

No. 80849-0

THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TONY L. STRODE,

Appellant.

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STATE OF WASHINGTON

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AMICUS CURIAE BRIEF OF  
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Jeffrey E. Ellis #17139  
*Attorney for WACDL*

705 Second Ave., Ste 401  
Seattle, WA 98104  
(206) 262-0300  
(206) 262-0335 (fax)  
ellis\_jeff@hotmail.com

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**A. INTRODUCTION**

Washington Association of Criminal Defense Attorneys (WACDL) submits this amicus brief on the issue of whether fully closing a courtroom for part of jury selection constitutes reversible error where the closure was not preceded by a *Bone-Club* hearing.

**B. FACTS**

WACDL relies on the facts set forth in the respective briefs of the parties. Specifically, WACDL notes that both parties agree that part of jury selection was conducted “in chambers” with the attorneys, the defendant, and one juror present, but with the public excluded. *See Respondent’s Brief*, p. 1; VRP 1.

**C. ARGUMENT**

1. *Introduction*

In this case, the trial judge completely closed the courtroom for part of jury selection. The issues that arise from that decision are two-fold:

1. Is it error for a trial judge to close a courtroom, without conducting a hearing, for a portion of jury selection based on the apparent reasoning that the information sought to be elicited from prospective jurors is personal or sensitive?

and;

2. Does the trial court's obligation to conduct a hearing to close the courtroom persist even where defense counsel (apparently) does not object to closing a portion of the trial?

This Court has already answered both of these questions, "yes." Rather than provide this Court with a reason to overrule past precedent, the State simply asks this Court to ignore it. The State's request is not supported by any compelling analysis of the issue and, worse yet, ignores the fact that this is a not only a state constitutional issue, it is also federal constitutional issue. This Court has complete authority over state constitutional issues but not over federal constitutional issues. This Court has correctly relied upon controlling United States Supreme Court precedent in its previous opinions reversing courtroom closures based upon lack of a full and fair evaluation of the issue. Because those previous decisions of the United States Supreme Court have not been overruled, this Court should not abandon its previous application of those cases.

In contrast, WACDL urges this Court to reaffirm the rule that any request to close the courtroom, whether raised by the prosecutor, the defense, or by the court *sua sponte*, always requires the court to

conduct hearing preceding the decision to close, as well as the contemporaneous entry of specific findings supporting any decision to close. WACDL further urges this Court not to depart from past precedent and hold that it is proper to close a courtroom, with or without conducting a hearing, based on the generalized claim that sensitive questions should be asked of prospective jurors in private, *i.e.*, in a closed courtroom. Absent a specific, unique, and individualized showing, such questions should be asked of prospective jurors individually (apart from other jurors), but not privately (in a closed courtroom).

2. *The Right to a Public Trial is Protected by Both the State and Federal Constitutions*

The Sixth Amendment to the United States Constitution and Washington Constitution, Article I section 22 guarantee a criminal defendant the right to a public trial. In addition, the First Amendment to United States Constitution and Article I, section 10 of the state constitution provide the press and the public the right to attend criminal trials.

The constitutional right to a public trial is designed to ensure fairness to the defendant, maintain public confidence in the criminal

justice system, provide an outlet for community reaction to crime, ensure that judges and prosecutors fulfill their duties responsibly, encourage witnesses to come forward, and discourage perjury. *See Waller v. Georgia*, 467 U.S. 39, 46 104 S.Ct. 2210, 2215-16, 81 L.Ed.2d 31 (1984). *See also, United States v. Brazel*, 102 F.3d 1120, 1155 (11<sup>th</sup> Cir. 1997) (public trials ensure participants act responsibly, encourage witnesses to come forward, and discourage perjury).

### 3. *Jury Selection is an Important Part of a Trial*

This Court has scrupulously protected the accused's and the public's right to open public criminal proceedings. *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the

criminal justice system); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents).<sup>1</sup> See also *In re Oliver*, 333 U.S. 257, 266, 68 S.Ct. 499, 504, 92 L.Ed. 682 (1948) (federal constitutional right to a public trial applicable to the states through 14<sup>th</sup> Amendment).

There is a strong presumption that courts will remain open. Protection of this basic constitutional right requires a trial court to “resist a closure motion except under the most unusual circumstances.” *Bone-Club*, 128 Wn.2d at 259.

The process of jury selection is included, not excepted, from this rule. *Brightman, supra; Orange, supra*. As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984), “(t)he process of juror selection is itself a matter of importance, not simply to the

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<sup>1</sup> In 2006, this Court, in its rulemaking capacity, strengthened its commitment to maintaining publicly accessible court proceedings by amending GR 15, the rule governing the destruction, sealing or redaction of court files. That rule reaffirms that

adversaries but to the criminal justice system.” *See also In re Memphis Pub. Co.*, 887 F.2d 646, 648-49 (6<sup>th</sup> Cir. 1989) (findings not sufficient to justify closure of *voir dire* proceedings based on trial court’s “naked assertion” that closure necessary to protect right to fair trial); *Cable News Network, Inc. v. United States*, 824 F.2d 1046, 1048-49 (D.C. Cir. 1987) (findings insufficient to justify closure during jury selection because not support for conclusion that public questioning of jurors would interfere with juror’s candor).

This court has specifically noted that 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. *Brightman*, 155 Wn.2d at 515; *Orange*, 152 Wn.2d at 812. *See also State v. Frawley*, \_\_\_ Wn. App. \_\_\_, 167 P.3d 593, 596 (2007) (“We can find no material distinction between individual *voir dire* of jurors *in camera* and general *voir dire* of the jury panel. Jury selection is jury selection.”).

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sealing, redacting or destroying records is permissible only on a showing of specifically identified compelling privacy or safety concerns.

Despite these precedents, the State now argues that the trial court can properly close a courtroom, as it did here, to “protect the defendant’s right to a fair trial by not tainting the jury pool” with disclosures, overheard by the other jurors, from individual jurors “who were victims of sexual abuse and who could not render impartial judgment on a case of sexual abuse involving a child.” *Respondent’s Brief*, p. 3, 5. However, closing a courtroom is simply unnecessary to protect this interest. Instead, a defendant’s interest in avoiding a “tainted” jury pool is easily protected by conducting individual (as opposed to group) *voir dire*, in whole or in part. Excluding the public does not further this interest.

Nevertheless, some would argue that the “privacy” of a closed courtroom provides for closer questioning of jurors, and, perhaps, more honest answers. However, the opposite can also be true—the absence of the watchful eye of the public can result in less honest answers. Frankly, the danger that a prospective juror might be unwilling to truthfully reveal sensitive or embarrassing information exists whether a court is open or closed. And, there is simply no reason to conclude that a juror would be more willing to

tell the truth in a courtroom where the judge, the judge's staff, a court reporter, the prosecutor (and a law enforcement representative, if requested), defense counsel, the defendant, and jail security (if the defendant is in custody) are present, as opposed to a courtroom where members of the public can observe.

However, what is clear is that a generalized concern about the need for juror privacy is insufficient to overcome the strong presumption of openness—a presumption that can only be overcome based on specific, individualized findings, rather than a generalized concern about the need for privacy. *See also People v. Gacy* 103 Ill. 2d 1, 468 N.E.2d 1171 (1984) (concern as to juror embarrassment was an insufficient basis upon which to invoke a limitation of the constitutional right of access of the press and general public to criminal trials); *Providence Journal Co. v. Superior Court* 593 A.2d 446 (R.I. 1991) (trial court's belief that answers to *voir dire* questions about child abuse should not be aired or responded to publicly was unsupported by any facts in the record that demonstrated that an open proceeding would have imperiled or prejudiced the privacy rights of the jurors and the defendant's right

to a fair trial); *State ex rel. La Crosse Tribune v Circuit Court for La Crosse County*, 115 Wis. 2d 220, 340 N.W.2d 460 (1983) (*in camera voir dire* of the venire panel members in a criminal prosecution violated a state public trial law and constituted an abuse of discretion on the part of the trial judge where the *voir dire* proceeding was held in chambers, excluding a newspaper reporter and other members of the public so as to avoid "embarrassment" to prospective jurors).

WACDL certainly does not suggest that a trial court's decision to close a portion of *voir dire* is always reversible. For example, it may be appropriate to close part of *voir dire* where there is a clear and present danger of jury intimidation from the public. *See e.g., Commonwealth v Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985).

Instead, WACDL much more modestly suggests that, "a trial court may not close a courtroom without, first, applying and weighing five requirements set out in *Bone-Club* and, second, entering specific findings justifying the closure order." *Easterling*, at

175 (citing *Bone-Club*, at 258-259). Only after conducting a hearing can the trial court properly weigh and consider the relevant factors. However, a generalized concern about potential embarrassment of jurors is never a sufficient justification to close a courtroom.

4. *A Bone-Club Hearing Must Precede a Decision to Close*

Despite the State's invitation, this Court cannot conduct the necessary hearing for the first time on appeal. This follows as a matter of logic from the nature of the test. The *Bone-Club* requirements are:

1. The proponent of closure. . . 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 the closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose;

*Easterling*, at 175, n.5; *Bone-Club*, at 258-259. The constitutional 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 (emphasis added) (quoting *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)). These requirements are necessary to protect both the accused’s right to a public trial *and* the public’s right to opening proceedings. *Easterling*, at 175.

Despite the State’s argument otherwise, any “closure hearing” that took place in this case fell far short of the *Bone-Club* requirements. As noted previously, closure was not the least restrictive means available and there is no showing that the trial court considered individual *voir dire*, rather than closure of the courtroom. In addition, there is no place in the record where the court gave any member of the press or public the opportunity to object—an inquiry which, by its definition, must precede the closing

of the courtroom. Thus, any attempt by the State to now piece together stray comments made after the decision to close and call it a hearing preceding closure is simply disingenuous.

5. *The Defense Failure to Object Does Not Waive the Issue*

The next issue is whether the absence in the record of any defense objection or defense counsel's subsequent participation in closed courtroom proceedings means that the issue has been waived. Once again, this Court has answered this question holding that is "the request to close itself, and not the party who made the request, that triggered the trial court's duty to apply the five-part *Bone-Club* requirements. The trial court's failure to apply that test constitutes reversible error." *Easterling*, at 180.

Specifically, the *Easterling* Court held that this outcome was compelled by "our prior decisions relating to article 1, section 22 of our state constitution, which require trial courts to strictly adhere to the well-established guidelines for closing a courtroom, and . . .[by] public policy as made manifest by the federal and state constitutions which favors keeping criminal judicial proceedings open to the

public unless there is a compelling interest warranting closure.”  
*Easterling*, at 177.

Because the trial court must act to protect the rights of both a defendant and the public to open proceedings, “the defendant’s failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right.” *Brightman*, 155 Wn.2d at 517. This also follows as a matter of logic: a defendant cannot waive the second *Bone-Club* requirement of allowing any interested spectators an opportunity to object before closing a courtroom. In other words, a defendant cannot invite or waive the public’s right to an open trial. *Id.* See also *United States v. Raffoul*, 826 F.2d 218, 225-26 (3d Cir. 1987) (when request is made to close courtroom members of press and public who are present in the courtroom and subject to removal as a result of a closure order must be allowed a hearing on their objections in advance of closure).

A request to close a court always triggers the trial court’s duty to conduct a hearing. The failure to object never waives this obligation. Likewise, the decision to close, when challenged on appeal, always requires this Court to review the relevant factors

considered below. Indeed, it is impossible to conduct the *Bone-Club* analysis for the first time on appeal. When a trial court does not conduct a hearing and does not permit competing interests to be expressed, this Court cannot weigh what is not known.

Thus, the issue is not waived even where the record does not reveal an objection from the defense. Further, defense counsel's participation in a closed hearing does not constitute a waiver. *See also Walton v. Briley*, 361 F.3d 431, 433 (7<sup>th</sup> Cir. 2004) ("we hold that Walton's right to a public trial was not waived by failing to object at trial.").

6. *Reversal is Required When a Courtroom is Fully Closed for Part of a Trial Without First Conducting a Bone-Club Hearing*

"Prejudice is necessarily presumed where a violation of the public trial right occurs." *Easterling*, 157 Wn.2d at 181, 137 P.3d 825. "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." *Id.*

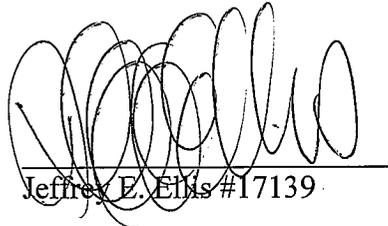
The remedy is reversal and a new trial. *Id.* at 174.

**D. CONCLUSION**

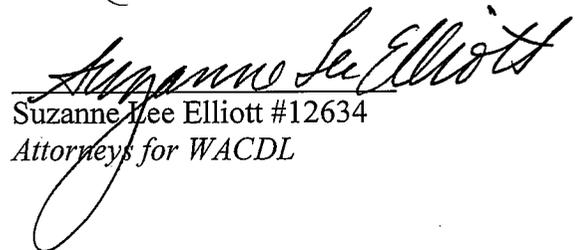
As noted previously, the constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts. It is integral to our system of government. When the courtroom doors are locked or a portion of the trial takes place behind the judge's closed chambers door without a proper prior hearing reversal is required.

This Court should reverse Strode's conviction and remand for a new trial.

Respectfully submitted this 11<sup>th</sup> day of January, 2008.



Jeffrey E. Ellis #17139



Suzanne Lee Elliott #12634  
*Attorneys for WACDL*

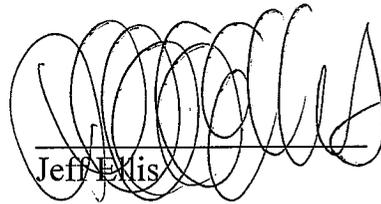
## CERTIFICATE OF SERVICE

I, Jeff Ellis certify that on January 11, 2008, I served the parties listed below with a copy of WACDL's *Motion to File Amicus Brief* and *WACDL's Amicus Brief* by placing a copy in the mail, postage pre-paid, addressed to:

Michael Sandona  
Ferry County Prosecuting Attorney  
350 E. Delaware Ave., #11  
Republic, WA 99166

David Gasch  
P.O. Box 30339  
Gasch Law Office  
Spokane, WA 99223

1/11/08 Seattle, WA  
Date and Place



Jeff Ellis