

SUPREME COURT NO. 82802-4
NO. 36625-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC D. WISE,

Petitioner.

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

The Honorable Toni A. Sheldon, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ISSUE STATEMENT</u>	1
B. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
THE TRIAL COURT VIOLATED WISE'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL AS PROVIDED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22.	3
1. <i>Introduction</i>	4
2. <i>The trial court "closed" a portion of Wise's trial.</i>	5
3. <i>The trial court erred by failing to apply the Bone-Club factors</i>	9
4. <i>Momah did not waive his public trial right by failing to object and by participating in the in-chambers voir dire.</i>	10
5. <i>The trial court committed structural error.</i>	11
6. <i>Protecting privacy did not justify the in-chambers voir dire.</i> ..	17
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Allied Daily Newspapers v. Eikenberry</u> 121 Wn.2d 205, 848 P.2d 1258 (1993).....	17
<u>Dreiling v. Jain</u> 151 Wn.2d 900, 93 P.3d 861 (2004).....	22
<u>Lunsford v. Saberhagen Holdings, Inc.</u> 166 Wash. 2d 264, 208 P.3d 1092 (2009)	9
<u>Seattle Times Co. v. Ishikawa</u> 97 Wn.2d 30, 640 P.2d 716 (1982).....	4
<u>State v. Bone-Club</u> 128 Wn.2d 254, 906 P.2d 325 (1995).....	1-10, 12-14, 17, 22
<u>State v. Bowen</u> __ Wn. App. __, __ P.3d __, 2010 WL 2817197 (2010).....	20
<u>State v. Brightman</u> 155 Wn.2d 506, 122 P.3d 150 (2005).....	5, 9, 10, 13, 14, 20, 21
<u>State v. Castro</u> 141 Wn. App. 485, 170 P.3d 78 (2007).....	20
<u>State v. Duckett</u> 141 Wn. App. 797, 173 P.3d 948 (2007).....	20
<u>State v. Erickson</u> 146 Wn. App. 200, 189 P.3d 245 (2008).....	20
<u>State v. Frawley</u> 140 Wn. App. 713, 167 P.3d 593 (2007).....	20
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	6, 7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Grenning</u> __ Wn.2d __ 234 P.3d 169 (2010).....	11
<u>State v. Heath</u> 150 Wn. App. 121, 206 P.3d 712 (2009).....	20
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	11
<u>State v. Marsh</u> 126 Wash. 142, 217 P. 705 (1923)	13, 14
<u>State v. Momah</u> 167 Wn.2d 140, 217 P.3d 321 (2009).....	5, 7, 9, 10, 11, 12, 13, 15, 16
<u>Stae v. Orange</u> 152 Wn.2d 795, 100 P.3d 291 (2004).....	14, 20
<u>State v. Paumier</u> 155 Wn. App. 673, 230 P.3d 212 (2010).....	11, 20
<u>State v. Price</u> 154 Wn. App. 480, 228 P.3d 1276 (2009).....	20
<u>State v. Sadler</u> 147 Wn. App. 97, 193 P.3d 1108 (2008).....	8, 20
<u>State v. Southerland</u> 109 Wn.2d 389, 745 P.2d 33 (1987).....	21
<u>State v. Strode</u> 167 Wn.2d 222, 217 P.3d 310 (2009).....	5, 7, 9-12, 15-17, 19-21
<u>State v. Vega</u> 144 Wn. App. 914, 184 P.3d 677 (2008) <u>review denied</u> , 165 Wn.2d 1024 (2009)	22

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Wise</u> 148 Wn. App. 425, 200 P.3d 266 (2009).....	1-3, 5-8, 11, 15-18

FEDERAL CASES

<u>Arizona v. Fulminante</u> 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).....	11
--	----

<u>Neder v. United States</u> 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	11, 13
--	--------

<u>Presley v. Georgia</u> __ U.S. __, 130 S. Ct. 721, __, __ L. Ed. 2d. __ (2010).....	4, 5, 9, 12, 17
---	-----------------

<u>Waller v. Georgia</u> 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	11, 12, 13, 14, 16
---	--------------------

OTHER JURISDICTIONS

<u>People v. Gacy</u> 103 Ill.2d 1, 468 N.E.2d 1171 (1984) cert. denied, 470 U.S. 1037 (1985).....	19
--	----

<u>Providence Journal Co. v. Superior Court</u> 593 A.2d 446 (R.I. 1991).....	19
--	----

<u>State ex rel. La Crosse Tribune v Circuit Court for La Crosse County</u> 115 Wis. 2d 220, 340 N.W.2d 460 (1983).....	20
--	----

RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. Amend. VI.....	1, 2, 4, 9, 11, 12, 17
Wash. Const. art. I, § 22	1, 3, 4, 9, 12, 17

A. SUPPLEMENTAL ISSUE STATEMENT

Did the trial court violate petitioner's constitutional right to a public trial, as guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution, by holding part of the voir dire of 10 prospective jurors in chambers without first conducting a "Bone-Club"¹ analysis?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The state charged Eric D. Wise with second degree burglary and first degree theft stemming from the forcible entry into a convenience store and taking of items therein. CP 41-42.

Toward the beginning of jury selection, the trial court announced, "~~[I]f there is anything that we're talking about or asking you that is sensitive and you don't want to speak about it in this group setting[,] [j]ust let us know. . . . [W]e take those jurors back into chambers so that we can ask those questions more privately.~~" RP3 11-12.² The court and parties questioned 10 panel members individually in chambers. RP3 21-37, 70-72.

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

² "RP3" refers to the verbatim report of the June 26, 2007, voir dire proceedings.

After trial, a Mason County jury found Wise guilty as charged. CP 17-18. The trial judge sentenced Wise to concurrent, standard range terms of 57 months for burglary and 22 months for theft. CP 4-16.

Wise appealed, arguing the trial court violated his right to a public trial by conducting private voir dire without first considering the factors this Court set forth in Bone-Club. Brief of Appellant (BOA) at 5-16. In a 2-1 decision, the Court rejected Wise's argument and affirmed his convictions. State v. Wise, 148 Wn. App. 425, 200 P.3d 266 (2009) (attached as appendix).

Noting the trial court "questioned only 10 potential jurors in chambers" and did not close the courtroom itself, the majority first held the trial court was not required to sua sponte conduct a Bone-Club analysis because unlike in that case, any closure in Wise's trial was "temporary and partial." Wise, 148 Wn. App. at 436.

Second, the majority held Wise waived his right to a public trial by not only failing to object, but also because his counsel "actively engaged in the private questioning of the prospective jurors." Wise, 148 Wn. App. at 437-38.

Third, the majority decried this Court's treatment of closure error as structural, claiming it is "inconsistent with controlling Sixth Amendment jury selection authority." Wise, 148 Wn. App. at 438. A

timely objection is thus required to preserve the issue for review, and a retrial will be ordered only upon a showing of prejudice. Id.

Fourth, the majority held Wise had no standing to assert the public's right to open proceedings as guaranteed by article I, section 10 of the state constitution. Wise, 148 Wn. App. at 441.

Fifth, the majority addressed the state's assertion that requiring potential jurors to publicly answer questions about their health violates the Health Insurance Portability and Accountability Act (HIPAA). The majority did not expressly adopt the state's position. Instead, it held (1) a jury summons does not remove a citizen's state constitutional right to privacy and (2) a trial judge may not order all potential jurors to waive HIPAA protections when questioned about their own medical information. Wise, 148 Wn. App. at 443-44.

C. ARGUMENT

THE TRIAL COURT VIOLATED WISE'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL AS PROVIDED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22.

The trial court's use of in-chambers voir dire of some prospective jurors was a "closure" and therefore required a sua sponte Bone-Club analysis. Because the trial court did not engage in the analysis, did not consider alternatives to closure, and did not enter findings to justify the closure, it violated Wise's right to a public trial under the Sixth

Amendment and article I, section 22 of the Washington Constitution. Wise did not waive a challenge to the improper closure by failing to object. The trial court's closure error was structural and requires reversal of Wise's conviction and remand for a new trial.

1. Introduction

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury. Presley v. Georgia, __ U.S. __, 130 S. Ct. 721, 724, __, __ L. Ed. 2d. __ (2010); State v. Bone-Club, 128 Wn.2d at 261-62.³ Additionally, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

³ The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury”

Whether a trial court procedure violates the right to a public trial is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public trial right is considered to be of such constitutional magnitude that it may be raised for the first time on appeal. State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). The accused's right to a public trial under both the federal and state constitutions applies to voir dire. Presley, 130 S. Ct. at 724; State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).

2. *The trial court "closed" a portion of Wise's trial.*

The trial court conducted some of the questioning of 10 prospective jurors in chambers. This procedure unquestionably constituted a "closure" under Momah and Strode.

The majority in Wise's case questioned whether closure occurred at all, noting the trial court "did not order a closure of the courtroom itself and we presume the courtroom and the proceedings conducted therein remained open." Wise, 148 Wn. App. at 436. The court concluded even if the private voir dire was a closure, it was at most "temporary and partial," and therefore relieved the trial court of the obligation to sua sponte conduct a Bone-Club analysis. Id.⁴

⁴ A Bone-Club analysis requires a trial court to consider the following factors before closing part of a trial:

For the notion the closure was merely "temporary and partial," the majority cited State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006). Wise, 148 Wn. App. at 272. Reliance on Gregory is a stretch at best and disingenuous at worst. The trial judge in Gregory observed a spectator, the defendant's aunt, shake her head no to the witness, the defendant's grandmother. The court excluded the aunt for the rest of the grandmother's testimony, then allowed her to return to the courtroom. Gregory, 158 Wn.2d at 815-16. This Court held the trial court never fully

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.

closed the courtroom and thus did not violate the defendant's right to a public trial. Gregory, 158 Wn. 2d at 816.

The facts of Wise's case bear little resemblance. By removing a part of voir dire to chambers, the trial court completely excluded *all* courtroom observers. To be comparable to Gregory, the facts must have shown the trial judge invited some members of the public, but not all, into chambers. Or that the court excluded some observers from the courtroom, permitted others to stay, and conducted all voir dire in court. Of course, neither of these things happened because the trial court's standard practice was to take those prospective jurors who requested a private setting into chambers for individual voir dire. RP3 11-12. See Wise, 148 Wn. App. at 446 (Van Deren, C.J., dissenting) ("It appears from the record on appeal that it is the trial court's normal procedure, without regard to the Bone-Club factors, to advise jurors that they may answer questions in chambers.")

With all due respect, the majority's opinion issued well before this Court's decisions in Momah and Strode. In those cases, this Court treated in-chambers voir dire of particular prospective jurors as a closure. See Momah, 167 Wn.2d at 148-49 (holding that presumption of open judicial proceedings extends to voir dire and that courts apply Bone-Club factors to determine whether closure is appropriate); Strode, 167 Wn.2d at 227

(questioning of 11 potential jurors in chambers "was a courtroom closure and a denial of the right to a public trial.").

To the extent the majority's conclusion rests on its observation that the courtroom remained open during in-chambers voir dire, it is patently absurd. While the courtroom was not closed, there was nothing to see because the proceedings were held in private. The dissenting judge said it well:

It is the business of the court—the conduct of a trial where the public may observe—that is the essence of a public trial. Leaving the remainder of the venire in the courtroom, while the business of the trial takes place in chambers, does not constitute an open forum.

Wise, 148 Wn. App. at 447.

So did the majority in State v. Sadler, 147 Wn. App. 97, 112, 193

P.3d 1108 (2008):

Here, the trial court's affirmative act of moving the proceeding into the jury room, a part of the court not ordinarily accessible to the public, without inviting the public to attend, had the same effect as expressly excluding the public. Jury rooms are not ordinarily accessible to the public; in fact, it is well known that juries are often taken into the jury room to be insulated from events occurring in the courtroom.

The majority's classification of the closure as "temporary and partial" cannot stand.⁵ What happened was a full closure of a portion of trial.

3. *The trial court erred by failing to apply the Bone-Club factors.*

A judge violates a defendant's right to a public trial under the Sixth Amendment by conducting part of jury selection in the judge's chambers without sua sponte considering reasonable alternatives to closure, identifying an overriding interest likely to be prejudiced without closure, and entering specific findings justifying closure. Presley, 130 S. Ct. at 724-25. The same is true under article I, section 22 absent sua sponte consideration of the Bone-Club factors. Momah, 167 Wn.2d at 140; Strode, 167 Wn.2d at 228-29; see State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005) ("Because the record in this case lacks any hint

⁵ The majority appears to have borrowed from the Court of Appeals in Momah, where the court concluded that "[n]othing in the trial court's language or actions indicates that any member of the public, aside from the other members of the jury venire, were excluded from this proceeding.") State v. Momah, 141 Wn. App. 705, 714, 171 P.3d 1064 (2007). This Court repudiated this reasoning sub silentio. See Lunsford v. Saberhagen Holdings, Inc., 166 Wash. 2d 264, 280, 208 P.3d 1092 (2009) (A later holding overrules a prior holding sub silentio when it directly contradicts the earlier rule of law.).

that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted.").⁶

4. *Momah did not waive his public trial right by failing to object and by participating in the in-chambers voir dire.*

This Court has consistently held the accused does not waive the right to challenge closure of a portion of trial on appeal by failing to timely object. Strode, 167 Wn.2d at 229; State v. Easterling, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006); Brightman, 155 Wn.2d at 517-18; Bone-Club, 128 Wn.2d at 261. This did not change in Momah. Momah argued his failure to object did not waive a challenge to the Court's improper closure. This Court agreed Momah could raise the issue on appeal. Momah, 167 Wn.2d at 154-55.

⁶ This Court in Momah did not explicitly hold that the trial court erred by failing to use the Bone-Club factors. Instead, it observed, "To determine if closure is appropriate, we apply [the Bone-Club factors]." Momah, 167 Wn.2d at 149. Immediately thereafter, this Court launched into a discussion of whether the violation of a public trial right is necessarily structural error. Momah, 167 Wn.2d at 149.

If the goal was to obfuscate, this Court has succeeded. See State v. Paumier, 155 Wn. App. 673, 681, 230 P.3d 212 (2010) ("Momah curiously cites the five Bone-Club guidelines . . . and acknowledges that Bone-Club provides the appropriate criteria for determining if closure is appropriate, but it does not address the failure to comply with the obligatory language in those guidelines. . . . It merely notes that if the reviewing court determines that the defendant's right to a public trial was violated it should then "devise[] a remedy appropriate to that violation.") (quoting Momah, 167 Wn.2d at 149).

The majority attempts to distinguish this body of law by holding that Wise not only failed to object, but also questioned prospective jurors in chambers. But so did defense counsel in Momah, who not only participated in questioning the prospective jurors, but took the extraordinary step of arguing for expansion of private voir dire. Momah, 167 Wn.2d 146. And in Strode, "the trial judge and counsel for both parties asked questions of the potential jurors about their backgrounds" and "[c]hallenges for cause were registered in chambers and either granted or denied" Strode, 167 Wn.2d at 224.

Wise's counsel did nothing more than counsel in either of those cases, and much less than counsel in Momah. Because this Court found waiver in neither case, it certainly should not here.

5. *The trial court committed structural error.*

The trial court's error was structural under the Sixth Amendment. See Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999) (violation of right to public trial is structural, citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)); Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (same); State v. Grenning, ___ Wn.2d ___ 234 P.3d 169, ¶ 17 n.11 (2010); State v. Levy, 156 Wn.2d 709, 724 n.3, 132 P.3d 1076 (2006); State v. Paumier, 155 Wn. App. 673, 685, 230 P.3d 212 (2010)

(remedy for closing part of jury selection is reversal of conviction under Presley and Sixth Amendment).

The choice of remedy under article I, section 22 is not as clear. In Strode, the Court held "denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed." Strode, 167 Wn.2d at 231. This is consistent with Bone-Club, where the Court declared that "[t]he Washington Constitution provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment." Bone-Club, 128 Wn.2d at 260. The Strode Court consequently reversed the convictions and remanded for a new trial because part of voir dire occurred in chambers. Strode, 167 Wn.2d at 231.

Yet in Momah, the Court held the closure of part of voir dire was not structural error. Momah, 167 Wn.2d at 156. The Court relied on Waller, which held the remedy for unjustified closure of a hearing on a motion to suppress evidence was a new suppression hearing, not a new trial. Momah, 167 Wn.2d. at 150. Waller held:

[T]he remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest.

Waller, 467 U.S. at 50.

The Momah Court acknowledged that in the four closure cases immediately preceding its decision, it found structural error and granted automatic reversal. This Court asserted that in those cases, "we have held that the remedy must be appropriate to the violation and have found a new trial required in cases where a closure rendered a trial fundamentally unfair." Momah, 167 Wn.2d. at 150-51. Careful review of those cases calls this claim into question; in three of the four cases, the Court found the structural error remedy necessarily followed unjustified closure.

In Easterling, the Court found the remedy was automatic:

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. See 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) (citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Prejudice is necessarily presumed where a violation of the public trial right occurs. Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)). As a result, precedent directs that the appropriate remedy for the trial court's constitutional error is reversal of Easterling's unlawful delivery of cocaine conviction and remand for new trial.

Easterling, 157 Wn.2d at 181.

The Brightman court held similarly, finding the structural error remedy of a new trial necessarily followed where the trial court failed to apply the Bone-Club factors before closing voir to the accused's friends and family:

Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted. Id. at 261, 906 P.2d 325. Accordingly, we remand for a new trial. See id.

Brightman, 155 Wn.2d at 518.

In In re Personal Restraint of Orange, the trial court also excluded family and friends from part of voir dire without weighing the Bone-Club factors. Orange, 152 Wn.2d 795, 808-09, 100 P.3d 291 (2004). This Court did not hesitate in finding the remedy for the improper closure was reversal and remand for a new trial:

As to the remedy for the violation of Orange's public trial right, we granted the defendant in Bone-Club a new trial, stating that “[p]rejudice is presumed where a violation of the public trial right occurs.” 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923); Waller, 467 U.S. at 49 & n. 9, 104 S. Ct. 2210). Thus, had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial.

Orange, 152 Wn.2d at 814.

Finally, only in Bone-Club did the Court consider – and reject -- remanding only for a suppression hearing after concluding the trial court improperly ordered part of the hearing closed. Bone-Club, 128 Wn.2d at 261-62. It found persuasive the defendant's argument the undercover officer could testify differently in an open suppression hearing. It held, "Even if the new suppression hearing again results in the admission of [the

defendant's statements to the officer], Defendant should have the opportunity to use any such variances in testimony for impeachment purposes in a new trial." Bone-Club, 128 Wn.2d at 262.

This review establishes that reversal and remand for a new trial has been considered by this Court as the "default" remedy for improper closure. This structural error remedy will always apply absent extraordinary circumstances. See Strode, 167 Wn. 2d at 226 (right to public trial is "strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances"), citing Easterling, 157 Wn.2d at 174-75.

Momah presented those circumstances:

[W]e find the facts distinguishable from our previous closure cases. Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

Momah, 167 Wn.2d at 151-52.

Wise's case, like Strode and every other published closure case except Momah, has no comparable extraordinary facts. Defense counsel did not affirmatively assent to the closure, argue for its expansion, or forgo

the opportunity to object. Unlike Momah's counsel, Wise's attorney did not "make a deliberate choice to pursue" an in-chambers conference. Momah, 167 Wn. 2d at 155. The judge sought no input from counsel and did not close the proceedings to protect Wise's constitutional right to a fair trial by an impartial jury.

Counsel did ask some questions and moved to excuse some prospective jurors while in chambers, but no more so than counsel in Momah or Strode. And Wise did not "benefit" from the closed portion of voir dire any more than he would have had the proceeding been open. None of the prospective jurors revealed sensitive information that likely would have been withheld in an open setting. Three disclosed they knew a witness, four said they knew police officers, one was a burglary victim, and one had a felony conviction. RP3 21-37, 70-72. This mundane information is of a type regularly presented during open voir dire. For all the reasons the Momah Court found against a finding of structural error, this Court should find for such a result.

Finally, as a practical matter, reversal and retrial is the only available remedy for improper closure of voir dire absent extraordinary circumstances. A suppression hearing, such as the one found to be improperly closed in Waller, can be easily redone. Voir dire, in contrast, involves a jury. Remand for public voir dire is a meaningless remedy

absent a new trial. It is also a waste of time, for the new jury will have nothing to do. The proper remedy for Wise is the structural error remedy – a new trial.

6. *Protecting privacy did not justify the in-chambers voir dire.*

Prospective jurors' privacy is a compelling interest trial courts must protect. Strode, 167 Wn.2d at 235-36 (Fairhurst, J., concurring), 167 Wn.2d at 241 (C. Johnson, J, dissenting). The majority in Wise's case seemed to say the same thing by asserting prospective jurors have a constitutional right under article I, section 7 "to keep personal information private." Wise, 148 Wn. App. at 444.

Wise does not disagree with this general proposition. The presence of a compelling interest, however, does not of itself excuse a trial court's failure to apply the required standards under the Sixth Amendment and article I, section 22. Instead, the proponent of closure must show the compelling interest would likely be prejudiced by a public proceeding, Presley, 130 S. Ct. 724, or that an open proceeding would present a "serious and imminent threat" to that interest. Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). And even if this showing is made, a trial court must still perform the remainder of the analysis before ordering closure. Strode, 167 Wn.2d at 229.

The Wise majority held the closure "did not prejudice Wise and that private questioning, on the record, generally works to a defendant's advantage." Wise, 148 Wn. App. at 445. As support, the Court declared that "defendants frequently invite such private questioning" "to eliminate potential jurors with particular biases." Id. The majority also noted that one prospective juror disclosed in private that he had been a defense witness's school teacher and would find it difficult to be impartial or to believe the witness. Had this panelist "been allowed or required to make such a statement in the presence of the entire venire, the jury pool would have been tainted." Id.

There are several problems with this reasoning. First, it is based on the unsupported belief that the "privacy" of a closed procedure provides for closer questioning of jurors and 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 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 Strode, 167 Wn.2d at 236 (Fairhurst, J., concurring) (although agreeing that failure to close portion of voir dire would have thwarted court's procedural assurances that juror information would remain confidential and would have endangered jurors' openness and "*potentially* defendant's right to an impartial jury, the potential for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court."); see also People v. Gacy, 103 Ill.2d 1, 468 N.E.2d 1171 (1984) (concern for juror embarrassment was insufficient basis upon which to invoke a limitation of the constitutional right of access of the press and general public to criminal trials), cert. denied, 470 U.S. 1037 (1985); Providence Journal Co. v. Superior Court, 593 A.2d 446, 449 (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 record that demonstrated open proceeding would have imperiled or

prejudiced prospective jurors' privacy rights and defendant's right to 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-chambers voir dire to avoid "embarrassment" to prospective jurors violated state public trial law and constituted abuse of discretion).

Second, the majority's assertion that private questioning of potential jurors generally benefits the defendant ignores this Court's statement 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 (citing Orange, 152 Wn.2d at 812).

Third, the majority's bald claim that defendants often invite private voir dire does not comport with the published Washington closure cases.⁷

⁷ See, e.g., Strode, 167 Wn.2d at 229 (court initiated private voir dire); Brightman, 155 Wn.2d at 511 (court); State v. Bowen, __ Wn. App. __, __ P.3d __, 2010 WL 2817197 (2010) (court); State v. Paumier, 155 Wn. App. 673, 676, 230 P.3d 212 (2010) (court); State v. Price, 154 Wn. App. 480, 485, 228 P.3d 1276 (2009) (court); State v. Heath, 150 Wn. App. 121, 125, 206 P.3d 712 (2009) (prosecutor's request); State v. Sadler, 147 Wn. App. at 107 (court conducted private Batson hearing in jury room); State v. Erickson, 146 Wn. App. 200, 204, 189 P.3d 245 (2008) (court); State v. Castro, 141 Wn. App. 485, 488, 170 P.3d 78 (2007) (court); State v. Duckett, 141 Wn. App. 797, 801, 173 P.3d 948 (2007) (court); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593, 596 (2007) (court).

It also conflicts with Brightman's observation that private voir dire harms the accused.

Fourth, the state charged Wise with second degree burglary and first degree theft. These are obviously not charges that call for questions requiring prospective jurors to reveal sensitive personal matters. Cf. Strode, 167 Wn.2d at 238 (C. Johnson, J., dissenting) ("In cases such as this involving sexual abuse, counsel may voir dire jurors about experiences that may touch on deeply personal issues that might affect their ability to be fair and impartial. Jurors' willing and truthful disclosure of private information regarding such experiences is essential to ensuring the defendant's impartial jury right.").

Fifth, the majority's claim "the jury pool would have been tainted" had the schoolteacher been allowed or forced to reveal his belief a defense witness was a liar is wrong. First, this reasoning reveals the majority's cynical belief jurors would disregard the trial court's standard instruction that "[t]he only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence." CP 20 (Instruction 1). Such a belief ignores the well-established presumption that jurors follow a court's instructions. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987). Moreover, the proper solution for protecting the venire from taint caused by a prospective juror's answer is to remove the venire, not

the public. State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008),
review denied, 165 Wn.2d 1024 (2009).

Having said these things, Wise maintains trial courts should be permitted to develop procedures that respect the privacy interests of prospective jurors and encourage more forthright answers to sensitive voir dire questions. Such procedures must, however, comply with Bone-Club Dreiling v. Jain, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004) (the right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified).

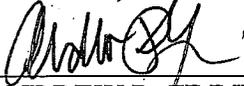
D. CONCLUSION

The majority's opinion is wrong. This court should say so, reverse Wise's convictions, and remand for a new trial.

DATED this 10 day of August, 2008.

Respectfully submitted,

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APPENDIX

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DIVISION II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 36625-8-II

Respondent,

v.

ERIC D. WISE,

PUBLISHED OPINION

Appellant.

QUINN-BRINTNALL, J. — A jury found Eric D. Wise guilty of second degree burglary and first degree theft. He argues that the trial court violated his federal and state constitutional right to an open trial, as well as the public's state right to an open trial, when it conducted portions of voir dire in the trial judge's chambers without first conducting a *Bone-Club*¹ analysis. Because Wise waived any objection to the questioning of jurors who asked to be questioned privately in the judge's chambers and because Wise lacks standing to assert the public's right to an open trial, we affirm.

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

FACTS

Wise was charged with second degree burglary and first degree theft in connection with the April 5, 2007 break-in of the Lake Limerick Mini Mart.² During jury selection, the trial court read a list of potential witnesses and gave the venire an opportunity to raise numbered cards if anyone knew a particular witness. Seven potential jurors were acquainted with at least one witness. As a follow-up question, the trial court asked whether “the fact that you’re acquainted with some of these [potential witnesses] would make it difficult for you to hear this case fairly.” Suppl. Report of Proceedings (RP) (June 26, 2007) at 6. Four venire persons answered affirmatively. The trial court then asked if any potential jurors had been burglarized in the past or knew someone who had been burglarized. Four of the jurors answered affirmatively. The trial court also asked if any jurors had relatives or close friends in law enforcement; 19 answered affirmatively. Three jurors answered affirmatively when asked whether their acquaintance with someone in law enforcement would “make it difficult for you to sit as a fair juror in this case.” Suppl. RP (June 26, 2007) at 8.

The trial court then posed a series of additional questions to the group with the venire members answering affirmatively by holding up numbered cards. Before this questioning, the trial court stated: “[I]f there is anything . . . that is sensitive and you don’t want to speak about it in this group setting[,] [j]ust let us know. I make a list on my notebook and we take those jurors back into chambers so that we can ask those questions more privately.” Suppl. RP (June 26,

² Wise and his friends broke into the Mini Mart with a crowbar or similar instrument and stole several items, including lottery tickets, cigarettes, and change from two cash registers. Police caught the group when two members attempted to cash in some of the lottery tickets the next day. Two of the group members testified against Wise at trial.

No. 36625-8-II

2007) at 11-12. Although there is nothing on the record indicating that either party requested private questioning of jurors, neither the State nor Wise objected to this process.

After this group questioning, the trial court directly questioned particular venire members. The judge prefaced each question with "are you comfortable telling me . . . here or would you like to go to chambers." Suppl. RP (June 26, 2007) at 13. Juror 43 requested that he be questioned in chambers. The trial court then stated, "At this time, we are going to take a number of jurors into chambers and begin a question - a series of questions there. We'll start with Juror No. 43 and then, if counsel will approach, I'll get the numbers for the other jurors." Suppl. RP (June 26, 2007) at 20-21. The trial judge, Wise, his counsel, the prosecutor, and the court reporter went into chambers to question eight potential jurors who had requested that they be questioned privately.

In chambers, but on the record, the trial court asked prospective jurors about health problems, time constraints, and their relationships with witnesses and law enforcement officials. Upon returning to the courtroom, voir dire continued and the trial court gave the parties each an opportunity to ask specific questions of the potential jurors. During this questioning, one prospective juror requested to speak in chambers. The trial court also called an additional juror into chambers to ask about a response on her questionnaire concerning her history of criminal convictions. The trial court, parties, and court reporter moved to chambers for this questioning as well and returned to the courtroom to complete jury selection.

All individual questioning took place on the record. Once the trial court and both parties finished questioning the venire, the parties exercised peremptory challenges. At the end of voir dire, the State had one remaining peremptory challenge and Wise had two remaining peremptory challenges.

The jury found Wise guilty of second degree burglary and first degree theft. The court sentenced him to 57 months and 22 months in prison, respectively. He now appeals.

ANALYSIS

Wise argues that he is entitled to a new trial because the trial judge failed to sua sponte conduct a *Bone-Club* analysis before closing the courtroom during jury selection. Wise urges this court to reject Division One's holding in *State v. Momah*, 141 Wn. App. 705, 171 P.3d 1064 (2007), *review granted in part*, 163 Wn.2d 1012 (2008), that only an express order to close the courtroom constitutes a closure requiring application of *Bone-Club*, and asks that we follow Division Three's holdings in *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007), and *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007).

The State argues that the trial court never closed the courtroom and that *Bone-Club* analysis was unwarranted. The State also urges us to reject Division Three's holding in *Duckett* that "individual juror questioning in-chambers violates a defendant's public trial rights" and argues that *Duckett* ignores juror privacy rights and "[Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C.A. § 1320d] for any jurors that have medical concerns." Br. of Resp't at 4-5.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. *State v. Russell*, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), *review denied*, 164 Wn.2d 1020 (2008). Additionally, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," giving the public, in addition to the defendant, a right to open proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

We review de novo whether a trial court has violated the right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). And we presume prejudice where the court proceedings violate this right. *Bone-Club*, 128 Wn.2d at 257. The jury selection proceedings fall “within the ambit of the right to a public trial.” *State v. Erickson*, 146 Wn. App. 200, 208, 189 P.3d 245 (2008) (citing *Brightman*, 155 Wn.2d at 511, 515; *Bone-Club*, 128 Wn.2d at 259-60). Therefore, *Bone-Club* appears to require a finding of necessity on the record before conducting voir dire in chambers just as it does before closure of trial proceedings. *Erickson*, 146 Wn. App. at 208. The remedy for a trial court’s failure to follow *Bone-Club* is to reverse and remand for a new trial. *In Re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

BONE-CLUB ANALYSIS NOT WARRANTED

Protection of the right to public trial requires a trial court “to resist a closure motion except under the most unusual circumstances.” *Bone-Club*, 128 Wn.2d at 259. It also provides that a trial court may close a courtroom only after considering the five requirements enumerated in *Bone-Club* and entering specific findings on the record to justify the closure order. 128 Wn.2d at 258-59. The *Bone-Club* factors “assure careful, case-by-case analysis of a closure motion,” and consist of the following five determinations:

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.

128 Wn.2d at 258-59. A trial court's failure to undertake the *Bone-Club* analysis, which directs the trial court to allow anyone present an opportunity to object to the closure, undercuts the guarantees enshrined in both article I, section 10 as well as article I, section 22. 128 Wn.2d at 258-59.

In *Bone-Club*, the State requested closure of the courtroom during an undercover police officer's testimony at the pretrial suppression hearing. The trial court cleared the entire courtroom for the officer's testimony during the pretrial suppression hearing. *Bone-Club*, 128 Wn.2d at 256-57. The defendant was not given an opportunity to object to the closure. *Bone-Club*, 128 Wn.2d at 257. The Washington Supreme Court found that "the temporary, full closure of [the] pretrial suppression hearing" was a violation of the defendant's right under article I, section 22 of the Washington Constitution. *Bone-Club*, 128 Wn.2d at 256-57. The court further found that the defendant's "failure to object contemporaneously did not effect a waiver" and that the closure requirements are triggered by the motion to close, not by a defendant's objection. *Bone-Club*, 128 Wn.2d at 257, 261. But here, unlike in *Bone-Club*, there was no motion or request to close the courtroom and no order closing the courtroom was ever made.

We acknowledge that the Washington Supreme Court specifically considered the issue of closure during voir dire in *Orange*. The trial court in *Orange* questioned all members of the venire in chambers on their answers to eight particular juror questionnaire questions. 152 Wn.2d at 801. The trial court also prohibited the defendant's and the victim's families from watching the courtroom voir dire because of space constraints in the courtroom, stating, "I am ruling no family members, no spectators will be permitted in this courtroom during the selection of the

jury because of the limitation of space, security, etcetera [sic]. That's my ruling." *Orange*, 152 Wn.2d at 802 (emphasis omitted).

The Washington Supreme Court held that the trial court "ordered a permanent, full closure of voir dire," thereby exceeding the *Bone-Club* threshold of "a temporary, full closure." *Orange*, 152 Wn.2d at 807-08. The court found that, because there had been a closure and because the trial court failed to conduct the *Bone-Club* analysis, Orange's constitutional right to a public trial had been violated. *Orange*, 152 Wn.2d at 811. Finally, the court held that Orange's remedy for the violation of his right to a public trial was remand for a new trial. *Orange*, 152 Wn.2d at 814.

In *Brightman*, neither party requested the courtroom closure. 155 Wn.2d at 511. The trial court closed the courtroom to spectators during voir dire, stating, "In terms of observers and witnesses, we can't have any observers while we are selecting the jury, so if you would tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that." *Brightman*, 155 Wn.2d at 511. Neither party objected to this statement. *Brightman*, 155 Wn.2d at 511. The Washington Supreme Court held that "the defendant's failure to object at trial to the courtroom closure 'did not effect a waiver,'" *Brightman*, 155 Wn.2d at 514, and that "once the plain language of the trial court's ruling imposes a closure," there is a "strong presumption that the courtroom was closed." *Brightman*, 155 Wn.2d at 516.

In the present case, the record shows that, at the prospective jurors' request, a portion of voir dire questioning took place in chambers. Neither party requested the chambers questioning or objected to the process and our review of the record demonstrates that neither party was prejudiced by the process; in fact, both appear to have benefited from the prospective jurors'

candid answers, some of which would have tainted the entire venire if stated in open court. The trial court individually questioned only 10 potential jurors in chambers, while the rest of the jury remained in the courtroom. The trial court did not order a closure of the courtroom itself and we presume the courtroom and the proceedings conducted there remained open. The court reporter was present in chambers during questioning, as were all parties, and our record contains a full transcript of the proceedings. Closure, if any, was temporary and partial, below the “temporary, full closure” threshold of *Bone-Club*. See *State v. Gregory*, 158 Wn.2d 759, 815-16, 147 P.3d 1201 (2006). We, therefore, hold that the trial court was not required to sua sponte conduct a *Bone-Club* analysis prior to this temporary relocation of voir dire to chambers for the purpose of asking prospective jurors sensitive questions.

WISE HAS NO BASIS TO APPEAL HIS CONVICTION

Even assuming the trial court improperly closed the courtroom, we hold that Wise is not entitled to a new trial on that basis because (1) he waived his own public trial right and (2) he lacks standing to defend the public’s right to an open trial under article I, section 10 of the Washington Constitution.³ We, therefore, affirm Wise’s conviction.

³ We note the Division Three holding in *Duckett*, which expressly rejected a similar standing argument. 141 Wn. App. at 804. Division Three determined that the trial court has an “independent obligation to safeguard the open administration of justice.” *Duckett*, 141 Wn. App. at 804. We also take note of a decision from this division, *Erickson*, in which the majority responded to the dissent’s argument:

The dissent suggests that *Erickson* lacks standing to invoke the public’s right to a public trial. The dissent further states that *Erickson*’s interest in full candor during questioning conflicts with the public’s interest in open proceedings, and thus he cannot ‘fairly represent the public’s interests in exercising its public trial rights’ under article I, section 10. We disagree.

146 Wn. App. at 206 n.2 (internal citations omitted).

A. WISE WAIVED HIS OWN RIGHT TO AN OPEN TRIAL

Wise argues that the closure of the courtroom violated both the Sixth Amendment of the federal constitution, and article I, section 22 of the Washington Constitution, which protect a defendant's own right to a public trial. Wise cannot appeal the trial court's decision based on his own right to an open trial because Wise waived this right at trial.

A defendant may waive certain constitutional rights through his conduct without ever expressly waiving them on the record. *See State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996). In *Thomas*, the Washington Supreme Court determined that a defendant may waive his right to testify through his conduct; there is no requirement that "the trial court . . . obtain an on-the-record waiver of the right." 128 Wn.2d at 559. The court explained that, while certain fundamental constitutional rights—including the right to testify—must be waived "knowingly, voluntarily, and intelligently," there is no requirement that such rights be waived on the record. *Thomas*, 128 Wn.2d at 558-59. The court also found no requirement that trial courts "inform a defendant of [his testimonial] right." *Thomas*, 128 Wn.2d at 558-59 (citing various federal court decisions holding the same).

We hold that a defendant's conduct may similarly waive his right to have all voir dire questions conducted in open court, even without an express explanation of the public trial right by the trial court. And we hold that Wise waived his right to ask prospective jurors sensitive personal questions in public in this case. This is because not only did Wise not object at trial,⁴

⁴ We note that a mere failure to object, without additional conduct, has been held not to constitute waiver. *See Brightman*, 155 Wn.2d at 514 ("the defendant's failure to object at trial to the courtroom closure 'did not effect a waiver'"); *Bone-Club*, 128 Wn.2d at 257 ("Defendant's failure to object contemporaneously did not effect a waiver") (citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923)).

but because his counsel actively engaged in the private questioning of the prospective jurors. Indeed, Wise benefited from the private questioning and successfully requested that four privately questioned jurors be excused for cause after their answers revealed bias or prior negative contact with prospective defense witnesses. Wise, therefore, waived his right to ask prospective jurors sensitive personal questions in public and cannot now be heard to complain that his constitutional right to an open trial was prejudicially violated as a result.

B. THERE IS NO STRUCTURAL ERROR

Our Supreme Court has thus far treated denial of public trial right for full, temporary courtroom closures (which did not occur here) as if it were structural error, i.e., not subject to harmless error and not requiring the defendant to timely object in order to preserve the issue for appeal. But such treatment is inconsistent with controlling Sixth Amendment jury selection authority. See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). We believe that conducting voir dire on the record, in chambers, with the defendant and all counsel present—such as presented in this case—is not a structural error that undermines the integrity of the verdict rendered by a fair and impartial jury. Accordingly, a timely objection to such voir dire is required to preserve the issue for appeal and, absent a showing of prejudice, retrial before another fair and impartial jury is not required. Cf. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (full closure of suppression hearing on State's motion to close was structural error).

“Structural errors are those which create ‘defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” *In re Det. of Kistenmacher*, 163 Wn.2d 166, 185, 178 P.3d 949 (2008) (Sanders, J., concurring in part, dissenting in part) (quoting *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d

No. 36625-8-II

35 (1999)). “Structural errors . . . are not subject to harmless error review.” *Kistenmacher*, 163 Wn.2d at 185 (quoting *State v. Frost*, 160 Wn.2d 765, 779, 161 P.3d 361 (2007), *cert. denied*, 128 S. Ct. 1070 (2008)). Examples of structural errors include the absence of counsel for a criminal defendant, a judge who is not impartial, unlawful exclusion of members of the defendant’s race from a grand jury, the right to self-representation at trial, and admission of a defendant’s coerced statements or confessions. See *State v. L.B.*, 132 Wn. App. 948, 954 n.2, 135 P.3d 508 (2006) (citing *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). As the Supreme Court recently reiterated:

“[M]ost constitutional errors can be harmless. . . . [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis. . . . Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error ‘necessarily’ render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”

Washington v. Recuenco, 548 U.S. 212, 219, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (footnotes omitted) (quoting *Neder*, 527 U.S. at 8, 9).

In the context of jury selection, the right to a public trial is not structural error unless the defendant makes a prima facie showing of the alleged jury selection defect at trial and the trial court fails to correct the discriminatory jury selection process. *Batson*, 476 U.S. 79; *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831, *cert. denied*, 129 S. Ct. 278 (2008). Although *Batson* errors are structural, absent a showing of prejudice they cannot be raised for the first time on appeal. To preserve the issue, the defendant must present the trial court with a prima facie showing that the prosecution is unlawfully excluding prospective jurors on the basis of race or gender and the State must then be given an opportunity to rebut the allegations. *Batson*, 476

No. 36625-8-II

U.S. at 93-94; *United States v. Gordon*, 974 F.2d 97, 100 (8th Cir., 1992); *State v. Wright*, 78 Wn. App. 93, 896 P.2d 713, *review denied*, 127 Wn.2d 1024 (1995).

As in the *Batson* context, when no prejudice appears on the record, it is proper to require a defendant or a representative of the public, such as a citizen or a newspaper, to bring an alleged Sixth Amendment public trial right violation to the trial court's attention for immediate correction. Applying *Bone-Club*, as Wise urges, to vacate the verdict of an impartial jury simply because, without objection, the trial court granted potential jurors' requests that they be questioned in chambers, on the record, with the defendant and counsel present is inconsistent with the handling of other, arguably more serious, challenges to the integrity of the jury selection process.

Indeed, in the *Batson* context, a trial court judge may require the prosecutor to answer the issue of discriminatory jury selection on its own motion only if the facts appearing in the record support a prima facie case of discrimination. *State v. Evans*, 100 Wn. App. 757, 767, 998 P.2d 373 (2000). But even a *Batson* query is a discretionary decision for the trial court judge and is not required because, with the benefit of hindsight, an appellate court discovers potential error. *Evans*, 100 Wn. App. at 767. Allowing a defendant to request or acquiesce in private voir dire, or to merely sit by idly at trial and then, on appeal, claim an error for an alleged jury selection challenge, imposes additional duties on the trial court that run counter to case law governing other jury selection issues.

Here, no one challenged the jury selection process or raised the issue of the right to public trial to the trial court. No party made a motion to close the court room and the judge did not sua sponte move to close the courtroom. Thus, our record lacks two elements that would trigger the structural error doctrine in other jury selection matters. First, there was no timely

prima facie showing by a party that the court was closing. Second, the trial court did not have before it a closure motion. Such a closure motion triggers the trial court's duty to conduct the *Bone-Club* analysis and triggers the parties' duty to timely object to closure before the court acquiesced in prospective jurors' requests for slight privacy in answering personal questions on the record, with the defendant and counsel present but out of public view. Accordingly, the trial court's error in failing to conduct a *Bone-Club* analysis on the record may be harmless and Wise is entitled to a new trial only if the jury selection process prejudiced his right to a fair and impartial jury. Wise has not shown that he was prejudiced by the process of selecting the fair and impartial jury in this case and the constitution does not require that we vacate that jury's verdict and remand for a new trial.

C. WISE LACKS STANDING TO DEFEND PUBLIC'S RIGHT UNDER ARTICLE I, SECTION 10

Wise also argues that the trial court violated article I, section 10 of the Washington Constitution, which protects the public's right to open proceedings. But Wise cannot appeal on the grounds of the public's right to an open trial because he lacks standing.

The standing doctrine generally prohibits a party from defending the rights of another person. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987), *dismissed*, 488 U.S. 805 (1988). Article I, section 10 of the Washington Constitution gives the *public* the right to the open administration of justice. WASH. CONST. art. I, § 10; *Bone-Club*, 128 Wn.2d at 259.

Article III of the federal constitution requires that any litigant possess standing. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). Standing requires "(1) that the plaintiff have suffered an 'injury in fact' . . . ; (2) that

there be a causal connection between the injury and the conduct complained of . . . ; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

There is a “general prohibition on a litigant’s raising another person’s legal rights.” *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). “[E]ven when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, [the U.S. Supreme Court] has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). A plaintiff may only raise the rights of another person when “(1) the party asserting the rights has suffered an injury in fact, giving him a sufficiently concrete interest in the outcome of the litigation, (2) there is a sufficiently close relationship between the litigant and the person whose rights are being asserted so that the litigant will be an effective proponent of the rights being litigated, and (3) there is some hindrance to the third party’s ability to protect his own interests.” *United States v. De Gross*, 960 F.2d 1433, 1437 (9th Cir., 1992) (citing *Powers v. Ohio*, 499 U.S. 400, 409-13, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)); see also *Ludwig v. Dep’t of Retirement Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006); *Mearns v. Scharbach*, 103 Wn. App. 498, 511, 12 P.3d 1048 (2000), review denied, 143 Wn.2d 1011 (2001).

Wise does not meet the requirements for third party standing to assert a violation of the public’s open trial right. Wise does not point to any injury caused by private voir dire. More importantly, Wise does not have a “sufficiently close relationship” to the public open trial right.

He was the defendant and not an observer in this case and the trial court did not bar him from the juror questioning it conducted on the record in chambers. Additionally, Wise's interests on appeal are starkly different than the interests of the public: Wise benefited from the private questioning because it allowed jurors to be more forthcoming; whereas the public's interest was in observing the proceedings, Wise's interest was on getting accurate private personal information. We do not determine here what parties might have standing to allege a violation of article I, section 10 on the public's behalf, but only hold that Wise himself does not have standing to do so.

ADDITIONAL CONSIDERATIONS: VIOLATION OF HIPAA AND TAINING OF JURY POOL

The State also argues that the court's requiring potential jurors to publicly answer questions regarding their health violates HIPAA. The State also notes that requiring potential jurors to answer questions on sensitive issues in front of the venire violates the jurors' constitutional right to keep personal matters private from the government. *See* WASH. CONST. art. I, § 7. Wise acknowledges that the trial court conducted questioning in chambers in order to "facilitate privacy." Reply Br. of Appellant at 3. He argues, however, that "[p]ersonal embarrassment does not trump [the public trial] right." Reply Br. of Appellant at 4. He further argues that the jurors "obviously consented to sharing medical information" since "[n]either the court nor the parties compelled the prospective jurors to reveal anything about their medical conditions." Reply Br. of Appellant at 4. We disagree with Wise that a jury summons negated a Washington citizen's privacy right. The prospective jurors were compelled to come to court by summons. RCW 2.36.095. If they had failed to respond to the summons, they would have committed a criminal offense. RCW 2.36.170. Moreover, once they had responded to the courthouse for jury duty, they were required to take an oath and were subject to potential perjury

charges if found to have lied in answers to the questions posed by the court and counsel. CrR 6.6.

HIPAA is a federal statute that “restricts health care entities from disclosure of ‘protected health information.’” *Lloyd v. Valley Forge Life Ins. Co.*, No. C06-5325 FDB, 2007 WL 906150, at *3 (W.D. Wash. Mar. 23, 2007). In this case, several jurors discussed health problems to the court, with one juror asking the trial court to question him in chambers. More important, one venire member was a public health nurse and asked to respond privately to questions regarding her acquaintance with a defense witness because he was a patient. Though individuals may volunteer information about themselves in response to questioning, a health care provider may not answer questions about a patient absent patient consent without violating her duties under HIPAA. 42 U.S.C.A. § 1320d-6.

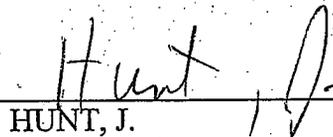
We also reject the argument that the court may compel all potential jurors to waive HIPAA protections when they are questioned about their personal medical information. Potential jurors are required to be candid with the court and are under oath to be truthful. Here, the trial court specifically asked the jury pool the common question—whether anyone had “a physical problem or limitation that would make it difficult to sit as a juror,” Suppl. RP (June 26, 2007) at 9-10, and any disclosures in response to that question cannot be seen as waivers of HIPAA and the prospective juror’s constitutional right under article I, section 7 of the Washington Constitution to keep personal information private. Additionally, though the jurors were free to waive their own privacy rights knowingly and voluntarily by responding to questioning, the defense witness who had received medical treatment from the prospective juror who is a public health nurse was never given an opportunity to waive his HIPAA rights and may not even be aware that those rights have been violated.

We also note that a trial court's decision to conduct small portions of jury selection in private did not prejudice Wise and that private questioning, on the record, generally works to a defendant's advantage. In order to eliminate potential jurors with particular biases, defendants frequently invite such private questioning. Indeed, in the present case, one potential juror explained in private that he had been a defense witness's school teacher and that he "would find it hard to be impartial or possible [to] take [the defense witness's] word." Suppl. RP (June 26, 2007) at 35. Wise successfully challenged this juror for cause. If this juror had been allowed or required to make such a statement in the presence of the entire venire, the jury pool would have been tainted.

In the absence of a timely objection, the trial court did not commit reversible error by failing to sua sponte conduct a *Bone-Club* analysis before allowing jurors to answer personal questions in chambers on the record and in the defendant's presence. Our review of the record which contains verbatim a transcript of the entire voir dire of prospective jurors, whether conducted in the courtroom or the judge's chambers, does not support Wise's claim that his constitutional right to a public trial was violated, prejudicing his right to a fair trial and requiring that he be afforded a new trial on that basis. Accordingly, we affirm.


QUINN-BRINTNALL, J.

I concur:


HUNT, J.

Van Deren, C.J. (dissenting)—I respectfully dissent. I would reverse and remand for a new trial because the trial court failed to conduct a *Bone-Club* analysis before removing the jury selection proceedings from the public courtroom, thus violating Wise’s right to a public trial and the public’s right to open and observable conduct of public trials. In doing so, I would adopt the majority’s reasoning in *State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008).

It appears from the record on appeal that it is the trial court’s normal procedure, without regard to the *Bone-Club*⁵ factors, to advise jurors that they may answer questions in chambers.⁶ Without discussing the *Bone-Club* factors, the trial judge, Wise, both counsel, the court clerk, and the court reporter twice moved from the courtroom to chambers to further question certain potential jurors. *Bone-Club* provides a straightforward means to balance the defendant’s and the public’s interest in having trials conducted in public against any specific, articulated need to conduct a limited portion of the trial outside the public forum. Thus, it protects the right to public trials as well as the need for privacy of potential jurors or witnesses. A trial court’s failure to apply *Bone Club*’s five tests before closing the courtroom deprives both the defendant and the public of an important constitutional right, and the proper remedy is remand for a new trial.

⁵ *State v. Bone-Club*, 128 Wn.2d 254, 406 P.2d 325 (1995).

⁶ A judge’s chambers comprises the judge’s office and space for other courtroom personnel, including court clerks, judicial assistants, and court reporters. It does not include the jury room and it is not part of the public courtroom. It is a relatively small area where the judge and judicial staff work when they are not in the courtroom. Often, reaching chambers involves passing other judicial chambers. Normally, no one is allowed to enter chambers without express permission.

I. MOVING VOIR DIRE TO JUDICIAL CHAMBERS EXCLUDES THE PUBLIC FROM PUBLIC TRIALS

The majority holds that no *Bone-Club* analysis was required because the courtroom was never closed to the public. It states: “Closure, if any, was temporary and partial, below the ‘temporary, full closure’ threshold of *Bone-Club*.” Majority at 8 (quoting *State v. Bone-Club*, 128 Wn.2d 254, 257, 406 P.2d 325 (1995)). The majority bases its decision on the fact that the trial court did not expressly order closure and/or because it presumes that “the courtroom and the proceedings conducted there remained open.” Majority at 8. There is no evidence in the record on appeal that any proceedings took place in the open courtroom while the judge, court reporter, court clerk, defendant, counsel, and individual jurors conducted voir dire in the judge’s chambers.

The majority misconstrues the meaning of an open courtroom. It is the business of the court—its conduct of a trial where the public may observe—that is the essence of a public trial. Leaving the remainder of the venire in the courtroom, while the business of the trial takes place in chambers, does not constitute an open forum. Moving voir dire into judicial chambers precluded the public’s opportunity to observe the proceedings in Wise’s trial. As the majority noted in *State v. Erickson*, 146 Wn. App. 200, 209, 189 P.3d 245 (2008) private questioning of prospective jurors “outside the courtroom has more than an inadvertent or trivial impact on the

proceedings,”⁷ and, therefore, “acts as a closure for purposes of *Bone-Club*.”

Here, the trial court moved voir dire to judicial chambers, an area even less accessible than a jury room, in accord with its routine practice. It did not invite the public into chambers, and it is highly unlikely that members of the public would have understood the judge’s chambers to be part of the open courtroom when voir dire was expressly moved to chambers to allow for juror privacy. Thus, I would hold that Wise has met his burden to show that the trial court closed the public trial by moving voir dire into the trial court’s chambers.

II. WISE DID NOT WAIVE HIS RIGHT TO A PUBLIC TRIAL

I also disagree with the majority’s holding that Wise waived his right to public trial, in light of our Supreme Court’s controlling authority. Majority at 9. A defendant’s failure to object at the time of a courtroom closure does not waive his right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 948 (2005). I would also adopt the holdings in *Sadler*, 147 Wn. App. 97, *Erickson*, 146 Wn. App. 200, *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007), and *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007), rejecting the waiver argument.

Sadler was charged with sexual exploitation of a minor. During voir dire, the State used two of its peremptory challenges to dismiss the only two African-American venire members.

⁷ In *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) the court held that “trivial closures may not violate a defendant’s public trial right.” *Erickson*, 146 Wn. App. at 208. Trivial closures are illustrated by three federal cases: *Peterson v. Williams*, 85 F.3d 39, 41-42 (2nd Cir. 1996) (where court inadvertently leaves courtroom closed for fifteen minutes following legitimate temporary closure, no violation of right to public trial); *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994) (where court security officer closed courthouse doors 20 minutes before trial proceedings complete, no violation); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975) (where bailiff would not allow people to leave or enter the courtroom during arguments, no violation).

Sadler raised a *Batson*⁸ challenge, “asserting that the State was unlawfully excluding these jurors because of their race.” The trial court moved the *Batson* challenge hearing to the jury room, “[w]ithout discussing its reasons for doing so on the record or asking Sadler or anyone else present to comment.” *Sadler*, 147 Wn. App. at 107. Sadler, both counsel, corrections officers, and the court reporter were present in the jury room during the hearing. The trial court ruled that the State properly struck the venire members for reasons other than race. *Sadler*, 147 Wn. App. at 107.

Sadler appealed, arguing that “the trial court denied him his constitutional right to an open public trial when it heard his *Batson* challenge in the jury room rather than in the open courtroom.” *Sadler*, 147 Wn. App. at 109. The State argued that “the proceeding was not closed to the public because the trial court never asked anyone in the courtroom to leave the courtroom.” *Sadler*, 147 Wn. App. at 112.

The *Sadler* majority stated: “Admittedly, unlike the situations in *Orange*⁹ and *Brightman*, the trial court did not expressly exclude the public during the jury selection process.” 147 Wn. App. at 112 (citations omitted). But, the majority explained, neither is this case “similar to those instances that did not amount to a closure. . . . Here, the trial court’s affirmative act of moving the proceeding into the jury room, a part of the court not ordinarily accessible to the public, without inviting the public to attend, had the same effect as expressly excluding the public.” *Sadler*, 147 Wn. App. at 112.

⁸ *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

⁹ *In Re the Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004).

In *Erickson*, the parties agreed at the beginning of trial to use a juror questionnaire. The trial court ruled that it would hold private questioning following juror orientation; Erickson's counsel did not object. After orientation, four prospective jurors requested private questioning. The trial court "excused the rest of the prospective jurors from the courtroom and proceeded with counsel and the court reporter to the jury room." *Erickson*, 146 Wn. App. at 203-04.

Erickson appealed, arguing that the jury-room questioning violated his right to a public trial because conducting private questioning of jurors in a jury room "is equivalent to a courtroom closure." *Erickson*, 146 Wn. App. at 207 (quoting *Frawley*, 140 Wn. App. at 720). The State, relying on *State v. Momah*, 141 Wn. App. 705, 171 P.3d 1064 (2007), *review granted*, 163 Wn.2d 1012 (2008),¹⁰ argued that "individual questioning of prospective jurors in chambers and in the jury room does not constitute a closure." *Erickson*, 146 Wn. App. at 207.

The majority held that the "trial court must undertake a *Bone-Club* analysis before individual questioning of prospective jurors outside the courtroom or in the jury room."¹¹ *Erickson*, 146 Wn. App. at 208. The majority rejected the dissent's argument that Erickson invited the error. *See Erickson*, 146 Wn. App. at 212-13 (Quinn-Brintnall, J., dissenting).

In *Frawley*, the trial court conducted voir dire in chambers based on answers prospective jurors gave to a questionnaire. Frawley waived his right to be present. *Frawley*, 140 Wn. App. at 718. On appeal, Frawley argued that the individual questioning violated his right to a public trial. The State argued that (1) Frawley waived his right and (2) "the individual voir dire was

¹⁰ Our Supreme Court granted review of *Momah* and heard oral arguments on June 10, 2008. *State v. Momah*, 163 Wn.2d 1012 (2008). The Court has yet to issue an opinion.

¹¹ We noted that, because jury selection "lies within the ambit of the right to a public trial[,] . . . if private questioning of prospective jurors in a jury room acts as a courtroom closure, *Bone-Club* mandates findings to support such action by the trial court." *Erickson*, 146 Wn. App. at 208.

appropriately kept from public view” under a court rule that “presumes privacy of juror information because of GR 31(j).” *Frawley*, 140 Wn. App. at 719. “Individual juror information, other than name, is presumed to be private.” *Frawley*, 140 Wn. App. at 719 n.2 (quoting GR 31(j)). Because information in jury questionnaires is private, the State argued questioning based on the questionnaires is correspondingly private. *Frawley*, 140 Wn. App. at 720.

Division Three of this court rejected the State’s position and held that juror questioning in chambers violated *Frawley*’s constitutional right to a public trial. It held: “Jury selection is jury selection”; there should, therefore, be no distinction between private questioning in response to questionnaires and private questioning not based on questionnaires. The court also rejected the argument that court rules can “trump constitutional requirements that the trial be public.” *Frawley*, 140 Wn. App. at 720. The trial court’s failure to conduct a *Bone-Club* analysis violated *Frawley*’s constitutional rights. *See Frawley*, 140 Wn. App. at 721.

In *State v. Duckett*, the defendant was charged with rape, and, as in *Frawley*, the prospective jurors answered a questionnaire. 141 Wn. App. 797, 173 P.3d 948 (2007). The trial court allowed counsel to ask follow-up questions “outside the courtroom . . . ‘so as to maintain some privacy.’” *Duckett*, 141 Wn. App. at 801 (quoting *Duckett* Report of Proceedings at 46). *Duckett* expressly waived his right to be present for this questioning. On appeal, Division Three reversed *Duckett*’s second degree rape conviction based on the trial court’s failure to conduct a *Bone-Club* analysis. *Duckett*, 141 Wn. App. at 801-03. The court rejected the State’s contention that *Duckett* waived his right either explicitly or through his conduct, explaining that the right to a public trial is a constitutional right that cannot be waived through conduct. *Duckett*, 141 Wn. App. at 805-06.

Division One of our court is the only court that has concluded that there is no need for a *Bone-Club* analysis when voir dire is moved outside the courtroom. In *Momah*, the trial court, the parties, and the court reporter “moved into chambers adjoining the presiding courtroom.” *Momah*, 141 Wn. App. at 710. The trial court stated on the record: “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” *Momah*, 141 Wn. App. at 710. The trial court then questioned other jurors in chambers following questioning of juror 36. *Momah*, 141 Wn. App. at 711.

In rejecting *Momah*’s challenge to the procedure on appeal, the court held that a *Bone-Club* analysis was not required because the trial court made no specific order closing the courtroom and, therefore, no closure occurred. *Momah*, 141 Wn. App. at 711-14. Furthermore, it reasoned that the trial court did not close the courtroom because “there is nothing in the record to indicate that any member of the public . . . or the press was excluded from voir dire.” *Momah*, 141 Wn. App. at 712. It also relied on the fact that *Momah*’s counsel requested the individual questioning because of “the concern that prospective jurors might have knowledge about the case that could disqualify them or that they might contaminate the rest of the prospective jurors with such knowledge.” *Momah*, 141 Wn. App. at 711-12.

The clear weight of authority dictates that *Wise* should not be denied a new trial simply because he did not object to the trial court’s routine practice of doing a portion of voir dire in chambers. Furthermore, I agree that the right to a public trial is a constitutional right that is not waiveable through conduct. *Duckett*, 141 Wn. App. at 806. Moving voir dire from the open courtroom deprives defendants of a public trial.

III. WISE HAS STANDING TO ASSERT CONSTITUTIONAL VIOLATIONS OF THE RIGHT TO A PUBLIC TRIAL

Furthermore, I disagree with the majority's conclusion that Wise does not have standing to voice the public's interest in public trials. Majority at 10. This contention has been rejected by both our court and Division Three of our court. *Erickson*, 146 Wn. App. at 205 n.2; *Duckett*, 141 Wn. App. at 804-05.

In *Duckett*, the court rejected the State's argument that the defendant lacked standing to challenge his conviction under article I, section 10 of the Washington State Constitution, noting that the trial court has an "independent obligation to safeguard the open administration of justice." "Article I, section 10 is mandatory." *Duckett*, 141 Wn. App. at 804. The right to a public trial is "not simply the defendant's individual interest in being present, but also the public's interest." *Duckett*, 141 Wn. App. at 806.

In *Erickson*, the majority expressly rejected the dissent's argument that Erickson lacked standing to appeal based on the public's right to an open trial. 146 Wn. App. at 205, 205 n.2. The majority explained that "[a]rticle I, section 10's guarantee of public access to proceedings and article I, section 22's public trial right together perform complementary, interdependent functions that assure the fairness of our judicial system." *Erickson*, 146 Wn. App. at 205. "[T]he constitutional requirement that justice be administered openly is . . . a constitutional obligation of the courts." *Erickson*, 146 Wn. App. at 205-06 (quoting *Easterling*, 157 Wn.2d at 187) (Chambers, J., concurring).

Here, the trial court's failure to conduct a *Bone-Club* analysis before excluding the public from voir dire allows Wise to raise the constitutional right to a public trial individually and on

behalf of the public. I would follow the weight of authority and return this matter to the trial court for a new trial.

IV. PRIVACY CONSIDERATIONS REQUIRE A *BONE-CLUB* ANALYSIS

The majority agrees with the State that requiring potential jurors to answer questions regarding their health and other sensitive issues could breach the Health Insurance Portability and Accountability Act (HIPAA)¹² and might taint the jury pool. Majority at 12. The State also argues that requiring potential jurors to answer questions on sensitive issues in front of the jury pool violates the jurors' rights to privacy.

HIPAA and other privacy concerns are precisely the kind of issues that compel a trial court to apply the *Bone-Club* analysis before it closes the courtroom. While a juror's request to be questioned in private may have merit, the trial court must first conduct a *Bone-Club* analysis to preserve the constitutional right to a public trial. *See Frawley*, 140 Wn. App. at 720-21. Rather than prohibiting closure, *Bone-Club* allows the trial court to close the courtroom once it has explained on the record the specific issues that require privacy. The *Bone-Club* factors "assure careful, case-by-case analysis of a closure motion," with specific determinations and findings on the record that justify the closure of public trials. 128 Wn.2d 254, 258-59.

Alternatives to closing the courtroom are readily available. The trial court may conduct questioning of potential jurors within the courtroom but apart from the rest of the venire, as in *State v. Vega*. 144 Wn. App. 914, 916-17, 184 P.3d 677 (2008). And, as Wise suggests, instead of removing the individual juror to chambers, the trial judge may sequester the rest of the jury

¹² Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

pool in the jury room or in jury administration while individual questioning of the potential jurors takes place in open court.

V. *BONE-CLUB* REQUIRES REMAND FOR A NEW TRIAL

The protections of the right to public trial under the federal and our state constitutions require a trial court “to resist a closure motion except under the most unusual circumstances” *State v. Russell*, 141 Wn. App. 733, 738, 172 P.3d 361 (2007) (quoting *Bone-Club*, 128 Wn.2d at 259); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). We presume prejudice where the court proceedings violate this right. *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001). A trial court’s failure to undertake the *Bone-Club* analysis, including allowing anyone present an opportunity to object to the closure, undercuts these constitutional guarantees. 128 Wn.2d at 258-59.

In failing to address the *Bone-Club* factors and moving voir dire to chambers without unusual circumstances being articulated on the record, the trial court violated Wise’s right to a public trial. The remedy for such a violation is to reverse and remand for a new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

For all the stated reasons, I would grant Wise a new trial.


VAN DEREN, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	NO. 82802-4
)	
ERIC D. WISE,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF AUGUST 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EDWARD LOMBARDO
MASON COUNTY PROSECUTOR'S OFFICE
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P.O. BOX 639
SHELTON, WA 98584

[X] ERIC WISE
DOC NO. 308268
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF AUGUST 2010.

x *Patrick Mayovsky*