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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

BENITO GOMEZ, Respondent

RESPONDENT'S SUPPLEMENTAL BRIEF

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ORIGINAL

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A. ISSUE PRESENTED FOR REVIEW

Whether the trial court violated Mr. Gomez's constitutional public trial right by prohibiting the public from entering the courtroom once court was in session, without considering the factors set forth in *Bone-Club*.

B. STATEMENT OF THE CASE

The State charged Benito Gomez with one count of first degree murder and six counts of first degree assault. (CP 145-147). Prior to trial, after the jury was selected, the trial court addressed the security measures in place for the trial. (CP 140, 148-158). The trial court issued the following ruling regarding closure of the courtroom:

We continue to have rules of procedure where people have to be on time for proceedings here. *We do not allow people to come into the courtroom after the court is in session for not only security reasons but as well as the distraction that that causes when people come in.* As you all know who have been here and tried cases, when a jury is impaneled in a case such as this, it doesn't make any difference what type of case it might be, but when people come into the courtroom after the matter is in session, they stop listening to the attorneys or to the witness who is testifying and they immediately direct their attention to the person that is coming in the door. And even though that person may be very innocent in coming in late, that distracts from the proceeding. And you run the potential that whatever is being said or addressed by the testimony, by the questions, by the Court's instructions is not going to be heard by the jury or members of that jury. And again, that then leads to problems and distractions and the orderly processing of that case.

(RP 153-154) (emphasis added).

Mr. Gomez did not object to this ruling. (RP 153-154). The trial court did not consider the five factors set forth in *State v. Bone-Club*. (RP 153-154); *see also State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

The jury found Mr. Gomez guilty of the lesser-included offense of second degree murder, and the jury also found him guilty of six counts of first degree assault, as charged. (CP 206-212; RP 666-667). Mr. Gomez appealed. (CP 258-272).

In an unpublished decision filed on March 27, 2014, the Court of Appeals reversed Mr. Gomez's convictions and remanded the case for a new trial, holding that the trial court failed to provide a public trial when it closed entry into the courtroom after court sessions began. This Court granted review of this unpublished decision.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. GOMEZ'S CONSTITUTIONAL PUBLIC TRIAL RIGHT BY PROHIBITING THE PUBLIC FROM ENTERING THE COURTROOM ONCE COURT WAS IN SESSION, WITHOUT CONSIDERING THE FACTORS SET FORTH IN *BONE-CLUB*.

Both the federal and Washington State constitutions provide that a defendant has a right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288

P.3d 1113 (2012) (*citing* Wash. Const. art. I, § 22; U.S. Const. amend VI).

This right is of utmost importance in our criminal justice system:

A public trial is a core safeguard in our system of justice. 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. The open and public judicial process helps assure fair trials. It deters perjury and other misconduct by participants in a trial. It tempers biases and undue partiality. The public nature of trials is a check on the judicial system, which the public entrusts to adjudicate and render decisions of the highest import. It provides for accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized. And openness allows the public to see, firsthand, justice done in its communities.

Id. at 5.

“In *Bone-Club*, this court enumerated five criteria that a trial court must consider on the record in order to close trial proceedings to the public.”

Id. at 10 (*citing Bone-Club*, 128 Wn.2d at 258-59). “A trial court is required to consider the *Bone-Club* factors *before* closing a trial proceeding that should be public.” *Id.* at 12 (emphasis in original); *see also State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012).

A defendant may raise the constitutional right to a public trial issue for the first time on appeal. *State v. Koss*, No. 85306-1, slip op. at 5 (Wash. Sept. 25, 2014) (*citing Wise*, 176 Wn.2d at 9; *State v. Brightman*, 155 Wn.2d 506, 517-18, 122 P.3d 150 (2005)). Whether a defendant’s constitutional

public trial right has been violated is reviewed de novo. *Id.*, slip op. at 5-6 (citing *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)).

“A violation of the public trial right is structural, meaning prejudice is per se presumed to inhere in the violation.” *State v. Njonge*, No. 86072-6, slip op. at 7 (Wash. Sept. 25, 2014) (citing *Wise*, 176 Wn.2d at 13-14; *Paumier*, 176 Wn.2d at 35; *Easterling*, 157 Wn.2d at 181). Washington has not adopted a *de minimis* standard in the context of the public trial right. *See Easterling*, 157 Wn.2d at 180-81; *see also State v. Frawley*, No. 80727-2, slip op. at 16-17 (Wash. Sept. 25, 2014) (plurality opinion declining to take a *de minimis* approach); *State v. Shearer*, No. 86216-8, slip op. at 9-12 (Wash. Sept. 25, 2014) (plurality opinion rejecting the State’s argument that courtroom closures were *de minimis*, because structural error standard “forecloses the possibility of *de minimis* violations.”).

This Court recently adopted a three-step framework to analyze public trial right cases. *See State v. Smith*, No. 85809-8, slip op. at 5, 15-16 (Wash. Sept. 25, 2014). “The steps of this public trial right framework are: (1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) If so, was the closure justified?” *Id.*, slip op. at 15-16.

Turning to the first question, the proceeding at issue here is the trial itself, and therefore, the public trial right is implicated. *See State v. Lormor*,

172 Wn.2d 85, 93, 257 P.3d 624 (2011) (the public trial right “certainly applies during trial”); *see also Njonge*, No. 86072-6, slip op. at 6 (listing proceedings where the public trial right applies).

The second question asks whether there was a closure of the courtroom. *See Smith*, No. 85809-8, slip op. at 5, 15-16. Mr. Gomez bears the burden of showing that a closure occurred. *See Koss*, No. 85306-1, slip op. at 12; *Njonge*, No. 86072-6, slip op. at 9.

A courtroom closure “occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.” *Lormor*, 172 Wn.2d at 93. In *Lormor*, this Court held no courtroom closure occurred where only one person was excluded from trial. *Id.* at 92-93. The Court reasoned “[n]o showing is made that public attendance during the trial, or at any other stage, was prohibited.” *Id.* at 92. And, the Court found “there was no general prohibition for spectators or any other exclusion of the public.” *Id.*

Here, the trial court closed the courtroom by prohibiting the public from entering the courtroom any time court was in session throughout the four-day trial. (RP 153-154). This ruling was a general prohibition for spectators and an exclusion of the public from the trial. *Cf. Lormor*, 172 Wn.2d at 92-93 (the exclusion of one person from trial, without a general prohibition for spectators, was not a courtroom closure).

The State argues there must be a complete closure, and that “[h]ere it is apparent that the courtroom was full of spectators.” (Petition for Review, p. 6). However, the record only contains one reference to the number of spectators in the courtroom. (RP 150). On the first day of trial, prior to its closure ruling, the trial court stated “the courtroom is rather full today of spectators concerning this particular case.” (RP 150).

It appears the State is arguing a courtroom closure occurs only when the courtroom contains no spectators. (Petition for Review, p. 6). However, this Court should not interpret the definition of a closure from *Lormor*, that a courtroom closure “occurs when the courtroom is completely and purposefully closed to spectators . . . [.]” to mean that a closure only occurs when the courtroom contains no spectators. *See Lormor*, 172 Wn.2d at 93. Instead, this Court should find a courtroom closure occurs when the public cannot enter a courtroom with available space during a proceeding to which the public trial right attaches, regardless of whether there were already observers seated inside. This interpretation of the definition of a courtroom closure upholds the safeguards provided by the constitutional right to a public trial. *See Wise*, 176 Wn.2d at 5.

One Washington case upheld the trial court’s exclusion of additional members of the public from a closing argument, when those already seated in the courtroom were permitted to remain. *See State v. Collins*, 50 Wn.2d

740, 745-48, 314 P.2d 660 (1957). However, this case did not interpret the constitutional public trial right articulated in article I, § 22, and it preceded this Court's adoption of the *Bone-Club* factors that must be considered by the trial court in order to close trial proceedings to the public. *See Collins*, 50 Wn.2d at 745-48; Wash. Const. art. I, § 22; *Bone-Club*, 128 Wn.2d at 257-59. Therefore, this Court's current jurisprudence of the constitutional public trial right should control in determining whether a closure occurred in Mr. Gomez's trial.

This Court recently considered the issue of when a courtroom closure occurs. *See State v. Njonge*, No. 86072-6, slip op. at 9-12 (Wash. Sept. 25, 2014). In *Njonge*, this Court found the record did not establish a courtroom closure occurred during the portion of jury selection in which the court excuses jurors for hardship. *See Njonge*, No. 86072-6, slip op. at 9-12. This Court found that on the record presented, it could not determine that the public was excluded. *Njonge*, No. 86072-6, slip op. at 11-12.

The *Njonge* Court reasoned that the discussions between the trial court and observers "does not demonstrate that *no* observers were going to be allowed in the courtroom during the first stages of voir dire." *Njonge*, No. 86072-6, slip op. at 9 (emphasis in original). This Court also reasoned that a conversation between the trial court and the prosecutor about allowing observers to enter as space became available due to jurors being excused did

not “demonstrate that no spectators had been present during the hardship excusals.” *Njonge*, No. 86072-6, slip op. at 3-4, 11. This Court stated “[t]his may be one reasonable inference, but the record can equally be read to mean that additional persons were admitted as space became available.” *Njonge*, No. 86072-6, slip op. at 11. This Court also found there were space limitations in the courtroom, and “the size of a courtroom alone cannot effect a closure.” *Njonge*, No. 86072-6, slip op. at 11.

Here, in contrast, the record establishes a courtroom closure occurred. (RP 153-154). When court was in session, the public was not allowed to enter the courtroom. (RP 153-154). This ruling applied to all members of the public seeking to view the trial who were not present for the few moments before the trial court began its sessions each day. The closure ruling was not based on space constraints. (RP 153-154).

Because the plain language of the trial court’s ruling imposes a closure, the burden shifts to the State to overcome the strong presumption that the courtroom was closed. *See Brightman*, 155 Wn.2d at 516.

Finally, under the third question, the closure here was not justified, because the trial court did not conduct a *Bone-Club* analysis to justify the closure. *See Smith*, No. 85809-8, slip op. at 5 n.5, 15-16; *see also Wise*, 176 Wn.2d at 12 (the trial court must consider the *Bone-Club* factors before closing the courtroom). “It remains true that the trial court, not the

defendant, is responsible for making a record that the proper procedures were followed before closing a court proceeding to which the right to an open trial attaches.” *Koss*, No. 85306-1, slip op. at 12 (citing *Bone-Club*, 128 Wn.2d at 258-59).

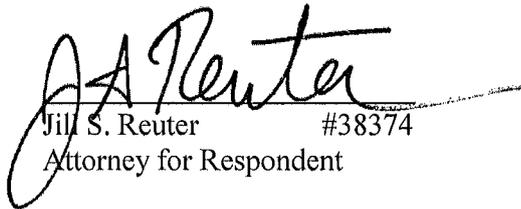
The trial court violated Mr. Gomez’s constitutional public trial right by prohibiting the public from entering the courtroom once court was in session, without considering the factors set for in *Bone-Club*.

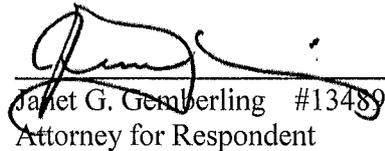
D. CONCLUSION

A courtroom closure occurred here. This Court has consistently required strict compliance with the *Bone-Club* factors before any portion of a criminal trial may be closed to the public. Because the trial court failed to abide by this requirement, the decision of the Court of Appeals should be affirmed and the case remanded for a new trial.

Dated this 30th day of September, 2014.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
) Petitioner,) No. 90329-8
)
) vs.) CERTIFICATE
) OF MAILING
)
 BENITO GOMEZ,)
)
) Respondent.)

I certify under penalty of perjury under the laws of the State of Washington that on September 30, 2014, I mailed a copy of the Answer to Petition for Review in this matter to:

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Signed at Spokane, Washington on September 30, 2014.


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Please accept for filing in State v. Gomez, 90329-8, the attached Respondent's Supplemental Brief.

Thank you.

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