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NO. 81096-6

THE SUPREME COURT OF WASHINGTON

(C/A No. 58004-3-I)

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES MOMAH,

Petitioner.

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PETITIONER'S SUPPLEMENTAL BRIEF

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ORIGINAL

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## I. INTRODUCTION

It is well settled as a matter of federal and state constitutional law that it is automatic reversible constitutional error for a trial court to close the courtroom during voir dire. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). Such violations are especially harmful to the administration of justice in high-profile and emotional cases in which the defendant's interest in public supervision and the society's interest in the therapeutic effect of trial are at their zenith.

The trial court here held a full day of voir dire behind closed doors. The morning voir dire occurred in the judge's chambers of the King County Superior Court's Presiding Courtroom, with each separate juror escorted in and out by the bailiff and the door being closed shut behind them.<sup>1</sup> The transcript further shows that the afternoon voir dire occurred individual by

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<sup>1</sup> On October 11, 2005, the trial court adjourned to chambers – a “closed” back room – for individual questioning of jurors. 10/11/05 VRP:19. It stated no compelling or even substantial interest in courtroom closure; considered no alternatives less restrictive than complete closure; and made no findings on the record to justify this closure.

According to the transcript, this began first thing in the morning and lasted until the end of the court day in the late afternoon. Id., VRP:19. (“At this time the Court and counsel adjourned to chambers.”) It was in “chambers,” with the door “closed.” Id., VRP:19-20. (“THE COURT: We have moved into chambers here. *The door is closed.* We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36.”) (emphasis added).

individual in the jury room at the back of the courtroom, while the rest of the venire sat in the courtroom itself.<sup>2</sup>

The key question presented, as this Court has framed it for supplemental briefing, is whether the fact that Dr. Momah did not object to the trial court's improper actions precludes his ability to obtain a new trial on that basis. It does not. This Court repeatedly, recently, squarely, and unanimously has held that "the burden is placed upon the trial court to seek the defendant's objection to [any proposed] courtroom closure." State v. Easterling, 157 Wn.2d 167, 176 n.8 (2006); see also State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005) (defendant's failure to object at trial to closure "does not effect waiver"); State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.3d 325 (1995) (same; burden on trial court "to seek the defendant's objection to courtroom closure"). Accordingly, at least when the trial court does not make any such inquiry, a defendant's failure to object to a closure does not impair his right to a new trial based on a violation of his right to a public trial. Section II.A. A detailed review of the record shows that is exactly what happened here. Section II.B.

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<sup>2</sup> After the lunch break, VRP:104, they resumed behind closed doors in the afternoon, this time using the jury room, but still using it as a closed back room. Id., VRP:106 (Court says: "With that, we are going to adjourn back into the jury room, the lawyers, the defendant, and the court reporter.") Again, individual jurors came in one at a time and then left. E.g., VRP:107. It lasted that way until the very end of the court day, approximately 3:10 p.m. Id., VRP:141.

Indeed, even if this Court were somehow dissatisfied with the holdings of Easterling, Brightman, and Bone-Club on this “waiver” issue, this is not the case to revisit them – because unlike the state’s appellate briefs in Easterling, *see, id.*, 157 Wn.2d 167, 176, the state’s appellate briefs in Momah *never raised the defense of “waiver.”* Instead, the state argued that the courtroom was not really closed (despite the fact that the transcript itself showed that voir dire occurred in chambers with the door closed). Hence, the state has waived the right to assert any possible defense of waiver.

Section III.

**II. DR. MOMAH IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT UNJUSTIFIABLY CLOSED THE COURTROOM DURING VOIR DIRE.**

**A. A DEFENDANT IS ENTITLED TO A NEW TRIAL, REGARDLESS OF ANY SPECIFIC OBJECTION, WHEN THE TRIAL COURT CLOSED THE COURTROOM DURING VOIR DIRE WITHOUT SEEKING THE DEFENDANT’S VIEWS AS TO THE CLOSURE.**

This Court has squarely held that a defendant’s lack of a contemporaneous objection to courtroom closure does not waive the claim when the trial court fails to inquire whether the defendant assents to the closure.

In State v. Easterling, 157 Wn.2d 167, the trial court closed a small portion of the trial during which Easterling’s codefendant was making a

motion, a portion that did not even turn out to be dispositive, given the codefendant's plea agreement that followed. Easterling did not object to this courtroom closure. Despite the fact that it was raised for the first time not just on direct appeal to the Court of Appeals, but in the petition for review to this Court, this Court granted review on that claim. Easterling, 157 Wn.2d at 173. This Court then unanimously granted relief on the claim, with all Justices agreeing that the failure to raise a contemporaneous objection to the judge's closure decision did not bar Easterling from raising the courtroom closure issue for the first time on direct appeal.

This Court provided the unremarkable explanation that courtroom closure was a constitutional issue that could be raised for the first time on appeal under RAP 2.5(a)(3): "Easterling asserts a constitutional error. We have the discretion to review an issue raised for the first time on appeal when it involves a 'manifest error affecting a constitutional right.' RAP 2.5(a); *see* RAP 13.4. A criminal accused's rights to a public trial and to be present at his criminal trial are issues of constitutional magnitude that may be raised for the first time on appeal." Easterling, 157 Wn.2d at 173 n.2 (citing In re Personal Restraint of Orange, 152 Wn.2d 795, 800; State

v. Bone-Club, 128 Wn.2d at 257).<sup>3</sup>

What is more, the precise “waiver” issue on which this Court has requested briefing here was already addressed in Easterling. In that case, the state raised a claim of waiver (whereas in this case, as discussed below, the state has not raised such a claim). This Court rejected the waiver claim, holding that the defendant had no duty to raise a contemporaneous objection to this type of error because the burden was *on the trial court* to inquire whether there was an objection to courtroom closure:

The State argues, additionally, that Easterling’s failure to object at trial to the courtroom closure served as a waiver of his right to appeal the improper closure. The State’s waiver argument is without merit. This court has explicitly held that a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection. Brightman, 155 Wn.2d at 514-15, 122 P.3d 150 (defendant’s failure to object at trial to improper courtroom closure does not effect a waiver, and does not free the reviewing court from having to consider the defendant’s right to a public trial); Bone-Club, 128 Wn.2d at 257, 906 P.3d 325. *Additionally, under the Bone-Club criteria, the burden is placed upon the trial court to seek the defendant’s objection to the courtroom closure. The record in this case shows that the trial court did not affirmatively provide Easterling with such an opportunity.*

Easterling, 157 Wn.2d 167, 176 n.8 (emphasis added).

This holding, this Court explained, was compelled by this Court’s

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<sup>3</sup> In fact, this Court has even held that the right to an open courtroom can be raised for the first time in the appellate court in a personal restraint petition, despite the failure to raise it on appeal. In re Personal Restraint of Orange, 152 Wn.2d 795, 800.

consistent prior precedent, since 1923, on this issue of whether the courtroom closure issue can be waived by the failure to make a contemporaneous objection. See State v. Bone-Club, 128 Wn.2d 254, 257 (“The court neither sought nor received an objection or assent from Defendant on the record [before closing the suppression hearing at the state’s request]. After the courtroom was cleared, Detective Frakes, an undercover police officer, testified he feared public testimony would compromise his undercover activities.” “We also note Defendant's failure to object contemporaneously did not effect a waiver.”); State v. Marsh, 126 Wash. 142, 145-47, 217 P. 705 (1923) (rejecting state’s argument that the defendant-appellant’s failure to object to courtroom closure during this juvenile trial waived the issue and holding, instead, that courtroom closure can be raised for the first time on appeal) (cited in Bone-Club).<sup>4</sup>

There is no good legal or policy reason to change 85 years worth

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<sup>4</sup> We recognize that there are other waiver standards applicable in other cases. See, e.g., Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993) (“failure to make contemporaneous objections usually waives any error”); In re Welfare of Young, 24 Wn. App. 392, 397, 600 P.2d 1132 (1979), review denied, 93 Wn.2d 1005 (1980) (“general rule requires that the alleged error first be brought to the trial court's attention at a time that will afford that court an opportunity to correct it”). But this case is a criminal case in which a constitutional issue has been raised. The waiver standards applied in those other, civil, or non-constitutional contexts are therefore inapplicable. Furthermore, the public trial right, unlike even other constitutional rights, places an affirmative obligation on trial courts to inquire of the parties before impinging on the defendant’s right. Accordingly, this Court squarely has held that “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.

of precedent, including Easterling's recent unanimous reaffirmation of this precedent. This Court has consistently held that stare decisis "requires a *clear showing* that an established rule is incorrect and harmful before it is abandoned."<sup>5</sup> Obviously, there has been no such "clear showing" that the Easterling/Bone-Club/Marsh rule on waiver is incorrect and harmful in this case. The state has not even questioned that rule at all – it has instead relied upon other arguments.<sup>6</sup>

Nor does placing upon the judge the duty to inquire about objections pose any sort of logistical problem. It is no more time-consuming or intrusive than the requirement that there be an affirmative waiver of other constitutional rights, such as the rights to trial;<sup>7</sup> to a jury rather than a bench trial;<sup>8</sup> to presence;<sup>9</sup> to appeal;<sup>10</sup> or to counsel.<sup>11</sup>

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<sup>5</sup> Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (emphasis added). See State v. Berlin, 133 Wn.2d 541, 547, 947 P.2d 700 (1997).

<sup>6</sup> There is also no reason to treat Dr. Momah's attendance at the closed voir dire or his lawyer's participation as having any greater significance than the lack of objection has. The Easterling/Bone-Club/Marsh requirement is that the trial judge seek and obtain the defendant's assent. Simply following the judge's order to begin voir dire and do it in chambers does not satisfy that requirement.

<sup>7</sup> State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 951 (2001).

<sup>8</sup> State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994).

<sup>9</sup> State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003).

<sup>10</sup> City of Seattle v. Klein, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007).

<sup>11</sup> Faretta v. California, 422 U.S. 806, 955 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Indeed, the only possible effect of abandoning Easterling and its progeny would be to invite carelessness – or, worse yet, civil disobedience – from trial courts. This Court’s public courtroom decisions are easily understood and easily followed. If this Court were to condone a trial court’s failure to abide by the mild requirements those decisions imposed, the power of this Court’s precedent – and the force of its authority – would be palpably diminished.

**B. THE TRIAL COURT CLOSED THE COURTROOM WITHOUT SEEKING DEFENDANT’S VIEWS CONCERNING THAT ACTION.**

The October 10, 2005, transcript shows that the judge began instructing jurors in King County Superior Court’s Presiding Courtroom, E-942, at the beginning of that day. 10/10/05 TR:18. He gave them a questionnaire to fill out. Id. Then, “At this time a break was taken.” Id. Court then reconvened in W-813; the judge stated: “We are back on the record, State versus Momah. We have moved the courtroom down to west 813. The jury panel is up in 942 completing the questionnaire in the custody of the bailiff.” Id. The parties argued pretrial motions and then broke for lunch. Id., TR:50.

After lunch, they reconvened in the same courtroom, W-813. Id., TR:50, 64 (judge states that tomorrow, they “will do the hardships up in E-942”). They then went through lists of jurors to determine who should

be questioned individually for a variety of reasons, to discuss hardship requests, etc. Id., TR:51.

At one point on that afternoon of October 10, 2005, they did bring in some jurors to question. The court reporter duly noted, "Prospective jury entered the courtroom." 10/10/05 TR:77. So the questioning about hardship that afternoon occurred in the courtroom itself, of W-813.

It ended with the court reporter noting that the last juror questioned left the courtroom. Id., TR:150. They talked about which jurors had already been excused, which ones needed additional questioning, and then adjourned for the day. Id., TR:156. There was no discussion of courtroom closure, doing individual questioning in chambers or behind closed doors, up to this point.

Court reconvened on October 11, 2005. They began by discussing where they were with excused jurors, remaining jurors, and jurors that needed to be questioned further. 10/11/05 TR:2.

They seem to have reconvened in E-942, but were noting that they could use that Presiding courtroom only in the morning; the judge said:

... That leaves us with 52 jurors. The complicating factor with E-942 today is as follows: They do the anti-harassment calendar, and it is such a large calendar there is no other place to put them. We can't use this courtroom this afternoon. I was seeking input from counsel about what to do. I made a list of jurors who wanted to have private questioning about various issues. On that list I have

eight jurors who wanted private questioning. I can give you those numbers if you want them.

10/11/05 TR:2.

The parties and the court then discussed logistical options for the afternoon, and reasons that jurors had given for “private questioning.”

10/11/05 TR:3. The judge suggested using E-942 in the morning, and W-813 in the afternoon, as follows:

What I was thinking is we merge these lists [of jurors requiring individual questioning for different reasons] and do all the jurors who want individual questioning, have them come up here, sit up here, perhaps excuse the other jurors until 1:30. I’m not sure. If we think it takes less than a morning then we have to figure out if we can fit everybody in West 813 this afternoon.

Id., TR:4. There was still no suggestion that voir dire would be closed.

After the judge and lawyers discussed arrangements, the jurors entered the courtroom – the court reporter says so on the record. Id., TR:9.

Following some discussion in the courtroom, the court explained that the rest of the process would be different – they would turn to individual questioning of the jurors who said they wanted it:

Thank you again for your diligence in following up and your participation in the process. At this point in time we will shift to a slightly different phase in jury selection. There are a number of you who have indicated that you would like to have private questioning about some aspect of the case and other issues. So we are going to have some

of you stay this morning, and we are going to question you one at a time. ...

10/11/05 TR:16. The Judge still did not say that this would be in a closed room.

The judge then told some of the jurors to leave, and kept the ones that he would question individually. He had them come up to the jury box. He said, "It is slightly more comfortable chairs." Id., TR:18. He seated them in the box, and then said, "These are our jurors who we are going to individually question this morning." Id. Then he listed the jurors to be individually questioned in the afternoon. Id. He told the afternoon ones to report to the jury room at 1:45. Id. He told the others they were excused until the following day. Id., TR:19.

Then the record shows – for the first time – that the judge said he would take the jurors to be questioned individually that morning into "the back room" for questioning: "We will take juror 36 first. Let's go in the back room. Those of you out here, we are going to ask for your patience. We will try to go through this as quickly as we can." Id.

That juror said, "I never requested to be questioned individually." 10/11/05 TR:19. The judge explained that many people had requested individual questioning, and for some others, he decided it would be better to do the questioning individually. Id.

The court reporter then explained where they were: “At this time the Court and counsel adjourned to chambers.” 10/11/05 TR:19. And, immediately thereafter, “At this time Juror Number 36 entered the courtroom.” Id. The judge then stated, on the record, that they were in chambers with the door closed: “*We have moved into chambers here. The door is closed. We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36. Good morning, sir.*” Id., TR:19-20 (emphasis added).

They then questioned Juror No. 36. When the questioning is done, the judge directed that juror to go back out. The court reporter noted, “At this time Juror Number 36 left chambers.” Id., TR:22.

The next juror came into chambers – the court reporter wrote, “At this time Juror Number 2 entered chambers.” Id. She was questioned about prior knowledge of the case. When that questioning was done, the court reporter wrote: “At this time Juror Number 2 left chambers.” Id., TR:26. Then, “At this time Juror Number 3 entered the chambers.” Id., TR:28.

The court reporter even noted when the bailiff came in. In the middle of this juror’s questioning, the court reporter noted, in the middle of a question posed by defense counsel, “At this time the bailiff entered chambers.” Id., TR:30. The judge told the bailiff, “We are going to use

you to bring the jurors in. So when we excuse Ms. Nuss we will have you bring the next one.” 10/11/05 TR:30.

After Juror number 3 was excused, the court reporter noted, “At this time Juror Number 7 entered chambers.” Id., TR:32. Juror No. 7 was excused, the parties discussed him briefly, and then the court reporter wrote, “At this time Juror Number 6 entered chambers.” Id., TR:35. She was excused; the court reporter wrote, “At this time Juror Number 6 left chambers”; she was discussed by the parties and the judge; and then, “At this time Juror Number 11 entered chambers.” Id. The court reporter noted when that juror left, id., TR:48, and when the next one, Juror Number 14, came into chambers. Id., TR:49. This scrupulous notation of who entered and who left continued for the rest of the morning.<sup>12</sup> During all this time that the court reporter recorded who the bailiff escorted in and out of the “closed” door of E-942’s chambers, the judge never asked the parties’ views on this procedure and the court reporter never noted any

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<sup>12</sup> The court reporter noted when Juror Number 14 left, id., TR:58, and when Juror Number 19 “entered chambers.” Id., TR:59. The court reporter noted when that juror left, id., TR:66, and when the next juror, Juror Number 22, “entered chambers.” Id., TR:69. The court reporter noted when Juror Number 22 left, id., TR:75, and thereafter, that “At this time Juror Number 30 entered chambers.” Id. The reporter noted that Number 30 left, id., TR:77, and then, “At this time Juror Number 31 entered chambers.” 10/11/05 TR:78. The reporter noted when that juror left, id., TR:80, and then, that “At this time Juror Number 34 entered chambers.” Id., TR:81. The reporter wrote down when that juror left chambers. Id., TR:88. The reporter then noted, “At this time Juror Number 35 entered chambers.” 10/11/05 TR:89. When she left, the reporter wrote, “At this time Juror Number 35 left chambers.” Id., TR:103. The parties discussed a challenge, and that was the last juror interviewed in chambers of E-942.

other person entering.

Then they broke for lunch; immediately before, that, though, the court stated, "We will reconvene at 2:00 in West 813." Id., TR:104.

They did reconvene after lunch, but not in the courtroom part of West 813. Immediately after the break the judge stated, "I guess we have twenty folks outside in the hall. What I propose to do is have them come into the courtroom, we will move to the jury room for the individual questioning, and question them one at a time. I thought about having them in the jury room, but there is only 16 chairs. Secondly, we reserved 50 jurors for tomorrow." Id., TR:105. The judge neither sought objections nor made any findings concerning this procedure.

The jury then entered the courtroom after some housekeeping discussion; the court reporter wrote, "At this time the prospective jury entered the courtroom." Id., TR:106. The judge welcomed them and explained that they would sit in the courtroom, while the parties and the judge called them one at a time into the separate jury room:

Welcome back, ladies and gentlemen. We are continuing in the individual questioning process. We would like you to have a seat here in the courtroom while we take one juror at a time. The attorneys and I and the court reporter will recess back in the jury room. You can just rest at ease until we have you come back for questioning. We will give you further instructions at the end of each individual questioning period. *With that, we are going to adjourn back into the jury room, the lawyers,*

*the defendant and the court reporter.*

10/11/05 TR:106 (emphasis added). The court reporter then wrote, “At this time the Court and counsel moved to the jury room.” Id.

Next, an individual juror came in to that jury room: “At this time Juror Number 100 entered the jury room.” Id., TR:107. The court reporter wrote down when she left. Id., TR:108. The court reporter wrote down when the next juror, Number 39, “entered the jury room.” Id. The court reporter wrote down when he left. Id., TR:118. The court reporter wrote down when the next juror came into that jury room: “At this time Juror Number 41 entered the jury room.” Id., TR:119. The court reporter wrote down when he left. Id., TR:130 (“At this time Juror Number 40 left the jury room.”). The court reporter noted when the next juror came in. Id., TR:131 (“At this time Juror Number 41 entered the jury room.”). The court reporter noted when he left. Id., TR:141.

The parties then discussed whether to go on, and the prosecutor noted the time – 3:10 p.m. 10/11/05 TR:141. About 5 lines later, the judge adjourned court for the day. Id., TR:142.

Court reconvened on the morning of October 12, 2005 – the next day. It begins with the court reporter noting, “At this time the prospective jurors entered the courtroom.” 10/12/05 TR:2. The judge instructed all jurors and handed out questionnaires. It appears that this was in E-942.

Id., TR:11.

The court reporter immediately thereafter wrote, “At this time the court resumed in C-813 with individual voir dire.” Id. This time, the judge said that the jurors are “in the jury room,” id., and they would “bring them out and ... continue in order. *We have moved now. We are in the general courtroom.* We will have them come out and take a chair in the jury box and we will proceed.” Id., TR:12, (emphasis added). Voir dire behind the closed door of judicial chambers or the jury room had ended.

**III. EVEN IF DR. MOMAH COULD HAVE WAIVED HIS RIGHT TO A PUBLIC TRIAL, REVERSAL STILL IS REQUIRED BECAUSE THE STATE ITSELF HAS WAIVED ITS ABILITY TO PROFIT FROM ANY SUCH WAIVER.**

Even if this Court were prepared to question the rule of Easterling that a defendant is entitled to a new trial whenever the trial court closes the courtroom without soliciting the parties’ views of the closure, it still would not matter here. This case is different – and a more compelling case for reversal – than Easterling because, in contrast to that case, the state never raised the waiver argument here. It is not mentioned in the state’s Response brief in the Court of Appeals.<sup>13</sup> It is not mentioned in the state’s

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<sup>13</sup> The state’s Response did not dispute the fact that the trial court held a full day of voir dire in chambers, behind a closed door. It did not dispute that the transcript says that the door to “chambers” was “closed” while this day of voir dire was occurring, and it did not claim that the transcript – which states both that this occurred in “chambers” and that the “door is closed” is inaccurate. Response, pp. 25-28. Instead, it argued that despite all this, the courtroom was not “closed” in the constitutional sense. Response, pp. 25, 28,

Answer to the Petition for Review.<sup>14</sup>

In fact, the state's Answer to Petition for Review explicitly distinguishes Momah's case from State v. Strode, and related Division III decisions on the ground that "Strode ... did not turn on whether the trial court closed voir dire to the public. Rather, these cases [referring to Strode and the Division III cases it followed] considered whether the defendant waived his right to a public trial. *The issue in Momah was different, namely whether there was a courtroom closure at all.*" Answer, p. 5 (emphasis added).

The state's complete failure to raise this waiver issue in the Court of Appeals or Answer to Petition for Review constitutes abandonment of that argument.<sup>15</sup> In other words, the state, under a well-established line of precedent, has waived the defense of waiver by failing to raise it in the appellate court or the Answer to Petition for Review.<sup>16</sup>

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29, 52.

<sup>14</sup> The only argument in that document is that the courtroom closure was never really closed, so there was no need to address the Bone-Club factors. Answer to Petition for Review, pp. 1-4.

<sup>15</sup> RAP 10.3(a)(5), (b) (required contents of respondent's brief includes citation to authority for arguments); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); State v. Noah, 103 Wn. App. 29, 41 n.3, 9 P.3d 858 (2000), review denied, 143 Wn.2d 1014 (2001) ("Ordinarily, we treat a trial issue not briefed on appeal as abandoned.").

<sup>16</sup> See Estate of Jordan v. Hartford Accident & Indem. Co., 120 Wn.2d 490, 496, 844 P.2d 403 (1993) (refusing to review appellate court's decision where respondent failed to assign error to that court's ruling); Young v. Key Pharm., Inc., 130 Wn.2d 160, 166 n.3,

This waiver-of-the-waiver result is especially appropriate given the fact that waiver is an affirmative defense. See, e.g., Go2Net, Inc. v. FreeYellow.com, Inc., 158 Wn.2d 247, 251, 143 P.3d 590 (2006). It should be treated as an affirmative defense on appeal, also; indeed this Court treats other, similar, affirmative defenses as affirmative defenses even in the appellate court.<sup>17</sup> Such affirmative defenses are not raised by the court sua sponte; they are waived by a party's silence.

This waiver-of-the-waiver result is also consistent with the common law doctrine of waiver; “[U]nder the common law doctrine of waiver, waiver of affirmative defenses can occur under certain circumstances in two ways: if the defendant’s assertion of the defense is inconsistent with the defendant’s previous behavior and if defendant’s counsel has been dilatory in asserting the defense.”<sup>18</sup> The state’s assertion of the waiver defense fails in Dr. Momah’s case on both counts. First, it is inconsistent with the state’s tacit acknowledgment, in the Court of

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922 P.2d 59 (1996) (refusing to consider issue where plaintiff failed to raise it in his answer to the petition for review); State v. Laviollette, 118 Wn.2d 670, 826 P.2d 684 (1992), overruled in part on other grounds, State v. Maxfield, 125 Wn.2d 378 (1994) (this Court will not generally consider issues that aggrieved party failed to raise in Court of Appeals).

<sup>17</sup> E.g., In re the Personal Restraint of Turay, 153 Wn.2d 44, 48, 153 P.3d 854 (2004), cert. denied, 544 U.S. 952 (2005) (treating “abuse of the writ” as affirmative defense to personal restraint petition, which the state had the burden of pleading and proving in the appellate court, at the risk of losing the right to raise it).

<sup>18</sup> Ottman v. Holland Am. Lines USA, Inc., \_\_\_ Wn.2d \_\_\_, 2008 Wash. LEXIS 211 (March 13, 2008).

Appeals, that Dr. Momah had the right to raise courtroom closure for the first time on appeal and hence its decision to address the merits of that claim; and it is inconsistent with the state's explicit admission that a waiver issue was present in Strode, but differentiated Momah as containing no such issue. Second, since the state is required to raise its arguments and authority in its appellate briefs (RAP 10.3(a)(5), (b)), it would also be dilatory for the state to assert this "waiver" defense for the first time in this Court in response to an invitation for supplemental briefing. Under the common law doctrine of waiver, the state has waived the defense that Dr. Momah has waived his right to raise a courtroom closure claim.

There is nothing exceptional about applying this doctrine of waiver to the state's own conduct on appeal. Indeed, the federal appellate courts have ruled that where as here the government fails to assert the defense of "waiver" on appeal, the government was waived the right to rely on a purported defense waiver, later; in other words, "the government can waive the waiver." United States v. Castillo, 496 F.3d 947, 949 (9th Cir. 2007) (en banc) (citing line of cases holding that government can waive a criminal defendant's waiver of appeal by failing to raise the waiver defense); United States v. Garcia-Lopez, 309 F.3d 1121, 1122 (9th Cir. 2002) (same; "the government can waive the waiver" of appeal, since

the appellate court retains jurisdiction to hear the appeal, if the government fails to assert the waiver defense on appeal).

That is precisely what occurred here; the state has waived any possible waiver committed by Dr. Momah.

#### IV. CONCLUSION

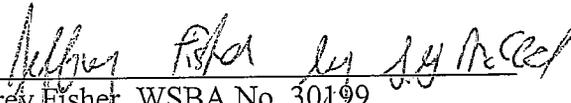
For all the foregoing reasons, courtroom closure constituted structural error requiring reversal of all convictions.

DATED this 8<sup>th</sup> day of May, 2008.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA No. 16709  
Attorney for Petitioner, Charles Momah



Jeffrey Fisher, WSBA No. 30199  
Attorney for Petitioner, Charles Momah

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SUPREME COURT  
STATE OF WASHINGTON  
CERTIFICATE OF SERVICE

2008 MAY -9 P 3:12  
The undersigned hereby certifies that on the 8<sup>th</sup> day of May, 2008, a copy of the PETITIONER'S SUPPLEMENTAL BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

\_\_\_\_\_  
CLERK

James Whisman, Sr. Deputy Prosecutor  
King County Prosecutor's Office  
W554 King County Courthouse  
516 Third Ave.  
Seattle, WA 98104

Charles Momah, M.D.  
DOC # 888910  
MCC - Twin Rivers  
P.O. Box 888  
Monroe, WA 98272-0888

  
\_\_\_\_\_  
Sheryl Gordon McCloud