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IN THE SUPREME COURT
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STATE OF WASHINGTON,

Petitioner,

vs.

KENNETH SLERT,

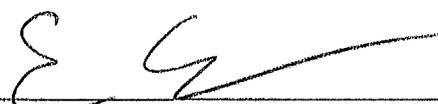
Respondent.

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

State's Supplemental Brief

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I. ISSUES PRESENTED

1. Did the Court of Appeals err in interpreting *State v. Irby* as an open-courts case despite the opinion's explicit language to the contrary?
2. The parties and judge reviewed answers to jury questionnaires in chambers on the day of trial, then announced the agreed-upon dismissal of four jurors on the record in open court. Was this procedure consistent with the defendant's right to a public trial and open courts?
3. If any error resulted from this procedure, was it invited, harmless, or otherwise subject to a more-limited remedy than a new trial?

II. STATEMENT OF THE CASE

Kenneth Skert appeals his second-degree murder conviction following his third trial for the same offense. This petition addresses whether Skert should obtain a new, fourth trial because counsel informed the judge, at an in chambers conference leading up to in-court voir dire, that based on jury questionnaire answers they agreed on four potential jurors to be excused for cause.

I. Relevant Facts And Procedural History¹

In October of 2000, Kenneth Skert was camping in Lewis County, Washington, when a man named John Benson drove into his campsite. Verbatim Report of

¹ For a more expansive recitation of the facts, please see the State's Response Brief in the Court of Appeals or one of the previous appellate decisions in this case: *State v. Skert (Skert I)*, No. 31876-8-II, 128 Wn. App. 1069, 2005 WL 1870661 (Aug. 9, 2005), and *State v. Skert (Skert II)*, No. 36534-1-II, 149 Wn. App. 1043, 2009 WL 924893 (Apr. 7, 2009).

Proceedings (VRP) (Nov. 18, 2009) at 17, 20, 58; VRP (Jan. 27, 2010) at 492. The two were strangers. VRP (Nov. 18, 2009) at 229. Benson invited Slerf into his truck to share some whiskey. VRP (Jan. 27, 2010) at 492. The interaction between the men did not go as planned; Slerf eventually shot and killed Benson. *Id.* at 493-95, 513. Slerf claimed that the killing was justified because Benson attacked him, *id.*, but gave inconsistent accounts, VRP (Feb. 2, 2010) at 903-04. The physical evidence suggesting an execution-style killing at close range, with one shot paralyzing Benson and a second shot fired with the gun touching Benson's head. VRP (Jan. 27, 2010) at 345, 349, 352-54, 363-64. Consistent with this evidence, Slerf told a fellow inmate that he killed Benson because Benson had come on to him. VRP (trial) at 433, 478.

The State charged and convicted Slerf of second-degree murder, but the conviction was overturned because the trial court erred in rejecting one of Slerf's proposed self-defense instructions. *Slerf I*, 2005 WL 1870661 at *1-4. Slerf was convicted again on remand; that conviction was overturned because the trial judge violated the appearance of fairness doctrine. *Slerf II*, 2009 WL 924893 at *4-5.

In the lead-up to Sler's third trial, Sler's lawyer submitted a jury questionnaire designed to screen the venire for exposure to pretrial publicity. VRP (Jan. 6, 2010) at 3-4. The goal was to remove jurors who were prejudiced from hearing about Sler's previous trials, without tainting the whole panel. *Id.* Sler proposed the questionnaire on the record in open court. *See id.* at 2. At a subsequent hearing in open court, the parties changed the words "prior trials" in the questionnaire's introduction to "prior proceedings," to obscure the fact that Sler had previously been convicted of the crime. VRP (Jan. 21, 2010) at 2-4. Otherwise, it remained as proposed by the defense. *Id.*

The prospective jurors received the questionnaire when they appeared for voir dire on the first day of trial. VRP (Jan. 6, 2010) at 14. They filled them out in the courtroom that morning. *Id.*; VRP (Jan. 25, 2010) at 5-6. The trial court and counsel for both parties then reviewed the questionnaires; the defendant was present to consult with his attorney for at least a portion, if not all, of this review. *See* VRP (January 25, 2010) at 5-6; CP at 194.² At some

² The defendant was present as of 9:30 a.m. that morning, when the prospective panel was still going through the questionnaires. VRP (Jan. 25, 2010) at 5-6. The Court did not excuse the four tainted potential jurors until 10:49 a.m. CP at 194. The judge indicated that they had reviewed the questionnaire answers by then. VRP (Jan. 25, 2010) at 5. Thus, it appears that the defendant was present for the intervening hour and twenty minutes, while

point, counsel and the judge had an in-chambers conference. CP at 194. At 10:49 a.m., the Court went on the record to address some preliminary matters, *id.*, during which the trial court announced the agreed-upon excusal of four jurors in open court:

There are a couple other things. We have had the questionnaires that have been filled out. I have already, based on the answers, after consultation with counsel, excused jurors number 19, 36, and 49 from panel two which is our primary panel and I've excused juror number 15 from panel one, the alternate panel.

VRP (Jan. 25, 2010) at 3, 5. The clerk noted this announcement as the dismissal of these jurors for cause. CP at 194. Defense counsel explained that the jurors were dismissed because they had knowledge of prior trials. VRP (Jan. 25, 2010) at 11.

Other than agreeing about these four jurors, Slet's counsel noted that the parties had not yet discussed the voir-dire implications of the jury questionnaire. *Id.* at 10 (“[W]e still haven't dealt with the responses to the questionnaire.”). This discussion occurred in open court: defense counsel identified 15 potential jurors who had heard something about the case. *Id.* at 10-11. He requested in-chambers voir dire of these potential jurors. *Id.*; see also VRP (Jan. 6, 2010) at 4

the jurors finished responding to the questionnaires and counsel reviewed them.

(proposing in-chambers voir dire from the start). The judge rejected this proposal, requiring individual voir dire to be in open court. VRP (Jan. 25, 2010) at 11-14. Slerf's attorney therefore explored these jurors' questionnaire answers in open court. *Id.* at 14-69. General voir dire of the whole panel also occurred in open court. *Id.* at 69-124.

The resulting jury heard the trial over the course of seven days. *See generally* VRP (Jan. 25, 2010 to Feb 2, 2010). Slerf was convicted for a third time. VRP (Feb. 2, 2010) at 977-79; VRP (Feb. 10, 2010) at 1-13 (sentencing).

Slerf timely appealed, arguing that the in-chambers conference regarding the jury questionnaire answers violated his right to open courts. The Court of Appeals agreed, interpreting *State v. Irby* to hold that conducting any portion of case-specific voir dire out of public earshot violates the open-courts doctrine. *State v. Slerf (Slerf III)*, 169 Wn. App. 766, 772-75, 282 P.3d 101 (2012). The majority of the panel also opined that any sidebar conference would be proscribed under *Irby*. *Id.* at 774 n. 11. The dissent objected that the actual dismissal of jurors occurred in open court and that the parties' discussion of it beforehand did not have to be public. *Id.* at 785-91. The State sought review in this Court, which was granted.

III. STANDARD OF REVIEW

Whether an open-courts violation occurred and what remedy follows from any such violation are legal issues subject to de novo review. *Drelling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004).

IV. ARGUMENT

A. **DISCUSSING JURY QUESTIONNAIRE ANSWERS IN CHAMBERS PRIOR TO ANNOUNCING THE AGREED-UPON DISMISSAL OF FOUR POTENTIAL JURORS IN OPEN COURT DID NOT VIOLATE THE OPEN-COURTS DOCTRINE.**

The Court of Appeals' conclusion that the open-courts doctrine barred the discussion in chambers in this case both misconstrued the record and misinterpreted *Irby*. The jurors were excused in open court. *Irby* does not elevate the prior in-chambers discussion of this fact into a proceeding that must be public—*Irby* is not even an open-courts case. Rather, "experience and logic" confirm that the public access to the in-chambers discussion was not required. Even if it should have been public, announcing the dismissals in open court, under the circumstances, fully informed the public so as to eliminate any open-courts violation. The Court should reverse the decision below and reinstate Slert's conviction.

1. The Court Of Appeals Misconstrued The Record And Misinterpreted *Irby*, Applying The Wrong Legal Standard.

The decision below was doubly flawed: it misconstrued the record regarding when the potential jurors in this case were dismissed, and it misinterpreted *Irby* to hold that it violates the open-courts doctrine for any portion of case-specific jury selection to occur out of public earshot. The Court should explicitly correct both errors.

Based on the judge's announcement, "I have already, based on the [questionnaire] answers, after consultation with counsel, excused [four] jurors," the Court of Appeals concluded that the judge formally dismissed the jurors in chambers while consulting with counsel. *Siert III*, 169 Wn. App. at 774. However, the clerk's minutes noted this public announcement, *not* any prior conference, as the moment the jurors were dismissed for cause. See CP at 194.³ The parties proceeded to discuss which jurors would need to be questioned individually, VRP (Jan. 25, 2010) at 10-14, suggesting that the only discussion in chambers was the parties' report that they agreed on four jurors to be

³ The Clerk's minutes distinguish between matters that happened before the court came into session and after that point. CP at 194. The pretrial conference is listed as being before the session, and the excusals for cause were listed after. *Id.* In contrast, the Court noted that exhibits were marked before the session. *Id.* So it is not the case that the clerk simply delayed noting pre-session actions of the trial court; instead, the notation indicates that the excusal occurred in open court.

dismissed.⁴ In light of this record, the judge's announcement meant that he had already reviewed the questionnaire answers and consulted with counsel, not that he had already formally dismissed the jurors. The actual dismissal occurred in open court. This point underscores exactly how little occurred during the in-chambers conference that, according to Skert, should be the basis for scrapping his entire trial.

Compounding its mistake on the facts, the decision below based its open-courts holding on *Irby's* disapproval of dismissing jurors by email before the trial began. *Skert III*, 169 Wn. App. at 772-75. But, *Irby* limited itself to the defendant's right to presence and did not consider the open-courts doctrine. *State v. Irby*, 170 Wn.2d 874, 887, 246 P.3d 796 (2011). Indeed, *Irby's* right-to-presence-style analysis was superseded by the "experience and logic" test for open courts. *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). This Court should reverse the decision below, taking the

⁴ Defense counsel actually remarked, "[W]e still haven't dealt with the responses to the questionnaire." VRP (Jan. 25, 2010) at 10. In fact, Skert's counsel had not even informed the court of all of his proposed for-cause excusals. See *id.* at 12. The idea that the parties and judge hashed out everything in chambers simply ignores the tone of the conversation in open court.

opportunity to explicitly reject *Irby* as the legal standard for open-courts cases.

In limiting *Irby* to its right-to-presence holding, the Court should correct the decision below's pronouncement that *Irby* prohibits all sidebar conferences or off-the-record discussions during a trial.⁵ See *Skert III*, 169 Wn. App. at 774 n.11 (taking the court's holding to its logical conclusion). In *Irby*, the court and parties dismissed jurors by email outside of court, without any input from the defendant or any formal court procedure whatsoever. *Irby*, 170 Wn.2d at 881-83. *Irby* distinguished the emails from sidebar or in-chambers legal discussions, of which it approved. *Id.* at 881-82; see also *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306-07, 868 P.2d 835 (1994). *Irby* proscribed novel, out-of-court proceedings without the defendant's participation, not legal discussions after the defendant has consulted with counsel.

Here, the defendant participated throughout the voir dire process, including the use of the questionnaire. His absence from the in-chambers discussion identifying four agreed-upon dismissals for cause was no different than the

⁵ Skert's supplemental brief argues that the Court should ignore this case as moot, having granted review solely on the open-courts issue. Respondent's Supplemental Br. at 4-5. The decision below based its right-to-presence and open-courts holding based the same case, *Irby*, which it misinterpreted. In correcting this misinterpretation of *Irby*, the Court can address both issues.

sidebars permitted under *Lord* and *Irby*. The court should reverse the decision below and affirm Sliert's conviction.

2. The Public Need Not Be Privy To Preliminary Discussions Of Jury Questionnaire Answers As A Precursor To Substantive, Individual Voir Dire In Open Court.

Applying the correct legal standard, experience and logic confirm that the public need not be privy to preliminary discussions of jury questionnaire answers as a precursor to substantive, individual voir dire in open court. In three separate plurality opinions, a majority of this court adopted an "experience and logic" test for whether an event in court must be public. *Sublett*, 176 Wn.2d at 72 (opinion of C. Johnson, J.); *id.* at 98-101 (Madsen, J., concurring); *id.* at 136-42 (Stephen, J., concurring). The test's first prong explores whether similar procedures have historically been open to the public. The second 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)). The appellant bears the burden of establishing a violation under this test. *Id.* at 886.

Critically, no potential jurors in this case were questioned outside of open court. Substantive voir dire

questioning of potential jurors has traditionally been open to the public. *State v. Wise*, 176 Wn.2d 1, 11-12, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 34-35, 288 P.3d 1126 (2012). But, not every aspect of picking a jury has traditionally been open. Jurors' personal information is usually confidential absent a good-cause showing. GR 31(j); *State v. Beskurt*, 176 Wn.2d 441, 448, 293 P.3d 1159 (2013). This Court has twice distinguished jury questionnaires completed as an aid to in-court questioning from substantive voir dire, holding that the former need not be open. *Beskurt*, 176 Wn.2d at 447-48 (opinion of C. Johnson, J.); *Id.* at 452 (Madsen, J. concurring); *Yates*, 177 Wn.2d at 28-29. Similarly here, the parties' report to the judge that they agreed on four jurors to be dismissed, as a lead up to individual voir dire questioning in open court, was not substantive voir dire that had to be public.

Likewise, Washington law has long recognized that certain legal discussions can occur in chambers without offending the requirement of open courts. For example, answering a jury question during the trial may sometimes be done in chambers. See CrR 6.15; *Sublett*, 176 Wn.2d at 75-77 (opinion of C. Johnson, J.). The thoughtful opinion in *In Det. of Ticeson*, 159 Wn. App. 374, 384-87, 246 P.3d 550

(2011), *overruled by Sublett*, 176 Wn.2d at 72, describes how judges have long had powers to be informed of legal issues in chambers. *See also State v. Irby*, 170 Wn.2d 874, 881-82, 246 P.3d 796 (2011) (recognizing several types of sidebar or in-chambers conferences); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306-07, 868 P.2d 835 (1994) (same). It would be a fundamentally new proposition that the parties are not permitted to inform the judge, in chambers, that they agree on certain matters to be addressed when the court session begins.

Turning to “logic,” the public was sufficiently informed of the nature and contents of the in-chambers conference to satisfy open courts’ goals. Just as in *Beskurt* and *Yates*, the parties here contemplated the questionnaires as a screening tool for in-court voir dire, subject to the usual, public constraints on court proceedings.⁶ *Cf. Beskurt*, 176 Wn.2d at 447; *Yates*, 177 Wn.2d at 28-29. This purpose of the questionnaire was put on the record at pretrial hearings, VRP (Jan. 6, 2010) at 3-4; VRP (Jan. 21, 2010) at 2-4, and its use for that purpose was apparent in open court on the

⁶ The Court of Appeals did not address Slett’s contention that the jury questionnaires themselves had to be filed as public records. This contention is now squarely foreclosed. *Beskurt*, 176 Wn.2d at 447; *Yates*, 177 Wn.2d at 28-29. Slett also faults the trial court for failing to preserve the questionnaires. But, it was Slett’s duty, not the court’s, to preserve them in the record for appeal. Please refer to the State’s Supplemental Response Brief in the Court of Appeals for further argument on this point.

morning of trial, VRP (January 25, 2010) at 5-6, 10-14. The attending public would have known what was going on, which sufficed to remind the prosecutor, judge, and defense attorney of their responsibilities. *Cf. Sublett*, 176 Wn.2d at 78 (citing this as a goal). Furthermore, the judge dismissed the jurors in open court, and the defense attorney reiterated that the dismissal was for exposure to pretrial publicity, thus allowing public scrutiny of the event. *Cf. id.* (holding that the record of an in-chambers conference sufficiently subjected it to public scrutiny). It is hard to imagine how more openness would have changed the outcome: these four jurors were dismissed because they knew Slert had been convicted of the same murder. As a result, Slert has failed to show that public's presence would have played "a *significant* positive role in the functioning of the particular process in question." *Yates*, 177 Wn.2d at 29 (emphasis added).

Because experience and logic confirm that the in-chambers conference here did not need to be open to the public, the Court should reverse the decision below and affirm Slert's conviction.

3. Even If The Public Should Have Been Privy To The In-Chambers Discussion, The Record Shows That The Open-Courts Doctrine Was Satisfied.

In *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

1126 (2012), this Court suggested that if the record shows that the open-courts standard for a court closure was satisfied, the closure may be lawful despite lack of an explicit analysis under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). This approach would codify *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 810-12, 100 P.3d 291 (2004), which examined whether a closure was justified under *Bone-Club* despite the trial court's lack of findings in that regard. Here, the judge implicitly followed *Bone-Club* and prevented an open-courts violation from occurring.

Bone-Club's five-step test for court closures is: (1) the proponent of closure must show a compelling interest, such as an accused's right to a fair trial; (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; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. 128 Wn.2d. at 258-59.

These factors were satisfied in this case. First, the basis for questionnaires was clear on the record: to prevent those who knew Slert had been previously convicted from

sitting on his jury. VRP (Jan. 6, 2010) at 3-4; VRP (Jan. 21, 2010) at 2-4. Second, the process by which the jurors would be given the questionnaire was placed on the record to give anyone present an opportunity to object. VRP (Jan. 6, 2010) at 14. Third, the procedure was the least restrictive available, involving individual voir dire in open court rather than in-chambers questioning. Any in-chambers activity was minimal, seeing as the dismissal of jurors, the discussion of voir-dire implications, and the individual voir dire itself all occurred in open court. The court also publicly announced the content of any nonpublic discussion. Fourth, the judge weighed the competing interests served by closure and openness by rejecting the defense suggestion that individual questioning occur in chambers. Fifth, any closure in this case was as minimal as possible to screen out tainted jurors. Because this procedure complied with *Bone-Club*, any closure satisfied the open-courts doctrine despite the lack of an explicit *Bone-Club* analysis.

Paumier and *Wise* are the only cases suggesting an open-courts framework for analyzing inadvertent or minimal closures that the trial court seeks to correct.⁷ There must be

⁷ The Court has previously addressed a de minimis exception only in dicta. *State v. Easterling*, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006); see also *State v. Strobe*, 167 Wn. 2d 222, 230-31, 217 P.3d 310 (2009) (plurality opinion). Each of those opinions noted that the closure in question was neither brief,

some means of correcting closures if they occur. For example, consider a case in which the parties conduct a CrR 3.5 hearing, only to realize that the courtroom door was mistakenly locked. Recognizing the closure, the court should unlock the door and recapitulate what occurred at the hearing in open court. To require the parties to actually recall the witnesses and re-elicit all of the testimony would be absurd; instead, the court should simply make a public record of the inadvertent closure, its correction, anything that occurred during it, and invite the parties to make any further public record they choose on the matter. In sum, a trial court must be able to correct an open-courts error by making public what was nonpublic, so that the record will satisfy *Bone-Club* on review. *Cf. Wise*, 176 Wn.2d at 14-15

This is essentially what happened in this case. To the extent that any in-chambers discussion overstepped the bounds of permissible nonpublic court action, the judge and parties recapitulated that discussion in open court. Given

inadvertent, nor de minimis, hence the further discussion of the matter was dictum. *Id.* But, each declined to consider a closure trivial because no Washington decision had previously done so. *Id.* This is hardly a reason—it makes no attempt to examine what structural error means or whether an error might not reach that threshold because the context of the trial safeguarded open-courts goals. In this case, where no contested motion or substantive voir dire occurred out of public view, the Court must grapple this issue head on. *Wise's* idea of examining the record for an implicit *Bone-Club* analysis, i.e., an indication that the trial court adequately weighed the benefits of openness when conducting the proceedings, provides a means to measure trivial closures against open-courts policy.

their obvious attempt to comply with the case law of the time governing open voir dire, this correction brought the proceedings into open-courts compliance. No violation of the open-courts doctrine occurred. The Court should reverse the decision below and affirm Slet's conviction.

B. EVEN IF AN OPEN-COURTS VIOLATION OCCURRED IN THIS CASE, SLET IS NOT ENTITLED TO AN ENTIRELY NEW TRIAL.

The alleged closure in this case was minimal, was a product of the defense attorney's efforts to secure Slet a fair trial, in fact secured Slet a fair trial, and had a discrete and identifiable *positive* impact on Slet's case. Yet, Slet attempts to parlay the alleged closure into a structural error automatically entitling him to a new trial. This approach is incorrect because any error here was not structural, but rather harmless and invited by the defense. If Slet is entitled to any remedy, it is a remand for an open-courts hearing, not a new trial. Finally, if current case law would grant Slet a new trial, it is incorrect and harmful.

1. Any Open-Courts Error In This Case Was Not Structural; It Was Harmless.

Even if erroneous, a court closure that is demonstrably designed to serve the goals of the open-courts doctrine is not a structural error. In *State v. Momah*, 167 Wn.2d at 148, 153, 217 P.3d 321 (2009), the trial court

conducted nonpublic voir dire to increase jurors' candor and the defendant's chance at a fair trial. Because *Momah* affirmatively assented to, participated in, argued for the expansion of, and benefitted from in-chambers voir dire, the open-courts error from questioning jurors in chambers was not structural and did not merit reversal. *Id.* at 155-56. Two subsequent decisions added that, to avoid reversal, the closure must implicitly satisfy *Bone-Club. Wise*, 176 Wn.2d at 14-15; *Paumier*, 176 Wn.2d at 35-36. These cases limited *Momah* but did not overrule it. *Id.* Reading all three cases together, *Momah* controls this case.

Slert's counsel proposed the jury questionnaire in open court, announcing its purpose to secure Slert an impartial jury. VRP (Jan. 6, 2010) at 2-4. The questionnaire used was nearly identical to his original proposal. VRP (Jan. 21, 2010) at 3-4. The jurors filled out the questionnaire in the courtroom on the first day of trial. *Id.* at 14; VRP (Jan. 25, 2010) at 5-6. The participants may have discussed some of the answers off the record, but they articulated on the record in open court the reason that certain jurors were dismissed: knowledge of prior trials at which Slert was convicted. CP at 194; VRP (Jan. 25, 2010) at 5, 10-11. Again, this underscored to the public that these jurors could not fairly sit

on the jury. Defense counsel then asked for in-chambers voir dire of other potentially tainted jurors, but the court would not allow it. VRP (Jan. 25, 2010) at 10-14. The court instead required individual voir dire in open court to flesh out jurors' exposure to pretrial publicity without tainting the other members of the venire. *Id.* The record is resoundingly clear as to the purpose of these procedures, just as it is clear that Slert affirmatively assented to, participated in, argued for the expansion of, and benefitted from them. Moreover, as described in section A.3 above, the procedure here implicitly followed *Bone-Club*, even if no express *Bone-Club* findings occurred. See *Wise*, 176 Wn.2d at 14-15 (adding this requirement). As in *Momah*, any closure here was not structural error because Slert sought it to serve the goal openness is designed to serve: a fair trial in which the public can have confidence. *Cf. Momah*, 167 Wn.2d at 153-56.

To the extent that *Paumier* and *Wise* limited *Momah*, the former do not apply. Those cases distinguished *Momah* because, without an implicit or explicit *Bone-Club* analysis, in-chambers questioning of potential jurors is structural error. *Wise*, 176 Wn.2d at 14-15; *Paumier*, 176 Wn.2d at 35-36. No in-chambers questioning occurred in this case, and *Bone-Club* was implicitly satisfied. In the absence of

Paumier and *Wise*'s rationale for departing from *Momah*, the latter controls: the error here was not structural.

And if not structural, any error here was undoubtedly harmless. The alleged closure had a discrete and identifiable effect: four potential jurors. Slert's counsel himself noted that the dismissed jurors had heard that Slert was previously convicted of the same murder, indicating that no prejudice occurred. VRP (Jan. 25, 2010) at 11. Voir dire questioning of the 15 disputed jurors (and voir dire of the full panel) followed immediately afterwards, showing that Slert retained the right to a fair, public, and open selection of his jury. *Id.* at 14-124. If anything, the alleged error had a *positive* impact on Slert's trial. Because the error did not prejudice Slert's rights,⁸ the court should reverse the decision below and affirm Slert's conviction.

⁸ Any error in this case was also harmless because a defendant has the right only to reject, not to select, a particular juror. *Howard v. Kentucky*, 200 U.S. 164, 174, 26 S. Ct. 189, 50 L. Ed. 421 (1906) (quoting *Brown v. New Jersey*, 175 U.S. 172, 20 S. Ct. 77, 44 L. Ed. 119 (1899)); accord *Irby*, 170 Wn. 2d at 899 (Madsen, J., dissenting). Slert did not lose the opportunity to challenge any juror as a result of the in-chambers conference. On the contrary, his attorney used it to obtain dismissals or individual voir dire of all suspect jurors. Because Slert had no right to be tried by the particular jurors dismissed after in-chambers discussion, any error in the dismissal did not affect his substantive rights. *Irby*, 170 Wn. 2d at 901 (Madsen, J., dissenting). The State did not sufficiently demonstrate this point in *Irby*, where the propriety of the dismissals was unclear. *Id.* at 886 (Alexander, J., majority opinion). But in this case, where the record indicates that Slert's attorney wished to excuse these jurors because they were tainted by pretrial publicity, harmless error is shown.

2. Any Open-Courts Error In This Case Was Invited.

The Invited-error rule prohibits a party from obtaining appellate relief for an error that he or she set up at trial. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273, 274 (2002). Unlike RAP 2.5(a), which allows manifest constitutional errors to be raised for the first time on appeal, the invited-error rule precludes review of even highly prized constitutional claims. *State v. Heddrick*, 166 Wn.2d 898, 909, 215 P.3d 201 (2009); *State v. Henderson*, 114 Wn.2d 867, 867-71, 792 P.2d 514 (1990). This rule applies in the open-courts context, at least under certain circumstances. *Momah*, 167 Wn.2d at 155-56; *accord Wise*, 176 Wn.2d at 14-15 (limiting, but not overruling *Momah*).

The previous section recapitulates how the defense attorney sought the voir dire procedures in this case, going so far as to request that substantive questioning of individual jurors occur in chambers. *See supra* section B.1. The trial court did far less out of the public eye than the defense proposed. Any error resulting from this set up, whether intentional or unintentional, was invited by the defense. *State v. Recuenco*, 154 Wn.2d 156, 163, 110 P.3d 188

(2005) ("The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally."), *rev'd on other grounds, Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The Court should hold Slett to his trial strategy, reverse the decision below, and affirm Slett's conviction.

3. Any Open-Courts Error In This Case Should Be Resolved By Remanding For A Hearing On What Occurred In Chambers, To Make Public What Was Nonpublic, Or A *Bone-Club* Hearing.

Much of the uproar in open-courts cases arises because the bullets don't match the gun: based on an alleged error during one, brief aspect of Slett's voir dire, he requests an entirely new trial. The mismatch between the wrong and the remedy led the Court of Appeals to question whether the defendant should be entitled to a "windfall". *E.g., State v. Beskurt*, 159 Wn. App. 819, 833, 246 P.3d 580 (2011) *aff'd in part, rev'd in part*, 176 Wn.2d 441, 293 P.3d 1159 (2013); *see also Momah*, 167 Wn.2d at 150 (inspiring the question). For similar reasons, the federal public trial right permits the remedy to be tailored to the specific violation in each case. *Waller v. Georgia*, 467 U.S. 39, 49-50, 104 S. Ct. 2210, 2217, 81 L. Ed. 2d 31 (1984).

The Court did not address the issue of remedy when it granted review of *Beskurt* because the consensus was that no closure occurred. See 176 Wn.2d at 447-48 (opinion of C. Johnson, J.); *id.* at 452 (Madsen, J., concurring); *id.* at 456-57 (Stephens, J., concurring). But, at least two justices pointed out that the defendant should have been seeking a remand to address the specific open-courts violation at issue, not a blanket award of a new trial. *Id.* at 457, 459. This approach make sense: if the goal is to inform the public of the goings-on in court to obtain the “sunshine” benefits of public scrutiny, the best solution to an open-courts violation is a remand to make public what was nonpublic.

As argued above, the State's alternative positions in this case are that there was no closure, the closure was not an open-courts violation, or that any violation was harmless, invited error. But if the Court determines that Slert is entitled to some remedy, the State urges that the remedy be limited to a remand, making public what was hidden from public view in this case. This remedy either could take the form of a hearing on what transpired between counsel and the court during the in-chambers conference at issue, or could take the form of a *Bone-Club* hearing on whether that discussion was justifiably closed to the public. *Cf. Seattle Times Co. v.*

Ishikawa, 97 Wn.2d 30, 45-46, 640 P.2d 716 (1982) (remanding for a hearing to remedy open-courts error). Either hearing would serve to inform the public of the nature of the events in this case, remedying the violation. There is simply no reason to grant Slett the windfall remedy of overturning his conviction.

4. To The Extent That None Of The Above-Remedies Is Possible Under Current Case Law, That Case Law Is Incorrect And Harmful.

Open courts jurisprudence is evolving. The State believes that the current law authorizes case-specific investigation into whether an unlawful closure is structural error, whether it is harmless, whether it is invited, and what remedy results. If the Court determines the opposite—i.e., that existing precedents make even the smallest unjustified closure a structural error automatically warranting a new trial—then this jurisprudence is incorrect and harmful.

This knee-jerk remedy was incorrectly induced from more nuanced cases addressing graver violations. It derives primarily from the following opinions: *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006), *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), and *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). *Orange* relies on nothing more than *Bone-Club*. *Orange*, 152 Wn.2d at 815. *Easterling* relies on *Bone-Club* and *Neder v. United*

States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), which in turn cites *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). *Easterling*, 157 Wn.2d 167 at 180-181. *Bone-Club* relies solely on *Waller* and *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923). *Bone-Club*, 128 Wn.2d at 261-62. Following the trail backwards, then, *Bone-Club*, *Marsh*, and *Waller* are the cases from which the remedy originated.⁹

Marsh is a 1923 case in which an adult was tried for a crime and sentenced to a year of jail via private proceedings in juvenile court. 126 Wash. at 142-44. The entire criminal proceeding was nonpublic; there was no jury and he had no lawyer. *Id.* The Court held that the defendant need not show prejudice, but was presumed to be prejudiced and entitled to a new trial. *Id.* at 146-48. But, in light of the facts, the opinion had no need to discuss how this remedy might be limited if only a small portion of the trial were nonpublic.

In *Waller*, Georgia prosecutors conducted a seven-day suppression hearing closed to the public, based on concerns that wiretap evidence against future defendants would be unnecessarily publicized (and therefore made inadmissible). *Waller*, 467 U.S. at 41-42. The U.S. Supreme

⁹ There are many more cases than just these three cited in *State v. Wise*, 176 Wn.2d 1, 13-15, 288 P.3d 1113 (2012). But, the cases cited there also lead back to the same basic sources.

Court held that closing the entire hearing, which was far more than necessary to protect the wiretap evidence from disclosure, violated the federal open-courts doctrine. *Id.* at 48-49. The defendants requested a new trial, citing law that prejudice was presumed for violations of the right to open courts. *Id.* at 49. Although the Court agreed that the defendants need not prove prejudice from the closed hearing, it held that a new suppression hearing was the remedy "appropriate to the violation." *Id.* at 49-50. Anything more might give the defense an unfair windfall: a new trial was appropriate only if, on remand, the suppression hearing's outcome was different. *Id.* Thus, *Waller* did not address errors in which only a small portion of a hearing was closed, and in any event suggested that the smaller the closure, the less rigorous the remedy.

Finally, in *Bone-Club*, the trial court fully closed a pretrial suppression hearing for the testimony of an undercover police officer, on the theory that public testimony would compromise his undercover work. *Bone-Club*, 128 Wn.2d at 256-57. The trial court neither offered the defense an opportunity to object nor considered the defendant's public trial right in any way. *Id.* at 257, 261. This Court presumed prejudice to *Bone-Club* for the closed portion of

the testimony, remanding for a new trial. *Id.* at 261-62. The Court declined the State's request (under *Waller*) to remand solely for a new suppression hearing, reasoning that the officer's testimony could be different if in open court and would be available to impeach the officer at trial. *Id.* In doing so, *Bone-Club* did not express any disagreement with *Waller's* pronouncement that the remedy for an open-courts violation should be tailored to it; the opinion merely stated why the error in the case (closed suppression testimony) was related to the trial (impeach the witness). *See id.*

These seminal open-courts cases reveal that the structural error remedy was never intended to be a free pass to a new trial. Rather, these cases involved major closures of contested proceedings at which witnesses would be called and questioned; the remedy was tailored to the violation, but was broad when the violation itself was far-reaching.¹⁰

This understanding dovetails with the definition of structural error purportedly applied in open-courts opinions. A structural error is supposed to be a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Neder v. United States*,

¹⁰ For what it is worth as the seminal case in voir dire closure, *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2004), also dealt with a major closure of a contested proceeding: two days of substantive voir dire questioning closed to the public.

527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). Such an error subverts the entire trial process and undermines its ability to determine guilt or innocence. *Id.* at 8-9. Undoubtedly, conducting major portions of a trial or hearing behind closed doors deprives a defendant of the ineffable salient effect that openness has on criminal proceedings. Requiring the defendant to prove prejudice from the lack of that effect would be impossible. *Waller*, 467 U.S. at 49 n.9. But, this case demonstrates that some instances of nonpublic court action do not infect the trial process and do not affect its fundamental fairness. Considering the extent to which an open-courts error is structural and limiting the remedy appropriately does not disavow the open-courts doctrine; it applies it as originally (and sensibly) intended.

What's more, none of the marquee open-courts cases above dealt with closures invited by the defense for the purpose of securing the defendant a fair trial. Those cases hold that it would be unfair to make the defendant prove prejudice from the closure to which he was subjected—which is quite different from holding that the appellate court should ignore the fact that the defendant actually benefitted

from the closure he sought at trial. Applying a rote new-trial remedy when the defendant affirmatively benefitted from the closure fails to tailor the remedy to the violation and grants the defendant a windfall. *See Waller*, 467 U.S. at 49-50.

Here, the only open-courts objection is that the parties discussed one matter off the record, then announced it immediately afterwards on the record along with the reasons therefore. They proceeded to carry out an entirely fair, open voir dire and a fair, open trial. The discrete nature of the alleged violation undermines its connection to structural error because there is affirmative evidence that this was one small decision in a long, fair process. The idea that such a violation should automatically result in a new trial is inconsistent with the cases on which the open-courts doctrine is based, and is fundamentally incorrect.

By the same token, the absence of an invited- or harmless error analysis in open-courts doctrine, or a mechanism to tailor the remedy to the open-courts violation, is harmful because it is unfair. In no other area of criminal law may a defendant challenge, for the first time on appeal, a procedure that he requested and that actually benefitted him, on the grounds that it was a per se reversible error subject to no exceptions. The invited error doctrine was

created to prevent this sort of poison pill. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273, 274 (2002).

Without such limitations, the open-courts doctrine also mocks the very policies it is designed to implement: public access to trials is supposed to make them fair, but currently, practices that facilitate a fair trial receive no different treatment than heedless or malicious closures. Jettisoning whole trials for small missteps undermines, rather than fosters, public confidence in the justice system. It unfairly benefits the defendant and wastes the significant resources required to conduct criminal trials. See *Waller*, 467 U.S. at 49-50 (avoiding this outcome).

It is hard to imagine how the presence of the public would have changed the outcome of the closure here: by Slet's own attorney's account, the excused jurors knew about Slet's previous trials, at which he had been convicted of the same crime. Scrapping Slet's third murder trial because of this small defect is not required by the state or federal constitutions' requirements of open justice, and doing so undermines the goals that those provisions seek to foster. The Court should reverse the decision below and affirm Slet's conviction.

V. CONCLUSION

Kenneth Slert seeks to overturn his murder conviction because, leading up to voir dire in open court, the parties informed the judge in chambers that they agreed upon four jurors to be dismissed for cause. The defense attorney noted in open court that these jurors knew about Slert's prior trials (at which Slert had been convicted of the same murder). Because experience and logic demonstrate that the in-chambers discussion did not need to be public, and because any closure here was minimal, harmless, and invited error, the Court should reverse the decision below and affirm Slert's conviction.

RESPECTFULLY submitted this 7th day of June, 2013.

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by: 

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Subject: RE: State of Washington vs. Keneth Slert, 87844-7

Rec'd 6-7-13

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Sent: Friday, June 07, 2013 12:07 PM
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Subject: State of Washington vs. Keneth Slert, 87844-7

Attached for filing please find the State's Supplemental Brief for the above case.

Thanks,

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