Right to a Public Trial

Senate Judiciary Committee
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EXECUTIVE SUMMARY

The right to a public trial is guaranteed by the First and Sixth Amendment to the Constitution of the United States as well as article one, §§10 and 22 of the Washington State Constitution. Washington courts holdings have primarily focused on state constitutional rights. The right to public trials is held by the defendant and the public and can only be waived after both have been consulted. Presently, absent valid waivers, the trial court must conduct a *Bone-Club* analysis to determine whether the court can properly be closed. The analysis consists of the following 5 factors:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an 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 to the closure.
3. The proposed method for curtailing open access 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.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

These factors and the test required under the United States Constitution encompass the same considerations and analysis. The state analysis, however, gives more detailed guidance to the trial courts.

The specific circumstances of cases often determine when the *Bone-Club* analysis is required. It is less likely to be required for ministerial matters, pretrial procedures, and in-chambers conferences to deal with purely legal issues. In cases involving jury selection, exclusion of particular parties, and partial closures, the Court is likely to look more carefully at the circumstances involved. In these cases, a trial court is on much safer ground if it conducts the analysis.

This is a developing area of law and the specific facts of each case are often dispositive (should not be surprise given that the test is an analysis of specific case factors). Washington courts appear to be searching for a balance in relation to when a *Bone-Club* analysis is required. Especially in the *voir dire* cases, the court has yet to clarify the balance between the rights of privacy of the jurors (who are compelled to participate), the defendant, and the general public.

DISCUSSION

Bone-Club and Article 22

State v. Bone Club[1] involved a matter of first impression regarding a trial court's responsibility to protect a defendant's right to a public trial under article I, §22 of the Washington Constitution in the face of the State's motion for full closure of a criminal hearing. Joseph Bone-Club was charged with possession with intent to deliver cocaine and delivery of cocaine. The trial court held a pretrial suppression hearing to decide the admissibility of Bone-Club's statements to police. During those proceedings, the court ordered closure of the hearing solely on the basis of the following exchange with the State:

> [THE STATE]: Before the testimony of the next witness the State would request that the courtroom be cleared.
> THE COURT: All right. All those sitting in the back, would you please excuse yourselves at this time.
> (The courtroom was cleared.)

The trial court neither sought nor received an objection or assent from defendant on the record. After the courtroom was cleared, Detective Frakes, an undercover police officer, testified that he feared public testimony would compromise his undercover activities. The trial court denied Bone-Clubs's motion to suppress his statement to Frakes, while granting a motion to suppress a statement to another police officer. Frakes later testified at trial in open court. A jury found Bone-Club guilty.

On appeal, Bone-Club claimed the temporary, full closure of his pretrial suppression hearing during the testimony of the undercover police officer violated his right to a "speedy public trial" as guaranteed by article I, §22 of the Washington Constitution. The Washington Supreme Court acknowledged the public trial right extends to a pretrial suppression hearing.[2]

Although the Court had recognized in three cases the potential for a conflict between the State's request for a closed hearing and a defendant's public trial right, the facts of those cases have not necessitated the articulation of a §22 standard.[3] In the earliest public trial right case, the *Marsh* court decided on statutory grounds an adult defendant's challenge to his closed juvenile court hearing, holding the Legislature

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[1] 128 Wn. 2d 254, 906 P.2d 326 (1995).
[2] Citing, *Waller v. Georgia*, 467 U.S. 39, 47, 104 S.Ct. 2210, 2216, 81 L.Ed.2d 31 (1984); *Federated Publications, Inc. v. Kurtz*, 94 Wash.2d 51, 59-60, 615 P.2d 440 (1980).
[3] *State v. Collins*, 50 Wash.2d 740, 314 P.2d 660 (1957); *State v. Gaines*, 144 Wash. 446, 258 P. 508 (1927), accord, *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th Cir.1989), cert. denied sub nom. *Charley v. United States*, 506 U.S. 958, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992); *Walker v. Dalsheim*, 1988 WL 70599, at * 2 (E.D.N.Y.1988) (holding partial closure did not violate defendant's Sixth Amendment public trial right).; *State v. Marsh*, 126 Wash. at 142, 217 P. 705 (1923).

granted juvenile courts jurisdiction to close hearings only for minor defendants, not adults. In *Gaines*, the court decided a trial court's stated intention to close a hearing did not threaten the defendant's public trial right where no closure actually ensued. Finally, where a trial court ordered the courtroom doors locked while allowing a reasonable number of spectators to remain, the *Collins* court held a partially closed hearing did not rise to the level of a constitutional violation.

The Court noted that it had previously developed a strict, well-defined standard for closing a hearing in opposition to the public's right to open proceedings under article I, §10 of the Washington Constitution.[4] This series of cases, where media challenged closure of a hearing or court records, conceded the public's right to open proceedings is not absolute, but emphasized that the high order of that constitutional protection mandated a trial court limit closure to rare circumstances. To assure careful, case-by-case analysis of a closure motion, the trial Court required a weighing test consisting of five criteria:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an 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 to the closure.
3. The proposed method for curtailing open access 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.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

The Court found that the §10 guaranty of public access to proceedings and the §22 public trial right serve complementary and interdependent functions in assuring the fairness of our judicial system, in particular finding that the public trial right operates as an essential cog in the constitutional design of fair trial safeguards. The Washington Constitution provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment.[5] The Court's decision to employ the same closure standard for both §10 and §22 rights mirrored the United States Supreme Court's decision in *Waller v. Georgia*[6].

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with

[4] See, *Allied Daily Newspapers v. Eikenberry*, 121 Wash.2d at 205, 848 P.2d 1258 (1993); *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982); *Federated Publications v. Kurtz*, 94 Wash.2d 51, 615 P.2d 440 (1980).
[5] *Kurtz*, 94 Wash.2d at 60, 615 P.2d 440 (1980).
[6] 467 U.S. 39, 47, 104 S.Ct. 2210, 2215-16, 81 L.Ed.2d 31 (1984).

> findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Waller at 45[7].

The *Bone-Club* Court found that the trial court record lacked any hint that the trial court considered Bone-Club's public trial right, much less engaged in the detailed review required to protect that right. Nor was the Court of Appeals' post hoc determination sufficient to cure the trial court's deficiency. The Court of Appeals justified closure by identifying a compelling interest in Frakes' testimony, presented after the trial court cleared the courtroom, that a public hearing would threaten "any" undercover officer. The Washington Supreme Court held that only evidence of a particularized threat would likely justify encroachment into a defendant's constitutionally guaranteed fair trial rights. Moreover, the existence of a compelling interest would not necessarily permit closure: the trial court must then perform the remaining four steps to weigh thoroughly the competing interests. The trial court's failure to follow the five-step closure test enunciated in the Court's §10 cases violated Defendant's right to a public trial under §22. The case was remanded for a new trial. Prejudice was presumed because a violation of the public trial right occurred.

Subsequent Cases

There have been a number of cases relying on *Bone-Club* since 1995. Each is reviewed below and those that contribute most significantly to the development of Washington law are also attached.

Civil Commitment Proceedings

In re D.A.H.[8] involved a civil commitment proceeding under the sexually violent predators statute. The trial court initially sealed the court file . The Seattle Times moved to intervene and have the file opened. The trial court closed the court for the probable cause hearing without conducting a *Bone-Club* analysis based upon equal protections and privacy rights of D.A.H.. The Court of Appeals held that the privacy rights of individuals in mental health commitment proceedings trump the open justice mandate in article 1, §10 of the Washington Constitution. These probable cause hearings held under RCW 71.09.040 are presumptively closed although full civil commitment trials for sexually violent predators are not and, therefore require a full *Bone-Club* analysis. [9]

[7] Quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984).
[8] 84. Wn.App. 102, 924 P.2d 49 (1996).
[9] See, *In re Detention of Townsend*, 27905-7-III (WACA).

The constitutional right to a public trial also trumps court rules enacted by the Washington Supreme Court. Superior Court Mental Proceedings Rule 1.3 provides that:

> Proceedings had pursuant to RCW 71.05 shall not be open to the public, unless the person who is the subject of the proceedings or his attorney files with the court a written request that the proceedings be public. The court in its discretion may permit a limited number of persons to observe the proceedings as a part of a training program of a facility devoted to the healing arts or of an accredited educational institution within the state.

MPR 1.3

The Court of Appeals in *Detention of D.F.F.*[10], held that because MPR 1.3 did not permit an individualized inquiry into the need to close D.F.F.'s 90 day mental illness commitment proceeding which had collateral consequences of constitutional magnitude[11], the court rule violated the mandate of article 1 §10 of the Washington State Constitution and was unconstitutional on its face and totally inoperative. The order committing D.F.F. was reversed and remanded.

Ministerial Matters

During the course of the noncapital murder case in *State v. Riviera*[12], the trial court barred the public from the courtroom to deal confidentially with a juror's complaint regarding a fellow juror's personal hygiene. The court did not conduct a *Bone-Club* analysis prior to closing the courtroom. The Court of Appeals found that this was a ministerial matter, not an adversarial proceeding and it did not involve any consideration of evidence or other trial related issue. This hearing was akin to a chambers hearing or bench conference, so there was no constitutional right for the defendant or the public to be present, so *Bone-Club* was not implicated.[13]

In *State v. White*[14], the state called a witness who immediately pleaded the Fifth Amendment during trial. To facilitate an in camera review, the trial court cleared the courtroom, including the defendant (over counsel's objections and without a *Bone-Club* analysis). After a brief colloquy, the witness agreed to testify and the court reopened. The Court of Appeals found that an in-camera hearing never occurred, just a very brief conversation where the witness withdrew her Fifth Amendment claim, so *Bone-Club* was again not triggered.

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[10] 144 Wn.App. 214, 183 P.3d 302 (2008), affirmed, 256 P.3d 357 (2011).
[11] Consequences not faced by D.A.H. in the prior case because D.A.H. was a felon and, as such, already suffered the loss of the right to vote and to possess firearms.
[12] 108 Wn.App. 645, 32 P.3d 292 (2001), rev. denied, 146 Wn.2d 1006 (2002).
[13] Citing, *State v. Bremer*, 98 Wn.App. 832, 991 P.2d 118 (2000).
[14] 152 Wn.App. 173, 215 P.3d 251 (2009) (domestic violence conviction).

Pretrial Proceedings

In *State v. Easterling*[15], Ricko Easterling sought reversal of his conviction on one count of unlawful delivery of cocaine. Easterling and codefendant Jackson were scheduled to be tried together. On the first day of trial, during pretrial motions, Jackson's counsel moved to sever Jackson's trial from Easterling's. Easterling was present, but he did not join Jackson's severance motion, nor did he file his own motion for severance. Jackson combined his motion to sever with a motion to dismiss. The trial court indicated that Jackson's severance motion would not succeed and Jackson's attorney responded that he wanted to argue the motions further, but was reluctant to discuss the specifics in open court and in front of Easterling, in particular.

Without seeking or receiving the State's or Easterling's input or objection, the trial court ordered the courtroom cleared and specifically directed Easterling, his attorney, and others to leave. The deputy prosecuting attorney, court personnel, Jackson, and Jackson's attorney were, however, allowed to remain. The record of the closed proceedings was ordered sealed. Ultimately, Jackson pled guilty to a reduced charge and testified against Easterling.

Easterling asserted that the trial court's decision to close the courtroom at the request of his codefendant during pretrial motions on the day of their joint trial violated his constitutional right to a public trial and/or his constitutional right to be present at all critical stages of his criminal proceeding. Although the State acknowledged the improper closure of the courtroom, it argued that the closed proceedings related to the codefendant's, not Easterling's, trial and, therefore, Easterling's public trial right was not violated. In addition, the State asserted that Easterling had no right to be present during closed court consideration of pretrial motions made by the codefendant because consideration of these motions did not constitute a "critical stage" of Easterling's trial.

The state also attempted to characterize the violation as de minimis, but this argument was rejected because the closure "was neither ministerial in nature nor trivial in result." The Washington Supreme Court concluded that the trial court committed an error of constitutional magnitude (under both article1 §§10 and 22 of the Washington State Constitution) when it directed that the courtroom be fully closed to Easterling and to the public during the joint trial without first satisfying the requirements set forth in *Bone-Club*. The trial court's failure to engage in the required case-by-case weighing of the competing interests prior to directing the courtroom be closed rendered unfair all subsequent trial proceedings. Consequently, the Court reversed Easterling's conviction and remanded for a new trial.

Justice Madsen wrote a concurring opinion, pointing out numerous cases in other jurisdictions where the *de minimis* rationale had been successful. Justice Chambers wrote

[15] 157 Wn.2d 167, 137 P.3d 825 (2006).

separately, stating that "I cannot agree that there could ever be a proper exception to the principle that a courtroom may be closed without a proper hearing and order."

In *State v. Heath*[16], the defendant's attorney brought 16 pretrial motions, some of which were dealt with in open court and others which were heard in the judge's chambers. No *Bone-Club* analysis was done. The Court of Appeals found that, although the trial court judge never explicitly closed the court, the state had the burden of showing that the closing did not occur. Judge Hunt's dissent argued that the court was never closed because the judge said "See everybody tomorrow in chambers". The court said nothing about excluding anyone, the judge's chambers were the courthouse law library that were open to the public, and there was no record that any member of the public was excluded. Even assuming the court had been closed, Judge Hunt cited *State v. Sadler*[17] for the proposition that the defendant had no constitutional right to be present for in-chambers conferences to address legal matters (in this case, admissibility of evidence and testimony).

Mr. Castro appealed his conviction for possessing cocaine, contending his constitutional right to a public trial was violated when the trial court decided pretrial motions on legal matters in chambers and later put them on the record in open court with an invitation to counsel to object[18]. The Court of Appeals found that the trial court addressed legal issues during the pretrial hearing: (1) whether to exclude witnesses; and (2) whether the State could impeach Mr. Castro with his prior criminal history. Further, during the pretrial hearing, the trial court admonished the State to avoid hearsay and improper opinion. Thus, the matters addressed did not involve any fact finding required to be open to the public. Therefore, the trial court was not required to engage in a *Bone-Club* analysis. Accordingly, the trial court did not violate Mr. Castro's public trial rights in its procedure for resolving his motions in limine.

Calvin Ticeson was committed as a sexually violent predator[19]. In his appeal, he contended the court erred by the court's in-chambers conferences, arguing this violated his rights to an open, public trial. The Court of Appeals held that Ticeson was not a criminal defendant and had no rights under article I, §22 of the Washington Constitution, and the public right to an open proceeding under article I, §10 was not violated by in-chambers conferences that dealt with purely legal matters.

Jury Questionnaires

In *State v. Tarhan*[20], prior to commencing jury selection, the parties stipulated and the court agreed that the members of the venire would complete confidential questionnaires that included questions concerning their sexual histories. After the answers were made available to counsel, they questioned the members of the venire in open court.

[16] 150 Wn.App. 121, 206 P.3d 712 (2009) (full description of this case below).
[17] 147 Wn.App.97, 193 P.3d 1108 (2008).
[18] *State v. Castro*, 159 Wn.App. 340, 246 P.3d 228 (2011).
[19] *In Detention of Ticeson*,159 Wn.App. 374, 246 P.3d 550 (2011).
[20] 246 P.3d 580 (2011).

Thereafter, all parties selected and accepted the jury, as constituted. Following the selection, acceptance, and swearing of the jury, the court entered an order sealing the completed questionnaires. That order stated:

> The court having reviewed the applicant's motion and declaration to seal specific documents or this file, and pursuant to applicable case law and court rules, finds compelling circumstances to grant the order exist as follows:
>
> Jurors signed confidential questionnaires containing private information concerning sexual abuse with the understanding that the questionnaires would be sealed.

Despite the wording in the first paragraph of this order, there was nothing in the record showing that any party moved to seal the questionnaires. It was undisputed that the trial court did not hold a *Bone-Club* hearing before entering the sealing order. The Court of Appeals held that there was no violation of Taner's constitutional right to a public trial because the questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there was nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. However, because the trial court subsequently sealed the questionnaires without first conducting the required analysis, the case was remanded for a *Bone-Club* hearing and reconsideration of the sealing order, but the case result remained.

Steven Lee and Tsegazeab Zerahaimanot, co-defendants in a joint trial, appealed their judgments and sentences for one count of felony murder, one count of first degree murder, and one count of second degree unlawful possession of a firearm[21]. They asserted that the trial court violated their state and federal rights to a public trial by sealing juror questionnaires without first conducting the analysis required under *Bone-Club.* The public's right to open access to court proceedings was also implicated.

The Court of Appeals found that there could be no serious dispute that the trial court in this case violated the public's right of open access to court records by failing to conduct a *Bone-Club* hearing before entering its sealing order. The question was what remedy was appropriate for this error. The Court again remanded to the trial court to conduct a *Bone-Club* hearing and to reconsider its closing order. Lee and Zerahaimanot had not presented any reasoned argument why the error here is structural, requiring a new trial because the sealing order had taken place after the jury was selected.

A jury convicted Daniel Stockwell of first degree child molestation and attempted first degree molestation of his step-granddaughters, E.M. and M.S[22]. The trial court found Stockwell was a persistent offender and sentenced him to life without the possibility of

[21] *State v. Lee*, 159 Wn.App. 795, 247 P.3d 470 (2011).
[22] *In re Stockwell*, 160 W.App. 172, 248 P.3d 576 (2011).

parole. On direct appeal, the Court of Appeals and the Washington Supreme Court affirmed the convictions and sentence. In the subsequent PRP, Stockwell argued, among other claims, that the trial court erred by sealing jury questionnaires without weighing the five *Bone-Club* factors.

The Court of Appeals found that while the State proposed the questionnaires, Stockwell stipulated to their use and did not object to their sealing. He also actively participated in *voir dire* and used the questionnaires, in open court, to identify jurors who wanted to be questioned individually. The Court was satisfied that the questionnaire's promise of confidentiality made it more likely jurors would candidly reveal incidents of sexual assault or abuse, providing critical information for Stockwell to use in challenging a juror for cause. Thus, Stockwell benefitted from sealing the questionnaires. Moreover, the closure was partial and, at most, affected only the public's right to "open" justice. The Court noted that various opinions and shifting alignments in *Momah* and *Strode* demonstrated that a majority of the Washington Supreme Court was apparently unwilling to allow a defendant to assert the public's " open" justice rights. Because the error here, if any, was not structural, affected only the public's right to "open" justice, and because Stockwell did not argue that he was actually prejudiced, his argument that the trial court violated his public trial rights by sealing the juror questionnaires failed.

Darrel Kantreal Jackson and Tyreek Deanthony Smith appealed their joint jury trial convictions and weapon-enhanced sentences for two counts of aggravated first degree murder, first degree robbery, and first degree burglary.[23] Jackson argued that the trial court violated his constitutional rights to a public trial, by sealing juror questionnaires without first applying the *Bone-Club* test. The parties agreed to the use and to the content of the juror questionnaires, including the following language telling the jurors that the court clerk would seal their information:

> The information obtained through this questionnaire will be used solely for the purpose of selecting a jury. *The questionnaire will become part of the court's permanent record and will not be distributed to anyone except the lawyers and the judge. The original will be filed under seal and no one will be allowed access except by court order.*

(emphasis added).

When the State asked about sealing the juror questionnaires, the trial court explained its normal procedure: After completing jury selection, the parties return their copies of the juror questionnaires to the court's judicial assistant for shredding. The court retains the original set of questionnaires and orders them sealed, giving the jurors " some expectation of privacy[.]" Following this explanation, the trial court specifically asked Jackson if this procedure was satisfactory; Jackson replied that it was. Jackson, Smith,

[23] *State v. Smith*, 256 P.3d 449 (2011).

and the State then signed a stipulation, agreeing to the trial court's proposal for sealing the jury questionnaires.

The entire jury *voir dire* occurred on the record in open court. When individual jurors indicated a preference to discuss specific issues privately, the trial court and counsel questioned them in open court, on the record, in the presence of all parties. The trial court neither closed the courtroom nor excluded the public at any time. After the parties completed *voir dire*, the trial court ordered the jury questionnaires sealed. Relying on *Stockwell*, the Court of Appeals held that the trial court did not err in sealing the jurors' questionnaires after *voir dire* without first conducting a *Bone-Club* analysis.

Voir dire

The court in *In re Orange*[24] was asked to decide whether the trial court's closure of the courtroom during voir dire, because of overcrowding and excluding the public and the families of the defendant and the victim, violated Orange's constitutional right to a public trial and, if so, whether the error, raised on collateral review, necessitated remand for a new trial. The Court noted that Article I, §22 of the Washington State Constitution guarantees that "[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial." and also that Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". The Court further noted that the guaranty of open criminal proceedings extends to "the process of juror selection," which "is itself a matter of importance, not simply to the adversaries but to the criminal justice system." [25] As this court had stated, "[a]lthough the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances."[26] The Court found that the *Bone-Club* factors had not been satisfied and, as a result of the unconstitutional courtroom closure, what the prospective jurors saw, as they entered and exited the courtroom during at least the first two days of *voir dire*, was not the participation of the defendant's family members in the jury selection process, but their conspicuous exclusion from it. The vigil of Orange's parents outside the closed courtroom doors may have been especially suggestive, given that prospective jurors were questioned in chambers regarding their knowledge of the Orange family's reputation in the community. Reversed and remanded.

Justice Madsen wrote a concurring opinion in which she found that the Court has also recognized that "since courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated.",[27]. Thus, overcrowding may be a legitimate reason for closing a courtroom to additional spectators who have no immediate

[24] 152 Wn.2d 795, 100 P.3d 291 (2004) (murder case).
[25] Citing *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).
[26] Citing, *State v. Bone-Club*, at 259.
[27] Citing, *Richmond Newspapers Inc. V. Virginia* , 448 U.S 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

concern with the trial.[28] However, courts have held that there is a special concern for ensuring that a defendant's family be permitted to attend.[29] Thus, while overcrowding is a legitimate basis for closing a courtroom to further spectators, it does not outweigh the defendant's interest in having his or her family present where, as the majority noted, alternative arrangements can be made so that family members may attend. Justice Madsen also took issue with the majorities retrial remedy, finding that, some courts have reasoned, contrary to the majority's implicit disapproval of findings upon later consideration, that remand for entry of the required findings could be the appropriate remedy where insufficient findings were made. [30] Justice Madsen emphasized that it must be remembered that the ultimate question was whether there had been an abridgement of the defendant's right to an open trial. If a reviewing court could make the determination from the record that closure was warranted, the failure to engage in the *Bone-Club* process, in and of itself, might not lead to a holding that a defendant's right to a public trial was, solely because of that failure, abridged.

Justice Ireland, in her dissent, agreed with the concurrence by Justice Madsen that the court may close a courtroom in order to protect a defendant's right to a fair trial. As the concurrence pointed out, overcrowding may be a legitimate reason for closing a courtroom. In fact, it might be in the interest of the defendant to have a jury venire untainted by the distractions of warring family members and spectators mingling among them. Much of the jury inquiry during the claimed court closure was conducted in chambers. Allowing the jury venire to occupy all of the available seating in this case, to the exclusion of spectators, even family, was not an abuse of discretion. No member of the press claimed actual exclusion. In Justice Ireland's opinion, the reference hearing showed the effect of the claimed closure was *de minimis*.

The State attempted to use the *de minimis* argument in *State v. Brightman*.[31] Brightman was convicted of second degree murder. He claimed that his constitutional right to a public trial was violated when the trial court closed the courtroom to spectators during jury selection. During a pretrial meeting, the judge told the attorneys that the courtroom would be packed with jurors during *voir dire*, so observers would be excluded to avoid security issues. The Washington Supreme Court found that limited seating itself does not constitute a violation of the defendant's right to a public trial, but an affirmative act by the judge to exclude the public does, absent a *Bone-Club* analysis (not done in this case). The case was remanded for a new trial.

Brian Frawley was convicted of first degree felony murder.[32] At trial, the court divided the *voir dire* of the jurors into two parts. The first consisted of the *voir dire* of individual

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[28] *United States v. Yeager*, 448 F.2d 74, 80 (3d Cir.1971); *United States v. Kobli*, 172 F.2d 919, 922 (3d Cir.1949); *People v. Woodward*, 4 Cal.4th 376, 14 Cal.Rptr.2d 434, 435, 841 P.2d 954 (1992).

[29] *In re Oliver*, 333 U.S. 257, 271-72, 68 S.Ct. 499, 92 L.Ed. 682 (1948) ; *English v. Artuz*, 164 F.3d 105, 108 (2d Cir.1998); *State v. Torres*, 844 A.2d 155, 159 (R.I.2004).

[30] Citing,,*United States v. Doe*, 63 F.3d 121, 131 (2d Cir.1995); *United States v. Galloway*, 937 F.2d 542, 547 (10th Cir.1991), *vacated en banc on other grounds*, 56 F.3d 1239 (10th Cir.1995) .

[31] 155 Wn.2d 506, 122 P.3d 150 (2005).

[32] *State v. Frawley*, 140 Wn.App. 713, 167 P.3d 593 (2007).

jurors. This involved a short interview with each juror that was conducted in the judge's chambers outside the presence of the public or Frawley. It is undisputed that Frawley waived his right to be present at this phase of the trial. The court did not, however, ask whether Frawley would waive his constitutional right to have the public present. Nor did the court ask any of those in the courtroom whether they would waive the right to a public trial. The court conducted the second phase of the *voir dire* in the courtroom. The court, after appropriate inquiry of Frawley, concluded that he knowingly and voluntarily waived his right to have the public present during this phase of the *voir dire*. The court again did not request a waiver from any member of the public or press, if any were present.

The Court of Appeals found that there was no discussion about excluding the public and Frawley was never presented with an opportunity to waive his right to have the public present during *voir dire*, so he could not have knowingly and intelligently waived that right. Since there was no evidence that a *Bone-Club* analysis had been done, prejudice was presumed and the case was remanded for a new trial.

In *State v. Castro*[33], the defendant was convicted of molesting C.S.H., his wife's granddaughter. During jury *voir dire*, the jurors responded to questionnaires about any past history of sexual abuse and sexual offenses. The court held an in-chambers hearing to discuss Castro's decision to waive his right to question the jurors about their answers in open court. The court stated: "These questions that will be asked [of] these individual jurors are private, and the reason we would do it in chambers is to hopefully get a better disclosure from the individuals of the issues that we will question them about." The court specifically referred the decision in *In re Pers. Restraint of Orange* when discussing the waiver issue. Defense counsel stated he discussed the matter with Castro and he wished to waive his right to open proceedings. When asked if this was correct, Castro responded, "Yes." The court questioned the jurors in chambers. Juror 5 responded to questions from the judge and defense counsel by explaining her father had molested her 32 years earlier. She stated she could be an impartial juror. Neither party challenged juror 5 for cause. Jury *voir dire* resumed in open court following the limited closure.

The Court of Appeals found that defense counsel clearly stated he discussed the public trial right with Castro, and he wished to waive his right for the limited purpose of questioning jurors in chambers regarding personal sexual matters. Castro stated he agreed with defense counsel's statement. Based on this record, Castro provided a valid limited waiver of his public trial rights. Further, the trial court considered the *Orange* factors as to Castro's rights. The trial court held an in-chambers hearing and indicated a compelling interest for closing the proceedings to gain better disclosure from the jurors regarding personal sexual abuse and sexual offenses. The trial court allowed Castro the opportunity to object, whereby he waived his public trial rights. The court then used the least restrictive means to close the *voir dire* proceedings solely for that limited purpose. The Court of Appeals found that Castro's public trial rights had been properly considered. Castro was not allowed to waive his rights and then appeal an adverse jury verdict, arguing the public was deprived of

[33] 141 Wn.App. 485, 170 P.3d 78 (2007).

its right to participate in the hearing; the public had not appealed. The conviction was affirmed.

Absent a clear order that a proceeding is closed to the public, a *Bone-Club* analysis may not be required. Dr. Momah was convicted of indecent liberties and rape[34]. The trial court and defense counsel were concerned about contamination of the jury in this highly reported case and eight jurors had also requested private questioning. On the second day of *voir dire*, the questioning was moved into the judge's chambers with a court reporter, Counsel and Momah were also present. The judge noted that "the door is closed", but never specifically ordered that the court was closed. There was no indication on the record that the individual questioning was for the purpose of excluding the press or the public from the trial nor that they were in fact specifically excluded. No *Bone-Club* analysis was required; the convictions were affirmed.

The Washington Supreme Court upheld the Court of Appeals finding that the closure occurred to protect Momah's rights and did not actually prejudice him. The record revealed that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case. The record also demonstrated that the trial court recognized the competing article I §22 interests in the case. The trial court, in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of *voir dire* to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have had a problem being fair or impartial. Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it[35]. Thus, the underlying facts and impact of the closure in *Momah* were significantly different from those presented by the Court's previous cases. The Court affirmed the jury's determination of guilt.

Justice Alexander wrote a dissent, finding that:

> From the record we have, there appears to be no justification for closing the courtroom to the public. If there was a valid reason for doing so, it is not apparent from the record because the trial judge did not perform a *Bone-Club* analysis prior to closing the courtroom. Neither did he make formal findings or conclusions justifying the closure. Thus, it is impossible to know exactly what motivated the trial judge's decision to partially close *voir dire*. While it may appear to some that a new trial is a steep price to pay for the closure of the courtroom for a portion of a trial, the expense of a retrial

[34] *State v. Momah*, 141 Wn.App. 705, 171 P.3d 1064 (2007), affirmed, 217 P.3d 321 (Wash. 2009).
[35] Contrast, *State v. Erickson*, 146 Wn.App 200, 189 P.3d 245 (2008) (Remanded when jurors questioned privately without *Bone-Club* analysis after defendant acquiesced to closure. Court noted that jurors could have been questioned in open court regarding sensitive issues after removing other jurors as was done in *State v. Vega*, 144 Wn.App. 914, 184 P.3d 677 (2008).

> pales in comparison to the harm done to the constitutionally guaranteed right to have justice in this state administered openly.

In *State v. Duckett*, the Court of Appeals wrote a detailed analysis explaining why the state constitution requires remand for retrial for conducting *voir dire* outside of the public forum of the courtroom without engaging in a *Bone-Club* analysis. Duckett was found guilty of secend degree rape.[36] During *voir dire*, the trial judge had questioned selected jurors individually in the jury room, based on their responses to a questionnaire that asked about their experiences with sexual abuse. Duckett had waived his right to be present. However, the court never advised Duckett of his right to a public trial, nor asked him to waive this right. The Court of Appeals concluded, as in *Frawley,* that this procedure violated a criminal defendant's public trial right, and reversed Duckett's conviction with remand for a new trial. The Court clarified that the *Bone-Club* analysis is a burden born by the trial court to affirmatively provide the defendant and members of the public an opportunity to object before a court proceeding can be closed. This was the first recognition that the public's interest must be separately considered in this context.

During jury selection in *State v. Sadler*[37], the state exercised two peremptory challenges against the only two African-American jurors on the panel. Defense counsel raised a *Batson* challenge[38]. The court heard the challenge in the jury room, but on the record. There was no record regarding whether members of the public or press were in the courtroom or whether the court would have allowed spectators into the jury room. No *Bone-Club* analysis was done. The Court of Appeals found that moving the proceedings to the jury room was equivalent to closing the courtroom to the public even though no express order was made by the court. While defendants are not entitled to attend in-chambers or bench conferences involving purely legal or ministerial issues, the Court found that *Batson* challenges involve factual findings and the prosecutor's explanation must be tested in a forum open to the public. Reversed and remanded.

A result seemingly outside the mainstream was reached in *State v. Wise*[39] (review granted 2010) which involved a conviction for second degree burglary and first degree theft in connection with a break-in of the Lake Limerick Mini Mart. During jury selection after some initial questions, the trial court posed a series of additional questions to the group with the venire members answering affirmatively by holding up numbered cards. Before this questioning, the trial court stated: " [I]f there is anything ... that is sensitive and you don't want to speak about it in this group setting, just let us know. I make a list on my notebook and we take those jurors back into chambers so that we can ask those questions more privately." Although there is nothing on the record indicating that either

[36] 141 Wn.App. 797, 173 P.3d 948 (2007).
[37] 147 Wn.App.97, 193 P.3d 1108 (2008).
[38] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (regarding excluding jurors because of race.)
[39] 148 Wn.App. 425, 200 P.3d 266 (2009), *rev. granted*, 170 Wn.2d 1009, 236 P.3d 207 (2010) .

party requested private questioning of jurors, neither the State nor Wise objected to this process.

The trial court then stated, " At this time, we are going to take a number of jurors into chambers and begin a question-a series of questions there. The trial judge, Wise, his counsel, the prosecutor, and the court reporter went into chambers to question eight potential jurors who had requested that they be questioned privately.

In chambers, the trial court asked prospective jurors about health problems, time constraints, and their relationships with witnesses and law enforcement officials. Upon returning to the courtroom, *voir dire* continued and the trial court gave the parties each an opportunity to ask specific questions. During this questioning, one prospective juror requested to speak in chambers. The trial court also called an additional juror into chambers to ask about a response on her questionnaire concerning her history of criminal convictions. The trial court, parties, and court reporter moved to chambers for this questioning as well and returned to the courtroom to complete jury selection.

The Court of Appeals found that, at the prospective jurors' request, a portion of *voir dire* questioning took place in chambers. Neither party requested the chambers questioning or objected to the process and review of the record demonstrated that neither party was prejudiced by the process; in fact, both appeared to have benefited from the prospective jurors' candid answers, some of which would have tainted the entire venire if stated in open court. The trial court individually questioned only 10 potential jurors in chambers, while the rest of the jury remained in the courtroom. The trial court did not order a closure of the courtroom itself and the courtroom and the proceedings conducted there remained open. The court reporter was present in chambers during questioning, as were all parties, and the record contained a full transcript of the proceedings. Closure, if any, was temporary and partial, below the " temporary, full closure" threshold of *Bone-Club*[40]*.* The trial court was not required to *sua sponte* conduct a *Bone-Club* analysis prior to this temporary relocation of *voir dire* to chambers for the purpose of asking prospective jurors sensitive questions.

Even assuming the trial court improperly closed the courtroom, the Court of Appeals held that Wise was not entitled to a new trial on that basis because (1) he waived his own public trial right[41] and (2) he lacks standing to defend the public's right to an open trial under article I, §10 of the Washington Constitution. Wise's conviction was affirmed. The Washington Supreme Court has granted review.

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[40] *Citing, State v. Gregory*, 158 Wash.2d 759, 815-16, 147 P.3d 1201 (2006).

[41] "a defendant's conduct may similarly waive his right to have all *voir dire* questions conducted in open court, even without an express explanation of the public trial right by the trial court. And we hold that Wise waived his right to ask prospective jurors sensitive personal questions in public in this case. This is because not only did Wise not object at trial, but because his counsel actively engaged in the private questioning of the prospective jurors."

Tony Strode was charged in Ferry County with first degree rape of a child, first degree attempted rape of a child, and first degree child molestation[42]. Because the case against Strode centered on allegations that he had sexual contact with a child, prospective jurors were given a confidential juror questionnaire to complete. In it they were asked whether they, or anyone close to them, had either been the victim of sexual abuse or accused of committing a sexual offense. Those who answered " yes" to either question were called one at a time into the judge's chambers for questioning on the issue of whether their past experiences would preclude them from rendering a fair and impartial verdict in the case. The trial court conducted this form of individual *voir dire* for at least 11 prospective jurors. Counsel for the State and Strode both acknowledged in that the record was devoid of any indication that the trial judge held a *Bone-Club* hearing prior to these interviews being conducted in chambers.

Refusing to review the facts of the closure or conduct a Bone-Club analysis at the appellate level, the Washington Supreme Court held that the determination of a compelling interest for courtroom closure is " the affirmative duty of the trial court, not the court of appeals."[43]

The Court rejected the State's assertion that Strode invited or waived his right to challenge the closure when he acquiesced, without any objection, to the private questioning of jurors. Additionally, Strode could not waive the public's right to open proceedings. The public also had a right to object to the closure of a courtroom, and the trial court had the independent obligation to perform a *Bone-Club* analysis. The record revealed that the public was not afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration. Finally, the Court observed that the trial court and counsel for the State and Strode questioned at least 11 prospective jurors in chambers. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. This closure was not brief or inadvertent. Reversed and remanded.

Justice J. Johnson dissented, finding that the plurality dismissed out of hand the legitimate privacy interests of jurors. Johnson found that juror privacy and candidness could be particularly important in cases that involve extremely sensitive matters. A review of the record in this case demonstrated that the trial judge balanced the compelling interests of juror privacy with the defendant's right to a public trial by an impartial jury and ordered a narrowly tailored closure that protected jurors' interests and ensured an impartial jury. "We should recognize, as the trial court did here, that jurors have a compelling interest in maintaining confidentiality in their private, personal affairs and that those interests are integrally connected to the defendant's right to an impartial jury."

[42] *State v. Strode*, 217 P.3d 310 (2009).
[43] Citing *Bone-Club* at 261.

There is no courtroom closure when a member of the public leaves the courtroom at a party's request without a court order[44]. Price was convicted of first degree murder. During *voir dire*, one juror asked to be questioned in private. At the end of the day, the other jurors were excused and this juror was questioned alone after the victim's mother agreed to leave the courtroom at the prosecuting attorney's request. The court of Appeals held that the other jurors were officers of the court, not members of the public, after they had been sworn in so their exclusion did not constitute excluding the public.

In *State v. Paumier*[45], the Court of Appeals revisited the issue of conducting *voir dire* for jurors who had requested questioning in the judge's chambers. The Court of Appeals, in a thorough analysis of Washington and federal precedent, expressed confusion as to whether some analysis, short of *Bone-Club* would suffice.[46] After the *Mohmah* and *Strode* cases in Washington, the United State Supreme court, in *Presley v. Georgia*[47], held that under the First and Sixth Amendments to the Constitution of the United States, *voir dire* must be open to the public, subject to cases involving other rights or interests subject to the test articulated in *Waller v. Georgia*[48].

> The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller at 467 U.S. 48.

The Court of Appeals reversed and remanded under federal precedent, not *Bone-Club*. The trial court had not properly considered reasonable alternative and failed to make appropriate findings.

In *State v. Leyerle*[49], the State charged Leyerle with unlawful possession of methamphetamine. During *voir dire*, the trial court asked if any jurors felt that they could not be impartial if they were to be on the jury. When a prospective juror indicated that he could not be impartial, the trial court asked the prospective juror and both counsel to join him in the hallway. The hallway discussion between the trial judge, prosecutor, defense counsel, and the prospective juror was recorded. The trial judge asked defense counsel if Leyerle wanted to join them in the hallway. Defense counsel's response was inaudible and not recorded, but later, before they returned to the courtroom, the trial judge stated, " There were no spectators who waived their right to be here [; defendant] doesn't want

[44] *State v. Price*, 154 Wn.App. 480, 228 P.3d 1276 (2009).
[45] 155 Wn.App. 673, 230 P.3d 212 (2010).
[46] *Bone-Club* court had stated clearly mirrored the requirements of Waller. *Bone-Club* at 259.
[47] ---- U.S. ____, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).
[48] 467 U.S. 39, 104 S.Ct. 2210, 81 L.AEd.2d 31 (1984).
[49] 242 P.3d 921 (2010).

to be here and his counsel said [he] didn't want to be here. Isn't that correct?" Defense counsel responded affirmatively.

The Court of Appeals held that, as in *Paumier,* applying the federal constitution resolved any question about what a trial court must do before excluding the public from trial proceedings, including *voir dire*. Similar to what occurred in *Paumier,* the trial court conducted a portion of *voir dire* outside the public forum of the courtroom. By doing so, without first considering alternatives to such closure of this portion of the *voir dire* proceedings and making appropriate findings explaining why such closure was necessary, the trial court violated Leyerle's and the public's right to an open proceeding. *Presley* required reversal of Leyerle's conviction.

State v. Njonge[50] involved an appeal from conviction for second degree murder. Njonge contended that he was denied his right to a public trial when the trial court closed the courtroom during a portion of *voir dire*. At trial, the State made a motion to exclude witnesses from *voir dire*. The following exchange occurred:

> [DEPUTY PROSECUTOR]: ... Five of the family members of the victim are testifying at trial. They will be testifying as my first witnesses, and I have told them that they are not allowed to be in the courtroom until after. At that point, I expect them to sit in.
>
> One of the family members had asked if they could sit in during voir dire. I have not had that request before; so I don't know the Court's feelings. It's not testimony. I don't think it's a concern, but I don't know, or even if there is space for that. So, I just wanted to raise that issue, also, to find out if that was even a possibility.
>
> THE COURT: It's not testimony; that's true. However, I'm not going to allow it. For one thing, we are in very cramped quarters for jury selection, and I think about the only place for visitors to sit is going to be in a little anteroom out there, and I will tell you, with what we are going to do about trying to get enough just to do this in one meeting.
>
> The other thing is, quite frankly, the jurors will be seeing that face throughout the entire process and maybe making some connections with that person when the person gets on the stand. I don't think it's fair; so, I am not going to allow it.

The defense did not object. The court later described how *voir dire* would be conducted:

> So then we call the entire jury panel up. We have received permission to get more than the standard 50. I think we are getting 65. That necessitates

[50] 161 Wn.App. 568, 255 P.3d 753 (2011).

> a rearrangement of our courtroom, and my Bailiff put out a map for you guys as to how we are going to get this number in. The first two benches must remain clear at all times.

The defense did not object. Shortly after, the court addressed observers:

> Just let me say for the people who are observing. You are certainly welcome to observe. Tomorrow when we have the jury selection, there will not be room for all of you. What we are going to do to allow people to observe is check with the fire marshal... and make sure that we can keep those first swinging doors open. And if we can do that, then we will allow some people to observe if they wish to do so during jury selection by sitting in that kind of entry hall, if we can do that.
> But, otherwise, as you can see, we are already putting chairs up here to accommodate the jury. We may be able to have chairs out there; we may not. We may be able to have the doors open without chairs. We are going to find that out. The chance of all [of] you being able to be here and observe are slim to none during the jury selection process.

The defense did not object.

The next morning, the parties did not discuss accommodation of the public in the courtroom. Jury selection began. Several jurors were excused from service based on hardship. After the noon break, the prosecutor stated:

> Some family members who are not witnesses stuck around this morning, hoping there might be some seats later, and your bailiff informed them at lunch since some people were excused there were some. So I don't know if the Court has any problem with that. They are not witnesses. We tried to figure out a spot that would be in a row that basically has no jurors. So that second row over there only has Juror 30. Is that okay with the Court if they are in there?

The judge responded:

> Actually, that seemed to be a better idea. We checked with the fire department. They wouldn't let us leave the doors open for visitors to come in. Let's move No. 30 over next to 34, and then we can have visitors sitting in the second row there.

There was no additional discussion of the issue on the record. The record did not show any observer being asked to leave the courtroom or any objection to the *voir dire* procedure, by either the parties or any observers. The court clerk's minutes reflected no order relating to a closure.

The Court of Appeals found that, the trial court made a clear statement to both the parties and observers during pretrial motions that they would not be permitted in the courtroom the next day. Although the trial court thought at the time that observers might have been able to watch from the anteroom that did not ultimately occur. The combined effect of the trial court's statements and the closed courtroom doors resulted in a closure as to those observers who heard the trial court's statements on the first day. The record showed that this resulted in a full closure of *voir dire* for the morning session.

The Court noted that alternatives exist to closure in such cases, including calling fewer jurors, reserving certain rows for the public, dividing the jury venire panel, or moving to a larger courtroom. If these are not available, courts might consider technological solutions, such as providing live video feed of the proceedings in another courtroom. Of course, the court always has the opportunity to seek a knowing, intelligent, and voluntary waiver of the right to a public trial by the defendant. But, where space limitations completely exclude the public, the trial court must engage in an analysis of the *Bone-Club* factors to determine whether any resulting closure is warranted absent a knowing, voluntary, and intelligent waiver of the defendant's public trial right.

Here, the trial court did not analyze the *Bone-Club* factors on the record. The trial court offered two reasons for closure, space limitations and preventing the jurors from "maybe making some connections with that person when the person gets on the stand." The Court noted that the trial court required the first two benches of the courtroom to be left open without indicating why that space was not available to the public or putting on the record its reason for doing so. The trial court also did not consider less restrictive alternatives or expressly consider the impact of the closure on Njonge's right to a public trial. Because the trial court excluded the public from a portion of jury selection without applying the *Bone-Club* test, Njonge's conviction was reversed and remanded for a new trial.

The Court of Appeals in *State v. Applegate*[51] held that a criminal defendant can waive his constitutional right to a public trial if that waiver is knowing, voluntary, and intelligent. After a discussion with his attorney, Applegate consented to the in-chambers questioning of a single juror during jury selection. During *voir dire*, the following exchange occurred in open court.

> THE COURT: Is there any member of the jury panel or any member of the public who is present who has an objection to our speaking with juror No. 2 I guess in my office? It would be a public proceeding. Any member of the public that is available to come in I will have the outer door open for that purpose.

[51] 64100-0-I (2011).

> Is there any objection from anyone in the courtroom? Counsel, I evaluated the factors set forth by case law and I think all those factors have been met.
>
> MR. SETTER: Except the record doesn't reflect that the defendant has no objection to that process or defense counsel.
>
> THE COURT: That's the next question I'm going to ask, that in terms of I believe the five factors set forth referred to as the [*Bone-Club*] factors. I believe those have been met.
>
> Mr. Nelson, do you or your client have any objection to—
>
> MR. NELSON: No.

On appeal, Applegate characterized his statement of no objection as a "failure to object." Applegate relies on the following statement from *Bone-Club* to argue that his lack of an objection was not a waiver:

> We also dismiss the State's argument that Defendant's failure to object freed the trial court from the strictures of the closure requirements. To the contrary, this court has held an opportunity to object hold no "practical meaning" unless the court informs potential objectors of the nature of the asserted interests.

Bone-Club at 261.

The Court found that Applegate did not simply fail to object. Nor did he merely acquiesce to the court's procedure. He stated through defense counsel on the record that he personally had no objection to the closure after he discussed the issue with counsel. Washington law required no more. The Court held that Applegate's statement constituted a knowing, voluntary, and intelligent waiver. Because Applegate waived his right to a public trial, he could not later complain that the court interviewed juror 2 in chambers without first applying and weighing the *Bone-Club* factors on the record. The Court found that whether the trial court properly analyzed and weighed the *Bone-Club* factors was a separate issue that the Court did not need to decide because Applegate's waiver of his public trial right precluded him from raising it.

Partial Closure

In *State v. Russell*[52], the Court of Appeals held that a *Bone-Club* analysis was not required when the trial court prohibited the media from photographing juvenile witnesses without the consent of the witnesses and their parents. The courtroom was never fully closed to the

[52] 141 Wn.App. 733, 172 P.3d 361 (2007).

public. The court held that the photography ban was not even akin to a partial disclosure since no person was prevented from entering or remaining in the courtroom.

A defendant's four-year-old daughter was excluded from the courtroom during a trial for a methamphetamine possession trial in *State v. Lomor*[53]. The girl was in a wheelchair and on a ventilator (which made loud noises). The trial court reasoned that this would distract the jury and that the girl would not understand the proceedings, so her presence would not help ensure the fairness of the trial, but no *Bone-Club* analysis was done. Nobody else was excluded from the courtroom. The Court of Appeals held that there was no violation of Lomor's constitutional rights to a public trial.

Sean O'Connor claimed that regular courthouse screening violated his right to a public trial because some members of the public would not attend because of the practice[54]. There was no record that any court proceedings were actually closed. The Court of Appeals held that no *Bone-Club* analysis was required.

Tinh Trinh Lam appealed his conviction for first degree murder[55]. He contended that the trial court violated his constitutional right to a public trial by interviewing a previously seated juror in chambers without first conducting a *Bone-Club* analysis. The juror had requested a meeting in chambers because he thought his unusual name would make him easy to identify later by those who might want to harass or harm him or his family. The State argued that the questioning of the single juror in chambers was more like a side bar than *voir dire*. Because the jury had already been questioned and selected in a public proceeding, the State characterized the in-chambers questioning as " simply a housekeeping matter." Therefore, the State reasoned, Lam had no right to be present during the questioning, and his public trial right did not apply. The Court disagreed.

The Court perceived no principled basis for distinguishing either the process or purpose of *voir dire* and the questioning of the juror. In each instance, a judge and counsel question an individual to gather facts needed to decide whether that person will serve as a juror. The questioning of the juror conducted after the jury was selected was procedurally similar to and conducted for the same purpose as *voir dire*, determining an individual's ability to serve as a juror (not making the distinction that a sworn in juror is a member of the court). Since a defendant's public trial rights apply to *voir dire*, by analogy they applied to the questioning of a sworn juror in chambers conducted for the purpose of determining whether that juror will continue to serve. Because a failure to conduct a *Bone-Club* analysis before restricting public access to a criminal trial requires reversal in all but the most exceptional circumstances, the Court reversed Lam's conviction and remanded for a new trial.

Full Closure for Collateral Matter

[53] 154 Wn.App.386, 224 P.3d 857 (2010), affirmed, 257 P.3d 624 (2011).
[54] *State v. O'Connor*, 155 Wn.App. 282, 229 P.3d 880 (2010).
[55] *State v. Lam*, 161 Wn.App. 299, 254 P.3d 891 (2011).

Evan Savoie appealed his Grant County adult-court first degree murder conviction stemming from Craig Sorger's homicide when they were respectively 12 and 13 years old[56]. Early on, defense counsel theorized someone else killed Sorger, possibly a Sorger family member, and requested mental health and Child Protective Service records relating to the Sorger family. DSHS opposed unrestricted disclosure. The court ordered an in camera review to determine relevance. The court decided to release a portion of the Sorgers' record, but the prosecutor's office mistakenly provided all of the requested records to the defense.

The Grant County Prosecutor's Office decided "the Sorgers needed somebody to come in and vindicate their rights." The State moved to appoint counsel for the Sorgers under RCW 7.69.030 (addressing survivors' rights in criminal proceedings). Prosecutors proposed the order signed by the court. It partly states, "[w]ith respect to the victims and survivors of victims, the court finds that appointed counsel is necessary to protect their rights in this action." Nothing indicates defense counsel's presence, although blank signature lines are on the document. Attorney Garth Dano was appointed.

The trial court indicated Mr. Dano would not be heard in the criminal matter; he would have to institute a separate proceeding. But Mr. Dano did appear in the criminal case multiple times attempting to stop further distribution of the family records and seeking return of the records. Mr. Dano sought exemption from any rule prohibiting the Sorger family from attending the trial until they had completed their testimony. The defense repeatedly objected to Mr. Dano's participation in the proceedings, arguing the Sorgers were not parties to the action, had no standing to present argument through an appointed attorney, and the court lacked authority for Mr. Dano's appointment.

At one hearing, over Savoie's strenuous objection, Mr. Dano successfully asked the court to close the courtroom to the general public. The court ordered "[w]e'd ask everyone to leave the courtroom except parties and the attorneys." The court permitted Ms. Sorger to remain. Mr. Dano then argued why the court should order immediate return of all records. During this hearing, the prosecutor offered proof concerning two mental health professionals and their dealings with Ms. Sorger. The prosecution asked for, and the court ordered, certain documents related to the offer to be sealed. Mr. Dano successfully convinced the court to prevent further distribution of the records and to seal portions of the court file.

On appeal, the issue was whether the trial court violated Mr. Savoie's right to a public trial by closing the courtroom without performing a *Bone-Club* analysis. The State conceded the error but argued that reversal was not required. The Court of Appeals noted that every time counsel appeared on behalf of the Sorgers, it was in a hearing scheduled under the Savoie's criminal case title and cause number. Documents filed on behalf of the Sorgers were also filed in the criminal case. The closed hearing pertained to the criminal prosecution and involved the use of the records by the defense, the defense's trial strategy, the defense's witnesses, and the timing of the Sorgers' testimony. In sum, the closure was

[56] *State v. Savoie*, 25414-3-III (2011).

intended to protect the Sorgers' interest, not Savoie's interests, and he strenuously objected. Accordingly, the Court held that the closure violated Savoie's right to a public trial. The remedy was reversal for a new trial.

CONCLUSION

This report is limited to the issue of the application of *Bone-Club* to closed court proceedings. There is at least one other line of cases dealing with the sealing of court records. Many of these cases require a similar utilization of the *Bone-Club* analysis, but they are not included here.

Clearly, if a trial court, in a criminal case or civil commitment proceeding, is contemplating the closure of the courtroom, it should consider the public trial rights of the defendant as well as the rights help by the public, absent a waiver by both or a thorough *Bone-Club* analysis. Absent from the reported cases is any guidance regarding what a successful *Bone-Club* analysis would look like - the amount of detail required.