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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of

M.H.P.

SUPPLEMENTAL BRIEF OF THE STATE OF WASHINGTON

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 ORIGINAL

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I. INTRODUCTION

King County Superior Court has adopted a blanket policy that certain types of motions in civil dependency and termination of parental rights cases are filed under seal. This practice violates the constitution, statutes, and court rules that require courts to be open absent a showing of a particularized need for closure. It also harms children the state is seeking to protect by delaying these proceedings and denying the state and the children's appointed advocates an opportunity to object to secrecy. And it wastes public resources by routinely leading to secret orders that impose costs that ultimately serve no purpose.

If all of these harms were necessary to protect the rights of parents in these proceedings, the merits of this procedure would at least be debatable. But the reason no other county in the state takes a similar approach is that General Rule 15(c) provides an alternative mechanism for protecting parents' rights without violating the law, harming children, or wasting public funds. Simply following this rule allows courts to seal or redact motions when legally justified without the attendant harms that flow from King County's blanket approach. The Court should reject King County's default secrecy rule and instead require that these motions be evaluated under the test for justifying closure applied to all other requests.

II. STATEMENT OF THE ISSUES

1. Under the Washington Constitution, case law, and the court rules, the court record may be closed only if the court first identifies a compelling interest in closure, weighs competing interests, and uses the least restrictive means. May King County Superior Court use a blanket procedure that allows juvenile cases to be closed without first identifying the compelling interest, weighing the rights of the child, and attempting to limit closure by redacting the documents?

2. Given that GR 15(c) allows a record to be sealed where necessary to protect a litigant's due process rights, is there a basis for King County to develop an alternative rule in the name of due process that ignores this Court's test for when court closures are justified?

3. When a civil rule and case law provide a procedure for closure in civil cases, may the superior court ignore the civil rule and apply a rule that allows a criminal defendant to file a confidential motion?

III. STATEMENT OF THE CASE

This case concerns M.H.P., a six year-old boy. Mental illness, substance abuse, and violence caused his parents to neglect him, and, by his second birthday, the court found M.H.P. dependent. CP 2-4, 6-8. Although the State offered a variety of services to the parents, they were unable to remedy their problems and create a safe home for the child. CP 6. The

Department filed a petition for termination of parental rights, which was supported by the child's court-appointed special advocate (CASA).

The trial court issued a case schedule establishing a discovery cutoff and deadline for disclosing witnesses. CP 1-10, CP 11-4, 15-16. After these deadlines had passed, the parents filed three ex parte motions over a three month period. The motions were filed under seal pursuant to an informal practice used only in King County Superior Court, which permits indigent parents to file ex parte motions seeking public funding for experts. CP 296, 304. Under this procedure, the parents provided no notice of the motions to the State, the child's CASA, or the public. The motions were considered by a judge who hears criminal cases, not dependency and termination cases. In response to each motion, the judge issued a sealed order authorizing public funding to hire an expert. CP 59- 105, 180-194. None of the orders considered whether the facts of the case necessitated an ex parte motion or a sealed order or whether there was a less restrictive alternative to sealing the motion and order. As with the motions, the court and parents gave no notice the sealed orders had been issued. After the sealed orders were entered, the parents moved to continue the trial.

While reviewing the legal file, the child's CASA discovered that sealed motions and orders had been entered. CP 318. The State challenged entry of the sealed orders entered in M.H.P.'s case as well as sealed orders entered in four other dependency and termination of parental rights cases, involving a total of eleven children. CP 195-286. The State brought a motion to vacate the ex parte orders before the superior court criminal judge who had entered them. *Id.* The State's motion was denied. CP 438-443, 496-497. A month later, M.H.P.'s mother obtained an additional ex parte order to seal and appoint a defense expert to observe the mother with the child. CP 465- 477.

The Court of Appeals granted discretionary review of the State's motion to review the ex parte orders in this case, but stayed review of the other cases pending resolution of the appeal in M.H.P.'s case. In a split decision, the court affirmed the trial court's decision to allow the ex parte motions. *State v. Parvin*, 181 Wn. App. 663, 326 P.3d 832 (2014). Judge Becker dissented, concluding that the majority opinion sacrifices openness for administrative convenience; unwisely expands the court's authority to create its own procedures outside the rule-making process; creates a formula for unnecessary delay and expense; treats these cases as identical to criminal cases when they are not; and

neglects to consider the interests of the children and the State. *Parvin*, 181 Wn. App. at 683-88 (Becker, J., dissenting).

The State filed a timely petition for review. The parents responded by filing a motion to dismiss the case as moot. The parents contended that in the future, requests for funding will be made to the Office of Public Defense and that the King County Superior Court procedure at issue has been abandoned. After the State established that the challenged procedure is still being used, this Court denied the parents' motion.

IV. ARGUMENT

The Court should reverse the Court of Appeals and hold that the King County Superior Court erred by adopting a routine practice of secret motions and rulings in juvenile cases. First, the practice cannot be reconciled with constitutional and statutory obligations for open courts. Second, the rights of the parents to a fair hearing are fully protected by GR 15(c) and applying the *Bone-Club* test prior to closure. Finally, because GR 15(c) and this Court's decisions provide a process for hearing a motion to seal a civil record, it was improper to avoid those procedures by importing a criminal rule instead.

A. The King County Practice Violates Constitutional, Statutory, and Court Rule Provisions Mandating Open Courts

A general practice permitting secret motions in civil parental termination cases violates Washington’s constitutional requirement that “justice in all cases shall be administered openly” Wash. Const. art. I, § 10. This Court has vigorously stressed that “the open operation of our courts is of utmost public importance.” *Dreiling v. Jain*, 151 Wn.2d 900, 903, 93 P.3d 861 (2004). Open proceedings are a “core safeguard,” providing “accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized.” *State v. Wise*, 176 Wn.2d 1, 5-6, 288 P.3d 1113 (2012).

In cases involving a dependency or termination of parental rights, the constitutional mandate of open courts is reinforced by RCW 13.34.115(1). The statute requires that all dependency and termination cases “shall be open to the public” unless the court specifically finds that closure is in the best interests of the child. The legislature has declared that the child’s health and safety are “the paramount concern,” and that the child’s right to a “safe, stable, and permanent home” includes the right to “speedy resolution” of the termination proceeding. RCW 13.34.020.

The requirement of open courts is also embedded in the Superior Court Civil Rules governing termination proceedings. JuCR 1.4(a) (stating that the Superior Court Civil Rules shall apply in proceedings other than those involving a juvenile offense); CR 5, CR 6, KCJuCR 3.12 (requiring motions in dependency and termination proceedings to be served on other parties). No provision in the civil or juvenile rules permits secret motions and rulings. If the court or a party wants to seal or redact records, General Court Rule (GR) 15(c)(1) requires the moving party to give notice to all parties.¹

Despite the echoing call for open courts—in the constitution, statutes, and state court rules—King County has informally instituted a practice allowing blanket secrecy for certain motions in termination cases. Although the interests of the child are supposed to be paramount, in King County the trial court need only consider the interest of the parents. As Judge Becker observed, defying the requirement of open courts is expedient for the trial court and the parents, “but it sacrifices openness, a

¹ GR 15(c)(1) provides:
Sealing or Redacting Court Records.

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceedings, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile.

value that has a higher priority.” *Parvin*, 181 Wn. App. at 686 (Becker, J., dissenting).

1. Juvenile proceedings can be closed after an individualized determination of necessity

The parents argue that the trial court’s disregard for the constitutional and statutory requirement of open proceedings was justified by the need to maintain the confidentiality of the parents’ experts and trial strategy. But when a party believes there is a compelling need for secrecy, there is a remedy that respects the rights of the parties and the public. The public and parties can be barred and the record can be sealed after the trial court makes an individualized determination that closure is required. *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). The trial court must name the right that the parties and the public will lose if secret proceedings are permitted; identify the compelling interest that motivates closure; weigh the competing rights; provide an opportunity for objection; and consider alternatives to closure and adopt the least restrictive option. *Bone-Club*, 128 Wn.2d at 258-59.

The *Bone-Club* test gives the trial court the power to provide confidentiality when it is needed to protect due process, while respecting the constitutional mandate of open proceedings. The five-part test ensures

that closure is “carefully considered and specifically justified.” *Dreiling*, 151 Wn.2d at 904. If the law had been followed in this case, the trial court would have determined whether closure was necessary for each motion the parents brought. The trial court could have sealed each motion and order to the extent it was necessary. A less restrictive approach, such as redaction, also could have been used, so that limited access to the record would remain.

The requirements of *Bone-Club* were not met when, months after the records of three ex parte motions were sealed, the trial court issued a memorandum justifying its categorical decision to permit secret, ex parte motions in dependency and termination cases. As this Court has repeatedly held, “[a] trial court is required to consider the *Bone-Club* factors *before* closing a trial proceeding that should be public.” *Wise*, 176 Wn.2d at 12 (citing *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006)). Here, applying the test after the fact was pointless, because it was no longer possible for other parties to warn the court that competing interests, such as the child’s safety and need for speedy resolution, would be harmed by closure.

There is no justification for a blanket exemption from applying the *Bone-Club* test. The test gives the judge the tools needed to fully protect

the parents' rights while also considering other interests. If there is a compelling need for confidentiality, the court can seal or redact the record.

2. In addition to protecting the parents, the *Bone-Club* test preserves the rights of the child

In addition to protecting the parents' right to a fair hearing, the *Bone-Club* test protects the other parties to the case. Before closing the record, the court weighs the competing rights and provides an opportunity for objection. The Court of Appeals contends that allowing the parties to see a redacted version of the motion would have been meaningless, because the documents would have contained so little information. *Parvin*, 181 Wn. App. at 673. But there are at least four concrete ways in which applying the *Bone-Club* test and providing redacted notice of the motion would have protected the rights of the parties to this case and assisted the judge in making a fair ruling.

First, notice allows the State and the CASA to alert the court to other findings and orders in the case. In this case, for example, one of the secret orders permitted the expert to observe the parents and M.H.P. interact in the parents' home. CP 472. Although the parents involved in this case were permitted to have unsupervised visits with the child, notice allows the parties to inform the court of protective orders entered in the case and alert the court to any findings indicating that interaction with the

child poses a threat to his welfare. In this case, notice would have allowed the parties to inform the court that the child had already been evaluated multiple times by the parents chosen expert.² Allowing the parties an opportunity to explain what has occurred in the case is a particularly important concern, because in King County these motions to seal are typically heard by a judge that is not assigned to hear dependency and termination cases. Rather than making decisions blindly, the *Bone-Club* test gives the judge the benefit of hearing the competing interests of the parties.

Second, notice of the motion would have allowed the State and the child's CASA to tell the judge about the discovery cut-off date and case schedule. This may have prompted the court to question the wisdom of authorizing the use of public funds to hire an expert whose opinion would come too late to be utilized. *See Parvin*, 181 Wn. App. at 685 (Becker, J., dissenting). The Court of Appeals decision admonishes trial courts to consider discovery dates and the case schedule, and suggests that trial courts deny motions for expert expenditures made beyond the established discovery cut-off dates. *Parvin*, 181 Wn. App. at 676, n.7. The Court of Appeals' advice to motion judges is a poor substitute for allowing

² RCW 13.34.370 requires that evaluations ordered of parents in juvenile proceedings be conducted by mutually agreed providers, and pursuant to this statute the mother in this case had already been evaluated by a provider of her choice when she brought two additional motions for experts. CP 59-71, 180-194.

adversarial parties to present competing information to the court and make objections.

Third, an individualized determination would have allowed the court to limit closure by redacting only the confidential information. “The court should attempt to use redaction rather than wholesale sealing of the entire document.” *State v. Chen*, 178 Wn.2d 350, 355, 309 P.2d 410 (2013). A blanket rule shielding entire documents from the public is excessive and a pointless intrusion on the rights of the child and the public.

Finally, providing notice would have protected the parties’ right to appeal the order sealing the record. When orders are hidden from the State and the CASA, parties are stripped of their right to seek review. In this case, the trial court’s concealment of the record was inadvertently discovered by the CASA. *Parvin*, 181 Wn. App. at 684 (Becker, J., dissenting). Had this not happened, appellate review would have been impossible. In addition to harming the parties, preventing the appellate courts from reviewing the trial courts’ sealing of records erodes public confidence in the judicial system.

At its core, the *Bone-Club* test balances the need for secrecy against the benefits of an open judicial system. The parents’ alleged need for secrecy would have been satisfied by redacting the potential expert’s

name and the attorney's trial strategy for requesting the appointment. On the other hand, closure placed unwarranted burdens on the other parties by depriving them of the ability to object to closure, to provide case schedule information that the Court of Appeals admonishes trial courts to consider before authorizing public funding, and to preserve the right to appeal. The balance tips conclusively in favor of upholding the constitutional requirement of open courts and requiring compliance with GR 15(c).

B. Due Process Is Fully Protected Without Instituting Blanket Secrecy

The Court of Appeals held that compliance with the open courts mandate and GR 15(c)(1) would have violated the parents' due process rights. *Parvin*, 181 Wn. App. at 670-76. Whether providing notice of a hearing to seal violates due process rights requires examination of the familiar *Mathews* balancing factors, including (1) the private interest affected, (2) the risk of error created by requiring notice and a hearing before sealing records, and (3) the government interest in notice and a hearing prior to sealing records. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). All of these factors favor openness here.

The first *Mathews* factor examines the private interest affected. *Mathews*, 424 U.S. at 335. As the Court of Appeals notes, parents have the

right to a fair trial and the right to effective legal assistance. *Parvin*, 181 Wn. App. at 671. The parents contend that requiring disclosure of their proposed experts and trial strategy would have prejudiced them. But that argument does not justify King County's secret ex parte practice or excuse complying with GR 15(c). If there is a compelling need to protect the identity of the expert or any part of the motion regarding the parents' case strategy, it can be redacted. The parents have not demonstrated that a redacted motion would undermine their right to counsel. The need to keep an attribute of trial preparation confidential does not justify a blanket presumption of secrecy with no individual showing of a compelling need for closure.

In considering the first factor, it should be noted that even in criminal proceedings, the courts have not uniformly recognized a constitutional right to an ex parte request for funding. While Washington's criminal rules allow criminal defendants to file an ex parte request, there is not an automatic federal constitutional entitlement to secrecy in such motions. *See, e.g., State v. Apelt*, 176 Ariz. 349, 364-65, 861 P.2d 634 (1993) (concluding that neither the Fourteenth Amendment guarantee of due process nor equal protection entitles defendants to an ex parte hearing on request for expert assistance); *State v. Floody*, 481 N.W.2d 242, 256 (S.D. 1992) (finding no constitutional grounds for ex parte hearing);

Ramdass v. Commonwealth, 246 Va. 413, 421-22, 437 S.E.2d 566 (1993) (rejecting federal and state constitutional arguments for an ex parte hearing), *rev'd on other grounds sub nom.*, 512 U.S. 1217, 114 S. Ct. 2701, 129 L. Ed. 2d 830 (1994); *State v. Touchet*, 642 So.2d 1213 (La. 1994) (permitting ex parte request for funding only with notification to the State, opportunity for State objection, and defendant's showing of prejudice).

The second *Mathews* factor also fails to help the parents' due process argument. That factor examines the risk of erroneous deprivation posed by the procedures used—GR 15(c)(1) and *Bone-Club*—and the probable value, if any, in the additional safeguards sought by the parents—a secret ex parte motion practice. *Mathews*, 424 U.S. at 335. The *Bone-Club* analysis permits closure if the parents demonstrate a compelling interest. Because trial courts have discretion to hear ex parte motions when there is a compelling need to do so, and to devise other means of concealing the confidential portions of the record, the existing requirements for open courts and notice under GR 15(c) do not chill the parents' right to effective counsel or increase their risk of an incorrect ruling in the underlying proceeding. Since GR 15(c) and the *Bone-Club* test fully protect the parents, there is no need for allowing blanket secrecy

of the entire motion and court order, including information that does not need to be kept confidential.

Finally, the third *Mathews* factor requires consideration of the State's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews*, 424 U.S. at 335. The State and the child's CASA have a tremendous interest in open proceedings. "The State's primary interest is providing for the health and safety of children." *In re A.W.*, 2015 WL 710549, *9 (Feb. 19, 2015) (citing *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 12, 256 P.3d 339 (2011)) (recognizing that the State's "highest interest" is "in the protection of children"). The State and the CASA need notice so that they can inform the court if ordering contact with the parents or the expert poses a risk of harm to the child. This can occur when the court overrides protective orders in the case to allow the expert to witness interaction with the parents and child in an unsafe environment. It could also theoretically occur if the expert were permitted to conduct harmful physical tests of the child, remove the child from school, or otherwise exert control that conflicts with prior orders or findings in the case.

The State is also burdened by an inability to object to untimely expenditures, which can lead to a delay in proceedings and a waste of public resources. Delayed proceedings harm the child's interest in a

speedy resolution of the case. RCW 13.34.020. Without notice, it is impossible for the State and the child's CASA to inform the court about the case schedule or the burdens that delay and redundant evaluations will place on the child. The result is that the court is left to make a decision "based on one-sided information." *Parvin*, 181 Wn. App. at 685 (Becker, J., dissenting).

Because individualized determinations of the need for closure protect parents' need for confidentiality while ensuring that the child's needs for protection and speedy resolution are considered, the *Mathews* factors weigh in favor of barring blanket closure.

C. Criminal Rules Cannot Be Imported to Negate the Requirement of Open Civil Court Proceedings

As this Court has recognized, court rules should be adopted through a public rule making process, not through "judicial fiat." *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 592, n.4, 80 P.3d 587 (2003). The Court of Appeals justified its departure from *Carlstad* by stating that the civil and juvenile rules are silent on the question at issue, and a fair hearing could not be provided without importing the criminal rules. This is incorrect. GR 15(c) provides a means of closing civil proceedings without jeopardizing parents' right to a fair trial. Since the civil rules address the issue, there was no basis for importing a criminal rule.

GR 15(c) allows the court or a party to a juvenile proceeding “to request a hearing to seal or redact the court records.” The factors to be considered during the hearing are set out in the *Bone-Club* test. Since the rule allows the court to protect the parents’ need for a fair hearing, there is no constitutional justification for a blanket procedure allowing secrecy in parental termination cases.

A civil termination case is not comparable to a criminal case. In a criminal case, ensuring a fair process for the accused is the paramount interest. The rules of criminal procedure allow a defendant to make an ex parte motion to obtain funds for an investigator or expert and allow the court to seal the order. CrR 3.1(f)(2). Motions under CrR 3.1(f) are not required to comply with the notice requirement of GR 15(c) or receive a *Bone-Club* analysis. The State, the only other party to the criminal case, is not entitled to notice or an opportunity to be heard when a motion is made under CrR 3.1(f). As Judge Becker notes, when a defendant decides to give up his right to speedy trial so that he can consult additional experts, he has no obligation to consider the rights of anyone else. *Parvin*, 181 Wn. App. at 687 (Becker, J., dissenting).

But in a civil dependency or parental termination case, the child’s rights must also be considered. The child and the State have a compelling interest in notice and an opportunity to object to interaction that may put

the child in danger. In addition, unlike a criminal case, the right to a speedy resolution is held by the child—not by the parents. RCW 13.34.020. Requiring compliance with GR 15(c) and application of the *Bone-Club* test ensures that the judge will have all of the information necessary to protect the parent’s right to a fair hearing and consider how the child’s rights may be harmed by a particular motion.

Since GR 15(c) allows the parents to move to seal the record to protect their right to a fair hearing, there was no basis for importing the criminal rules. There is simply no justification for dispensing with the *Bone-Club* test in cases involving termination of parental rights.

V. CONCLUSION

The Court should reverse the Court of Appeals and hold that the King County Superior Court erred by adopting a practice for secret motions and rulings in juvenile cases.

RESPECTFULLY SUBMITTED this 25th day of March 2015.

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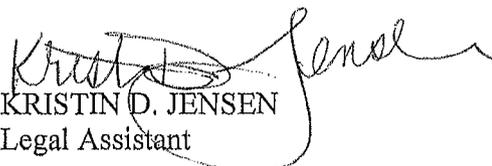
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I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of foregoing Supplemental Brief of the State of Washington to be served via electronic mail and First Class US Mail, postage paid, on the following:

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Dear Clerk:

Attached for filing in case no. 90468-5, please find the Supplemental Brief of the State of Washington.

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