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Supreme Court No. 93685-4
Court of Appeals No. 32708-6-III
(consolidated with No. 32760-4-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Petitioner,

vs.

RALPH E. WHITLOCK and
DAVID R. JOHNSON,

Defendants/Appellants/Respondents.

APPEAL FROM THE ASOTIN COUNTY SUPERIOR COURT
Honorable Scott D. Gallina, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT DAVID R. JOHNSON

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ORIGINAL

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A. ISSUE PRESENTED

Whether the court in a joint bench trial violated the defendants' constitutional right to a public trial when it heard unrecorded arguments and ruled on evidentiary objections in chambers without conducting the courtroom closure analysis under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and later had the attorneys place on the record what had been discussed in chambers.

B. SUPPLEMENTAL STATEMENT OF FACTS

During trial, counsel for Mr. Johnson attempted to cross-examine a witness on whether she had a prior business relationship with law enforcement. The State objected and requested a sidebar. The court recessed the bench trial and discussed the evidentiary objection with counsel in chambers. RP 338–39 (attached as Appendix A).

The ten (10) minute conference was held in chambers behind a presumably closed door. RP 339 (Appendix A, page 2); *see* Appendix

C¹, page 4. The defendants were not present for the conference. The conference was not recorded.

Approximately one and one-half (1-1/2) hours later, at the end of that morning's testimony, the trial court excused the last witness, announced "let's go ahead and take a lunch break at this time," noted the court "would like to have counsel stick around for a minute," and directed staff to turn off the recording machine "for a minute." RP 423 (Appendix B, page 1); *see* Appendix C, page 5. The court recessed for seven (7) minutes. *See* Appendix C, page 5.

Once back on the record, the judge and attorneys memorialized the purpose of the conference. RP 424–27 (Appendix B, pages 2–5); *see* Appendix C, page 6. The court stated:

All right, we're back on the record and we need to have a discussion on the record relative to a matter that took place in Chambers this morning when we had a discussion . . . relative to limiting Attorney Fay's cross-examination into, uh, Witness Ansel's cooperation with . . . various factions within law enforcement. And Mr. Liedkie, if you'd lay out what the State's concerns relative were [*sic*] to that testimony?

RP 424 (Appendix B, page 2).

¹ Appendix C is the clerk's trial minutes for Day 2 of trial (December 9, 2014) in *State v. Whitlock*, Asotin County Superior Court No. 14-1-00089-0. Undersigned counsel obtained these minutes on February 1, 2017, from court transcriptionist Amy Brittingham. Ms. Brittingham forwarded them as attachments to an original e-mail received by her from the county on March 19, 2015.

The State did so and put on the record its concerns about disclosure of a confidential informant and its relevance. RP 424–25 (Appendix B, pages 2–3). According to the State, the court decided in chambers “that, uh, that there was no, uh, material relevance or, uh, towards [Ansel’s] credibility on that, on those issues and so the State’s interests were, outweighed the, uh, the Defendants’ interests in obtaining or, or listening to this testimony.” RP 425 (Appendix B, page 3). Defense counsel responded:

For the record, Your Honor, I wanted to get into, uh, Ms. Ansel’s relationship with the police for two reasons and I believe, based on what happened off the record, those reasons have been adequately addressed by the Court. The first reason was to give some explanation as to why Ms. Ansel would be comfortable talking to Detective John Koe and only Detective John Koe, since part of our defense, basically, is that she really is more afraid of the police than she is of Mr. Johnson and Mr. Whitlock and we did not want the State to be able to hamper our ability to make that argument by pointing to the fact that she was willing to talk to Detective Koe. The State advised that the State doesn’t think that would be a very good argument for them to make since the Court’s already aware of these facts and they’re probably not going to make it.

The second reason was because I wanted to get into, uh, whether or not Mr. Johnson and Mr. Whitlock seemed like the sort of people who would deliberately commit a crime, knowing that an informant for the police is a witness to the crime that they are actually committing, as a consideration for Your Honor in closing argument. And the Court advised that Mr. Johnson and Mr. Whitlock can be permitted to say whether or not they had suspicions that Ms. Ansel was involved with the police as an informant during their testimony in this trial, but that we cannot

get into it with Ms. Ansel. And with, with that curative understanding, I, I think that that adequately addresses the Defenses' interests.

RP 425–26 (Appendix B, pages 3–4).

In other words, the court in chambers decided to sustain the State's objection to certain testimony sought to be elicited from Ms. Ansel by defense counsel.

After making a record, the court and attorneys recessed for lunch. RP 427 (Appendix B, page 5); *see* Appendix C, page 6. The record does not indicate whether the public had previously left the courtroom due to the declared lunch break. The defendants were not present when the record was made, having been taken back to jail. RP 424 (Appendix B, page 2). The court did not put its ruling regarding the State's objection on the record. *See* RP *passim*.

After bench trial, defendants were convicted in the Asotin Superior Court, Scott D. Gallina, J., of first degree burglary and first degree robbery, and they appealed. Division Three of the Court of Appeals determined the evidentiary conference was not a sidebar as contemplated by *State v. Smith*.² The court held:

² *State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049 (2014).

Hearing argument and ruling on an evidentiary objection in chambers implicates a defendant's public trial right. Moreover, conducting such a conference in chambers constitutes a closure. The trial court's decision to hear argument and rule on an evidentiary objection in chambers without explicitly or implicitly weighing the *Bone-Club* factors is, by binding precedent, structural error and is presumed prejudicial.

State v. Whitlock, 195 Wn. App. 745, 752–55, 381 P.3d 1250 (2016), review granted, No. 93685-4, 2017 WL 34624, at *1 (Wash. Jan. 4, 2017). The court reversed the convictions and remanded for a new trial. *Id.* at 755. This Court accepted the State's petition for review.

C. SUPPLEMENTAL ARGUMENT

Defendants in criminal cases have a constitutional right to a public trial. U.S. Const. amend. VI; Const. art. I, §§ 10, 22. Article I, section 10 of our constitution commands, "Justice in all cases shall be administered openly, and without unnecessary delay." "The section 10 guaranty of public access to proceedings and the section 22 public trial right serve complementary and interdependent functions in assuring the fairness of our judicial system." *Bone-Club*, 128 Wn.2d at 259 (citing Const. art. I, § 10). A violation of the public trial right may be raised for the first time on appeal. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d

1113 (2012). Whether the right to a public trial was violated is a question of law reviewed *de novo*. *Id.*

The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012), citing *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)).

This Court underscored the importance of this safeguard in *Wise*:

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 passerby, 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.

Wise, 176 Wn.2d at 4–6. The presumption is that all proceedings in a trial are open. *State v. Paumier*, 176 Wn.2d 29, 34–35, 288 P.3d 1126 (2012).

Competing rights and interests sometimes require trial courts to limit public access to a trial. *State v. Shearer*, 181 Wn.2d 564, 569, 334 P.3d 1078 (2014). Where a proceeding implicates the public trial right, the trial court may not close the courtroom without considering the five “*Bone-Club*” factors on the record.³ *Wise*, 176 Wn.2d at 10; *Bone-Club*, 128 Wn.2d at 258-59.

Closing the courtroom without considering the *Bone-Club* factors is structural error that is presumed prejudicial. *Shearer*, 181 Wn.2d at 569.

To determine whether the constitutional right to a public trial was violated, the reviewing Court considers three factors: (1) whether the public trial right was implicated; (2) whether, if the public trial right was implicated, there was in fact a closure of the courtroom; and (3) whether, if there was a closure, the closure was justified. *State v. Smith*, 181 Wn.2d 508, 513–14, 334 P.3d 1049 (2014).

³ The five factors are: (1) the proponent of closure must make some showing of a compelling interest and, where that need is based on a right other than the accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right; (2) anyone present when the closure motion is made must be given an opportunity to object; (3) the proposed method of closure must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. *Bone-Club*, 128 Wn.2d at 258-59.

To determine whether a court proceeding implicates the public trial right, the Court applies the “experience and logic” test. *Sublett*, 176 Wn.2d at 72–75. The “experience prong” asks “whether the place and process have historically been open to the press and general public.” *Id.* at 73 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The “logic prong” asks “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* (quoting *Press-Enter.*, 478 U.S. at 8). If both questions are answered yes, then the court proceeding implicates the public trial right. *Id.*

Here, in effect and substance, the trial court closed the trial to the public when it addressed and decided the evidence and testimony issues regarding Ms. Ansel in chambers. Those rulings helped shape the course of the trial, yet neither the public nor the defendants witnessed them. This was a violation of the defendants’ public trial right.

In *State v. Smith*, this Court held that traditional sidebar conferences do not implicate the public trial right. *Smith*, 181 Wn.2d at 511. Proper sidebars deal with mundane issues implicating little public interest. *Smith*, 181 Wn.2d at 516 (citing *Wise*, 176 Wn.2d. at 5).

“True sidebars are generally permissible—especially when held in open court. *See State v. Sublett*, 176 Wn.2d 58, 140, 292 P.3d 715 (2012) (Stephens, J., concurring) (condoning “brief sidebars to allow counsel to raise concerns that may need to be taken up outside the jury’s presence”).” *Smith*, 181 Wn.2d at 542 fn 5 (Owens, J., dissenting). In *Smith*, no one argued that a private meeting in the hallway to discuss a time for recess implicated the public trial right. *Smith*, 181 Wn.2d at 538 fn1, 541 fn 4 (Owens, J., dissenting). Here, the in-chambers conference was not a “sidebar” in the traditional sense, notwithstanding the State’s characterization.

Smith cautioned that “merely characterizing something as a ‘sidebar’ does not make it so.” *Id.* at 516 fn10. The court explained “[t]o avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly recorded.” *Id.* (emphasis added). The hallway conference in *Smith* was a “sidebar” because it was the most expedient method for resolving evidentiary objections, given the courtroom’s peculiar layout that allowed a jury to hear a traditional sidebar. *Whitlock*, 195 Wn. App. at 753 (citing *Smith*, 181 Wn.2d at 515).

As noted by Division Three, the trial here “was to the bench. There was no expediency justification for holding an evidentiary conference outside the courtroom. Rather, the trial court’s decision to recess court and hold an in-chambers argument and ruling actually disrupted the expedient flow of the trial. Moreover, the in-chambers argument and ruling were neither recorded nor promptly memorialized on the record. Rather, quite some time passed between when the in-chambers argument and ruling concluded and when the in-chambers argument and ruling were placed on the record.” *Whitlock*, 195 Wn. App. at 753.

As suggested by the dissent, it might have been better to have sent Ms. Ansel out in the hallway while the argument was heard in the courtroom. *Whitlock*, 195 Wn. App. at 759 (Korsmo, J. (dissenting)). However the record reflects the in-chambers private meeting had one purpose having little to do with concern about the witness’ potential treatment under cross-examination. The State wished to prevent the defendants and public in the courtroom from learning Ms. Ansel had previously worked as a confidential informant and the name of the detective who had contracted with her. RP 424–45 (Appendix B, page 2–3). There was a rush to chambers where the State had only requested

a sidebar. The in-chambers discussion was not contemporaneously put on the record as required by *Smith*. Instead it occurred one and one-half hours later, after the lunch recess was announced and defendants had been removed to return to jail and the courtroom was presumably unoccupied by the viewing public. *Cf. Smith*, 181 Wn.2d at 518 (“Critically, the sidebars here were contemporaneously memorialized and recorded, thus negating any concern about secrecy. The public was not prevented from knowing what occurred.”).

This was not a traditional sidebar as contemplated by *Smith* and *Smith* should not control the outcome of this case.

As to the experience prong, there can be no question that issues as to the admissibility of evidence and objections to inquiries by counsel have “historically been open to the press and general public” as they are inherent to the trial process in its search for truth. *See e.g., State v. Martin*, 171 Wn.2d 521, 535–36, 252 P.3d 872 (2011); *Smith*, 181 Wn.2d at 541–44 (Owens, J., dissenting) and cases cited therein; *Whitlock*, 195 Wn. App. at 753–54 and cases cited therein.

Logic shows that “public access plays a significant positive role in the functioning of the particular process in question,” *i.e.* the trial. The subject of the in-chambers legal arguments was not mundane. It

involved the scope of cross-examination of the State's witness regarding prior cooperation with law enforcement and the discussion held constitutional magnitude. *See Davis v. Alaska*, 415 U.S. 308, 316–17, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (constitutional right to cross-examine on bias created by relationship between witness and the State). “Unlike what may be true in the often arcane context of hearsay or statutory construction, the public can readily understand the idea that a witness may be biased due to a relationship with law enforcement. Moreover, the public has a strong interest in assessing the significance of any such relationship and whether the defendant has been permitted to challenge the State's evidence and thereby “discourage perjury.” *State v. Sublett*, 176 Wn.2d at 72; *see also Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).” *Whitlock*, 195 Wn. App. at 756 (Pennel, J., (concurrency)).

To the extent the record suggests counsel may have behaved improperly in the chambers conference⁴, an open and public proceeding

⁴ “[COURT]: Very good. All right. That record being made, I just want to advise all counsel, I have a gym in my basement. I use it for exercise, I don't need to get exercised up here. I just want everybody to remember in the conduct of this trial, I am particularly a huge fan of zealous advocacy, tried to do it myself for a number of years, but I'm also just as big a fan of proper decorum in the courtroom and showing respect and deference to the bench. I expect nothing less out of the professionals in this courtroom.” RP 426 (Exhibit B, page 4).

“helps remind [judges and lawyers] to act with decorum and to consider the consequences of their actions. Logically, this is perhaps most important during arguments over what evidence and testimony the jury will hear.” *Smith*, 181 Wn.2d at 544 (Owens, J., dissenting). A judge’s decisions should, and must, be made in open court and not secretly in chambers to preserve the integrity of the trial. To do otherwise would undermine a trial’s search for truth where the public’s access plays a major role in assuring the open and fair process guaranteed by the Constitution. *Sublett*, 176 Wn.2d at 72–73.

Because the court heard and ruled on an evidentiary objection outside of the courtroom in a proceeding that was not equivalent to a traditional “sidebar,” the defendants’ public trial right was implicated. *Whitlock*, 195 Wn. App. at 754. Holding the proceeding outside of the courtroom, thus causing the public to be excluded, amounted to a “closure.” See *id.* at 754–55.

“A closure unaccompanied by a *Bone-Club* analysis on the record will almost never be considered justified.” *Smith*, 181 Wn.2d at 520. If the trial court fails to conduct an express *Bone-Club* analysis, the reviewing court may examine the record to determine if the court effectively weighed the defendant’s public trial right against other

compelling interests. *Id.* If the court did not consider the *Bone-Club* factors—either explicitly or implicitly—the closure is not justified. *Whitlock*, 195 Wn. App. at 755.

Here, the court did not consider the *Bone-Club* factors either explicitly or implicitly. Therefore, the closure was not justified. *Id.*

Closing the courtroom without considering the *Bone-Club* factors is structural error requiring reversal. *Shearer*, 181 Wn.2d at 569; *Whitlock*, 195 Wn. App. at 755.

D. CONCLUSION

For the reasons stated here and in prior briefing, Division Three's reversal of the defendants' convictions and remand for new trials should be affirmed.

Respectfully submitted on February 3, 2017.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 3, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of respondent David Johnson:

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1 ANSEL: Yeah, and I told him that if he had anything to
2 do with it, I was gonna . . . I wasn't talking to him again.

3 FAY: Okay. You know Jake Gustafson pretty well?

4 ANSEL: Yes.

5 FAY: All right. How do you know Jake Gustafson?

6 ANSEL: His brother was my best friend.

7 FAY: All right. And you dated him before, didn't you?

8 ANSEL: Yep.

9 FAY: All right. Did it end badly or did it end well?

10 ANSEL: It, we still talk to this day, so it didn't end
11 too bad.

12 FAY: And he, and he still gives you rides, so it must
13 have ended okay. Okay. Now, you didn't want to call the police
14 because you had a warrant, right?

15 ANSEL: I wouldn't have called the police anyway, if you
16 want the truth.

17 FAY: Okay.

18 ANSEL: (Laughs) But no, I didn't because I had a
19 warrant.

20 FAY: Why wouldn't you have called the police anyway?

21 ANSEL: Because it wasn't something that I would do. If
22 you, you live in that kind of world, you just don't. I'm not gonna
23 call the police. I would have went and found Ralph and dealt with it
24 myself.

25 FAY: Okay, but you do have dealings with the police,

1 don't you?

2 ANSEL: What do you mean by that?

3 FAY: Well, you work with a man named John . . .

4 LIEDKIE: I'm gonna object to relevance, Your Honor.

5 ANSEL: Excuse me?

6 LIEDKIE: I'm gonna object to relevance and I want a
7 sidebar.

8 ANSEL: What?

9 (Pause)

10 JUDGE: Let's take a break, we're gonna go in Chambers.

11

12 (COURT IN RECESS)

13

14 JUDGE: All right, we're back on the record after a group
15 hug in Chambers. Ms. Ansel, if you'd come back up and re-take the
16 stand, please. I'll remind you, you are still under oath.

17 BOTTOMLY: Judge, before we proceed, uh, my client would
18 like the monitor put down, so . . .

19 JUDGE: Oh, sure.

20 BOTTOMLY: . . . we can see the proceedings.

21 JUDGE: As long as nobody's using (inaudible).

22 WHITLOCK: Thank you, Your Honor.

23 JUDGE: You bet.

24 FAY: Ms. Ansel, you say that you didn't want to give
25 any statement to the cops, but you did give one statement out of

1 to advise the Court that I would like to explore the circumstances
2 about, uh, the proposed Exhibit WD-1, which I received Monday morning
3 and I have not been able to identify other witnesses that may be
4 important, so I'd ask, ask that we reserve, uh, Mr. Gustafson, that we
5 do not release him.

6 FAY: I'm gonna join Mr. Bottomly in that request, Your
7 Honor.

8 LIEDKIE: I've got one more question for him while he's
9 here. You said you'd been in PC. Can you tell the Court what PC is?

10 GUSTAFSON: Uh, Protective Custody.

11 LIEDKIE: Thank you. That was it.

12 JUDGE: Okay, Mr. Gustafson. You're done testifying for
13 now. Mr. Bottomly has indicated with that, uh, Exhibit, he's not sure
14 whether or not they're gonna need you back to testify, so we're gonna
15 keep you on the hook for just a little while longer while he does some
16 . . . exploration of the circumstances surrounding that Exhibit.

17 GUSTAFSON: Okay.

18 JUDGE: If and when it appears that you're no longer
19 gonna be necessary, we'll cut you loose at that time, but . . . for
20 now, we need to keep you around just a while longer.

21 GUSTAFSON: Okay.

22 JUDGE: All right. Let's go ahead and take a lunch break
23 at this time. I'd like to have counsel stick around for a minute, if I
24 could. You can shut it off for a minute, if you like. We don't want
25 to burn tape.

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(BREAK IN COURT)

JUDGE: All right, we're back on the record and we need to have a discussion on the record relative to a matter that took place in Chambers this morning when we had a discussion . . . relative to limiting Attorney Fay's cross-examination into, uh, Witness Ansel's cooperation with . . . various factions within law enforcement. And Mr. Liedkie, if you'd lay out what the State's concerns relative were to that testimony?

LIEDKIE: Well, Your Honor, the operative word in Confidential Informant is "confidential" and whether or not she is or is not was not relevant to this, to this, it's the State's position that it was not relevant to her credibility in this case, uh, other than for the purposes of embarrassing Ms. Ansel or, uh, imperiling her or intimidating her, there was no, uh, material benefit to this trial on, on the question whether or not she was or was not or is or is not or has ever been an informant for, for any, uh, law enforcement agency and so the State had objected, uh, during the, uh, uh, sidebar and then as continued into Chambers, uh, after it became apparent that the sidebar was gonna be in effect, effective to limiting this. And I would note and just for the record that the Defendants have been taken back to jail at this time. Uh, the concern, obviously, the State had was, was identifying any potential of possible informants, obviously, unless they testify in that capacity as an informant. The State has a

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1 privilege in, uh, protecting the identity of the informants and so
2 that was, that was our concern and so we did make a rare, we did, uh,
3 discuss the matter in Chambers. Uh, we made our arguments that, as
4 to, uh, the lack of relevance. It was discussed that, uh, even the,
5 the detective's name should not be brought up. The witness, the
6 witness could certainly be asked whether she provided statements to
7 other or to police or to detectives, um, but, uh, that was my, that
8 was sort of my take on, on it. The Court, uh, agreed with the State
9 in Chambers that, uh, that there was no, uh, material relevance or,
10 uh, towards her credibility on that, on those issues and so the
11 State's interests were, outweighed the, uh, the Defendants' interests
12 in obtaining or, or listening to this testimony.

13 JUDGE: Attorney Fay, your record, please.

14 FAY: For the record, Your Honor, I wanted to get into,
15 uh, Ms. Ansel's relationship with the police for two reasons and I
16 believe, based on what happened off the record, those reasons have
17 been adequately addressed by the Court. The first reason was to give
18 some explanation as to why Ms. Ansel would be comfortable talking to
19 Detective John Koe and only Detective John Koe, since part of our
20 defense, basically, is that she really is more afraid of the police
21 than she is of Mr. Johnson and Mr. Whitlock and we did not want the
22 State to be able to hamper our ability to make that argument by
23 pointing to the fact that she was willing to talk to Detective Koe.
24 The State advised that the State doesn't think that would be a very
25 good argument for them to make since the Court's already aware of

1 these facts and they're probably not going to make it. The second
2 reason was because I wanted to get into, uh, whether or not Mr.
3 Johnson and Mr. Whitlock seemed like the sort of people who would
4 deliberately commit a crime, knowing that an informant for the police
5 is a witness to the crime that they are actually committing, as a
6 consideration for Your Honor in closing argument. And the Court
7 advised that Mr. Johnson and Mr. Whitlock can be permitted to say
8 whether or not they had suspicions that Ms. Ansel was involved with
9 the police as an informant during their testimony in this trial, but
10 that we cannot get into it with Ms. Ansel. And with, with that
11 curative understanding, I, I think that that adequately addresses the
12 Defenses' interests.

13 JUDGE: Mr. Bottomly, anything you wanted to put on?

14 BOTTOMLY: Not much to add, except that in, in Chambers we
15 also discussed other impeachment approaches, which I think were
16 addressed in actual trial, so I don't have anything to add.

17 JUDGE: Very good. All right. That record being made, I
18 just want to advise all counsel, I have a gym in my basement. I use
19 it for exercise, I don't need to get exercised up here. I just want
20 everybody to remember in the conduct of this trial, I am particularly
21 a huge fan of zealous advocacy, tried to do it myself for a number of
22 years, but I'm also just as big a fan of proper decorum in the
23 courtroom and showing respect and deference to the bench. I expect
24 nothing less out of the professionals in this courtroom.

25 LIEDKIE: And my apologies, Your Honor, for . . .

CRIMINAL MINUTES

DATE: December 8, 2014 TIME: 9:08

JUDGE: Scott D. Gallina

COURT REPORTER: CD SUPERIOR COURT DISTRICT COURT

DEPUTY CLERK: M. Kelley

IN THE SUPERIOR COURT OF ASOTIN COUNTY

STATE OF WASHINGTON

Prosecuting Attorney: Ben Nichols

Deputy Prosecutor: Curtis Liedkle

Catherine Enright

VS.

NO. 14-1-00089-0

Ralph Whitlock

COUNSEL: Victor Bottomly Dale Slack John Fay

DEFENDANT PRESENT VIDEO CONFERENCE

BOND HEARING

STATEMENT BY _____
_____ COURT RELEASED DEFENDANT ON CONDITIONS _____ BAIL SET AT \$ _____ CASH/SURETY/10%/PR _____

ARRAIGNMENT

_____ TRUE NAME _____ AGE _____ ACKNOWLEDGMENT OF ADVISE OF RIGHTS SIGNED _____
_____ COURT APPOINTED _____ RETAINED _____

_____ INDIGENCY FORM GIVEN TO DEFENDANT _____

_____ INFORMATION SERVED IN OPEN COURT _____ READ IN OPEN COURT _____ WAIVED READING _____

STATEMENTS REGARDING BOND _____
BOND CONTINUED _____ BOND AMENDED _____ CASH/SURETY/10%/PR _____

PLEA

_____ OMNIBUS PLEA AGREEMENT _____ AMENDED INFORMATION FILED _____ WAIVED READING _____
_____ GUILTY _____ NOT GUILTY _____

COUNTS _____ COUNTS _____ DISMISSED _____

_____ SPEEDY TRIAL EXPIRATION DATE _____ PRE-TRIAL _____ TRIAL DATE _____

_____ PRE-SENTENCE INVESTIGATION ORDERED _____

PRE-TRIAL HEARING

_____ PARTIES ARE READY FOR TRIAL _____
 OTHER: see attached trial minutes

SENTENCING

STATEMENT BY _____

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

_____ FILING FEE _____ PCV _____ ATTORNEY FEE _____ RESTITUTION _____

_____ SHERIFF SERVICE FEES _____ CRIME LAB _____ FINE _____ DNA _____

_____ DOMESTIC VIOLENCE FEE OTHER: _____ PRISON/JAIL _____

_____ COMMUNITY SERVICE _____ COMMUNITY SUPERVISION _____

_____ JUDGMENT & SENTENCE SIGNED _____

_____ THE MATTER IS STRICKEN BY _____

_____ THE MATTER IS CONTINUED BY _____ TO _____

_____ NEXT HEARING _____ Arraign. Plea/Omn/TS Pre-Trial Trial Re-setting

Change Plea/Sent. Motion/Show Cause Review Hearing

Appendix C-1

Description	
Date	12/9/2014
Location	Superior Court

Time	Speaker	Note
9:06:02 AM	Judge Scott Gallina	2nd day Bench Trial - St v. D. Johnson - 14-1-00088-1 and St v. R. Whitlock #14-1-00089-0 - state present by Curtis Liedkie; defendant Johnson present with counsel, John Fay and Rick Laws (lead counsel), defendant Whitlock present with counsel Victor Bottomly.
9:06:31 AM	Curtis Liedkie	Calls Kelly McDonough to the stand - sworn to testify - begins direct examination
9:09:55 AM	John Fay	Objection
9:10:06 AM	Curtis Liedkie	Continues direct examination
9:17:28 AM	Curtis Liedkie	No further question
9:17:41 AM	John Fay	Begins cross examination
9:21:27 AM	Curtis Liedkie	Objection
9:21:42 AM	John Fay	No further questions
9:21:47 AM	Victor Bottomly	Begins cross examination
9:24:11 AM	Curtis Liedkie	Objection
9:24:14 AM		Sustained
9:24:16 AM	Victor Bottomly	Continues cross examination
9:25:28 AM	Curtis Liedkie	Objection
9:25:41 AM		Sustained
9:25:42 AM	Victor Bottomly	Continues cross examination
9:27:34 AM	V. Bottomly	No further questions
9:27:37 AM	C. Liedkie	Begins re-direct examination
9:29:36 AM	C. Liedkie	No further questions
9:29:39 AM	J. Fay	Begins re-cross examination
9:30:10 AM	J. fay	No further questions
9:30:14 AM	V. Bottomly	No further questions
9:30:18 AM	C. Liedkie	Begins re-direct
9:30:21 AM		No further questions - witness is excused
9:30:39 AM	C. Liedkie	State calls Crista Ansel to the stand
9:30:55 AM		court is in recess.
9:31:00 AM		court is back in session
9:38:42 AM	C. Liedkie	Court calls Crista Ansel to the stand - sworn go testify - begins direct examination
9:57:03 AM	John Fay	Objection
9:57:07 AM		Sustained
9:57:08 AM	C. Liedkie	Continues direct examination
9:59:16 AM	John Fay	Objection
9:59:24 AM		Sustained
9:59:27 AM	C. Liedkie	Continues direct examination
10:01:05 AM	Jehn Fay	Objection

<u>10:01:09</u> AM	C. Liedkie	Continues direct examination
<u>10:02:25</u> AM	C. Liedkie	No further questions
<u>10:02:29</u> AM	J. Fay	Begins cross examination
<u>10:12:23</u> AM	C. Liedkie	Objection
<u>10:12:32</u> AM		sidebar is requested
<u>10:13:11</u> AM		court is in recess - attorneys go to chambers
<u>10:13:20</u> AM		
<u>10:22:59</u> AM		court is back in session
<u>10:23:00</u> AM	John Fay	Continues cross examination of witness
<u>10:24:34</u> AM	Curtis Liedkie	Objection
<u>10:24:37</u> AM		Sustained
<u>10:24:38</u> AM	John Fay	Continues cross examination
<u>10:30:22</u> AM	J. Fay	No further questions
<u>10:30:25</u> AM	V. Bottomly	Begins cross examination
<u>10:52:49</u> AM	V. Bottomly	No further questions
<u>10:52:52</u> AM	C. Liedkie	Begins re-direct examination
<u>10:56:37</u> AM	C. Liedkie	No further questions
<u>10:56:40</u> AM	J. Fay	Begins cross examination
<u>10:57:10</u> AM	J. Fay	No further questions
<u>10:57:14</u> AM	C. Liedkie	Objection
<u>10:57:20</u> AM		Overuled
<u>10:57:22</u> AM	V. Bottomly	No further questions
<u>10:57:30</u> AM		No further questions - witness is excused - bond orders reflecting material witness holds are lifted for Crista Ansel.

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<u>10:58:48</u> AM		court is in recess.
<u>11:07:52</u> AM		court is back in session
<u>11:07:55</u> AM	C. Liedkie	Calls Jacob Gustafson to the stand - sworn to testify; begins direct examination
<u>11:13:04</u> AM	J. Fay	Objection
<u>11:13:10</u> AM		Overuled
<u>11:13:13</u> AM	C. Liedkie	Continues direct examination
<u>11:23:15</u> AM	C. Liedkie	No further questions
<u>11:23:20</u> AM	J. Fay	Begins cross examination
<u>11:33:54</u> AM	Judge Gallina	Statements to the court
<u>11:34:12</u> AM	J. Fay	Statements to the court
<u>11:34:40</u> AM	C. Liedkie	Comments re: objection
<u>11:35:05</u> AM	J. Fay	Continues cross examination of witness
<u>11:36:50</u> AM	C. Liedkie	Objection
<u>11:36:53</u> AM	J. Fay	No further questions
<u>11:36:56</u> AM	V. Bottomly	Begins cross examination; hands the witness WD1; continues examination; hands the witness P5
<u>11:52:52</u> AM	V. Bottomly	No further questions
<u>11:53:00</u> AM	C. Liedkie	Begins re-direct examination
<u>11:56:25</u> AM	C. Liedkie	No further question
<u>11:56:28</u> AM	J. Fay	Begins re-cross examination
<u>11:56:46</u> AM	J. Fay	No further questions
<u>11:56:50</u> AM	V. Bottomly	Statements to the court - asks to reserve J. Gustafson for further questioning
<u>11:57:29</u> AM		No further questions - witness is excused at this time but subject to recall
<u>11:57:57</u> AM		court was in recess from 11:57 - 12:04

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<u>12:04:19</u> PM	Judge Gallina	Statements to the parties
<u>12:04:51</u> PM	C. Liedkie	Statements to the court
<u>12:06:40</u> PM	J. Fay	Statements to the court
<u>12:08:07</u> PM	V. Bottomly	Statements to the court
<u>12:08:26</u> PM	Judge Gallina	Statements to the parties
<u>12:09:06</u> PM		court is in reces until 1:0
<u>1:38:12</u> PM		Court Back In session
<u>1:38:20</u> PM	R. Laws	Missing a witness requests material witness warrant
<u>1:38:42</u> PM	C. Liedkie	Response
<u>1:39:19</u> PM	Judge Gallina	warrant to issue
<u>1:40:33</u> PM		Francis Rains sworn
<u>1:41:38</u> PM	J. Fay	Objects to this witness
<u>1:42:37</u> PM	C. Liedkie	Response
<u>1:43:41</u> PM	Judge Gallina	Will allow witness to testify
<u>1:44:42</u> PM	C. Liedkie	Begins direct examination, with Scott Chapman present - attorney for witness
<u>2:02:09</u> PM		P2 - jail call played in open court
<u>2:10:20</u> PM		P3 - jail call played in open court
<u>2:15:09</u> PM	C. Liedkie	continues with direct examination
<u>2:16:43</u> PM	J. Fay	cross-examination
<u>2:20:57</u> PM	V. Bottomly	cross-examination
<u>2:30:31</u> PM	C. Liedkie	re-direct
<u>2:35:32</u> PM	J. Fay	re-cross
<u>2:36:24</u> PM	C. Liedkie	re-direct
<u>2:36:42</u> PM		witness is excused
<u>2:36:56</u> PM		court in recess
<u>2:37:09</u> PM		
<u>2:52:50</u> PM		court back in session
<u>2:52:58</u> PM	C. Liedkie	state rests
<u>2:53:10</u> PM		David Johnson sworn & testified
<u>2:53:39</u> PM	J. Fay	begins direct examination
<u>2:55:33</u> PM	C. Liedkie	objection
<u>2:55:40</u> PM	Judge Gallina	overruled
<u>2:58:54</u> PM	J. Fay	continues direct
<u>3:01:36</u> PM	C. Liedkie	objection
<u>3:01:42</u> PM	Judge Gallina	sustained
<u>3:01:48</u> PM	J. Fay	continue direct

3:27:42 PM	C. Liedkie	objection
3:27:47 PM	J. Fay	response
3:28:06 PM	C. Liedkie	statements
3:28:15 PM	Judge Gallina	can lay foundation
3:29:27 PM	J. Fay	continues direct
3:29:33 PM	C. Liedkie	begins cross-examination
3:31:13 PM	J. Fay	objection
3:31:25 PM	C. Liedkie	response
3:31:48 PM	C. Liedkie	continues cross
3:45:31 PM	V. Bottomly	cross-examination
3:47:14 PM	J. Fay	re-direct
3:47:57 PM		witness is excused
3:48:11 PM		court in recess until 9am tomorrow
3:49:50 PM	Judge Gallina	statements re issuance of bench warrant
3:50:12 PM		court in recess

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) Supreme Court No. 93685-4
Plaintiff/Petitioner,)
vs.)
RALPH WHITLOCK,)
DAVID R. JOHNSON,) PROOF OF SERVICE (RAP 18.5(b))
Defendants/Respondents.)

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 3, 2017, I mailed to the following, by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Supplemental brief of respondent David Johnson - Appendices:

David R. Johnson (#865703)
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla WA 99362

E-mail: bnichols@co.asotin.wa.us
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Benjamin C. Nichols/Curtis Liedkie
Asotin County Prosecutor

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Kenneth H. Kato
Attorney on appeal for Ralph E. Whitlock

s/Susan Marie Gasch, WSBA #16485
Attorney for Respondent David Johnson

PROOF OF SERVICE

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Cc: Benjamin Nichols <bnichols@co.asotin.wa.us>; Curtis Liedkie <cliedkie@co.asotin.wa.us>; Ken Kato <khkato@comcast.net>; David/Susan <gaschlaw@msn.com>
Subject: State v. Whitlock, No. 93685-4 Supplemental Brief of Respondent and Appendices

Dear Mr. Carpenter,

I'm attaching for filing the Supplemental Brief of Respondent David Johnson and the Appendices to same. If you have any questions, please let me know. Thank you.

Susan Gasch

Gasch Law Office P. O. Box 30339 Spokane WA 99223-3005 (509) 443-9149

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