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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK DAVID RUSSELL,

Appellant.

Filed *E*
Washington State Supreme Court

MAY 20 2015

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Ronald R. Carpenter
Clerk

BRIEF OF AMICI CURIAE

OFFICE OF CRIME VICTIMS ADVOCACY;
WASHINGTON COALITION OF SEXUAL ASSAULT
PROGRAMS

Hugh D. Spitzer, WSBA #5827
Lee R. Marchisio, WSBA #45351
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: spith@foster.com
marcl@foster.com
Attorneys for Amici Curiae



ORIGINAL

TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION	1
II. IDENTITY AND INTEREST OF AMICI CURIAE.....	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT	3
A. The “Automatic Reversal” Doctrine Is Incorrect And Harmful.	4
1. Fundamental unfairness occurs when defendants, victims, witnesses and the public purse are hauled back into court when a magical test (that’s not a constitutional right) wasn’t applied.	4
2. Automatic reversals subject crime victims and witnesses to unnecessary repeated victimization.	7
3. The “automatic reversal” doctrine inhibits development of Washington constitutional law.....	8
4. The “automatic reversal” doctrine constrains defense counsel and encourages legal sandbagging.	11
5. The “automatic reversal” doctrine mistakenly shifts responsibility to protect defendants’ fair trial rights from defense counsel to prosecutors.....	12
B. The Court Should Take This Opportunity to Abandon The “Automatic Reversal” Doctrine, Allowing Appellate Courts To Craft Public Trial Remedies Appropriate To The Closure.	13
1. Recent scholarship from an experienced trial and appellate jurist indicates that disagreement among the members of this Court causes lower court confusion.	14

2.	The Court’s current three step analytical framework acknowledges that appellate courts are well equipped to determine when closure errors impact fundamental fairness, rendering the “automatic reversal” doctrine unnecessary.	14
3.	The remedy for failure to apply <i>Bone-Club</i> should often mirror the remedy for failure to apply <i>Ishikawa</i>	17
4.	Like all legal presumptions, <i>Bone-Club</i> ’s prejudicial error “presumption” should be disputable.	18
C.	In This Case, Closed Review Of Jury Hardship Questionnaires Did Not Affect The Fundamental Fairness Of Defendant’s Trial.....	20
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Gibbons v. Savage</i> , 555 F.3d 112 (2d Cir. 2009).....	6
<i>In re Morris</i> , 176 Wn.2d 157, 288 P.3d 1140 (2012).....	7, 11
<i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	6, 16
<i>Rivera v. Illinois</i> , 556 U.S. 148 S. Ct. 1446 (2009).....	19
<i>Rufer v. Abbott Labs.</i> , 154 Wn.2d 530, 114 P.3d 1182 (2005).....	17
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	1, 10, 16, 18
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	6, 16
<i>State v. Devin</i> , 158 Wn.2d 157, 142 P.3d 599 (2006).....	4, 8
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	6, 16
<i>State v. Frawley</i> , 181 Wn.2d 452, 334 P.3d 1022 (2014).....	5
<i>State v. Gocken</i> , 127 Wn.2d 95, 896 P.2d 1267 (1995).....	13
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	13
<i>State v. Mertens</i> , 148 Wn.2d 820, 64 P.3d 633 (2003).....	19

<i>State v. Momah</i> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	passim
<i>State v. Richardson</i> , 177 Wn.2d 351, 302 P.3d 156 (2013).....	16, 17
<i>State v. Slett</i> , 181 Wn.2d 598, 334 P.3d 1088 (2014).....	1, 9
<i>State v. Smith</i> , 181 Wn.2d 508, 334 P.3d 1049 (2014).....	9, 14
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	passim
<i>State v. Wise</i> , 176 Wn.2d 1, 288 P.3d 1113 (2012).....	9

STATUTES AND RULES

RAP 2.5(a)	12
RCW 7.69.010	8
RPC 3.3(a)(3).....	11

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VI.....	13
WASH. CONST. art. I, § 10.....	17
WASH. CONST. art. I, § 22	passim
WASH. CONST. art. I, § 35.....	8

OTHER AUTHORITIES

Anne L. Ellington & Jeanine Blackett Lutzenhiser, <i>In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions</i> , 88 WASH. L. REV. 491 (2013).....	10, 14
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I. INTRODUCTION

*“[N]ot all courtroom closure errors are fundamentally unfair and thus not all are structural errors.”*¹

ARTICLE I, SECTION 22 of the Washington Constitution prohibits “secret tribunals and Star Chamber justice.”² At their core, public criminal trials are meant to protect every defendant’s right to a fundamentally fair trial. When that basic purpose is satisfied, ARTICLE I, SECTION 22 permits limited closures. This is particularly true when the closure of an otherwise public trial *protects* a defendant’s fair trial rights.

However, under some recent rulings, a conviction after a fundamentally fair trial can be automatically reversed for a trial court’s failure to recite the five-part *Bone-Club*³ inquiry. As the State notes in its Supplemental Brief, the “automatic reversal” doctrine is *incorrect* and *harmful*, and it should be reversed.⁴

This doctrine of “automatic reversal” is *incorrect* because “not all courtroom closure errors are fundamentally unfair....”⁵ Some public trial errors are trivial, and the question should always be whether a material error truly occurred, not whether the court simply recited *Bone-Club*. The

¹ *State v. Momah*, 167 Wn.2d 140, 150, 217 P.3d 321 (2009).

² *State v. Slett*, 181 Wn.2d 598, 603, 334 P.3d 1088 (2014).

³ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

⁴ State’s Br. at 12-19.

⁵ *Momah*, 167 Wn.2d at 150.

doctrine is *harmful* because for no good reason it subjects crime victims and witnesses to the repeated victimization of a new trial. It also undermines the role of defense counsel. Accordingly, instead of asking trial judges to engage in magical incantations, this Court should permit reviewing courts to analyze which closure errors actually impact a defendant's fair trial rights. Courts should then craft remedies *appropriate* to the nature of any erroneously closed proceeding.

This particular case highlights the flaws in the "automatic reversal" doctrine. No public trial error occurred. Even if reviewing hardship requests outside of court was error, the Defendant was able to offer evidence, to cross examine accusers, and to receive a verdict from an impartial jury. The Defendant received a fair trial. The purpose underlying his public trial rights was satisfied. Remand for a new trial would stretch traditional notions of justice beyond their limits.

II. IDENTITY AND INTEREST OF AMICI CURIAE

The Office of Crime Victims Advocacy (OCVA) serves as a voice within state government for the needs of Washington's crime victims. Established in 1990, OCVA serves the state by advocating on behalf of victims obtaining needed services and resources; administering grant funds for community programs working with crime victims; assisting communities in planning and implementing services for crime victims;

and advising local and state government agencies on practices, policies, and priorities that impact crime victims.

The Washington Coalition of Sexual Assault Programs (WCSAP) is a non-profit organization that for 37 years has united agencies engaged in the elimination of sexual violence. WCSAP provides education, training, technical assistance, and public policy advocacy efforts at the local, state, and national level to ensure that victims and their families have access to justice. WCSAP also provides information, training and expertise to program and individual members who support victims, family and friends, the general public, and all those whose lives have been affected by sexual assault.

III. STATEMENT OF THE CASE

Amici Curiae rely on the State's statement of the case.

IV. ARGUMENT

Reviewing juror hardship questionnaires does not implicate defendants' fair trial rights. Defendant Frederick Russell's conviction in this case should thus be affirmed. State's Br. at 4-11. Even if the Court holds that hardship requests do implicate fair trial rights, the trial court's failure to apply an on-the-record *Bone-Club* analysis should not invalidate the verdict under the "automatic reversal" doctrine. Any closure error here simply did not render the entire trial fundamentally unfair.

A. The “Automatic Reversal” Doctrine Is *Incorrect And Harmful*.

Even if the Court holds that jury hardship questionnaires do not implicate defendants’ fair trial rights, it may (and should) limit the “automatic reversal” doctrine’s application only to certain closure errors “in light of the extensive briefing on [this] question, its importance to victim rights, and the likelihood that it will come up again.” *State v. Devin*, 158 Wn.2d 157, 167, 142 P.3d 599 (2006). The Court may (and should) similarly overrule the “automatic reversal” doctrine in its entirety as “incorrect and harmful.” State’s Br. at 12-19; *Devin*, 158 Wn.2d at 168.

1. Fundamental unfairness occurs when defendants, victims, witnesses and the public purse are hauled back into court when a magical test (that’s not a constitutional right) wasn’t applied.

ARTICLE I, SECTION 22 protects defendants’ rights to public trials, not the tests used to evaluate whether those rights were violated. “The *Bone-Club* inquiry is not, in and of itself, the constitutional right.” *State v. Sublett*, 176 Wn.2d 58, 102, 292 P.3d 715 (2012) (Madsen, C.J., concurring).

This must be true, as the *Bone-Club* test is necessary only because courtroom closures *can* be constitutionally permissible. The public trial right competes with, and sometimes yields to, other important constitutional rights.

On the one hand, Momah had a right to have openness where the public and jurors could hear every part of the proceedings, ensuring the fairness of his trial process. On the other, Momah had a right to an impartial jury, wherein no juror's prejudice or prior knowledge would compromise the fairness of Momah's trial process. One right privileges openness, while the other may necessitate closure. ...

In the present case, we must also balance the article I, section 22 rights at issue. To achieve the proper balance, we construe those rights in light of the central aim of a criminal proceeding: to try the accused fairly.

State v. Momah, 167 Wn.2d 140, 152, 153, 217 P.3d 321 (2009).⁶

Yet, the "automatic reversal" doctrine ignores this fundamental tension, even among the many ARTICLE I, SECTION 22 rights. Under recent rulings, the doctrinal right to a *Bone-Club* inquiry overrides the defendant's actual rights to both a fair *and* a public trial. Failure to analyze *Bone-Club* leads to reversal, even if the courtroom closure was constitutionally *required* to protect other rights, such as the right to a fair trial. The legal and factual merits related to the defendant's public trial rights are also ignored. Without considering whether any ARTICLE I, SECTION 22 rights are actually violated, the case is remanded for a new, ostensibly more public trial that may turn out to be *less* fair.

This is true even if the closure was trivial in comparison to the defendant's other constitutional rights. This Court currently forecloses

⁶ Accordingly, defendants may affirmatively waive their public trial rights. *State v. Frawley*, 181 Wn.2d 452, 334 P.3d 1022 (2014).

constitutional de minimis or triviality analysis. *See State v. Easterling*, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006) (rejecting de minimis doctrine); *In re Orange*, 152 Wn.2d 795, 824, 100 P.3d 291 (2004) (Madsen, J., dissenting); *but see State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (holding closure of jury selection not de minimis). But federal courts routinely apply such analysis, asking whether a closure actually impacted the values furthered by public trial rights: “(1) ensuring a fair trial, (2) reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward; and (4) discouraging perjury.” *Gibbons v. Savage*, 555 F.3d 112, 121 (2d Cir. 2009). This Court has never justified its rejection of this federal doctrine, and the “automatic reversal” concept instead requires appellate courts to ignore the values underlying public trial rights.

The “automatic reversal” doctrine is also unfair because it often forces defendants, victims, and witnesses as well as publicly-funded judges, prosecutors, defenders, and staff to redo trials for no particularly good reason. “When a post-trial *Bone-Club* inquiry can be made and would show that a closure was justified, requiring new trials has no positive purpose but instead leads to delayed justice and additional costs, not all of which are quantifiable but which are nevertheless onerous.” *Sublett*, 176 Wn.2d at 103 (Madsen, C.J., concurring).

A post-trial *Bone-Club* analysis should determine whether closure was constitutionally justified. If it was, the conviction should stand. Similarly, when an otherwise public trial's closure was for a trivial portion or duration, the Court should not reverse a conviction obtained through a fundamentally fair proceeding. The bathwater may be drained, but the clean babies should be kept.

2. Automatic reversals subject crime victims and witnesses to unnecessary repeated victimization.

As members of this court have made clear, retrials impose significant burdens on victims, witnesses, and the public, and those burdens are utterly unwarranted where constitutional violations could not, or did not, have an adverse impact on the trial's fairness.

Openness is a crucially important value in our criminal justice system, but so is finality. It does not serve the interests of justice to reopen this long-decided case, requiring a young girl to relive old traumas, and granting a windfall new trial to a man convicted of sexually molesting his daughter.

In re Morris, 176 Wn.2d 157, 186, 288 P.3d 1140 (2012) (Wiggins, J., dissenting); *see also Sublett*, 176 Wn.2d at 103 (noting “the burdens placed on victims and other witnesses who must go through the process of another trial”) (Madsen, C.J., concurring). In the conviction abatement context, this Court similarly recognized that automatic reversal “is particularly unfair to crime victims who have participated in often times

painful trials only to see a hard won conviction overturned....” *Devin*, 158 Wn.2d at 170 (internal quote omitted).

These are not just prudential considerations. They are law. ARTICLE I, SECTION 35 requires that crime victims receive “due dignity and respect.” *See Devin*, 158 Wn.2d at 171. It is also state policy that “all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity” and that the rights of “victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.” RCW 7.69.010. The “automatic reversal” doctrine mechanically defeats these rights of crime victims—and for no good reason.

3. The “automatic reversal” doctrine inhibits development of Washington constitutional law.

Under current precedent, “not all courtroom closure errors are fundamentally unfair and thus not all are structural errors.” *Momah*, 167 Wn.2d at 150. This statement rightly anticipated future guidance by the Court, on a case by case basis, instructing when courtroom closure errors cause fundamental unfairness and when they do not. For example:

The defendant’s right to a fair and speedy trial, the potential jurors’ right to privacy, the judge’s obligation to provide a safe and orderly courtroom, and many other considerations may justify a courtroom closure. Not all

arguable courtroom closures require satisfaction of the five factor test established in *State v. Bone-Club*....

State v. Slerf, 181 Wn.2d 598, 604, 334 P.3d 1088 (2014).

The automatic reversal rule, however, effectively prevents appellate courts from determining when a closure error should constitute structural error. If the trial court fails to conduct a pre-closure on-the-record *Bone-Club* analysis, reversal is automatic regardless of whether the closure infected the entire trial with fundamental unfairness. *See State v. Wise*, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012). If, on the other hand, the trial court closes the proceeding after conducting a *Bone-Club* analysis, an appellate court will review only for abuse of discretion. *State v. Smith*, 181 Wn.2d 508, 520, 334 P.3d 1049 (2014) (citing *Wise*, 176 Wn.2d at 11). Thus, the appellate courts are robbed of any opportunity to engage in de novo review over whether a particular erroneous closure rendered a trial fundamentally unfair.

Defendants and the public are also left wondering which “many other considerations” may justify closure. *Slerf*, 181 Wn.2d at 604. Under current precedent, we will never know. The irony is magnified by the fact that the Court’s prior holdings on the types of closures that implicate fundamental unfairness have been quite instructive. *See, e.g., Momah*, 167 Wn.2d at 151-52 (holding that partial voir dire closure did not create

fundamental unfairness where defense counsel “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.”); *State v. Bone-Club*, 128 Wn.2d 254, 262, 906 P.2d 325 (1995) (holding suppression hearing closure fundamentally unfair where: “Even if the new suppression hearing again results in the admission of Frakes’ testimony, Defendant should have the opportunity to use any such variances in testimony for impeachment purposes in a new trial.”).

As Washington Court of Appeals Judge (ret.) Ellington and Jeanine Lutzenhiser highlight in a recent article:

The court has not clearly explained why (for example) in-chambers questioning of selected prospective jurors, on sensitive subjects and at their request, falls into the class of constitutional errors that infect the entire trial, such as the complete denial of counsel, coerced confession, racial discrimination in selection of a grand jury, denial of self-representation at trial, or defective reasonable-doubt jury instructions. It is therefore even more difficult to see how the failure to articulate a proper balancing of interests similarly infects the entire trial process, or deprives defendants of “basic protections” such that “no criminal punishment may be regarded as fundamentally fair.”

Anne L. Ellington & Jeanine Blackett Lutzenhiser, *In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions*, 88 WASH. L. REV. 491, 517 (2013) (citation omitted). The “automatic

reversal” doctrine inhibits future development of the law and for no good reason.

4. The “automatic reversal” doctrine constrains defense counsel and encourages legal sandbagging.

The automatic reversal doctrine also creates an odd dissonance between appellate and trial strategy. An appellate counsel who doesn’t raise the trial court’s failure to conduct a *Bone-Club* analysis is deemed ineffective. *Morris*, 176 Wn.2d at 166-68. However, at trial, defense counsel may consent to limited closures for fair trial purposes and, with little fear of waiver, simultaneously set up an adverse verdict for automatic reversal. *Cf. Morris*, 176 Wn.2d at 177 (Madsen, C.J., dissenting). Given this doctrine, trial counsel would arguably be ineffective in *objecting* to a courtroom closure. But constitutional jurisprudence, like the Rules of Professional Conduct, should discourage rather than encourage legal sandbagging. *See, e.g.*, RPC 3.3(a)(3) (“A lawyer shall not knowingly ... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”).

The Court’s “automatic reversal” doctrine places defense counsel in the untenable position of weighing the force with which counsel should request, or not request, limited closures for fair trial purposes. If counsel

does not request closure, then other fair trial rights may be impacted. If counsel vigorously requests closure for fair trial purposes, then the defendant's public trial rights may be waived, even if the trial court fails to run a *Bone-Club* analysis. *Momah*, 167 Wn.2d at 151-52. The Constitution should not require defense counsel to try cases on a razor's edge. Instead, Court doctrine should encourage defense counsel to object to any courtroom closure they think harms their client, aware that failure to object will limit appellate review except where the error is manifest. *See* RAP 2.5(a).

5. The “automatic reversal” doctrine mistakenly shifts responsibility to protect defendants’ fair trial rights from defense counsel to prosecutors.

Counsel to defendants, and not the state, are in the best position to balance their clients' immediate interests in public trial and fair trial rights. Yet the “automatic reversal” doctrine encourages defense counsel to remain silent, and requires prosecutors to blindly object to closures that may best serve the interests of justice for a defendant.

Because defense counsel must remain silent (objecting may invite an adverse *Bone-Club* inquiry reviewable only for abuse of discretion), “automatic reversal” leaves it to the state to decide whether to object to a closure on public trial principles or not on fair trial principles. Cooperation between prosecutors and defense counsel to preserve a defendant's fair

trial rights, as typified in *Momah*, is now foreclosed. If the state fails to object to closure, then the defendant's right to automatic reversal will be preserved. If the state does object, and the trial is public, then defendant's fair trial rights are implicated on review. The better course is to require defense counsel, and not the prosecution, to marshal defendant's rights through trial.

B. The Court Should Take This Opportunity to Abandon The “Automatic Reversal” Doctrine, Allowing Appellate Courts To Craft Public Trial Remedies Appropriate To The Closure.

Sensible jurisprudence requires that this Court provide clear and *workable* frameworks for evaluating the scope of constitutional rights. If, for example, the Court adopts federal law frameworks, then, in accordance with applicable federal doctrine, it should abandon the “automatic reversal” approach. State's Br. at 16-17. If the Court determines that ARTICLE I, SECTION 22 provides more robust public trial rights to defendants than the Sixth Amendment, it should affirmatively say so. Then it should develop a thoughtful rationale to support its conclusion by applying the *Gunwall* criteria⁷ or detailing the force of its prior opinions,⁸ which include many well-reasoned majorities, concurrences and dissents.

⁷ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

⁸ *State v. Gocken*, 127 Wn.2d 95, 110, 896 P.2d 1267, 1274 (1995) (Madsen, J., concurring in part/dissenting in part).

1. Recent scholarship from an experienced trial and appellate jurist indicates that disagreement among the members of this Court causes lower court confusion.

As Judge Ellington recently pointed out, Washington’s public trial law is confusing and contradictory because the members of this Court are “struggling to reach consensus on the test for appellate review, whether and when an error is structural, and what remedy should apply.” Ellington & Lutzenhiser, *Open Courts Jurisprudence*, 88 WASH. L. REV. at 496. We recognize that the questions here are challenging for the Court. But defendants, crime victims, prosecutors, defense counsel, and the general public all deserve a thoughtful answer.

2. The Court’s current three step analytical framework acknowledges that appellate courts are well equipped to determine when closure errors impact fundamental fairness, rendering the “automatic reversal” doctrine unnecessary.

In *State v. Smith*, the Court formally adopted a three step analytical framework to guide public trial analysis: (1) is the public trial right implicated under the “experience and logic” test; (2) was the courtroom closed; and (3) was closure justified under *Bone-Club*? *Smith*, 181 Wn.2d at 513 (citing *Sublett*, 176 Wn.2d at 92 (Madsen, C.J., concurring)).

The Court in *State v. Smith* further noted that under step three, a court closure without a contemporaneous on-the-record *Bone-Club* inquiry “will *almost* never be considered justified.” *Smith*, 181 Wn.2d at 520

(emphasis added). Though this rule is far too strict, as detailed above, it recognizes that closures without a contemporaneous *Bone-Club* analysis can be constitutional, as in *Momah*. The Court should, at the very least, take this opportunity to provide a framework for future cases, like *Momah*, to develop.

If public trial rights are implicated, a courtroom is closed, and *Bone-Club* is not recited, reviewing courts should consider a range of remedies based on whether closing the particular proceeding has rendered the entire trial fundamentally unfair. *Momah*, 167 Wn.2d at 149 (“If, on appeal, the court determines that the defendant’s right to a fair public trial has been violated, it devises a remedy appropriate to that violation.”).

In its prior holdings, this Court has indicated that the closure error’s impact on a trial’s fundamental fairness should inform the appropriate remedy. The following table illustrates some of the Court’s open courts and public trial violation remedies. Reviewing courts should consider examples like these when deciding the appropriate remedy for a closure under a particular set of facts.

IMPACT ON FAIRNESS	APPELLATE REMEDY	EXAMPLES
None / <i>De minimis</i> or Trivial	Affirm	<p><i>Momah</i>⁹ (holding private juror questioning enhanced fairness and jury impartiality)</p> <p><i>See Brightman</i>¹⁰ (analyzing whether closed jury selection was <i>de minimis</i>).</p>
Possible (developed record)	Apply <i>Bone-Club</i>	<p><i>See In re Orange</i>¹¹ (reviewing trial court record under independent <i>Bone-Club</i> analysis)</p>
Possible (limited record)	Remand for trial court to apply <i>Bone-Club</i>	<p><i>Cf. Richardson</i>¹² (remanding to consider ARTICLE I, SECTION 10 <i>Ishikawa</i> analysis on motion to unseal court records)</p>
Certain	Reverse for new trial	<p><i>Bone-Club</i>¹³ (holding closed suppression hearing necessarily impacted defendant's ability to introduce evidence)</p> <p><i>Easterling</i>¹⁴ (holding closed hearing on codefendant's motion to sever impacted defendant's entire trial)</p>

⁹ *State v. Momah*, 167 Wn.2d 140, 151-52, 217 P.3d 321 (2009).

¹⁰ *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

¹¹ *In re Orange*, 152 Wn.2d 795, 809-11, 100 P.3d 291 (2004).

¹² *State v. Richardson*, 177 Wn.2d 351, 357, 302 P.3d 156 (2013).

¹³ *State v. Bone-Club*, 128 Wn.2d 254, 262, 906 P.2d 325 (1995).

¹⁴ *State v. Easterling*, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006).

3. The remedy for failure to apply *Bone-Club* should often mirror the remedy for failure to apply *Ishikawa*.

Under ARTICLE I, SECTION 10, the remedy for failing to apply *Ishikawa* is remand for the trial court to apply *Ishikawa*. *State v. Richardson*, 177 Wn.2d 351, 357, 302 P.3d 156 (2013). When reviewing the denial of a motion to unseal court records, for example, the appellate court does not simply unseal the record because the trial court failed to apply *Ishikawa*. *Richardson*, 177 Wn.2d at 366.¹⁵ ARTICLE I, SECTION 22 public trial cases should be no different. The Court should adopt the same rule for a trial court's failure to conduct *Bone-Club*.

Appellate courts may also affirm orders on motions to seal even in the absence of a recited *Ishikawa* analysis. As in *Momah*, this Court affirmed a trial court order denying sealing that failed to apply *Ishikawa* because the lower court procedures “effectively did so by allowing all parties to assert their respective interests, weighing those interests, and applying the compelling interest standard in making its determination.” *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 551, 114 P.3d 1182 (2005).

There is no good reason to depart from this approach in ARTICLE I, SECTION 22 public trial cases.

¹⁵ Generally, “where the trial court applied an incorrect legal rule, the appellate court remands to the trial court to apply the correct rule.” *Richardson*, 177 Wn.2d at 357. Arguably, however, the Court could have conducted its own *Ishikawa* analysis in *State v. Richardson* if it had not been “hampered somewhat by the lack of a record” on appeal. *Richardson*, 177 Wn.2d at 359.

4. Like all legal presumptions, *Bone-Club*'s prejudicial error "presumption" should be disputable.

The "automatic reversal" doctrine is rooted in a presumption that prejudice must have occurred. In *Bone-Club*, the Court stated broadly after remanding for a new trial, "Prejudice is presumed where a violation of the public trial right occurs." *Bone-Club*, 128 Wn.2d at 261-62.

But even in *Bone-Club*, the presumed prejudicial error did not necessarily require automatic reversal and a new trial. Instead, the Court analyzed whether remand for a new suppression hearing would cure the errors resulting from the first hearing's closure. The Court held that remand might not cure those errors because, "Even if the new suppression hearing again results in the admission of Frakes' testimony, 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. Although the Court presumed closure was error and that the error was prejudicial, it nevertheless examined the nature of the proceeding to determine whether closure constituted structural error. Because remanding for a second suppression hearing would not necessarily cure the closure error, the error was structural and required retrial.

More importantly, however, presumed prejudice to a defendant's public trial rights, like other legal presumptions, may be overcome by

sufficient fact showings.¹⁶ “[W]hen the *Bone-Club* inquiry is not made on the record, this does not tell us whether the closure *in fact* violated the defendant's public trial right, which we know is not absolute since closing a court may be justified and therefore the closure will not violate the public trial right.” *Sublett*, 176 Wn.2d at 102 (Madsen, C.J., concurring) (emphasis in original).

Defendants bear the burden to establish a public trial right violation. *Sublett*, 176 Wn.2d at 75. Once that burden is met, the Court presumes the violation is prejudicial. But that presumption should be rebuttable, based on the facts of the case, when the closure error was not necessarily structural (e.g., could be remedied by redoing the proceeding). If the error was trivial, the appellate court should affirm.¹⁷ Otherwise, a post-trial *Bone-Club* analysis is appropriate to determine whether closure was *in fact* justified. If yes, the conviction should stand. If no, the proceeding may be repeated. If the proceeding's outcome changes and that change could have affected the trial, a new trial may be appropriate.

¹⁶ “Presumptions ... may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.” *State v. Mertens*, 148 Wn.2d 820, 833, 64 P.3d 633 (2003) (internal quote omitted) (Chambers, J., dissenting).

¹⁷ Federal courts have suggested an error is “structural” “only when the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Rivera v. Illinois*, 556 U.S. 148, 160, 129 S. Ct. 1446, (2009) (internal quote and alterations omitted). The “automatic reversal” doctrine prevents Washington courts from developing similar parameters under ARTICLE I, SECTION 22.

C. In This Case, Closed Review Of Jury Hardship Questionnaires Did Not Affect The Fundamental Fairness Of Defendant's Trial.

Even if erroneously closing review of jury hardship questionnaires raises the presumption of prejudice, this Court should affirm because such review was at most a trivial portion of Defendant's trial and *did not* impact the trial's fundamental fairness. If a future case presented a closer question of prejudice, the court could remand for a post-trial *Bone-Club* inquiry. Or, the court could conduct a *Bone-Club* inquiry of its own. Here, closed jury hardship discussions did not prevent the Defendant from introducing evidence or argument before an impartial judge and jury. Retrial is unnecessary.

V. CONCLUSION

The Defendant's trial in this case was fundamentally fair. The trial court's failure to incant *Bone-Club* does not change this. The conviction should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of May, 2015.


Hugh D. Spitzer, WSBA #5827
Lee R. Marchisio, WSBA #45351
Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned certifies that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty one years, I am not a party to this action, and I am competent to be a witness herein.

The undersigned declares that on May 11, 2015, I caused to be served this document on:

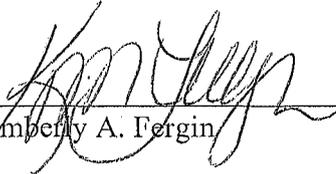
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	<input checked="" type="checkbox"/>	via e-mail

Counsel for Appellant

Robert W. Ferguson <i>Attorney General</i> Noah Guzzo Purcell <i>Solicitor General</i> Lana S. Weinmann <i>Chief Criminal Prosecutor</i> Melanie Tratnik <i>Assistant Attorney General</i> Office ID 91087 PO Box 40100 1125 Washington Street S.E. Olympia, WA 98504-0100 Email: lanam@atg.wa.gov noahp@atg.wa.gov melaniet@atg.wa.gov sgoolyef@atg.wa.gov	<input checked="" type="checkbox"/>	via first class mail, postage prepaid
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Counsel for Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate this 11th day of May, 2015, at Seattle, Washington.



Kimberly A. Fergin

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State of Washington v. Frederick David Russell

Case No. 85996-5

Hugh D. Spitzer, WSBA #5827

Lee R. Marchisio, WSBA #45351

(206) 447-4400

spith@foster.com

marcl@foster.com

Good afternoon. Attached hereto for filing is *Office of Crime Victims Advocacy's and Washington Coalition of Sexual Assault Programs' Motion for Leave to File Amici Curiae Brief and Brief of Amici Curiae, Office of Crime Victims Advocacy; Washington Coalition of Sexual Assault Programs.*

cc: All Counsel of record, *via email and U.S. mail*

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Kim Fergin, assisting Municipal Desk
Foster Pepper PLLC
DO: 206-447-5938 | F: 206-447-9700 | E: fergk@foster.com
Loc: 31.91