the general voir dire and jury selection process was invalid for a different reason. Namely, Mr. Frawley did not have the authority to waive the right to have the general voir dire and jury selection process conducted without the public being present. See *Strode*, 167 Wn.2d at 229. The public and press have an implicit First Amendment right to a public trial and a similar right under the Washington Constitution. U.S. Const. amend. I; WA Const. art 1, § 10; *Waller v. Georgia*, 467 U.S. at 46, 104 S.Ct. 2210; *Easterling*, 157 Wn.2d at 179, 137 P.3d 825.

Since the public also has a right to object to the closure of a courtroom, the trial court has an independent obligation to perform a *Bone-Club* analysis. *Strode*, 167 Wn.2d at 230. The concurring opinion

in *Strode* asserted that any discussion of the public's right to open trials conflates the rights of the defendant and the public because a defendant should not be able to assert the rights of the public or press. *Strode*, 167 Wn.2d at 236, (Fairhurst, J., concurring). However, the lead opinion noted, “We address the right of the public because courts have the overriding responsibility to ensure that the public's right to open trials is protected. This responsibility is laid out in the fourth *Bone-Club* criterion.” *Strode*, 167 Wn.2d at 230, fn. 4.

Here, the record reveals that the public was not afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration by the trial court. The authority cited above requires strict compliance of the *Bone-Club* factors before any closure order may be properly entered. The *Bone-Club* factors go far beyond just the defendant's wishes. The public, the press, interested spectators, friends and family have an equal constitutional right to witness the entire proceedings. Therefore, the waivers do not substitute for or alleviate the need for a thorough analysis of the *Bone-Club* factors.

c) GR 31 does not carve out voir dire concerning juror responses to questionnaires as non-public portions of a jury trial.

The State argues that the presumptive privacy afforded juror information under GR 31 means that voir dire concerning juror responses to questionnaires does not implicate the public trial right.

GR 31 applies to all court records. *Duckett*, 141 Wn. App. at 807, 173 P.3d 948. It is merely a procedural tool that facilitates compliance with the requirement of public access to judicial information. *Id.* (citing 2 Karl B. Tegland, *Washington Practice: Rules Practice GR 31*, *Supreme Court Press Release Concerning GR 31*, at 40–42 (6th ed. Supp.2007)); GR 31(a).

GR 31 is read in accord with GR 15, which provides a uniform procedure for the sealing of court records. *Duckett*, 141 Wn. App. at 808. Appellate courts of this state have construed the standard for sealing documents under GR 15 as subject to the constitutional requirement of public records and proceedings set out in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). *Id.* (citing *Ishikawa*, 97 Wn.2d at 36–39, 640 P.2d 716) (further citations omitted). This is in keeping with the general principle that a court rule will not be construed to circumvent or

supersede a constitutional mandate. *Id.* (citing *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987)).

Accordingly, GR 31 should not be construed to relieve the trial court of its obligation to engage in the *Bone-Club* analysis before closing all or any portion of voir dire to the public. *Id.* The privacy interests of jurors acknowledged by GR 31 are simply part of the *Bone-Club* analysis. *Id.* (citing *Bone-Club*, 128 Wn.2d at 258–59, 906 P.2d 325). GR 31 cannot substitute for the particularized constitutional inquiry. *Id.* “We will not then read GR 31 as carving out non-public portions of a jury trial.” *Id.* (citing *Orange*, 152 Wn.2d at 804, 100 P.3d 291 (stating, “[t]he guaranty of open criminal proceedings extends to ‘[t]he process of juror selection,’ which ‘is itself a matter of importance, not simply to the adversaries but to the criminal justice system’ ”)) (further citations omitted).

Moreover, in-chambers questioning is not the only alternative to protecting juror privacy. Individual questioning in the courtroom is an equally viable alternative to closure. *Strode*, 167 Wn.2d at 230, fn. 5.

d) The presumption of prejudice where a violation of the public trial right occurs should not be abrogated.

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.” *Easterling*, 157 Wn.2d at 181, 137 P.3d 825 (citing *Neder*, 527 U.S. at 8, 119 S.Ct. 1827 (citing *Waller*, 467 U.S. 39, 104 S.Ct. 2210)). This is so because denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed. *Strode*, 167 Wn.2d at 230 (citing *Neder*, 527 U.S. at 8, 119 S.Ct. 1827 (citing *Waller*, 467 U.S. 39, 104 S.Ct. 2210)); *Easterling*, 157 Wn.2d at 181, 137 P.3d 825 (citing *Bone-Club*, 128 Wn.2d at 261–62, 906 P.2d 325 (citing *Marsh*, 126 Wash. at 146–47, 217 P. 705)). This Court in *Orange* concluded that by improperly closing the courtroom during voir dire “the remedy for the presumptively prejudicial error [was], as in *Bone-Club*, remand for a new trial.” *Orange*, 152 Wn.2d at 814, 100 P.3d 291.

The State argues that this rule of presumptive prejudicial error should be abrogated; that prejudice to Mr. Frawley should not be presumed because the closure was for his benefit. The State’s argument fails to take into account that the public and press also have an implicit First Amendment right to a public trial and a similar right under the

Washington Constitution. See citations *supra*. Since the public also has a right to object to the closure of a courtroom, the trial court has an independent obligation to perform a *Bone-Club* analysis. *Strode*, 167 Wn.2d at 230.

The focus cannot be solely on whether or not a defendant benefited or was not harmed by the closure. To adopt this position, as the State suggests, would deny the public and the press any remedy when closure occurs. That is the obvious reason for the rule of presumptive prejudicial error and it should not be abrogated.

- e) The trial court did not consider, analyze or weigh any of the Bone-Club factors.

Considering the first *Bone-Club* factor, the trial court as the proponent of closure of the individual voir dire did not make any showing of a compelling interest that posed a serious and imminent threat to Mr. Frawley's right to a fair trial. In a colloquy with Mr. Frawley, the court indicated, "...we're trying to determine if there's potential pretrial publicity that would be damaging in this case; and we're trying to determine what experience people have had with these issues to, ultimately, make a decision whether they're the type of people that could be fair and impartial and be a member of this jury." RP 64-65. The court

also suggested “jurors are willing and able to disclose more fully if members of the State aren’t there, if the defendant isn’t there...I honestly think the jurors answer more honestly and both sides need to know that before you select those jurors.” RP 66. But this statement of purpose and the court’s personal belief does not constitute a compelling interest for closure, nor did the court suggest that it would.

Similarly, as the proponent of closure of the general voir dire, the trial court did not make any showing of a compelling interest. The court merely indicated, “And the reason I have to do that is I don’t have any room to put the public in here. Otherwise, I’m going to have to locate a larger courtroom somewhere.” RP 859. This justification for closure is remarkably similar to that offered by the trial court in *Orange*, which the Supreme Court rejected. *Orange*, 152 Wn.2d at 808-10, 812.

In *Orange*, the trial court closed the courtroom during more than half of the time spent on jury voir dire, because of limited courtroom space and for security reasons. *Orange*, 152 Wn.2d at 808-10. The *Orange* Court held the trial court’s failure to analyze the five *Bone-Club* factors before ordering the courtroom closed violated *Orange*’s right to a public trial. *Orange*, 152 Wn.2d at 812.

Here, the violation is even more egregious since the judge closed the courtroom to the public for the *entire* jury voir dire merely because of limited courtroom space and for convenience. See RP 859. Thus, the closure was not based on any requisite compelling interest that posed a serious and imminent threat to Mr. Frawley's right to a fair trial.

Regarding the second factor, there is nothing in the record to show that anyone other than the attorneys was given the opportunity to object to either closure. Both the public and press have an implicit First Amendment right to a public trial as well as a similar right under the Washington Constitution art 1, § 10. Yet neither group was given an opportunity to object to the court's decision.

Considering the third factor, the proposed method for curtailing open access for both the individual and general voir dire was clearly not the least restrictive means available for protecting the threatened interests. For example, instead of conducting the individual voir dire in chambers, the court could have protected the threatened interest to an impartial jury by holding the prospective jury pool at a location outside the public courtroom and bringing prospective jurors into the courtroom for voir dire one at a time. For the general voir dire, a less restrictive alternative was readily available, and the judge said as much on the record. See RP 859.

All the trial judge needed to do to keep the general voir dire open to the public was to switch courtrooms with another judge in a larger courtroom, *as it had done just two days previously* when it addressed the entire venire panel. RP 425-26, 434-35.

To comply with the fourth factor the court must weigh the competing interests of the proponent of closure (the court) and the public. The record herein does not disclose any such weighing of the competing interests of private proceedings and the public's right to witness the proceedings. The constitutional public trial right is the right to have a trial open to the public. *Orange*, 152 Wn.2d at 804-05. "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" *Bone-Club*, 128 Wn.2d at 259 (citing *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 506 n.25, 92 L.Ed. 682 (1948) (quoting Thomas M. Cooley, *Constitutional Limitations* 647 (8th ed. 1927)). Herein, the public, the press, interested spectators, friends and family were excluded from the entire voir dire and jury selection process.

Finally, to comply with the fifth factor the order must be no broader in its application or duration than necessary to serve its purpose. Assuming *arguendo* that the decision to hold the individual voir dire in chambers made the jurors more at ease and honest as the court suggested, the additional closing of the general voir dire was clearly too broad. As stated above, the only purpose for the second closure was to avoid switching courtrooms again, which is not a legitimate purpose. Therefore, the order of closure was too broad.

f) The closure was not *de minimis* or trivial.

The *Strode* Court noted that some courts in other jurisdictions have held there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. *Strode*, 167 Wn.2d at 230 (citing *United States v. Ivester*, 316 F.3d 955 (9th Cir.2003)). Trivial closures have been defined to be those that are brief and inadvertent. *Id.* (citing *United States v. Al-Smadi*, 15 F.3d 153, 154–55 (10th Cir.1994); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir.1975)). The Washington Supreme Court, however, “has never found a public trial right violation to be [trivial or] *de minimis*.” *Id.* (citing *Easterling*, 157 Wn.2d at 180, 137 P.3d 825). The Court has also ruled that where jury selection or a part of the jury

selection is closed, the closure is not *de minimis* or trivial. *Brightman*, 155 Wn.2d at 517.

In *Strode*, the trial court and counsel for the State and Strode questioned at least 11 prospective jurors in chambers. *Strode*, 167 Wn.2d at 230. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. *Id.* The Court held this closure was not brief or inadvertent. *Id.*

In the present case, the trial court conducted individual voir dire in chambers of 35 prospective jurors over the course of two days in the presence of only the respective counsel and the court reporter. RP 424-25, 437, 462-74, 493-648, 651-857. Challenges for cause were conducted and either granted or denied in chambers following the voir dire of each individual prospective juror. RP 427, 462-74, 493-648, 651-857. Eleven prospective jurors were stricken for cause. RP 857-58. In addition to this closure the Court closed the entire general jury voir dire and jury selection to the public. Therefore, this closure was not brief or inadvertent.

Because the trial court failed to analyze the *Bone-Club* factors before excluding the public from the jury voir dire and jury selection process, under the rule in *Orange* and *Brightman*, Mr. Frawley's constitutional right to a public trial was violated. Accordingly the Court of

Appeals applied the correct remedy -- reversal and a new trial. *Strode*, 167 Wn.2d at 231.

IV. CONCLUSION

This Court has consistently required strict compliance with the *Bone-Club* factors before any portion of a criminal trial may be closed to the public. Since the trial court failed to abide by this ruling, the decision of the Court of Appeals should be affirmed and the case remanded for a new trial.

Respectfully submitted, June 26, 2013,

s/David N. Gasch
WSBA #18270
Attorney for Respondent/Defendant

PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on June 26, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Supplemental Brief:

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OFFICE RECEPTIONIST, CLERK

To: David/Susan Gasch
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Subject: RE: Respondent's Supplemental Brief, State v. Frawley No. 80727-2

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From: David/Susan Gasch [<mailto:gaschlaw@msn.com>]
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To: OFFICE RECEPTIONIST, CLERK
Cc: Lila J. Silverstein; Kathy Owens; Jill Reuter
Subject: Respondent's Supplemental Brief, State v. Frawley No. 80727-2

Dear Mr. Carpenter,

Please find attached Respondent's Supplemental Brief in State v. Frawley No. 80727-2, along with the proof of service.

David N. Gasch