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NO. 85996-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK DAVID RUSSELL,

Appellant.

STATE OF WASHINGTON'S ANSWER TO AMICUS BRIEFS

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I. INTRODUCTION

The amicus briefs filed in this case highlight three key points, all of which support the State's position.

First, under the experience and logic test, no open courts violation occurs when a trial judge considers hardship excusal requests outside of court. Amicus the American Civil Liberties Union (ACLU) asks this Court to find a public trial violation, but its primary argument disavows the experience and logic test. Instead, the ACLU asks the Court to adopt a new test focused on "the level of discretion exercised" by the trial court at the relevant stage in the trial. ACLU Amicus Br. at 7. But the ACLU provides no argument that the experience and logic test should be overruled, and the Court should decline to adopt the ACLU's new test absent such argument. When the ACLU finally does apply the experience and logic test, its argument finds no support in precedent or reality. The ACLU's rule would also force counties across Washington to drop longstanding procedures for granting hardship excusals outside of court, creating significant difficulties for superior courts and for citizens requiring hardship excusals.

Second, as the State has argued and as emphasized by the Washington Association of Prosecuting Attorneys' (WAPA) amicus brief, the Court's current approach of allowing public trial violations to be raised for the first time on appeal without a showing of manifest error is harmful and incorrect and should be overruled. It is harmful because it: (1) leads to the unfair result that defendants who did not object to closure at trial are

better off than those who did object; (2) causes more public trial violations by actively discouraging defense counsel from objecting to closures; and (3) unfairly penalizes trial judges for errors they had no opportunity to fix. And it is incorrect because none of the rationales the Court has offered for exempting public trial claims from RAP 2.5 justify this result.

Finally, as the State has argued and as emphasized in the amicus brief of the Office of Crime Victims Advocacy and Washington Coalition of Sexual Assault Programs (Victims Advocacy brief), this Court's current approach of reversing a defendant's conviction whenever the trial court failed to conduct a *Bone-Club* inquiry is harmful and incorrect and should be overruled. It is harmful because it has led to the unnecessary reversal of dozens of serious convictions, penalizing crime victims, their families, and the taxpaying public for no good reason. And it is incorrect because it requires reversal even when there was no constitutional violation or when the closure actually benefited—and surely did not harm—the defendant.

In short, the amicus briefs confirm both that no public trial violation occurred in this case, and that the Court should overturn its recent holdings exempting public trial claims from RAP 2.5 and requiring reversal whenever the trial court conducted no *Bone-Club* inquiry.

II. ARGUMENT

A. No Public Trial Violation Occurred Here, and the ACLU Amicus Brief Fails to Show Otherwise

The ACLU amicus brief urges this Court to hold that hardship excusal requests must be considered in open court if they involve any

discretion. But the ACLU has cited no case from this Court or any other requiring that hardship excusal requests be considered in open court. Moreover, the ACLU's argument rests on an unsupported request to overrule precedent, is untenable under existing precedent, rests on utter speculation, and would create serious difficulties for superior courts and citizens requiring hardship excusals. The Court should reject it.

1. The ACLU's Primary Argument Proposes Abandoning Precedent Without the Required Showing

The ACLU's primary argument asks this Court to jettison the experience and logic test in favor of a new test focused on the level of discretion the court exercises during the process at issue. But the ACLU never argues that the experience and logic test is harmful or incorrect and should be overruled. The Court should therefore decline this request.

The ACLU argues that, in deciding what parts of the jury selection process must be public, the Court should "reject an analysis focused on the location and procedure utilized in favor of one that more appropriately considers the level of discretion exercised." ACLU Amicus Br. at 8-9. As the ACLU later implicitly admits by separately applying the experience and logic test, *id.* at 14-16, this amounts to a request to overrule the experience and logic test and apply a different test. This admission is correct, for the experience and logic test first asks "whether the place and process have historically been open to the press and general public," *State v. Smith*, 181 Wn.2d 508, 514, 334 P.3d 1049 (2014) (internal quotation marks omitted), the very question the ACLU asks this Court to ignore.

While asking this Court to abandon precedent, the ACLU provides no argument to justify that approach. But as this Court has long held, it will reject precedent only upon a showing that it is “incorrect and harmful.” *See, e.g., State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). The ACLU never even tries to meet that bar. The Court should therefore decline to overrule its precedent to adopt the ACLU’s new test.

Moreover, the Court has already rejected an approach that would focus on the level of judicial discretion involved. For example, in *State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049 (2014), the Court held that sidebar conferences need not be conducted in open court even though rulings in such conferences are highly discretionary. The Court has also held that discussions of proposed jury instructions need not be in open court, *State v. Koss*, 181 Wn.2d 493, 334 P.3d 1042 (2014), even though judges have significant discretion in formulating such instructions. *See, e.g., State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015) (appellate court reviews for abuse of discretion trial court decision to instruct on lesser included offense); *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991) (“The number and specific language of the instructions are matters left to the trial court’s discretion.”).

In short, the ACLU proposes an approach directly contrary to precedent without acknowledging that or justifying a change in course. The Court should reject the ACLU’s new test.

2. Under the Prevailing Experience and Logic Test, Hardship Excusal Requests Need Not be Considered in Open Court

The ACLU eventually applies the experience and logic test, saying that “even under” that test, hardship excusal requests must be considered in open court. ACLU Amicus Br. at 14. This Court’s precedent refutes this claim.

The public trial right attaches to a particular process only if *both* experience and logic require that it be conducted in open court. *See, e.g., State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). The “experience prong” asks whether the place and process have historically been open to the press and public. *Id.* The “logic prong” asks whether public access plays a significant positive role in the functioning of the process in question. *Id.* The ACLU fails to support either prong.

As to experience, the ACLU’s entire argument is one sentence of misdirection. The ACLU relies on one quote broadly stating that the “jury selection” process has historically been public. ACLU Amicus Br. at 14. But as the State pointed out in its supplemental brief, both the plurality and the dissent in *State v. Slett*, 181 Wn.2d 598, 334 P.3d 1088 (2014), recognized that parts of the “jury selection process” do not implicate the public trial right. *Id.* at 605 (plurality), 614 (dissent). Both cited administrative excusals, such as for hardship, as processes that have *not* historically been open to the public. *Id.* at 605 (plurality), 616 (dissent). And both the plurality and the dissent cited with approval to *State v.*

Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013), a case even more directly on point.

In *Wilson*, the Court of Appeals, Division 2, held that public trial rights are not implicated during “the administrative component of the jury selection process.” *Wilson*, 174 Wn. App. at 343. The court explained that Washington cases distinguish between the broad “jury selection process,” which includes granting hardship requests, and the narrower “voir dire” portion, “which provides the parties . . . an opportunity to question prospective jurors in the open public courtroom to examine them for biases and to obtain a fair and impartial jury to try the specific case.” *Id.* at 340 n.12. The court noted that there is no “case holding that . . . preliminary juror excusals for illness or other juror hardships have historically been open to the public[.]” *Id.* at 342. Division 1 of the Court of Appeals just adopted and endorsed the reasoning of *Wilson* in likewise holding that considering hardship excusal requests does not implicate the right to public trial. *State v. Schumacher*, ___ Wn. App. ___, 347 P.3d 494, 501 (2015), *petition for review filed* May 18, 2015.

The State also cited court rules, statutes, other precedent, and common practice making clear that hardship excusals have routinely been considered outside of open court. State’s Suppl. Br. at 5-8. The ACLU never even attempts to rebut these authorities or provide any contrary ones. It is thus clear that experience does not require hardship excusal requests to be considered in open court.

Turning to the logic prong, the ACLU makes two claims. Both fail.

First, the ACLU points out that a lack of racial and economic diversity in jury pools is a real concern—a proposition the State does not dispute. The ACLU then suggests that reviewing hardship excusal requests in open court would somehow mitigate this problem, but it never explains how. It seems to be suggesting that perhaps if all hardship excusal requests were reviewed in open court, the public would see that certain groups (e.g., “many parents of young children,” ACLU Amicus Br. at 16) are more likely to need hardship excusals than others, and that this might eventually lead to unspecified policy changes (court-provided childcare?) that would enhance jury diversity. But this speculative hypothesis is no basis to invent a new constitutional rule. And this approach would essentially punish the very groups it is purportedly intended to help, forcing those who most need hardship excusals to come into court to get one rather than being able to obtain one by phone, mail, or online. It makes little sense to force a single mother to arrange childcare for a day, or a day laborer to miss a day’s work, all so that each can come to court to seek a hardship request on the off chance that members of the public seeing their requests will become motivated to attempt to reform state policy towards jurors.

To be clear, the State agrees that increasing jury diversity is a worthy and important goal. But twisting the open courts doctrine to require hardship excusals in open court is not the way to achieve it, especially because there is no reason to think that this approach would actually do anything to increase jury diversity.

Second, although the ACLU agrees that certain “nondiscretionary” hardship excusal requests can be granted outside of court, such as for illness, ACLU Amicus Br. at 11, it claims that logic requires that decisions involving “more” discretion, such as juror claims about a lack of childcare or of economic hardship, must be decided in court. But this distinction is unworkable. Deciding whether an illness is real or sufficiently serious to warrant excusal involves no more discretion or less factual issues than deciding whether a parent needs to be excused to take care of his or her children or whether a sole breadwinner can afford to forego her normal salary and serve on a jury. The ACLU’s proposed distinction is a chimera.

The ACLU seeks support for its distinction in *State v. Shearer*, 181 Wn.2d 564, 334 P.3d 1078 (2014), but that fractured opinion offers no help. The error there was that, “[d]uring voir dire,” the trial judge questioned one juror in chambers about whether he had a prior criminal conviction. *Id.* at 568. The Court found that this implicated the public trial right because it had already held that “‘individually questioning potential jurors [during voir dire] is a courtroom closure.’” *Id.* at 574 (quoting *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012)). That is not remotely what happened here, as the trial judge did not individually question any of the excused jurors in chambers. And the hardship excusal request systems that operate by phone, mail, or online in counties throughout the state also include no component of private voir dire. In short, *Shearer* simply provides no support for the ACLU’s view that any hardship excusal involving discretion must be considered in open court.

3. The ACLU Proposal Would Harm Superior Courts and Citizens Called for Jury Duty

As the State noted in its opening brief, many Washington counties have systems for granting hardship excusals by phone, mail, or online without a prospective juror even coming to the courthouse. Suppl. Br. at 5-6 & n.2. Many of these systems have been in place for decades. *See, e.g., State v. Rice*, 120 Wn.2d 549, 560, 844 P.2d 416 (1993) (describing practice in Yakima County dating to at least 1985).

The ACLU's proposed approach would require eliminating or substantially curtailing these systems. Prospective jurors would no longer be able to request any sort of hardship excusal or deferral involving any discretion except in open court.

This massive change in procedure would pose a hardship for citizens called for jury duty who have valid reasons they cannot serve at a particular time, for they would no longer be able to conveniently obtain a deferral or excusal and instead would have to show up in court, wait to be called for a particular case, and only then be excused. This would be an inconvenience for anyone called for jury duty who has a valid reason they cannot serve, and it would be far more than an inconvenience for many citizens, such as a parent with primary childcare responsibilities or a low-wage worker getting by paycheck to paycheck.

This change would also increase the burdens on already strained superior courts. Rather than having court staff address deferral and hardship requests administratively, trial judges would have to address them in open court, consuming valuable time. The ACLU provides no

evidence or argument that such a change would actually impact which hardship excusals are granted or denied, so this added burden on superior court judges would also be to no end.

In short, requiring all hardship requests involving discretion to be decided in open court is contrary to precedent, would not achieve the aims the ACLU emphasizes, and would cause significant harms to courts and to those called for jury service. The Court should reject this approach.

B. Exempting Public Trial Claims From RAP 2.5 is Harmful and Incorrect and Should be Overruled

As the State explained in its supplemental brief, although the Court should find no public trial violation here, it should also take this chance to correct several elements of its public trial doctrine. The single most important change the Court could make to bring this doctrine in line with this Court's own precedent and with federal law would be to apply RAP 2.5 to public trial claims, just as the Court does to all other claims of constitutional error. The Court's failure to apply RAP 2.5 to such claims is harmful and incorrect and should be overruled. The WAPA amicus brief compellingly explains why, but several points merit further mention.

1. Exempting Public Trial Claims From RAP 2.5 is Harmful

RAP 2.5 serves important interests. "The underlying policy of the rule is to 'encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.'" *State v. O'Hara*, 167 Wn.2d

91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). Exempting public trial claims from RAP 2.5 is harmful not only because it undermines these principles, but also for at least three other reasons: (1) it is unfair to defendants; (2) it encourages public trial violations; and (3) it is unfair to superior court judges.

Under the Court's current public trial doctrine, a defendant who objects to a courtroom closure is worse off than one who remains silent because the silent defendant is entitled to automatic reversal on appeal, while the objecting defendant's claim is reviewed only for abuse of discretion once the trial court applies *Bone-Club*. See, e.g., *Smith*, 181 Wn.2d at 520. This is utterly unfair and contrary to precedent. This rule doesn't just "sanction a party's failure to point out at trial an error which the trial court" could have corrected, it actively rewards such failure. *O'Hara*, 167 Wn.2d at 98. There is no good reason why a defendant who diligently protects his rights should be worse off than one who does not. Yet that is the Court's current rule. Applying RAP 2.5 to public trial claims would fix this inequity, eliminating the advantage currently enjoyed by those defendants who fail to object.

A related problem is that because defendants who fail to object are better off than those who do object under the Court's current doctrine, this doctrine encourages public trial violations. Defense counsel are best positioned to protect their clients' rights to public trials, weighing the costs and benefits of closure and deciding whether to object. But under the

Court's current approach, it would border on malpractice for defense counsel to object to a courtroom closure, because the objection eliminates a near certain ground for appellate reversal. The Court's current approach to RAP 2.5 in public trial cases thus perversely encourages rather than discourages courtroom closures. This is harmful.

At times, members of this Court have suggested that it would be unfair to require a defendant to object to a courtroom closure to avoid RAP 2.5 because it is ultimately the trial judge's responsibility to protect the public trial right. *See, e.g., Shearer*, 181 Wn.2d at 571 ("Requiring the defendant to object to a courtroom closure would shift that burden away from the trial court, in conflict with our precedent."). But this rationale is inconsistent with this Court's precedent and unfair to trial courts.

Trial court judges have innumerable responsibilities during a trial, including deciding constitutional claims raised by the parties, such as alleged violations of the Confrontation Clause. But the trial judge's responsibility to rule on such claims does not also make it the trial judge's responsibility to identify every such claim and raise it *sua sponte*. For example, article I, section 22 protects not only the public trial right, but also the right to confront witnesses and to testify on one's own behalf. Yet this Court has actively discouraged trial courts from *sua sponte* raising questions about these issues. *See, e.g., State v. Thomas*, 128 Wn.2d 553, 560, 910 P.2d 475 (1996) ("it seems ill-advised to have judges intrude into the attorney-client relationship or disrupt trial strategy with a poorly timed

interjection”). It is inconsistent and unfair for the Court to then place the entire burden on trial courts when it comes to the public trial right.¹

This rule is especially unfair to trial judges given the significant changes in the Court’s public trial doctrine in recent years. Because of those changes, trial court judges often have no idea whether this Court will later deem a particular action a courtroom closure.² In this context, it is perfectly fair to require defense counsel to speak up if they believe something constitutes a courtroom closure. Otherwise, a defendant can argue on appeal that the superior court judge erred without ever giving the judge himself or herself an opportunity to decide whether there was a closure or whether it was justified. This harmful rule disrespects the hard work superior court judges do every day. Applying RAP 2.5 to public trial claims would end this harmful effect as well.

2. Exempting Public Trial Claims From RAP 2.5 is Incorrect

The primary rationale that this Court has offered for exempting public trial claims from RAP 2.5 is that to do otherwise would be to treat such claims as “waived,” and failure to object to a closure should not count as waiver because “[w]aiver of a constitutional right must be

¹ The Court may feel a need to place a special onus on trial courts as to the public trial right in case there are instances where both the prosecution and defense want a particular proceeding closed, leaving the judge as the only guarantor of the right. But where that is the case, the defendant should not later receive the windfall of a new trial when his counsel believed the closure was in his interests in the first place.

² See, e.g., Anne Ellington & Jeanine Lutzenhiser, *In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions*, 88 Wash. L. Rev. 491, 521-22 (2013) (“Because every criminal case may present these issues, further guidance from the Supreme Court is sorely needed so as to avoid the dire consequences of retrials.”).

knowing, voluntary, and intelligent.” *Shearer*, 181 Wn.2d at 571 (citing *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994)). This holding is unsupportable for at least two reasons.

First, as WAPA points out, it confuses the concepts of waiver and forfeiture. Holding that a claim is altogether waived is very different from applying RAP 2.5(a). When a defendant has properly “waived” a right, there is no constitutional error at all, and it cannot be raised on appeal at all. *See, e.g., United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (“Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’”). But applying RAP 2.5(a) does not mean that there was no error or that the alleged violation cannot be raised at all, it simply means that the defendant can only raise the issue for the first time on appeal if the error is “manifest.” *See, e.g., State v. Fenwick*, 164 Wn. App. 392, 400 n.2, 264 P.3d 284 (2011) (distinguishing waiver from RAP 2.5(a)); *Sublett*, 176 Wn.2d at 154 & n.6 (Wiggins, J., concurring in result) (“Requiring compliance with RAP 2.5 is not the same as saying the defendant ‘waived’ the right to a public trial.”). Thus, enforcing RAP 2.5(a) as to public trial claims would not mean that such claims are “waived” absent an objection.

As some members of this Court have recognized, *see, e.g., Sublett*, 176 Wn.2d at 144 (Stephens, J., concurring in result), courts sometimes carelessly use “waiver” and “forfeiture” interchangeably. But the fact that courts often use language loosely when describing the effect of a failure to

object should not blind the Court to this fundamental distinction. As the U.S. Supreme Court has explained, where a defendant fails to object to an alleged error at trial, the claim is forfeited, not waived, and “[t]his Court’s precedents requiring that certain waivers be personal, knowing, and voluntary are thus simply irrelevant.” *Puckett v. United States*, 556 U.S. 129, 138, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). But this Court is treating these “irrelevant” cases as controlling. That is incorrect.

Second, this “waiver” holding conflicts with the dozens of cases in which this Court has applied RAP 2.5 to claims of other types of constitutional error. The Court either needs to overrule those cases or reject this rationale—they cannot both be correct.

More specifically, this Court has routinely applied RAP 2.5(a)(3) to claims of constitutional error. *See, e.g., State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007); *State v. Clark*, 139 Wn.2d 152, 155-56, 985 P.2d 377 (1999). Indeed, by its terms, RAP 2.5(a)(3) applies *only* to claims of constitutional error. But in its public trial cases, the Court has said that applying RAP 2.5 to a claim of public trial error “is tantamount to holding that a defendant’s silence in the face of a courtroom closure constitutes a waiver of his or her public trial rights.” *Shearer*, 181 Wn.2d at 571 (citing *State v. Wise*, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012)). If applying RAP 2.5 to claims of public trial error is the same as treating such claims as “waived,” then why is applying the rule to other types of constitutional error not the same as treating those claims as waived? The

Court has never explained this contradiction, and there is no defensible explanation.

At times, some members of the Court have suggested that rather than constituting an exception to RAP 2.5, public trial errors always satisfy RAP 2.5(a)(3) because such errors are always structural and thus always cause prejudice, making them “manifest.” *See, e.g., Sublett*, 176 Wn.2d at 144 (Stephens, J., concurring in result). But this conflates the concepts of actual prejudice and structural error, contrary to this Court’s own precedent. To show “actual prejudice,” a defendant must show ““that the asserted error had practical and identifiable consequences in the trial of the case.’” *O’Hara*, 167 Wn.2d at 99 (quoting *Kirkman*, 159 Wn.2d at 935). Yet this Court has recognized that typically “it is impossible to show whether the structural error of deprivation of the public trial right is prejudicial[.]” *State v. Wise*, 176 Wn.2d 1, 19, 288 P.3d 1113 (2012); *In re Personal Restraint of Coggin*, 182 Wn.2d 115, 121, 340 P.3d 810 (2014) (holding that courtroom closure during voir dire was not per se prejudicial, and might well have benefitted the defendant). For that reason, the Court has held that public trial violations are not subject to harmless error review. But whether an error is subject to harmless error review is an entirely separate question from whether the error is manifest. *See, e.g., O’Hara*, 167 Wn.2d at 99 (noting that “a harmless error analysis occurs after the court determines the error is a manifest constitutional error,” and “[t]he determination of whether there is actual prejudice is a different question and involves a different analysis”). Thus, public trial errors are

not always “manifest,” as they often benefit the defendant, and do not always harm him. *See, e.g., In re Personal Restraint of Coggin*, 182 Wn.2d at 121; *see also, e.g., Johnson v. United States*, 520 U.S. 461, 469, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (applying plain error review even though claimed error was allegedly structural).

In short, the Court’s “waiver” rationale for exempting public trial claims from RAP 2.5 is incorrect. This rationale cannot stand the test of time, and the Court should abandon it now.

C. Requiring Reversal Whenever a Trial Court Fails to Apply *Bone-Club* is Harmful and Incorrect and Should be Overruled

The State’s supplemental brief explained at length why treating the mere failure to apply *Bone-Club* as structural error always requiring reversal is harmful and incorrect and should be overruled. The Victims Advocacy amicus brief confirms and further develops those arguments. A few points deserve brief mention.

1. Requiring Reversal Whenever a Trial Court Fails to Apply *Bone-Club* is Harmful

As the Victims Advocacy amicus brief confirms, the Court’s current approach to public trial errors is severely harming victims and the public. This Court and the Courts of Appeals have now overturned dozens of convictions based on this doctrine, with more coming every week—at least four in May alone.³ There is no end in sight to this tide of needless.

³ *See, e.g., State v. Cox*, No. 45971-0, 2015 WL 3422220 (Wash. Ct. App. May 27, 2015) (unpublished); *State v. Burkey*, No. 25516-6, 2015 WL 2452631 (Wash. Ct. App. May 21, 2015) (unpublished); *State v. Anderson*, No. 45497-1, 2015 WL 2394961 (Wash. Ct. App. May 19, 2015) (unpublished); *State v. Glass*, No. 26686-9, 2015 WL 2242531 (Wash. Ct. App. May 5, 2015) (unpublished).

reversals, as trial courts understandably remain uncertain as to what constitutes a public trial violation given this Court's fractured rulings and the sharp divides among the Courts of Appeals. *Compare, e.g., State v. Best*, No. 45749-1, 2015 WL 1600278 (Wash. Ct. App. Apr. 7, 2015) (unpublished) (considering peremptory challenges during sidebar does not violate right to public trial), *with State v. Cox*, No. 45971-0, 2015 WL 3422220 (Wash. Ct. App. May 27, 2015) (unpublished) (considering challenges for cause during sidebar violates right to public trial).

These countless reversals are harmful because they are not required by federal or state precedent, as explained in the State's supplemental brief and the Victims Advocacy amicus brief, and they impose enormous emotional costs on victims and their families and enormous financial costs on the general public. These harms are particularly troubling because the "error" leading to reversal has no bearing whatsoever on the defendant's guilt or innocence and often actually benefits the defendant, e.g., by allowing questioning of jurors in private, where they are more likely to be forthcoming about past incidents that might bias them against a particular type of defendant.

2. Requiring Reversal Whenever a Trial Court Fails to Apply *Bone-Club* is Incorrect

The Victims Advocacy amicus brief also reaffirms how flawed the Court's current approach to public trial remedies is. As the brief articulates, the current approach requires reversal even when: (1) no constitutional violation occurred, i.e., if a *Bone-Club* inquiry would have

shown the closure to be justified; (2) the closure actually benefitted the defendant and was designed to protect other important rights; or (3) the closure was trivial. All of these rules differ from federal law, and the Court has never explained why. In short, requiring reversal whenever a trial court failed to apply *Bone-Club* is incorrect.

D. The Court Should Correct Its Public Trial Doctrine in Several Ways

In the supplemental brief and this brief, the State has pointed out a number of elements in the Court's current approach to public trial errors that are harmful and incorrect and should be overruled. Ideally, the Court would recognize and fix all of these flaws, by: (1) applying RAP 2.5 to public trial claims absent objection at trial; (2) reviewing alleged closures after the fact to determine whether there was actually a public trial violation, rather than simply reversing for failure to invoke *Bone-Club*; and (3) recognizing that certain temporary closures are trivial and do not require reversal. Adopting any of these changes would be a step in the right direction, helping to staunch the tide of unnecessary reversals of criminal convictions taking place in this state under the Court's current, erroneous approach. Whether the Court adopts all or only some of these changes, it should act soon, before more convictions are overturned and more victims made to suffer needlessly.

III. CONCLUSION

No public trial violation occurred in this case. Even if one had, the remedy should not be reversal. The Court should take this opportunity to

hold that public trial claims are subject to RAP 2.5, that trivial errors do not warrant reversal, and that the constitutional question—which can be assessed after the fact—is whether a public trial violation occurred, not whether the trial court recited *Bone-Club*.

RESPECTFULLY SUBMITTED this 10th day of June 2015.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the foregoing Answer to Amicus Briefs to be served on the following via first class mail, postage prepaid, and via e-mail:

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Dear Clerk:

Attached for filing in the above matter, please find the State of Washington's Answer to Amicus Briefs.

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