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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KENNETH LANE SLERT,

Respondent.

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STATE OF WASHINGTON
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BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, ALLIED DAILY NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, and WASHINGTON COALITION FOR OPEN GOVERNMENT

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. The ACLU strongly supports the constitutional requirement that criminal proceedings generally should be open to the public. It also recognizes the occasionally competing civil liberties interests—including privacy and the right to an impartial jury—involved in access to court proceedings. The ACLU has participated in numerous cases involving access to public records and court proceedings as *amicus curiae*, as counsel to parties, and as a party itself. The ACLU also has participated in legislative and rule-making procedures surrounding access to a wide variety of public records and proceedings.

Allied Daily Newspapers of Washington ("Allied") is a Washington trade association representing 25 daily newspapers across the State of Washington. It is an independent, nonpartisan organization dedicated to promoting access to public records and open government. Allied frequently participates as *amicus* in cases concerning Article I, Section 10 and the public's right to access court records.

Washington Newspaper Publishers Association is a trade association representing 120 weekly community newspapers throughout

Washington. It actively advocates for public access to records and government accountability to Washington citizens, including regularly participating as *amicus* in open government appeals.

The Washington Coalition for Open Government ("WCOG") is a Washington nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of public business and matters of public interest. WCOG's mission is to help foster the cornerstone of democracy: open government (including courts), supervised by an informed and engaged citizenry.

ISSUE TO BE ADDRESSED BY *AMICI*

Whether the application of harmless or invited error doctrines will undermine both the public's right to access in criminal proceedings under art. 1, § 10 of the Washington Constitution and the constitutional guarantee of a public trial under art. 1, § 22.

STATEMENT OF THE CASE

Kenneth Slert was convicted of second-degree murder in Lewis County on February 2, 2010. At some point during jury selection, the judge and counsel for both parties (but not the defendant) met in chambers. The judge later announced that four jurors were excused based "after consultation with counsel," but the reasons for excusing the jurors

are not part of the record. *State v. Slert*, 169 Wn. App. 766, 771, 282 P.3d 101 (2012).

The trial court had held the conference in chambers without first conducting the courtroom closure analysis required by *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). The Court of Appeals subsequently found that "[t]he record contains no indication that circumstances required that this conference occur in chambers or that the trial court considered reasonable, public alternatives." *Slert*, 169 Wn. App. at 778. Nor did the record show "that either the trial court or the parties considered Slert's public trial right or explained that right to him before agreeing to the dismissal" of jurors. *Id.* at 779. Accordingly, the Court of Appeals held that the in-chambers conference violated Slert's right to a public trial and reversed his conviction.

ARGUMENT

This case is one of several pending before the Court that arise from criminal trials in which the trial courts limited public access to jury selection.[1] In each case, the trial court failed to apply the "closure test"

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[1] These cases include *State v. Shearer*, No. 86216-8; *State v. Grisby*, 87259-7; *State v. Njonge*, No. 86072-6; *State v. Frawley*, No. 80727-2; and *State v. Applegate*, No. 86513-2. *Amici* are submitting briefs in each of these cases, with considerable overlap between the arguments in each brief. The argument is repeated here for the convenience of the Court rather than incorporated by reference.

that this Court has held is a necessary safeguard for preserving both a defendant's right to a public trial under art. 1, § 22 of the Washington Constitution and the public's right to open proceedings under art. 1, § 10. *State v. Bone-Club*, 128 Wn. 2d 254, 906 P.2d 325 (1995).[2] Instead, the courts made largely *ad hoc* decisions to limit public access to jury selection without meaningful consideration of the impact the limitations would have on these constitutional guarantees. While the facts and issues in these cases vary, a common theme in all of them is the State's attempt to dilute the open court safeguards established by this Court and even hold, for the first time, that public trial violations can be treated as harmless or invited error. *Amici* respectfully urge the Court to reaffirm the decision in *Bone-Club* and reject the harmless and invited error standards

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[2] The five "criteria" of the *Bone-Club* closure "test" are:

1. The proponent of closure ... must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Id. at 258-59.

This is the same test that the Court had adopted for limiting access to public hearings under art. 1, § 10. *See Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993).

of review for open court violations, particularly when a violation occurs during the critically important jury selection phase of a trial.

A. All Parts of Jury Selection Are Important and Must Be Open to the Public

As a general matter, this Court has long held that a public trial is "a core safeguard in our system of justice." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *Id.* Among other essential functions in ensuring both fairness in individual cases and public confidence in the judicial system, an open and accessible trial "deters perjury and other misconduct ... provides for accountability and transparency ... [and] allows the public to see, firsthand, justice done in its communities." *Id.*; *see also Arizona v. Fulminante*, 499 U.S. 279, 294-95, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (violation of the guarantee of a public trial requires reversal, even without a showing of prejudice, because "the values of a public trial may be intangible and unprovable in any particular case").

In this case, the State does not dispute that "[t]he guaranty of open criminal proceedings extends to the process of juror selection, which is itself a matter of importance, not simply to the adversaries but to the

criminal justice system." *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quotations and citations omitted). Instead, the State argues that the in-chambers conference from which the public was excluded in this case was separate from jury selection because it involved "legal discussions preliminary to regular, in-court voir dire," Petition for Review at 6, and was merely "administrative or ministerial," *id.* at 8. According to the State, "[t]he only thing that might have occurred in chambers was the parties' indication that they agreed that four jurors should be dismissed." *Id.* Whether or not a conference about dismissing jurors is somehow distinct from jury selection, the Court's recent decision in *State v. Saintcalle*, __ Wn.2d __, __ P.3d __, 2013 WL 3946038 (2013), makes plain that the act of dismissing jurors is a critical part of a criminal trial and, if not undertaken in a fair and open manner, fraught with potential for undermining trust in the judicial system.

More specifically, "[t]he petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)). Consistent with that critical function, jury selection must be free from improper discrimination on the part of prosecutors, judges and even

defense counsel because the harm of discrimination "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87; *see also Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (prohibiting racially motivated peremptory strikes by defense counsel).

This Court has also recognized that discriminatory jury selection "undermine[s] public confidence in the fairness of our system of justice,'" *Saintcalle* at *4 (lead opinion) (quoting *Batson*), and "offends the dignity of persons and the integrity of the courts." *Id.* Since, as the Court emphasized in *Wise*, open and accessible court proceedings serve as an essential check on potential misconduct and foster public confidence in the judicial process, it stands to reason that the dismissal of jurors in closed proceedings undermines that confidence. While there is no evidence in this case that potential jurors were dismissed because of race or other improper reasons, it is the very lack of public oversight during part of the selection process that defeats the public trial and public access guarantees and casts doubt on the integrity of the proceedings. It is unknown whether the reasons for dismissing the jurors in this case were valid or not, because the public had no opportunity to view that part of the process; that is precisely the harm that art. 1, § 10 and art. 1, § 22 are designed to prevent.

Notably, while trying to distinguish the process of dismissing jurors from other aspects of the jury selection process, the State does not argue that *Bone-Club* was wrongly decided or dispute the soundness of its closure test for determining when, and to what extent, limiting public access is appropriate. After all, when it comes to jury selection in particular, nothing precludes a court from questioning jurors in private or otherwise closing the courtroom when necessary, since *Bone-Club* recognized that closure is permissible to serve a "compelling interest." 128 Wn.2d at 258.

In particular cases, those compelling interests may include the preservation of juror privacy or helping ensure that the defendant receives a fair trial by encouraging jurors to provide full and frank answers to sensitive questions. Trial courts are simply required to carefully consider the need for closure, explain the reasons for closure on the record, and not limit public access more than necessary.

These are common sense requirements for ensuring the core constitutional rights of both defendants and the community at large and not unduly burdensome to implement. It is worth noting that many of the cases currently before the Court involve trials that took place years ago, before this Court had fully articulated the requirements for closure, and the applicability of those rules to jury selection. As trial courts become

familiar with these rulings, there is no reason to believe that trial courts will continue to close jury selection to the public without following *Bone-Club*. Moreover, this Court has stated that when a trial court has analyzed the need for closure and determines that it is warranted, its decision will be upheld absent an abuse of discretion. *Wise*, 176 Wn.2d at 11 ("where a trial court conducts a *Bone-Club* analysis on the record and concludes that a closure is warranted ... we would be assured that the foundational principle of an open justice system is preserved").

B. Applying a Harmless Error Standard of Review to Open Court Violations Cannot be Reconciled with State and Federal Constitutional Guarantees

Unable to dispute the need to protect a defendant's and the public's right to open proceedings or suggest a workable alternative to the *Bone-Club* analysis, the State instead argues that the Court should adopt "harmless or invited error" as the standard of review for open court violations. Petition for Review at 12-17. This proposal not only flies in the face of this Court's precedents, but is all but foreclosed by the U.S. Supreme Court's public trial rulings under the Sixth Amendment.

Specifically, a majority of this Court recently explained in *Wise* that, "unless the trial court considers the *Bone-Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial." 176 Wn.2d at

14. As a result, "deprivation of the public trial right... is not subject to harmlessness analysis." *Id.* (citing *Fulminante*, 499 U.S. at 309-10 (certain constitutional defects in a trial "defy analysis by 'harmless-error' standards," including abridgement of the right to self-representation and the right to a public trial)).

Nevertheless, the State relies on *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), to argue that court closures made without consideration of the *Bone-Club* factors can be treated as harmless error. *See* Petition for Review at 12-14. In *Momah*, prospective jurors were questioned individually in chambers at the request of defense counsel because of adverse publicity surrounding the case. 167 Wn.2d at 146. This Court found that the closure was designed to protect the defendant's right under art. 1, § 22 to an impartial jury, which under the circumstances was "in conflict" with the companion right to a public trial. 167 Wn.2d at 152. The Court then affirmed Momah's conviction, despite the fact that the trial judge had not directly addressed the *Bone-Club* factors.

This Court, however, has expressly limited *Momah* to its "unique set of facts," including the fact that the trial court had "effectively considered the *Bone-Club* factors," albeit not expressly. *Wise,* 176 Wn.2d at 14. In addition, any effort by the State to extend *Momah* beyond its unique facts is all but foreclosed by the U.S. Supreme Court's subsequent

decision in *Georgia v. Presley*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

In *Presley*, the trial court had summarily excluded spectators from the courtroom during *voir dire*. The U.S. Supreme Court reaffirmed that the Sixth Amendment right to a public trial extended to pretrial hearings and jury selection, and "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.* at 215. While the Court recognized that there were a variety of circumstances that could justify closure, it held that "in those cases, the particular interest, and threat to that interest, must 'be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Id.* (quoting *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 465 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). Because the trial court had made no findings, the Court reversed Presley's conviction. The Court went on to state that "even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire,* it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide." *Id.* at 216.

Like this Court, the U.S. Supreme Court has repeatedly reaffirmed the principal that deprivation of the right to public trial is structural error

and requires reversal of a conviction, "regardless of [the] actual impact on an appellant's trial." *United States v. Marcus*, 560 U.S. 258, __, 130 S. Ct. 2159, 2164, 176 L. Ed. 2d 1012 (2010); *see also, e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). While this Court "has not considered whether the public trial rights under the state and federal constitutions are coequal," *Wise*, 176 Wn.2d at 9, it has concluded that the state 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 (emphasis added). The State is therefore hard-pressed to argue that a violation of the right to a public trial can be treated as harmless error under either the federal or Washington constitutions. *See also State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) ("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."); *State v. Strode*, 167 Wn.2d 222, 230, 217 P.3d 310 (2009) (lead opinion) ("This court ... has never found a public trial right to be trivial or de minimis") (quoting *Easterling*, 157 Wn.2d at 180).

Further, applying harmless error analysis to open court violations would be unworkable because a violation of a defendant's public trial right will inevitably implicate the public's right to access criminal

proceedings under art. 1, § 10. This Court has recognized that "[t]he section 10 guaranty of public access to proceedings and the section 22 public trial right serve complementary and interdependent functions in assuring the fairness of our judicial system." *Bone-Club*, 128 Wn.2d at 259, 906 P.2d at 328; *see also State v. Paumier*, 176 Wn.2d 29, 37, 288 P.3d 1126 (2012) ("The right to a public trial is a unique right that is important to both the defendant and the public"). However, "assessing the effects of a violation of the public trial right is often difficult," and [r]equiring a showing of prejudice would effectively create a wrong without a remedy."[3] *Paumier*, 176 Wn.2d at 37.

Given the complementary functions of the core constitutional rights embodied in sections 10 and 22, this Court has unequivocally concluded that "we do not require a defendant to prove prejudice when his right to a public trial has been violated." *Id.* This standard of review makes particular sense where, as in this case, the trial court has not followed the closure test set forth in *Bone-Club*. After all, a prerequisite for closing a

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[3] In order to effectuate the public's right to open courts, any remedy must both minimize the damage caused by improper closures and deter future violations. *Amici* are not aware of any remedy that satisfies those goals other than a finding of structural error, resulting in a new trial—and structural error is also the only remedy supported by precedent. Certainly, use of a "harmless error" standard of review would fail to accomplish either of these goals, since it could easily result in no remedy whatever for improper closures. If this Court chooses to reject structural error, it must fashion a new remedy that equally addresses those goals and ensures the public's right to open courts is respected.

court room is that "[a]nyone present ... must be given an opportunity to object to the closure." *Bone-Club*, 128 Wn.2d at 258. As a practical matter, there is no way for members of the public (such as journalists or relatives of the defendant) to assert their rights or demonstrate prejudice under art. 1, § 10 unless a trial court does the *Bone-Club* analysis before a hearing is closed.

Bone-Club also requires courts to "weigh the competing interests of the proponent of closure and the public." 128 Wn.2d at 259. Absent findings on the record about how a trial court struck this balance, it is all but impossible for a reviewing court to determine if the public right to access was unreasonably curtailed. On the other hand, if a trial court follows the straightforward steps set forth in *Bone-Club* and decides that a closure is necessary then, as previously noted, that decision is reviewed for abuse of discretion. The State does not argue that a harmless error standard is somehow preferable to review based on abuse of discretion once an open court violation has been asserted. Rather, it seeks to foreclose meaningful appellate review of open court violations entirely by having the Court hold that it is no longer necessary for trial courts to make reviewable findings in the first place.

C. The "Invited Error" Doctrine Cannot Be Applied to Open Court Violations Because it Is Also Unworkable and Will Undermine the Public Trial and Open Proceedings Guarantees

In addition to broadly advocating for harmless error analysis, the State also proposes that the Court apply waiver rules or the "invited error doctrine" to avoid reversal of convictions for open court violations. Petition for Review at 16. This proposal is misguided for several reasons.

First, the Court rejected a similar appeal from the State almost one hundred years ago. In *State v. Marsh*, 126 Wash. 142, 217 P. 705 (1923), the defendant was tried in a closed juvenile court, waived his right to an attorney, and did not object to the closed proceedings. *Id.* at 143. On appeal, the State maintained "that because no objection or exception was entered or taken by the appellant at the time of the trial, the error, if any, cannot now be taken advantage of." *Id.* at 145. This Court unequivocally rejected the State's argument because it "ignores the force and effect of the constitutional provision. The right to a public trial is *guaranteed*." *Id.* at 146 (emphasis added) (quotation omitted). Consistent with this guarantee, the Court has always held that "[w]here the constitutional right has been invaded, it has been held by this court that no failure of objection or exception should stand in the way of considering errors based on the violation of such provisions." *Id.* (quoting *State v. Crotts*, 22 Wash. 245, 249, 60 P. 403 (1900) (reversing murder conviction when the judge

violated art. 4, § 16 of the state constitution by questioning witnesses, despite the lack of objection from the defendant)).

In addition, both the State's waiver and invited error arguments put the procedural cart ahead of the constitutional horse. While a defendant can waive many constitutional rights, such as the right to a jury trial, such waivers must be "knowing, intelligent and voluntary." *State v. Stegall*, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). Where, as here, there was no public, on-the-record colloquy about closing the proceedings, there is no way of determining whether a purported waiver was valid. After all, the *Bone-Club* factors are in large part designed to ensure that closures are done in a fully informed manner, and it is hard to envision a situation in which a defendant can be deemed to have knowingly and intelligently waived his or her right to a public trial where, as in this case, the court failed to address any of the relevant factors.

The State also fails to consider the fact that the public, not just defendants, must be informed about the reasons for closure and given an opportunity to object. As the Court explained in *Bone-Club*, "an opportunity to object [to a closure] holds no 'practical meaning' unless the court informs potential objectors of the nature of the asserted interests." 128 Wn.2d at 261 (citation omitted). Because the guarantees of sections 10 and 22 are so overlapping and intertwined, this Court has concluded

that trial courts have an "affirmative duty" to perform the *Bone-Club* analysis, regardless of whether a defendant has acquiesced in or even requested a court closure. *Strode*, 167 Wn.2d. at 228.

The fulfillment of this duty by the court may be particularly important when it comes to jury selection, since litigants' attorneys are not immune from choosing jurors based on race or other discriminatory grounds. Litigants may also allow jurors to be excused for invalid reasons, and the likelihood of that occurring increases if part of the jury selection process occurs out of view of the public. The mere fact that the proponent of a closure during jury selection was the defendant does not guarantee the integrity of the selection process or necessarily instill public confidence in the court's ability "to adhere to the law throughout the trial of the cause." *McCollum,* 505 U.S. at 49 (quotation omitted).

The State's waiver and invited error arguments therefore ultimately fail because they address open court violations solely through the prism of a defendant's right to a public trial. Since it is well-established that a defendant "cannot waive the public's right to open proceedings," *Strode*, 167 Wn.2d at 229, a trial court must always "weigh the competing interests of the proponent of closure and the public." *Bone-Club*, 128 Wn.2d at 259. From a constitutional standpoint, it makes little difference if the defendant invites or agrees to the closure because it is "[t]he motion to

close, not Defendant's objection, [that] trigger[s] the trial court's duty to perform the weighing procedure." *Id.* at 261. As a result, even if a defendant waives the right to a public trial or invites closure, "the trial court has an independent obligation to perform a *Bone-Club* analysis" to ensure that "the public's right to an open courtroom [is] given proper consideration." *Strode*, 167 Wn.2d at 230.

CONCLUSION

For all of the above reasons, precedent and compelling interests support continuing to treat any part of the jury selection process that is closed to the public, without first conducting a *Bone-Club* analysis, as structural error. It follows that any harmless error, invited error, or *de minimus* exception to structural error analysis should be rejected. Moreover, as the Court of Appeals recognized, a new trial should be ordered, since it is the remedy justified by the need to enforce both the public's right to open court proceedings under art. 1, § 10, and a defendant's right to a public trial under art. 1, § 22.

Respectfully submitted this 13th day of September, 2013.

By /s/ Colin Fieman
Colin Fieman, WSBA #40412

Attorney for *Amici Curiae*
American Civil Liberties Union of Washington
Allied Daily Newspapers of Washington
Washington Newspaper Publishers Association
Washington Coalition for Open Government

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Dear Clerk,

Please accept for filing in State of Washington v. Kenneth Lane Slert, Case No. 87844-7, the attached documents:

1. MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

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2. CERTIFICATE OF SERVICE.

Thank you,

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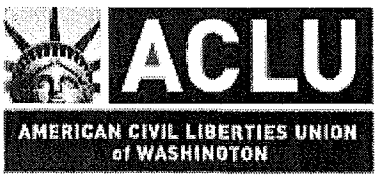

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