

65564-7

65564-7

NO. 65564-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

Henry Grisby, III,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 JUL 11 PM 4:58

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. ARGUMENT IN REPLY 1

THE STATE CONCEDES THAT MR. GRISBY'S
CONVICTION MUST BE REVERSED UNDER
PRESENT CASE LAW BECAUSE THE TRIAL COURT
VIOLATED HIS AND THE PUBLIC'S RIGHT TO AN
OPEN TRIAL 1

B. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Pers. Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	1
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	passim
<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	6
<u>State v. Collins</u> , 50 Wn.2d 740, 314 P.2d 660 (1957).....	3
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	1, 2, 6, 7
<u>State v. Heddrick</u> , 166 Wn.2d 898, 215 P.3d 201 (2009)	7
<u>State v. Marsh</u> , 126 Wash. 142, 217 P. 705 (1923).....	3
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009)	4, 5
<u>State v. Monday</u> , No. 82736-2, Slip. Op., __ Wn.2d __, __ P.3d __ (June 9, 2011).....	6
<u>State v. Rasmussen</u> , 125 Wash. 176, 215 P. 332, 333 (1923).....	7
<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	passim

Washington Court of Appeals Decisions

<u>State v. Lam</u> , Slip. Op., 161 Wn. App. 299, __ P.3d __ (April 18, 2011).....	1, 2, 4
<u>State v. Porter</u> , 3 Wn. App. 737, 477 P.2d 653 (1970)	7

United States Supreme Court Decisions

<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	6
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	7

Constitutional Provisions

Const. art. I, § 5.....2
Const. art. I, § 10.....2, 3, 4
Const. art. I, § 22.....2, 3, 4
U.S. Const. amend. I.....2
U.S. Const. amend. V.....2
U.S. Const. amend. VI.....2

Other

Keddington v. State, 19 Ariz. 457, 172 P. 273 (1918)4, 5

A. ARGUMENT IN REPLY

THE STATE CONCEDES THAT MR. GRISBY'S
CONVICTION MUST BE REVERSED UNDER
PRESENT CASE LAW BECAUSE THE TRIAL
COURT VIOLATED HIS AND THE PUBLIC'S RIGHT
TO AN OPEN TRIAL.

The State conceded in its Motion to Stay and again in its Response Brief that, under this Court's and Supreme Court precedent, Mr. Grisby's conviction must be reversed and remanded for a new trial. See Motion to Stay Pending Supreme Court Decisions at 3 (filed April 20, 2011); Resp. Br. at 3 ("Under existing decisions of this Court, private inquiry of even a single juror is reversible error, even if nobody lodged a contemporaneous objection."). Reversal is required because the trial court violated his and the public's right to an open trial by conducting a portion of voir dire in chambers. See, e.g., In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004); State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006); State v. Lam, Slip. Op., 161 Wn. App. 299, ___ P.3d ___ (April 18, 2011). Prior to closing the courtroom, the trial court conducted no analysis or weighing as required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). The in-chambers proceedings, moreover, were not conducted on the record. Thus, as the State concedes, the closed

proceedings require reversal of Mr. Grisby's conviction. See, e.g., U.S. Const. amends. I, V & VI; Const. art. I, §§ 5, 10 & 22; Easterling, 157 Wn.2d at 179-80.¹

In State v. Lam, this Court recently applied the principles asserted in Mr. Grisby's Opening Brief. In that case, this Court held that the trial court violated the defendant's right to a public trial under Article I, Section 22 and the Sixth Amendment by questioning a juror in chambers without first applying and weighing the Bone-Club factors. Lam, Slip Op. at 3-4.² The State argued that the defendant's failure to object to the closure below prevented the issue from being raised on appeal. Id. at 5. But this Court explicitly rejected that claim and the State's identical argument here must also be rejected. Compare id. at 5-7 with Resp. Br. at 4, 6, 16-26.³

¹ Based on a review of the record, the undersigned believes the State is correct that juror 18 was dismissed and not seated on the jury. See Resp. Br. at 3 n.3. However, this fact is inconsequential. Easterling, 157 Wn.2d at 180 & n.12 ("a majority of this court has never found a public trial right violation to be de minimus"); State v. Strode, 167 Wn.2d 222, 223, 230, 217 P.3d 310 (2009) (closed jury voir dire not de minimis); Lam, Slip Op. at 7-9. The State's subsequent argument that the closure here was "de minimis" is flawed for an additional reason: because there is no record of what occurred in the closed chambers proceedings, it is impossible to conclude that the closure was "trivial." See Resp. Br. at 30-31.

² Unlike here, it appears the defendant in Lam did not allege a violation of Article I, Section 10. Compare Slip Op. at 3-4 with Opening Br. at 3-4, 11-13.

³ The State's Response Brief not only repeats arguments previously rejected in prior case law but is almost a verbatim copy of the amicus brief submitted to the Supreme Court on behalf of the Washington Association of

Despite conceding that reversal is dictated by case law, the State now argues that this Court should abandon its and the Supreme Court's precedent. The State's pleas for a new regime that severely limits defendants' and the public's right to open trials should be ignored. However, even if considered by this Court, the State's arguments do not support an overhaul of jurisprudence under Article I, Section 10 and Article I, Section 22.

Contrary to the State's argument that this State's extensive line of cases, including Bone-Club and State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), constitute a new regime, in Bone-Club itself the Supreme Court noted its holding had historical roots by relying on State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923). In Marsh, the court explicitly decided (in the face of the State's similar waiver argument) that the defendant could raise the constitutional claim of courtroom closure for the first time on appeal. 126 Wash. at 144-47; see also State v. Collins, 50 Wn.2d 740, 747-48, 314 P.2d 660 (1957).

Prosecuting Attorneys. See State v. Lormor, Wash. Sup. Ct. No. 84319-8 (oral argument held May 3, 2011); State v. Paumier, Wash. Sup. Ct. No. 84585-9 (oral argument held May 3, 2011); State v. Wise, Wash. Sup. Ct. No. 82802-4 (oral argument held May 3, 2011). This Court has already denied the State's request to stay this case pending the outcome in the Supreme Court.

The State also conflates circumstances where the defendant fails to object, as occurred here and in Strode, 167 Wn.2d at 229, with those where the defendant actively participates in the closure, like in State v. Momah, 167 Wn.2d 140, 155, 217 P.3d 321 (2009). See, e.g., Resp. Br. at 28-29. The State provides no justification for abandoning those holdings, or this Court's holding in Lam, that a defendant can generally raise a violation of his right to a public trial for the first time on appeal. See, e.g., Strode, 167 Wn.2d at 229; Lam, Slip Op. at 5-6.

The State's reliance on Keddington v. State, 19 Ariz. 457, 172 P. 273 (1918) is similarly unavailing. Keddington involved a situation more analogous to Momah than to the situation at bar.⁴ In Keddington, the defendant objected to the court's initial plans to close the courtroom but failed to object to the court's revised plans. Accordingly, the Arizona court held that it "reasonably appear[ed]" the defendant was satisfied with the modified plans.⁵ Here, the

⁴ In Momah, unlike in Keddington, however, our Supreme Court found the defendant's participation in the alleged error did not amount to a waiver but rather counseled against application of the automatic reversal rule Mr. Grisby is entitled to here. Momah, 167 Wn.2d at 155; Keddington, 19 Ariz. at 462.

⁵ The State's attempt to compare this State's open trial jurisprudence with Arizona's is also specious because it does not appear that the Arizona constitution has a provision similar to Article I, Section 22. See Resp. Br. at 8-9 (comparing Article I, Section 10 with Arizona's article 2, section 11). Here, the

court conducted no Bone-Club analysis and though Mr. Grisby did not object, he did not “invite” the error by participating in the decision making to any degree. See 3/11/10RP 25 (only record regarding courtroom closure derives from trial judge).

Keddington is also distinguishable because the court there considered only a partial closure—that is not all of the public was excluded. Additionally, the Keddington court stated in dicta that a different rule would likely result in the event of full closure. 19 Ariz. at 459, 464. Here, the entire public, including the press and court reporter, were excluded during the trial court’s in-chambers voir dire.

Moreover, the State ignores that Bone-Club properly placed the responsibility on the *trial court* to ensure that at least five factors are weighed on the record prior to closing a court proceeding. E.g., Strode, 167 Wn.2d at 228-29 (“The determination of a compelling interest for courtroom closure is ‘the affirmative duty of the trial court, not the court of appeals.’ Bone-Club, 128 Wn.2d at 261.”); Momah, 167 Wn.2d at 158-59 (Alexander, C.J., dissenting) (emphasizing trial court’s responsibility for propriety of closing

right derives from both Article I, Section 10 and Article I, Section 22 and Mr. Grisby alleges error under both provisions.

courtroom to public); State v. Easterling, 157 Wn.2d 167, 187, 137 P.3d 825 (2006) (Chambers, J., concurring) (same). Thus, it is the trial court's responsibility to ensure the Bone-Club procedures are followed prior to any courtroom closure. Applying a contemporaneous waiver rule would severely weaken this allocation.⁶

The case law also makes clear that violation of public trial rights mandates reversal because, like in other structural error contexts, where no record is made and no weighing and balancing performed, it is impossible for an appellate court to determine prejudice. When the record "lacks any hint that the trial court considered [the defendant's] public trial right as required by Bone-Club, [the appellate court] cannot determine whether the closure was warranted." State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (citing Bone-Club, 128 Wn.2d at 261). Closure of the courtroom during voir dire "is a structural error that cannot be considered harmless." Strode, 167 Wn.2d at 223; accord

⁶ Appellant takes issue with the State's assertion that Mr. Grisby and other defendants are "exploiting" a "flawed procedure." Resp. Br. at 18. Notably, as quasi-judicial officers, prosecutors are obligated to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, No. 82736-2, Slip. Op. at 10, ___ Wn.2d ___, ___ P.3d ___ (June 9, 2011). The State could have but also did not object below to the court's failure to adhere to Bone-Club.

Easterling, 157 Wn.2d at 181 (“The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.”).

And while such allocation of responsibility and enforcement absent objection may be rare, it is certainly not unique. For example, automatic reversal is required where counsel is denied. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Heddrick, 166 Wn.2d 898, 910-11, 215 P.3d 201 (2009).⁷ Similarly, in State v. Rasmussen, 125 Wash. 176, 179, 215 P. 332, 333 (1923), the Supreme Court held that the trial court bears the duty to “keep jurors together.” Thus defendant’s failure to request sequestering and “mere silence” did not constitute waiver. 125 Wash. at 179; accord State v. Porter, 3 Wn. App. 737, 738-39, 477 P.2d 653 (1970) (applying Rasmussen).

In sum, binding precedent plainly requires reversal of Mr. Grisby’s conviction. The State’s additional arguments are therefore not properly before the Court and are flawed on the several grounds set forth above.

⁷ Notably, the State’s recitation of cases at page 21 of its Response Brief lacks any reference to the case law of this State.

B. CONCLUSION

Mr. Grisby's conviction must be reversed because the trial court conducted individual voir dire in closed proceedings, which resulted in a violation of Mr. Grisby and the public's constitutional right to a public trial.

DATED this 11th day of July, 2011.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65564-7-I
v.)	
)	
HENRY GRISBY III,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES WHISMAN, DPA
KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] HENRY GRISBY III
794931
CLALLAM BAY CORECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

(X) U.S. MAIL
() HAND DELIVERY
() _____

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 11 PM 4:58

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF JULY, 2011.

x _____ *for*

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710