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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

KENNETH SLERT,

Respondent.

Lewis County Superior Court Cause No. 04-1-00043-7

**State's Response to Amici Curiae Brief of the
American Civil Liberties Union, et al.**

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By:


ERIC EISENBERG, WSBA No. 42315
Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. AUTHORITY FOR RESPONSE

The State of Washington files this response to the Amici Curiae brief of the American Civil Liberties Union, et al., as permitted by Comm. Goff's letter to counsel of Sept. 23, 2013 and RAP 10.6(c).

II. ARGUMENT

Voicing generalized open-courts concerns not specific to the facts of this case, the *amici* argue that a no-error, harmless-error, or invited-error analysis in this matter would be unworkable and unconstitutional. But, the state and federal constitutions are not a procrustean bed.¹ Considering this case on its own facts, the brief in-chambers conversation here did not violate the open courts doctrine. Even if it did, recognizing limitations on the remedy for certain violations based on "experience and logic" is neither unconstitutional nor unworkable.

A. **THERE ARE NO *BATSON* CONCERNS AT ISSUE IN THIS CASE; THE OPEN-COURTS ISSUES AROSE IN FURTHERANCE OF THE RIGHT TO AN IMPARTIAL JURY.**

The ACLU broadly argues that all aspects of jury selection must be open to avoid conscious or unconscious prejudice when picking jurors. See *Brief of Amici Curiae* at 5-

¹ According to legend, Procrustes "fitted" unwary travelers to his iron bed: those too tall had their feet chopped off; those too short were racked until they fit. See generally "Procrustes," Wikipedia, available online at <http://en.wikipedia.org/wiki/Procrustes> (last accessed Oct. 1, 2013).

9 (citing *State v. Saintcalle*, No. 86257-5, ___ Wn.2d ___, 2013 WL 3946038 (Aug. 1, 2013)). This argument ignores the Court's recent opinions treating jury questionnaires as aids that need not always be publically accessible. *State v. Beskurt*, 176 Wn.2d 441, 447-48, 293 P.3d 1159 (2013) (opinion of C. Johnson, J.); *id.* at 452 (Madsen, J. concurring); *In re Pers. Rest. of Yates*, 177 Wn.2d 1, 28-29, 296 P.3d 872 (2013). Here, experience suggests that trial counsel may foreshadow to the judge the likely areas of dispute or nondispute before addressing matters on the record, and logic indicates that such a "tip off," when repeated on the record with the reasons therefore, does not derogate the policies underlying open courts. Thus, no error occurred. See State's Supplemental Brief at 10-13.

Furthermore, the record contains no evidence of improper motives relating to jurors' dismissal. *Cf. Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (prohibiting racial discrimination in jury selection). Rather, the parties sought to remove those jurors who had heard or read about Slert's prior convictions for the same murder. See Clerk's Papers (CP) at 359-61 (questionnaire relating solely to pretrial publicity); Verbatim Report of Proceedings (VRP) (Jan. 6, 2010) at 3-4 (discussing pretrial

publicity); VRP (Jan. 25, 2010) at 11 (noting that jurors at issue were dismissed for knowledge of prior trials). This was part of a lengthy effort to vet potential jurors for fairness, which included individualized voir dire in open court based on their questionnaire answers. *See id.* at 5-69.

Consequently, there is no reason to believe that, when the parties told the judge that they would agree to four potential jurors' dismissal, their location in chambers (versus in the courtroom) affected this case or infringed upon the goals served by this Court's open-courts decisions or the *Batson* line of cases. Based on the actual facts of this case, the State asks the Court to find no violation, harmless error, or invited error as argued in its Supplemental Brief.

B. ASSUMING THERE WAS ERROR IN THIS CASE, THE FEDERAL AND STATE CONSTITUTIONS DO NOT REQUIRE A ROTE, NEW-TRIAL REMEDY FOR EVERY OPEN-COURTS MISSTEP.

As explored in the State's Supplemental Brief, the conception of open-courts errors as structural derives from cases in which major closures affected the framework in which a whole portion of a hearing or trial proceeded. *See Waller v. Georgia*, 467 U.S. 39, 41-42, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (seven-day suppression hearing); *State v. Marsh*, 126 Wash. 142, 217 P. 705 (1923) (entire criminal trial); *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325

(1995) (key witness's entire testimony); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) (two full days of voir dire). The courts in these cases declined to speculate on how such lengthy proceedings, in which witnesses were questioned, might be different if exposed to public scrutiny.

None of these cases involved circumstances in which the right to open courts butted up against the right to an impartial jury. But, *Waller* foreshadowed that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial," and cautioned that "the balance of interests must be struck with special care" in such cases. *Waller*, 467 U.S. at 45. Separately, *Waller* also envisioned that the remedy open-courts errors would be tailored to the nature and extent of the violation. See *id.* at 49-50 (tailoring its remedy to avoid giving the defendant a windfall).

Despite the ACLU's contention to the contrary, the federal cases following *Waller* do not alter this original understanding. In *Presley v. Georgia*, 558 U.S. 209, 210-11, 130 S. Ct. 721, 722, 175 L. Ed. 2d 675 (2010), the trial court closed the entire voir dire to the public, over the defendant's objection, for ease of seating the venire. *Id.* There was no

record that such a closure would benefit the defendant (who objected to it). *Id.* *Presley* quoted *Waller's* discussion of the delicate balance of the right to an impartial jury and the right to public proceedings, but concluded that the trial court had failed to undertake any such balance. *Id.* at 213-16. Like *Waller*, then, *Presley* did not address the more-difficult question of what the right and the remedy would be if the nonpublic action below had actually furthered the defendant's right to an impartial jury. The other federal cases cited in the *amici's* brief merely use public trial right as examples of structural error. See *United States v. Marcus*, 560 U.S. 258, ____, 130 S. Ct. 2159, 2164, 176 L. ed.2d 1012 (2010); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S. Ct 2557, 165 L. Ed. 2d 409 (2006). They do not discuss *Waller's* limitation on the remedy or its caution about conflicting constitutional rights. *Id.* In short, federal caselaw does not restrict this Court from determining that an open-courts error (if one exists here) was invited as a means to secure an impartial jury, or that it was of such limited effect that a new trial would be a windfall to the defendant.

Waller, *Presley*, and the structural error cases support such an inquiry. Structural error analysis is supposed to determine whether an error affected the framework of the

trial and fundamentally altered its character, as opposed to being a mere error in the trial process. *See Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The parties' indication to the judge that they agreed on certain jurors to be dismissed was, if anything, merely a trial misstep. And viewing the handling of the questionnaire as a whole, it is clear that the trial court here attempted to strike a delicate balance between the defendant's right to an impartial jury and public proceedings. *Cf. Presley*, 558 U.S. 203-16 (faulting the trial court for failing to do so). For example, the parties discussed the questionnaires and their purpose in open court, the jurors filled them out in open court, and individual voir dire occurred not in chambers, as the defense requested, but in open court. Given that balance, this Court should consider the fact that the procedures here were designed for the defendant's benefit, and avoid giving him a windfall remedy of a new trial. *Cf. Waller*, 467 U.S. at 49-50.

Washington law also provides for such an analysis. Though subsequently limited, *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) recognized invited error in an open-courts context remarkably similar to this one. *See State's Supplemental Brief* at 17-20 (arguing why *Momah*

controls even in light of case law limiting it). *Momah's* invited-error analysis was then reinvisioned as a no-error analysis by *State v. Wise*, 176 Wn.2d 1, 14-15, 288 P.3d 1113 (2012) and *State v. Paumier*, 176 Wn.2d 29, 35-36, 288 P.3d (2012). Those cases reinterpreted *Momah* to say that, if the record shows that the open-courts standard for closure was (implicitly) satisfied, no error actually occurred. *Wise*, 176 Wn.2d at 14-15; *Paumier*, 176 Wn.2d 29, 35-36. For further analysis regarding why the trial court's procedures here implicitly satisfied the open-courts doctrine, please see the State's Supplemental Brief at 13-16.

From a broader perspective, this Court has retreated from an absolutist approach to closures towards one based on experience and logic. *State v. Sublett*, 176 Wn.2d, 58, 72, 292 P.3d 715 (2012) (opinion of C. Johnson, J); *id.* at 98-101 (Madsen, J., concurring); *id.* at 136-42 (Stephens, J., concurring). Experience and logic bear on the remedy as well. Most trial errors are subject to harmless-error analysis, based on the courts' experience that few trials are perfect and the defendant is entitled to a fair trial, not a perfect one. *E.g.*, *State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012). Most trial errors are subject to invited-error analysis, based on the logic that it undermines the goals of fairness

and transparency—two things sought by making trials public—to allow a defendant to sow seeds of error at trial and reap them on appeal. *E.g.*, *State v. Henderson*, 114 Wn.2d 867, 867-71, 792 P.2d 514 (1990). Rather than abandoning these goals in the open-courts context, the Court should use experience and logic to reason through the structural error analysis in this case.

The question is whether the alleged error in this case posed an existential threat to the process of justice, either by rendering the trial unfair or by making it impossible to determine if the trial was fair. Considering the long experience of trial courts conducting limited actions in chambers or at sidebar, the in-chambers conference in this case does not reach that threshold. *Cf.*, *e.g.*, *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994); *In re Det. of Ticeson*, 159 Wn. App. 374, 246 P.3d 550 (2011). And logically, the in-chambers conference in this case, if error, was of a different order of magnitude than errors undermining the trial's fundamental fairness, such as an entirely closed trial or complete denial of counsel. *Cf. State v. Marsh*, 126 Wash. 142, 217 P. 705 (1923); *Neder*, 527 U.S. at 8. This is true because the conference *furthered* the trial's fairness by dismissing, for legitimate and publicly

explained reasons, potential jurors the defendant wished to be dismissed. Public access would not have altered the process. See *In re Pers. Rest. of Yates*, 177 Wn.2d 1, 29, 296 P.3d 872 (2013) (reasoning through what the public's impact would be on the process at issue). As a result, the Court should hold that any error in this case was not structural, but harmless and invited.

The ACLU's brief protests that the State's request for a case-by-case approach to open-courts issues would be unworkable. Such an approach has not proven unworkable in other constitutional contexts, such as due process or searches and seizures. As shown by this Court's splintered open-courts decisions, what has proven unworkable is the idea that the constitution requires a new trial based on any open-courts error, no matter how slight, well-intentioned, or unimportant it was to the outcome below. See *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012) (4-1-3-1 opinion); *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012) (5-1-3 opinion); *State v. Paumier*, 176 Wn.2d 29, 35-36, 288 P.3d (2012) (5-1-3 opinion); *In re Pers. Rest. of Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012) (4-1-1-3 opinion); *State v. Beskurt*, 176 Wn.2d 441, 293 P.3d 1159 (2013) (4-3-2 opinion). The best way to resolve the conflicting policies at

stake, which have divided this Court, is to have each case stand on its own bottom and to tailor the remedy to the violation at hand. *Cf. Waller*, 467 U.S. at 49-50.

Despite the *amici's* concerns, such a case-by-case approach can take the public's right to open courts into account. This is why the State proposes that the "experience and logic" test be incorporated into the remedy analysis. For example, the test's logic prong addresses whether public access "plays a significant positive role in the functioning of the particular process." *In re Pers. Rest. of Yates*, 177 Wn.2d 1, 29, 296 P.3d 872 (2013) (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). This inquiry is relevant to whether the absence of public access rendered the process fundamentally unfair or made fairness impossible to determine. Also, the open-courts doctrine has vigorously guarded the public's right up to this point; there is no reason to think it will cease to do so if the Court substitutes a rule of reason for a rule of rote.

On the facts of this case, no infringement of the open-courts doctrine occurred, and any such violation was the product of the parties' and court's attempt to secure the defendant a fair trial by an untainted jury. A member of the public in attendance would have comprehended as much.

Therefore, there was no error, or any such error was not structural, but harmless and invited. The Court should reverse the Court of Appeals' decision and affirm the defendant's conviction.

III. CONCLUSION

Trial counsel informed the judge in chambers that they agreed on four potential jurors to be dismissed because the jurors had heard that the defendant had been convicted of the same murder at previous trials. The judge announced the dismissal of the jurors on the record in open court and allowed individual voir dire of other potential jurors on the record in open court. This procedure did not violate the open-courts doctrine; if it did, the violation was harmless or invited. Engaging in a case-specific analysis based on "experience and logic", the Court should reverse the Court of Appeals' decision and affirm the defendant's conviction.

RESPECTFULLY submitted this 2nd day of October, 2013.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by: 

ERIC EISENBERG, WSBA 42315
Attorney for Plaintiff

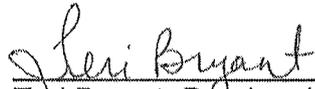
SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 87844-7
Petitioner,)	
vs.)	DECLARATION OF
)	EMAILING
KENNETH SLERT,)	
Respondent.)	
_____)	

Ms. Teri Bryant, paralegal for Eric Eisenberg, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On October 2, 2013, the Respondent was served with a copy of the **State's Response to Amici Curiae Brief of the American Civil Liberties Union, et al.** by emailing to the Respondent's Attorney, Jodi R. Backlund and Manek R. Mistry at the following email address: backlundmistry@gmail.com.

And to Colin Fieman at Colin_Fieman@fd.org, Katherine George at kgeorge@hbslegal.com and Douglas B. Klunder, Sarah A. Dunne and Nancy L. Talner at klunder@aclu-wa.org.

DATED this 2nd day of October, 2013, at Chehalis, Washington.



 Teri Bryant, Paralegal
 Lewis County Prosecuting Attorney Office

Declaration of
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Attached for filing in the above referenced case is the State's Response to Amici Curiae Brief of the American Civil Liberties Union, et al.

Thanks,

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney
345 W Main St. 2nd Floor
Chehalis, WA 98532
(360) 740-1258