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## AN OPEN COURTS CHECKLIST: CLARIFYING WASHINGTON'S PUBLIC TRIAL AND PUBLIC ACCESS JURISPRUDENCE

Jeanine Blackett Lutzenhiser

*Author's Note:* As this issue went to press, the Washington State Supreme Court decided four cases involving the right to public trial and the open administration of justice: *In re Personal Restraint of Morris*, *State v. Sublett*, *State v. Paumier*, and *State v. Wise*.<sup>\*</sup> The fourteen separate opinions in these cases demonstrate that the Court is far from agreement, and that important questions regarding Washington's open courts jurisprudence remain unanswered. In short, the decisions do not appear to definitively resolve the dilemmas that this Comment attempts to address and that trial courts still face. A response to these decisions in the June 2013 issue of this publication will more closely examine their impact on Washington open courts jurisprudence.

*Abstract:* Fundamental to the American system of justice is the right to a public trial and a general presumption of openness in judicial proceedings. These values are reflected in the First and Sixth Amendments of the United States Constitution and in many state constitutions. Washington is one of a number of states whose constitution (unlike the U.S. Constitution) also explicitly guarantees the open administration of justice. Constitutional dilemmas arise when a party requests the closure of a courtroom or the sealing of documents. These requests force courts to harmonize values of open justice with other compelling interests. U.S. Supreme Court decisions such as *Richmond Newspapers, Inc. v. Virginia* and *Waller v. Georgia* have provided guidance to states developing their own public trial jurisprudence. The Washington State Supreme Court used U.S. Supreme Court decisions to develop its own five-factor test for determining the constitutionality of closed proceedings in the criminal context in *State v. Bone-Club*. Since *Bone-Club*, however, many trial courts have failed to apply the factors articulated by the Court. This has resulted in many costly, high-profile reversals of convictions because of public trial violations. What could make the *Bone-Club* factors clearer and more practical for trial courts? This Comment argues that the *Bone-Club* test should become an "open courts checklist" that begins with a threshold question: Is the proposed action in fact a closure? If the answer is no, the rights to public access and public trial are not implicated. If the answer is yes, there remain six questions a trial court must ask on the record to evaluate the constitutionality of a proposed closure. Checklists have been employed in the fields of aviation and medicine for decades to ensure safety and procedural integrity. In a judicial context, an open courts checklist can provide clear, workable standards that will assist trial courts and leave a clear record for review. The goal is both improved judicial economy and the safeguarding of these essential constitutional rights and values.

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<sup>\*</sup> *In re Personal Restraint of Morris*, No. 84929-3 (Wash. Nov. 21, 2012); *State v. Paumier*, No. 84585-9 (Wash. Nov. 21, 2012); *State v. Sublett*, No. 84856-4 (Wash. Nov. 21, 2012); *State v. Wise*, No. 82802-4 (Wash. Nov. 21, 2012).

## INTRODUCTION

*Publicity . . . is the soul of justice.*<sup>1</sup>  
—Jeremy Bentham

Since even before the founding of the United States, there has been a presumption of openness in the American administration of justice. According to the Sixth Amendment to the U.S. Constitution, a criminal defendant enjoys the right to a public trial, which safeguards the defendant's civil rights and helps ensure the integrity of the justice system.<sup>2</sup> The First Amendment guarantees, among other rights, the rights of free speech, press, and assembly.<sup>3</sup> Throughout the nation's history, the freedoms of speech and assembly have also been understood to encompass the right to listen and be present at important government functions such as trials.<sup>4</sup> Twenty-seven state governments,<sup>5</sup> including Washington's, have emphasized this value of openness in their state constitutions by including provisions to the effect that "[j]ustice in all cases shall be administered openly."<sup>6</sup>

One of the thorniest constitutional challenges criminal defendants and civil litigants raise at trial and on appeal is the issue of courtroom closure.<sup>7</sup> In Washington, the Supreme Court continues to struggle with fundamental questions: What constitutes a closure?<sup>8</sup> What interests and whose rights are implicated, and whose will control?<sup>9</sup> If rights have been violated, what is an appropriate remedy?<sup>10</sup>

The Washington State Supreme Court has used decisions of the U.S. Supreme Court as a guide to evaluate alleged violations of the rights to public trial and open administration of justice. In 1995 the Washington State Supreme Court first articulated a test for courtroom closures in the

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1. JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (1825).

2. U.S. CONST. amend. VI.

3. U.S. CONST. amend. I.

4. *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 575 (1980).

5. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES app. 6 at 6-91, 6-92 (4th ed. 2006) (citing and comparing state constitutional provisions).

6. WASH. CONST. art. I, § 10.

7. *See generally* Daniel Levitas, Comment, *Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493 (2009) (surveying the history of the public trial guarantee and arguing for corrective measures to prevent improper courtroom closures).

8. *See State v. Lormor*, 172 Wash. 2d 85, 92-93, 257 P.3d 624, 628 (2011).

9. *See State v. Strode*, 167 Wash. 2d 222, 227-29, 217 P.3d 310, 314-15 (2009).

10. *See State v. Momah*, 167 Wash. 2d 140, 156, 217 P.3d 321, 329 (2009).

criminal context in *State v. Bone-Club*.<sup>11</sup> Since then, however, trial courts have often failed to apply the test and have improperly closed court proceedings or sealed court documents.<sup>12</sup> In the wake of a number of high-profile and costly reversals for public trial violations, Washington trial courts are asking practical questions: What are judges permitted to do in chambers or at sidebar?<sup>13</sup> How are they to balance abstract constitutional questions with concrete concerns such as privacy or limited space, time, and resources?<sup>14</sup>

This Comment argues that the Washington State Supreme Court should turn the *Bone-Club* factors into a checklist, much as pilots and surgeons use checklists to ensure the safety and integrity of their operating procedures.<sup>15</sup> This clarified checklist will give trial courts the guidance they need to evaluate closure and sealing requests. Part I briefly surveys the history of the rights to public trial and open administration of justice. Part II examines decisions of the U.S. Supreme Court interpreting these rights in the federal context. Part III details the development of open courts jurisprudence in Washington State. Part IV describes the current situation in Washington: numerous reversals in the courts of appeals and the Washington State Supreme Court because of persistent uncertainty about what constitutes a closure. Part V proposes an “open courts checklist.” Asking a threshold question of whether the contemplated action constitutes a closure will enable courts to decide whether a modified *Bone-Club* test is called for. These preliminary steps will also dictate the appropriate remedy for any violation. This process will safeguard constitutional rights and values, increase clarity and judicial economy, and address the practical concerns of trial courts around the state.

## I. THE U.S. AND WASHINGTON CONSTITUTIONS GUARANTEE THE RIGHT TO PUBLIC TRIAL AND OPEN JUDICIAL PROCEEDINGS

The open administration of justice implicates two sets of interests.

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11. 128 Wash. 2d 254, 906 P.2d 325 (1995).

12. Brief for Washington Association of Prosecuting Attorneys as Amicus Curiae Supporting Petitioner at app. A, *State v. Paumier*, 155 Wash. App. 673, 230 P.3d 212 (2010) (No. 84585-9) (collecting cases).

13. *See State v. Koss*, 158 Wash. App. 8, 16, 241 P.3d 415, 418 (2010); *see also State v. Smith*, No. 38868-5-II, slip. op. at 1 (Wash. Ct. App. Feb. 23, 2011).

14. *See In re Detention of Ticeson*, 159 Wash. App. 374, 386, 246 P.3d 550, 556 (2011).

15. *See generally* ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT (2010) (discussing the efficacy of simple checklists as fail-safe measures in a variety of contexts).

The First Amendment and Article I, Section 10 of the Washington Constitution guarantee the right of the *public* to openly administered justice. The Sixth Amendment and Article I, Section 22 of the Washington Constitution guarantee the right of the *accused* to a public trial. Many open courts cases involve uncertainty or conflict about whose interests are at stake—the public’s or the defendant’s—and whose interests will ultimately control.

A. *The First Amendment and Article I of the Washington Constitution Guarantee the Right of the Public and Press to Attend Trial Proceedings*

By the time the United States was founded, criminal trials in the Anglo-American justice system had long had a presumption of openness.<sup>16</sup> This understanding can be traced to Magna Carta Chapter 40, as interpreted by Sir Edward Coke’s Second Institute.<sup>17</sup> The drafters of the Magna Carta likely intended Chapter 40 to restore the integrity of the courts by prohibiting the sale of writs.<sup>18</sup> Coke, as well as American colonial lawyers a century later, reimagined Chapter 40 as addressing the more modern threat to an independent judiciary posed by improper political pressure.<sup>19</sup> What English courts called “one of the essential qualities of a court of justice”<sup>20</sup> was also a characteristic of the earliest American colonial justice systems.<sup>21</sup> The Bill of Rights reflects this

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16. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

17. Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1281 (1995) (citing David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199–200 (1992)). Magna Carta Chapter 40 reads in pertinent part: “To no one will we sell, to no one will we refuse or delay, right or justice.” WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 395 (2d ed. 1914) (cited in Hoffman, *supra*, at 1286). Coke stated:

[E]very subject of this realme, for injury done to him in [goods, land or person], by any other subject, be he ecclesiastical, or temporall, free or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.

1 SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 55 (W. Clarke and Sons 1817) (1642).

18. MCKECHNIE, *supra* note 17, at 395 (cited in Hoffman, *supra* note 17, at 1286).

19. See Hoffman, *supra* note 17, at 1296–99.

20. *Daubney v. Cooper*, (1829) 109 Eng. Rep. 438 (K.B.) 440; 10 B. & C. 237, 240 (cited in *Richmond Newspapers*, 448 U.S. at 566).

21. *Richmond Newspapers*, 448 U.S. at 567–68 (describing seventeenth-century framing documents from West New Jersey and Pennsylvania, and writings adopted by the First Continental Congress in 1774).

long-standing presumption of openness.<sup>22</sup>

Nineteenth-century philosopher Jeremy Bentham further contributed to the theoretical foundation of today's presumption of openness. Bentham discussed a number of benefits of open proceedings, including enhanced performance of all participants, protection of judges from accusations of dishonesty, and education of the public.<sup>23</sup> Bentham saw open administration of justice as paramount:

Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.<sup>24</sup>

Open access for the public and press to judicial proceedings is generally understood to be guaranteed by the First Amendment of the U.S. Constitution.<sup>25</sup> The freedoms of speech, the press, the right of assembly, and the right to petition the government “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”<sup>26</sup> The freedom to speak carries with it the freedom to listen.<sup>27</sup> The U.S. Supreme Court has at various times referred to a “First Amendment right to receive information and ideas,”<sup>28</sup> and has held explicitly that “the right to attend criminal trials is implicit in the guarantees of the First Amendment.”<sup>29</sup> The Court has recognized the “fundamental, natural yearning to see justice done,”<sup>30</sup> and observed that the criminal justice system must “satisfy the appearance of justice” to work effectively.<sup>31</sup> The appearance of justice is best satisfied by

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22. “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

23. 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 522–25 (1827).

24. *Id.* at 524.

25. *See supra* note 22.

26. *Richmond Newspapers*, 448 U.S. at 575.

27. *Id.* at 576.

28. *Id.* (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)) (internal quotation marks omitted).

29. *Id.* at 580. “The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.” *Id.* at 576–77.

30. *Id.* at 571.

31. *Id.* at 572 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

allowing the public to observe it.<sup>32</sup>

The Washington State Constitution of 1889 goes a step further in emphasizing the presumption of open court proceedings in Article I, Section 10: “Justice in all cases shall be administered openly, and without unnecessary delay.”<sup>33</sup> This “separate, clear and specific provision entitles the public, and . . . the press is part of that public, to openly administered justice.”<sup>34</sup> In an early twentieth-century case, the Washington State Supreme Court overturned the conviction of a criminal defendant because the trial court excluded the general public. The Court stated that “[c]ertainly there is not, nor can there be, any custom of the court for the trial of criminal cases in private.”<sup>35</sup>

The Washington State Supreme Court has noted that the U.S. Constitution does not contain the explicit mandate of open administration of justice required by the Washington State Constitution.<sup>36</sup> The Washington State Constitution is thus arguably more stringent on this point, making federal cases finding *de minimis* or trivial closures inapposite in a state constitutional analysis.<sup>37</sup> At the same time, however, both the U.S. and the Washington State Supreme Courts have made clear that public right of access is not absolute, and that other interests may permit that this access be limited.<sup>38</sup>

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32. *Id.*

33. WASH. CONST. art. I, § 10.

34. *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 36, 640 P.2d 716, 719 (1982) (alteration in original) (quoting *Cohen v. Everett City Council*, 85 Wash. 2d 385, 388, 535 P.2d 801, 803 (1975)).

35. *State v. Marsh*, 126 Wash. 142, 145, 217 P. 705, 706 (1923).

36. *State v. Easterling*, 157 Wash. 2d 167, 180 n.12, 137 P.3d 825, 831 n.12 (2006).

37. *Id.* Certain members of the court would apply a “*de minimis*” closure standard when a trial closure is “too trivial” to jeopardize the constitutional right to a public trial; this argument relies mostly on federal precedent. *See Easterling*, 157 Wash. 2d at 167, 182–85 (Madsen, J., concurring); *see also infra* notes 223–51 and accompanying text.

38. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 45 (1984) (government’s interest in inhibiting disclosure of sensitive information); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) (stating that in order to facilitate the “fair administration of justice,” a trial court has discretion to impose “reasonable limitations on access to a trial,” which could include management of accommodation, order and decorum); *Allied Daily Newspapers v. Eikenberry*, 121 Wash. 2d 205, 211, 848 P.2d 1258, 1261 (1993) (protection and privacy of child victims); *State v. Ishikawa*, 97 Wash. 2d 30, 36, 640 P.2d 716, 719 (1982) (citing cases to illustrate permissible limitations on public access); *Federated Publ’ns, Inc. v. Kurtz*, 94 Wash. 2d 51, 65, 615 P.2d 440, 447 (1980) (stating that pretrial hearings may be closed upon showing of some likelihood of prejudice to rights of defendant to fair trial); *In re Lewis*, 51 Wash. 2d 193, 198–200, 316 P.2d 907, 910–11 (1957) (stating that juvenile proceedings are not constitutionally required to be open).

B. *The Sixth Amendment and Article I of the Washington Constitution Guarantee the Right of the Accused to a Public Trial*

The U.S. and Washington Constitutions provide, in similar language, for the accused's right to a speedy and public trial.<sup>39</sup> This requirement of a public trial "is for the benefit of the accused, that the public may see that he is fairly dealt by and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility."<sup>40</sup> The transparency of a public trial, in addition to ensuring accountability for judge and prosecutor, also can encourage witnesses to appear and can discourage perjury.<sup>41</sup> The Washington State Supreme Court has recognized that Sections 10 and 22 "serve complementary and interdependent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards."<sup>42</sup> The Court has employed the same standard for evaluating court closures for both Section 10 and Section 22 rights,<sup>43</sup> mirroring the United States Supreme Court's decision in *Waller v. Georgia*,<sup>44</sup> which imported its Sixth Amendment public trial standard from closure cases brought under the First Amendment's protection of public access to trials.<sup>45</sup>

Both the Sixth Amendment and Section 22 also guarantee the right of the accused to an impartial jury.<sup>46</sup> At first glance, this right does not seem directly related to public trial and open courts questions. However, balancing the right to an impartial jury with other public trial interests has proved to be especially elusive in Washington, where many open courts cases have turned on court closures related to jury voir dire.<sup>47</sup>

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39. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."); WASH. CONST. art. I, § 22 ("In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . .").

40. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 312 (photo. reprint 1972) (1868).

41. *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

42. *State v. Bone-Club*, 128 Wash. 2d 254, 259, 906 P.2d 325, 328 (1995).

43. *Id.* at 259–60, 906 P.2d at 328.

44. 467 U.S. 39.

45. *Id.* at 46–47.

46. *See supra* note 39.

47. *See, e.g.*, *State v. Momah*, 167 Wash. 2d 140, 217 P.3d 321 (2009); *State v. Strode*, 167 Wash. 2d 222, 217 P.3d 310 (2009); *State v. Brightman*, 155 Wash. 2d 506, 122 P.3d 150 (2005);



Parties and trial courts have cited, for example, both the defendant's state constitutional right to a fair trial<sup>48</sup> and a prospective juror's right to privacy<sup>49</sup> to support proposals for closure or sealing.<sup>50</sup>

## II. THE U.S. SUPREME COURT HAS DEVELOPED STRICT SCRUTINY TESTS TO EVALUATE THE CONSTITUTIONALITY OF COURTROOM CLOSURES

The U.S. Supreme Court first began formulating standards for a doctrine of public access to judicial proceedings in the 1970s and 1980s.<sup>51</sup> The Court had previously recognized a common law presumption of openness but had focused primarily on the Sixth Amendment's guarantees to the criminal defendant.<sup>52</sup> From 1979 to 2010, however, the Court developed standards to further define not only the Sixth Amendment right of the defendant to a public trial, but also a First Amendment right of public access to judicial proceedings.<sup>53</sup> The Court has defined and evaluated several types of closure, including exclusion of the public and press from the courtroom during

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State v. Applegate, 163 Wash. App. 460, 259 P.3d 311 (2011); State v. Njonge, 161 Wash. App. 568, 255 P.3d 753 (2011); State v. Tinh Trinh Lam, 161 Wash. App. 299, 254 P.3d 891 (2011); *In re* Stockwell, 160 Wash. App. 172, 248 P.3d 576 (2011); State v. Tarhan, 159 Wash. App. 819, 246 P.3d 580 (2011), *rev. granted*, 172 Wash. 2d 1013, 259 P.3d 1109 (2011); State v. Leyerle, 158 Wash. App. 474, 242 P.3d 921 (2010); State v. Bowen, 157 Wash. App. 821, 239 P.3d 1114 (2010); State v. Paumier, 155 Wash. App. 673, 230 P.3d 212 (2010), *rev. granted*, 169 Wash. 2d 1017, 236 P.3d 206 (2010); State v. Price, 154 Wash. App. 480, 228 P.3d 1276 (2009); State v. Wise, 148 Wash. App. 425, 200 P.3d 266 (2009), *rev. granted*, 170 Wash. 2d 1009, 236 P.3d 207 (2010); State v. Sadler, 147 Wash. App. 97, 193 P.3d 1108 (2008); State v. Erickson, 146 Wash. App. 200, 189 P.3d 245 (2008); State v. Vega, 144 Wash. App. 914, 184 P.3d 677 (2008); State v. Duckett, 141 Wash. App. 797, 173 P.3d 948 (2007); State v. Frawley, 140 Wash. App. 713, 167 P.3d 593 (2007).

48. *Momah*, 167 Wash. 2d at 156, 217 P.3d at 329.

49. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7.

50. *Strode*, 167 Wash. 2d at 224, 217 P.3d at 313.

51. For a helpful discussion of the historical development of the public access doctrine, and of the cases discussed in this Section, see Jack B. Harrison, Comment, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307, 1307-20 (1992).

52. See, e.g., *In re Oliver*, 333 U.S. 257, 270 (1948) ("[T]he [public trial] guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.").

53. See *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 721 (2010); *Press-Enter. Co. v. Super. Ct. (Press-Enterprise II)*, 478 U.S. 1 (1986); *Press-Enter. Co. v. Super. Ct. (Press-Enterprise I)*, 464 U.S. 501 (1984); *Waller v. Georgia*, 467 U.S. 39 (1984); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

proceedings, such as pretrial hearings,<sup>54</sup> jury selection,<sup>55</sup> and witness testimony,<sup>56</sup> and sealing of court records.<sup>57</sup> While recognizing a presumption of openness, it has also cited interests that justify the closure of a courtroom or sealing of records, including, for example, the defendant's right to a fair trial,<sup>58</sup> protection of an ongoing government investigation,<sup>59</sup> protection of trade secrets,<sup>60</sup> protection of witnesses,<sup>61</sup> juror privacy,<sup>62</sup> order and security,<sup>63</sup> and space constraints.<sup>64</sup> After deciding a line of cases establishing a First Amendment right of access to judicial proceedings, the Court extended the tests it developed to the Sixth Amendment right to public trial in the criminal context.

A. *Four U.S. Supreme Court Cases Identify a First Amendment Right to Public Access*

Between 1979 and 1986, the Court developed its public access jurisprudence in the criminal context. At first, the Court did not recognize a First Amendment right of public access to criminal proceedings. By 1986, however, it had acknowledged this right and developed a strict scrutiny test to evaluate a courtroom closure or record sealing.

1. *Richmond Newspapers: The Court Holds that the Public and Press Have a First Amendment Right to Attend Criminal Trials*

In a fractured 1980 opinion,<sup>65</sup> the U.S. Supreme Court addressed the right to public trial in *Richmond Newspapers, Inc. v. Virginia*,<sup>66</sup> in which a trial court closed the courtroom to the public and press for the duration

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54. *Waller*, 467 U.S. at 43–47.

55. *Press-Enterprise I*, 464 U.S. at 511–12.

56. *Globe Newspaper*, 457 U.S. at 598.

57. *Press-Enterprise II*, 478 U.S. at 4–5.

58. *Gannett*, 443 U.S. at 380.

59. *Waller*, 467 U.S. at 41.

60. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 600 n.5 (1980) (Stewart, J., concurring in the judgment).

61. *Id.*

62. *Press-Enterprise I*, 464 U.S. 501, 511–12 (1984).

63. *Richmond Newspapers*, 448 U.S. at 600 (Stewart, J., concurring in the judgment).

64. *Id.*; *Waller*, 467 U.S. at 44; *Press-Enterprise I*, 464 U.S. at 511–12.

65. Burger, J. announced the judgment of the Court and delivered an opinion, in which White and Stevens, JJ. concurred, Brennan, Marshall, Stewart and Blackmun, JJ. concurred in the judgment, and Rehnquist, J. dissented. *Richmond Newspapers*, 448 U.S. at 555, 558.

66. 448 U.S. 555.

of a murder trial.<sup>67</sup> In an earlier case, *Gannett Co. v. DePasquale*,<sup>68</sup> the Court had upheld an order closing a pretrial hearing in order to protect the defendant's Sixth Amendment right to a fair trial.<sup>69</sup> The Court held in *Gannett* that the Sixth Amendment right to a public trial was "personal to the accused,"<sup>70</sup> and did not recognize a constitutional right of public access to a pretrial hearing.<sup>71</sup> The Court confronted a larger question in *Richmond Newspapers*: whether a judge may close an entire criminal trial to the public at the defendant's request, with no demonstration that such closure is necessary to protect the defendant's "superior right" to a fair trial, or some other overriding interest.<sup>72</sup>

In *Richmond Newspapers*, the Court emphasized the importance of openness in judicial proceedings: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."<sup>73</sup> Following a lengthy historical survey of the public access doctrine (similar to Justice Blackmun's dissent in *Gannett*), Chief Justice Burger concluded in a plurality opinion<sup>74</sup> that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice,"<sup>75</sup> and that both the First and Fourteenth Amendments guaranteed the public's right to attend the defendant's trial in this case.<sup>76</sup> Where the *Gannett* Court had proceeded under a Sixth Amendment analysis, the Court in *Richmond Newspapers* analyzed the public access right under a First Amendment conceptual framework.<sup>77</sup> The plurality found implicit among the guarantees of the First Amendment the public's right to attend criminal trials.<sup>78</sup> Because the trial court had not made findings articulating an overriding interest in support of closure, the Supreme Court deemed the closure unconstitutional and reversed the trial court's judgment.<sup>79</sup>

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67. This was the fourth trial of this defendant; the first trial was reversed on appeal, and two subsequent trials ended in mistrial. *Id.* at 555.

68. 443 U.S. 368 (1979).

69. *Id.* at 394.

70. *Id.* at 380.

71. *Id.* at 391.

72. *Richmond Newspapers*, 448 U.S. at 564.

73. *Id.* at 572.

74. He was joined by Justices Stevens and White. *Id.* at 558.

75. *Id.* at 573.

76. *Id.* at 580.

77. *Id.*

78. *Id.* at 577–80 (cited and discussed in Harrison, *supra* note 51, at 1317).

79. *Id.* at 581.

2. *Globe Newspaper Co.: The Court Applies Strict Scrutiny to Closures of Criminal Trials*

While *Gannett* and *Richmond Newspapers* recognized a right to public trial for the defendant and the public and press in the First, Sixth, and Fourteenth Amendments, the first case to articulate a strict-scrutiny test to evaluate the constitutionality of a closure came a year later in *Globe Newspaper Co. v. Superior Court*.<sup>80</sup> In *Globe*, the State had requested a closure pursuant to a Massachusetts statute requiring trial judges to exclude the press and public from the courtroom during the testimony of a minor victim at trials for certain sexual offenses.<sup>81</sup> While conceding that the right of access to criminal trials is not absolute, and that safeguarding the well-being of a minor is a compelling interest, the Court held that such a mandatory closure rule violated the First Amendment.<sup>82</sup> The Court emphasized that “the State’s justification in denying access must be a weighty one.”<sup>83</sup> Where the State intends to deny public access to a proceeding, it must show that “the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”<sup>84</sup>

3. *Press-Enterprise I and II: The Court Extends the First Amendment Public Trial Right to Voir Dire and Reinforces Strict Scrutiny*

In 1984 and 1986, the Court applied and expanded the *Globe* test in two sensational cases, both named *Press-Enterprise Co. v. Superior Court of California, Riverside County*.<sup>85</sup> The two cases involved separate high-profile murder trials, in which the trial court attempted to balance the press and public’s right of access with the defendant’s right to a fair trial. In *Press-Enterprise I*,<sup>86</sup> the trial court excluded the public and press from all but three days of a six-week jury voir dire in a case involving the rape and murder of a young girl.<sup>87</sup> Transcripts of the proceedings were sealed.<sup>88</sup> The Court reaffirmed that the presumption of openness of

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80. 457 U.S. 596 (1982).

81. *Id.* at 598.

82. *Id.* at 606–11.

83. *Id.* at 606.

84. *Id.* at 606–07.

85. *Press-Enterprise II*, 478 U.S. 1 (1986); *Press-Enterprise I*, 464 U.S. 501 (1984).

86. 464 U.S. 501.

87. *Id.* at 503.

88. *Id.* at 510.

judicial proceedings 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 findings specific enough that a reviewing court can determine whether the closure order was properly entered.”<sup>89</sup> The trial court had asserted two interests in support of its order to close the court and seal the transcripts: the defendant’s Sixth Amendment right to a fair trial, and the prospective juror’s right to privacy.<sup>90</sup> The Court recognized a right to privacy for prospective jurors<sup>91</sup> but concluded that such a prolonged closure was unsupported by findings showing that an open proceeding would have threatened the named interests, and moreover that the trial court had failed to consider less restrictive alternatives to closure and suppression of the transcript.<sup>92</sup> The total closure of voir dire was a violation of “the constitutional values sought to be protected by holding open proceedings.”<sup>93</sup> The Court vacated the judgment of the Court of Appeals and remanded the case.<sup>94</sup>

In *Press-Enterprise II*,<sup>95</sup> a nurse was charged with murdering twelve of his patients.<sup>96</sup> The defendant requested and was granted a closure of the preliminary hearing on the complaint.<sup>97</sup> While a California criminal statute required such proceedings to be open, the statute made an exception for cases in which the “exclusion of the public is necessary in order to protect the defendant’s right to a fair and impartial trial.”<sup>98</sup> The preliminary hearing lasted forty-one days, and the court sealed the transcript.<sup>99</sup> The California Supreme Court held that there is no general First Amendment right of access to preliminary hearings, reasoning that the right of access recognized in *Globe* and *Press-Enterprise I* extended

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89. *Id.*

90. *Id.*

91. *Id.* at 511. Note, however, that Justice Blackmun cautioned against deciding “whether a juror has a legitimate expectation, rising to the status of a privacy right, that he will not have to answer . . . questions.” *Id.* at 514 (Blackmun, J., concurring). This would, according to Justice Blackmun, “unnecessarily complicate the lives of trial judges attempting to conduct a voir dire proceeding.” *Id.* at 515.

92. *Id.* at 510–11.

93. *Id.* at 512.

94. *Id.* at 513.

95. 478 U.S. 1 (1986).

96. *Id.* at 3.

97. *Id.* at 3–4.

98. *Id.* at 4 (citing CAL. PENAL CODE § 868 (West 1985)).

99. *Id.* at 4–5.

only to criminal trials.<sup>100</sup> The U.S. Supreme Court reversed, holding that the right of access does extend to preliminary hearings.<sup>101</sup> The Court reiterated its *Press-Enterprise I* test requiring articulation of an overriding interest supported by findings that such a narrowly tailored closure is essential to preserve higher values.<sup>102</sup> The Court conceded that publicity surrounding pretrial suppression hearings risks influencing public opinion against a defendant by informing potential jurors of inculpatory information later ruled inadmissible at trial.<sup>103</sup> The Court noted, however, that “this risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress.”<sup>104</sup> In any event, “closure of an entire 41-day proceeding would rarely be warranted.”<sup>105</sup> Here, the California court had violated the press and public’s First Amendment right of access to criminal proceedings.<sup>106</sup>

*B. Two U.S. Supreme Court Cases Recognize a Public Trial Right Under Both the First and Sixth Amendments*

Just a few months after *Press-Enterprise I*, the U.S. Supreme Court considered another lengthy closure, this time a suppression hearing, in *Waller v. Georgia*.<sup>107</sup> The more recent case, *Presley v. Georgia*,<sup>108</sup> like *Press-Enterprise II*, involved a closure of voir dire proceedings. In both cases, the Court recognized a public trial right under both the First and Sixth Amendments.

*1. Waller v. Georgia: The Court Devises a Four-Part Test to Evaluate the Constitutionality of Courtroom Closures*

In *Waller*, the trial court had granted the prosecution’s motion to close a suppression hearing that lasted seven days.<sup>109</sup> The State’s argument for closure was that some evidence introduced at the hearing might “involve a reasonable expectation of privacy of persons other than” the

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100. *Id.* at 5.

101. *Id.* at 9–10.

102. *Id.*

103. *Id.* at 14.

104. *Id.* at 15.

105. *Id.*

106. *Id.*

107. 467 U.S. 39 (1984).

108. \_\_\_ U.S. \_\_\_, 130 S. Ct. 721 (2010).

109. *Waller*, 467 U.S. at 42.

defendant.<sup>110</sup> This evidence—tapes of conversations intercepted via wiretap—constituted only two and a half hours of the seven-day hearing.<sup>111</sup>

The Court asked three questions: (1) Does the defendant's Sixth Amendment right to a public trial extend to a pretrial suppression hearing? (2) If so, was that right violated? (3) If so, what is the appropriate remedy?<sup>112</sup> Noting that previous cases had turned largely on First Amendment questions, the Court concluded that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial right than the implicit First Amendment right of the press and public."<sup>113</sup> The Court reasoned that its earlier holdings that the public and press had a First Amendment right to attend criminal trials (including pretrial proceedings) led naturally to the conclusion that a defendant likewise possessed a right to open proceedings through the Sixth Amendment.<sup>114</sup>

Applying the factors it articulated in *Press-Enterprise I*, the Court established a new four-part test: (1) the proponent of closure must specify an overriding interest likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closure; and (4) the court must make findings adequate to support the closure.<sup>115</sup> The Court concluded that the State's proposal was not specific as to what and whose privacy interests were implicated.<sup>116</sup> Moreover, a seven-day closure for the sake of two and a half hours of taped evidence was overly broad and general—"far more extensive than necessary."<sup>117</sup> The trial court had not considered alternatives to full and immediate closure, and had made only broad, general findings that did not justify the closure.<sup>118</sup> The Court presumed prejudice, agreeing with the "consistent view of the lower federal courts"<sup>119</sup> that the defendant should not have to prove specific prejudice in order to obtain relief for a violation of his right to a

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110. *Id.* at 41.

111. *Id.* at 42.

112. *Id.* at 43.

113. *Id.* at 46.

114. *Id.* at 44–46.

115. *Id.* at 48.

116. *Id.*

117. *Id.* at 48–49.

118. *Id.* at 48.

119. *Id.* at 49.

public trial.<sup>120</sup>

Having answered the first and second questions of its inquiry, the Court considered a remedy that would be “appropriate to the violation.”<sup>121</sup> Because the violation occurred in the context of a suppression hearing, the Court reasoned that the appropriate remedy was a new suppression hearing, with significant portions open to the public.<sup>122</sup> A new trial at this juncture would “presumably be a windfall for the defendant, and not in the public interest.”<sup>123</sup> The case was remanded to the state courts to decide what portions (if any) should be closed.<sup>124</sup> Only in the event of the suppression of material evidence not suppressed at the first trial, or “some other material change in the positions of the parties” would a new trial be warranted.<sup>125</sup>

2. Presley v. Georgia: *The Court Emphasizes the Obligation of Courts to Accommodate Public Attendance at Criminal Trials*

In *Presley v. Georgia*,<sup>126</sup> the U.S. Supreme Court addressed both the Sixth Amendment rights of the defendant and the First Amendment rights of the public.<sup>127</sup> Over the defense’s objection, the trial court excluded a lone spectator (who happened to be the defendant’s uncle) from jury voir dire.<sup>128</sup> The Court did not resolve the question of to what extent the First and Sixth Amendment rights to public trial are coextensive.<sup>129</sup> It concluded, however, that under *Press Enterprise I* and *Waller* the law extending the Sixth Amendment public trial right to jury voir dire is so well established that the Court could proceed by summary disposition.<sup>130</sup> The Court concluded in its brief *per curiam* decision that “[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.”<sup>131</sup> In this case, because the trial court neither justified a compelling interest nor considered alternatives to closure, the closure order was a constitutional

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120. *Id.*

121. *Id.* at 50.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. \_\_\_ U.S. \_\_\_, 130 S. Ct. 721 (2010).

127. *Id.* at 723.

128. *Id.* at 722.

129. *Id.* at 724.

130. *Id.* at 723–24.

131. *Id.* at 725.



violation, and the appropriate remedy was reversal and remand.<sup>132</sup>

### III. THE WASHINGTON STATE SUPREME COURT HAS USED U.S. SUPREME COURT DECISIONS TO DEVELOP ITS OWN TEST TO EVALUATE CLOSURES

The Washington State Supreme Court has also ruled on cases involving closures of pretrial hearings and jury selection, as well as record sealing. In its rulings, the Court has used the U.S. Supreme Court cases described above to develop its own test for the validity of such denials of access. Washington is one of twenty-seven states whose state constitution includes a special provision guaranteeing openness in judicial proceedings.<sup>133</sup> Though the Washington State Supreme Court has held<sup>134</sup> that “the public’s right of access is not absolute, and may be limited to protect other interests,”<sup>135</sup> The Court’s decisions have consistently emphasized the value of open administration of justice.<sup>136</sup> While the Washington State Supreme Court began its public access and public trial analysis in recent cases with the U.S. Supreme Court’s federal constitutional framework, it has increasingly relied on Article I, Section 10 of the Washington Constitution<sup>137</sup> and applied a more stringent analysis of public access and public trial issues than have the federal courts.<sup>138</sup>

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132. *Id.*

133. *See supra* note 5.

134. *See supra* note 38.

135. *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 36, 640 P.2d 716, 719 (1982).

136. *See, e.g.*, *State v. Lormor*, 172 Wash. 2d 85, 90–91, 257 P.3d 624, 627–28 (2011); *In re Detention of D.F.F.*, 172 Wash. 2d 37, 39–40, 256 P.3d 357, 359–60 (2011); *State v. Momah*, 167 Wash. 2d 140, 147–48, 217 P.3d 321, 324–25 (2009); *State v. Strode*, 167 Wash. 2d 222, 229–30; 217 P.3d 310, 315–16 (2009); *State v. Easterling*, 157 Wash. 2d 167, 179, 137 P.3d 825, 830–31 (2006); *In re Orange*, 152 Wash. 2d 795, 804–05, 100 P.3d 291, 295–96 (2005); *Rufer v. Abbott Labs.*, 154 Wash. 2d 530, 540, 114 P.3d 1182, 1186–87 (2005); *Dreiling v. Jain*, 151 Wash. 2d 900, 903–04, 93 P.3d 861, 864 (2004); *State v. Bone-Club*, 128 Wash. 2d 254, 258, 906 P.2d 325, 327 (1995); *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wash. 2d 205, 209–10, 848 P.2d 1258, 1260–61 (1993); *Ishikawa*, 97 Wash. 2d at 36, 640 P.2d at 719; *Federated Publ’ns, Inc. v. Kurtz*, 94 Wash. 2d 51, 59–60, 615 P.2d 440, 444–45 (1980).

137. *See supra* note 33 and accompanying text.

138. *See, e.g.*, *Easterling*, 157 Wash. 2d at 180 n.12, 137 P.3d at 831 n.12.

A. Kurtz, Ishikawa, and Allied Newspapers: *The Washington State Supreme Court Develops a Section 10 Test to Evaluate Closures Implicating Rights of the Public*

By 1982, the Washington State Supreme Court had used federal decisions and state law to devise a five-part analysis for evaluating the closure of pretrial hearings and the sealing of court records. *Federated Publications, Inc. v. Kurtz*<sup>139</sup> concerned the closure of a suppression hearing in a murder trial.<sup>140</sup> Because of the notoriety of the case, the defense and prosecution jointly moved the court to order closure of a pretrial suppression hearing.<sup>141</sup> A newspaper publisher petitioned the Court to vacate the closure order and unseal the records.<sup>142</sup> While noting the factual similarities between this case and *Gannett Co. v. DePasquale*,<sup>143</sup> the Court explicitly set out to resolve this case under the Washington Constitution.<sup>144</sup> The Court identified five guidelines from Justice Powell's concurrence in *Gannett* that courts should employ to analyze closure questions under Article I, Section 22 of the Washington Constitution.<sup>145</sup> The Court noted that Section 10 "provides a textual basis for recognizing a right of public access to court proceedings."<sup>146</sup> However, the public's right in Section 10 must be interpreted in light of the defendant's right to a fair trial guaranteed by Section 22.<sup>147</sup> What a trial court needs is "workable standards that allow it to strike a balance between the public's right of access and the accused's rights to a fair

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139. 94 Wash. 2d 51, 615 P.2d 440.

140. *Id.* at 52, 615 P.2d at 441.

141. *Id.* at 53, 615 P.2d at 441.

142. *Id.* at 53–54, 615 P.2d at 441–42.

143. 443 U.S. 368 (1979); *see supra* notes 68–71.

144. *Kurtz*, 94 Wash. 2d at 56, 615 P.2d at 443.

145. The five guidelines provided:

(1) The accused (proposing closure) must make some showing of likelihood of jeopardy to his constitutional rights from an open proceeding.

(2) Anyone present when the closure motion is made must be given an opportunity to object. However, the court should not be obliged to delay proceedings.

(3) The objector to closure must demonstrate that there are available practical alternatives that would protect defendant's rights.

(4) The court must weigh the competing interests of the defendant and the public.

(5) The order must be no broader in its application or duration than necessary to serve its purpose (in this case, to protect the accused's right to a fair trial while preserving the public's right to open proceedings).

*Id.* at 62–65, 615 P.2d at 446–47.

146. *Id.* at 59, 615 P.2d at 445.

147. *Id.* at 61, 615 P.2d at 445.

trial including an impartial jury.”<sup>148</sup> Given the particular facts of this case, which involved “a sensational homicide combined with extensive publicity,”<sup>149</sup> the court’s closure order to prevent tainting of the jury pool was proper.<sup>150</sup> The Court denied the newspaper’s petition.<sup>151</sup>

Even as it upheld the trial court’s closure order, the Court in *Kurtz* acknowledged, albeit only in a footnote, the recent U.S. Supreme Court holding in *Richmond Newspapers* that a criminal trial must be open to the public “[a]bsent an overriding interest articulated in findings.”<sup>152</sup> Two years later in another murder trial in *Seattle Times Co. v. Ishikawa*,<sup>153</sup> the Court again made reference to *Richmond Newspapers*, and again observed that its own analysis would rely on Article I, Section 10 of the Washington State Constitution.<sup>154</sup> In *Ishikawa*, the trial court closed a pretrial hearing,<sup>155</sup> sealed the record, and refused requests to open it to the public.<sup>156</sup> Newspapers brought a mandamus action, relying on both federal and state constitutional grounds in their argument for access.<sup>157</sup>

The Court in *Ishikawa* announced a slightly different Section 10 analysis, based on the conclusion that a closure to protect the defendant’s right to a fair trial should be treated “somewhat differently” from closure to protect other interests.<sup>158</sup> The trial court had noted that ongoing investigations, safety of witnesses, and the possibility that other defendants might be charged were some of the other interests served by exclusion of the public and press and sealing of records.<sup>159</sup> Thus the Court decided to expand the framework adopted in *Kurtz*.<sup>160</sup> While Judge Ishikawa had cited the defendant’s right to a fair trial as one of the

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148. *Id.*

149. *Id.* at 65, 615 P.2d at 447.

150. *Id.*

151. *Id.*

152. *Id.* at 65 n.4, 615 P.2d at 447 n.4 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

153. 97 Wash. 2d 30, 640 P.2d 716 (1982).

154. *Id.* at 36, 640 P.2d at 719.

155. *Id.* at 33, 640 P.2d at 718. The hearing was for a motion to dismiss. The defense had moved to exclude the public, and the prosecution had concurred in the motion to close. *Id.* at 32, 640 P.2d at 717.

156. *Id.* at 32–33, 640 P.2d at 717–18.

157. *Id.* at 35, 640 P.2d at 719.

158. *Id.* at 37, 640 P.2d at 720.

159. *Id.* at 38, 640 P.2d at 720.

160. *Id.* at 37, 640 P.2d at 720.

interests supported by his closure order,<sup>161</sup> he had not demonstrated a need for continued secrecy to support a permanent sealing of the record post-trial<sup>162</sup> after the trial was over.<sup>163</sup>

In its decision remanding to the trial court for reconsideration of the petitioners' motion to unseal,<sup>164</sup> the Washington State Supreme Court held that whenever a party seeks restrictions on access to criminal hearings or the records from hearings, courts must follow five prescribed steps.<sup>165</sup> First, the proponent of closure or sealing must make some showing of the need, detailing the needs and interests involved as specifically as possible without endangering those interests.<sup>166</sup> The Court noted that "[t]he quantum of need which would justify restrictions on access differs" depending on whether a defendant's Sixth Amendment right to a fair trial or other federal or state constitutional interests are implicated.<sup>167</sup> The Sixth Amendment would in turn implicate Article I, Section 22, because the *Kurtz* Court had "start[ed] with the premise that section 22 affords fair trial rights which at a minimum must provide to the accused the protection he or she enjoys under the Sixth Amendment."<sup>168</sup> In cases where the right to a fair trial is at issue, only a likelihood of jeopardy to constitutional rights need be shown.<sup>169</sup> In cases where closure or sealing is sought to further any right or interest besides the defendant's right to a fair trial, a "serious and imminent threat to some other important interest" must be demonstrated.<sup>170</sup>

Second, the trial court must give anyone present an opportunity to object when the closure or sealing is proposed.<sup>171</sup> This opportunity presupposes that the proponent of closure or sealing has stated grounds for the motion with sufficient specificity so that one affected by the closure or sealing would be able to evaluate the need for objection.<sup>172</sup>

Third, the court, proponents, and objectors should carefully analyze

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161. *Id.* at 44, 640 P.2d at 723.

162. *Id.* at 32–33, 42, 640 P.2d at 717–18, 722.

163. *Id.* at 44–45, 640 P.2d at 724.

164. *Id.* at 45–46, 640 P.2d at 724.

165. *Id.* at 37–39, 640 P.2d at 720–21.

166. *Id.* at 37, 640 P.2d at 720.

167. *Id.*

168. *Federated Publ'ns, Inc. v. Kurtz*, 94 Wash. 2d 51, 60, 615 P.2d 440, 445 (1980).

169. *Ishikawa*, 97 Wash. 2d at 37, 640 P.2d at 720 (citing *Kurtz*, 94 Wash. 2d at 62, 615 P.2d at 446).

170. *Id.*

171. *Id.* at 38, 640 P.2d at 720.

172. *Id.*

whether the proposed restriction is both effective in protecting the interests involved and the least restrictive means available to achieve those ends.<sup>173</sup> The *Ishikawa* court assigned the burden of proposing alternatives differently, depending on the interests involved.<sup>174</sup> If the closure or sealing is requested to protect the defendant's right to a fair trial, the objectors carry the burden of suggesting alternatives to the proposed restrictions.<sup>175</sup> However, if the endangered rights or interests cited do not include the defendant's right to a fair trial, the burden to justify closure or sealing rests with the proponents.<sup>176</sup>

Fourth, the trial court must balance the competing interests of the defendant and the public, and consider any proposed alternatives to closure.<sup>177</sup> The court should articulate findings and conclusions, "which should be as specific as possible rather than conclusory."<sup>178</sup>

Fifth, "[t]he order must be no broader in its application or duration than necessary to serve its purpose."<sup>179</sup> An order sealing records shall apply for a specific period of time, and the burden shall be on the proponent to come before the court to justify continued sealing.<sup>180</sup>

The Court distinguished its decision in *Kurtz*.<sup>181</sup> While the record reflected that the trial judge in *Kurtz* considered the actual impact of negative publicity on potential jurors,<sup>182</sup> Judge Ishikawa's "sweeping, unsupported conclusion" that total closure and indefinite sealing were necessary was not substantiated by factual findings.<sup>183</sup> The Court contrasted the "indefinite duration" of the sealing order in *Ishikawa* with the narrower tailoring of the closure order in *Kurtz*.<sup>184</sup> The Court concluded its analysis: "When a perceived clash between a defendant's fair trial right and the right of free speech arises, courts have an affirmative duty to try to accommodate both of those interests."<sup>185</sup>

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173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* A court may also *sua sponte* suggest alternatives, and some have. See *infra* notes 381–86 and accompanying text.

178. *Id.*

179. *Id.* at 39 (alteration in original) (quoting *Federated Publ'ns, Inc. v. Kurtz*, 94 Wash. 2d 51, 64, 615 P.2d 440, 447 (1980)).

180. *Id.*

181. *Id.* at 37, 41, 640 P.2d at 720, 722.

182. *Id.* at 41, 640 P.2d at 722.

183. *Id.*

184. *Id.* at 42, 640 P.2d at 722–23.

185. *Id.* at 45, 640 P.2d at 724.

In 1993, the Court rejected another sweeping closure, this one mandated by state statute. In *Allied Daily Newspapers of Washington v. Eikenberry*,<sup>186</sup> the Court analyzed Substitute House Bill (SHB) 2348, which required courts to ensure that information identifying child victims of sexual assault not be disclosed to the public or press during the course of judicial proceedings or in any court records.<sup>187</sup> The Washington Legislature had articulated a compelling interest—the protection of the privacy of child victims of sexual assault—to justify the blanket denial of public access.<sup>188</sup> The Court held, however, that under Article I, Section 10, any closure of judicial proceedings is permissible only if such closure or sealing is necessary under the five-part analysis articulated in *Kurtz and Ishikawa*.<sup>189</sup> Applying the *Ishikawa* test, the Court concluded that at least one of the interests articulated by the legislature—protection of the privacy of child victims—was guaranteed under the Washington Constitution<sup>190</sup> and may well warrant closure or sealing on a case-by-case basis.<sup>191</sup> However, the blanket closures and sealings mandated by SHB 2348 did not permit such individualized determinations.<sup>192</sup> SHB 2348 was not compatible with the *Ishikawa* guidelines and was therefore unconstitutional.<sup>193</sup>

*B. State v. Bone-Club: The Court Applies the Ishikawa Test to a Closure Implicating the Section 22 Rights of the Accused*

*Ishikawa* and *Allied Newspapers* were both actions brought by newspaper companies that sued for public access to judicial records and proceedings under Section 10. In 1995, the Washington State Supreme Court for the first time applied the *Ishikawa* test to a closure challenged by a criminal defendant under Section 22 in *State v. Bone-Club*.<sup>194</sup> In *Bone-Club*, the Court applied the same closure standard for both Section

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186. 121 Wash.2d 205, 848 P.2d 1258 (1993).

187. *Id.* at 207, 848 P.2d at 1259.

188. *Id.* at 211, 848 P.2d at 1261.

189. *Id.* at 214.

190. “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. CONST. art. I, § 7.

191. *Allied Newspapers*, 121 Wash. 2d at 211, 848 P.2d at 1261.

192. *Id.*

193. *Id.* The Court concluded that it need not reach the question of whether SHB 2348 also violated the open justice requirements of the First and Fourteenth Amendments of the U.S. Constitution. *Id.* at 209, 848 P.2d at 1260.

194. 128 Wash. 2d 254, 906 P.2d 325 (1995).

10 and Section 22 rights.<sup>195</sup> The Court cited *Waller v. Georgia*,<sup>196</sup> which had imported standards from First Amendment cases to decide a Sixth Amendment case, as precedent guiding its decision.<sup>197</sup>

Whatcom County charged Joseph Bone-Club with six violations of the Uniform Controlled Substances Act, including possession and delivery of cocaine.<sup>198</sup> The court held a pretrial suppression hearing to decide the admissibility of Bone-Club's statements to police.<sup>199</sup> At the prosecution's request, the trial court ordered the courtroom cleared for the testimony of an undercover police officer whose evidence was crucial to the state's case against Bone-Club, but who feared his testimony in open court would jeopardize his undercover work.<sup>200</sup> The court denied Bone-Club's motion to suppress his statement to this officer, but granted another motion to suppress a statement made to a different officer.<sup>201</sup> The undercover officer later testified at trial in open court.<sup>202</sup> The jury found Bone-Club guilty as charged.<sup>203</sup> Bone-Club argued on appeal that closure of his suppression hearing violated his constitutional right to a public trial, but the court of appeals affirmed his convictions.<sup>204</sup>

Reviewing its holdings in *Allied Newspapers*, *Kurtz*, and *Ishikawa*, the Washington State Supreme Court unanimously reversed the decision of the court of appeals and articulated what are now known as the *Bone-Club* 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

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195. *Id.* at 259–60, 906 P.2d at 328.

196. 467 U.S. 39 (1984).

197. *Id.* at 47.

198. *Bone-Club*, 128 Wash. 2d at 256, 906 P.2d at 326.

199. *Id.*

200. *Id.*

201. *Id.* at 257, 906 P.2d at 327.

202. *Id.*

203. *Id.*

204. *State v. Boneclub*, 76 Wash. App. 872, 888 P.2d 759 (1995).

closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.<sup>205</sup>

Applying a somewhat abridged *Ishikawa* (Section 10) test,<sup>206</sup> the Court held that the trial court had not considered these five factors before closing the courtroom, and therefore had violated Joseph Bone-Club's right to a fair trial under Section 22.<sup>207</sup> The case was reversed and remanded for a new trial.<sup>208</sup>

C. *Since Bone-Club, the Court Has Grappled with a Variety of Closures*

In the years since *Bone-Club*, the Washington State Supreme Court has considered numerous public-trial challenges to a variety of closures.<sup>209</sup> In cases where the courtroom was completely closed to the public or defendant, the Court has found the closure an unconstitutional violation of the right to public trial under Section 10, Section 22, or both.<sup>210</sup> Cases in which a portion of the proceedings, such as jury voir dire, was held outside public view have provoked disagreement among the justices.<sup>211</sup>

1. *In re Orange and State v. Brightman, the Court Held that Exclusion of the Public Is Unconstitutional Under Section 22*

Criminal defendant Christopher Orange raised a collateral attack on his conviction for murder after the trial court, citing space and security concerns,<sup>212</sup> excluded his family, the victim's family, and other spectators from the courtroom during jury selection.<sup>213</sup> The Washington

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205. *Bone-Club*, 128 Wash. 2d at 258–59, 906 P.2d at 327–28.

206. *See supra* notes 166–85 and accompanying text. The *Bone-Club* test does not, for example, explicitly assign the burden of suggesting alternatives in step three. And though the Court noted in its *Bone-Club* opinion the need for specific findings, that requirement is not explicit in the *Bone-Club* test as it was in the *Ishikawa* factors. *Compare Bone-Club*, 128 Wash. 2d at 258–60, 906 P.2d at 327–28, with *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 37–39, 640 P.2d 716, 720–21 (1982).

207. *Bone-Club*, 128 Wash. 2d at 261, 906 P.2d at 329.

208. *Id.*

209. *See supra* note 136. While this issue arises in civil as well as criminal cases, this comment focuses primarily on closures in the criminal context.

210. *See infra* notes 212–51 and accompanying text.

211. *See infra* notes 252–82 and accompanying text.

212. *In re Orange*, 152 Wash. 2d 795, 802, 100 P.3d 291, 294 (2005).

213. *Id.* at 801–02, 100 P.3d at 294.



State Supreme Court, analyzing the case in light of Section 22 and the Sixth Amendment, held 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.”<sup>214</sup>

Citing *Bone-Club*, the Court reiterated that in order to protect a defendant’s Section 22 right to a public trial, a trial court confronted with a closure request must apply the “strict, well-defined standard” that the Court had imported from earlier cases analyzing Section 10 rights to the open administration of justice.<sup>215</sup> The “permanent, full closure of voir dire” was “the precise type of closure to which the *Bone-Club* court applied the five, well-settled guidelines.”<sup>216</sup> The Court found that the *Orange* trial court had satisfied only the second element of the *Bone-Club* test by allowing those present to object.<sup>217</sup> Because the record contained no finding of a specific threat to a compelling interest, narrowly tailored closure, consideration of alternatives, or weighing of interests, there was no indication that the trial court considered the defendant’s right to a public trial.<sup>218</sup> The Court also quoted from *In re Oliver*,<sup>219</sup> an early federal Sixth Amendment closure case, to emphasize the defendant’s right to have friends and family members present.<sup>220</sup> The Court held that the trial court had violated *Orange*’s right to a public trial, that such a constitutional violation is *per se* prejudicial, and that the proper remedy for this error was remand for a new trial.<sup>221</sup> “[O]ur duty under the constitution is to ensure that, absent a closure order narrowly drawn to protect a clearly identified compelling interest, a trial court may not exclude the public or press from any stage of a criminal trial.”<sup>222</sup>

While *Bone-Club* was a unanimous decision, *Orange* was 6-3. Two concurring justices agreed that excluding the defendant’s family

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214. *Id.* at 804, 100 P.3d at 295 (quoting *Press-Enterprise I*, 464 U.S. 501, 505 (1984)).

215. *Id.* at 805, 100 P.3d at 296.

216. *Id.* at 808, 100 P.3d at 297.

217. *Id.* at 811, 100 P.3d at 299.

218. *Id.* at 811–12, 100 P.3d at 299.

219. 333 U.S. 257 (1948).

220. *Orange*, 152 Wash. 2d at 800, 100 P.3d at 293. (“[N]either the size of the courtroom nor a general concern for security provided an adequate basis for compromising the fundamental tenet ‘that an accused is *at the very least* entitled to have his friends, relatives, and counsel present, *no matter with what offense he may be charged.*’”) (emphasis added) (quoting *In re Oliver*, 333 U.S. 257, 271–72 (1948)).

221. *Orange*, 152 Wash. 2d at 800, 100 P.3d at 293.

222. *Id.*

members violated his constitutional rights.<sup>223</sup> The concurrence and one dissenting justice, however, disagreed that failure to apply the *Bone-Club* factors automatically requires a retrial.<sup>224</sup> Justice Madsen in her concurrence argued that if even an unjustified closure is “de minimis in fact,” it does not implicate a defendant’s constitutional rights.<sup>225</sup> She took the majority to task for “placing form over substance” by holding that a trial court’s failure to apply *Bone-Club* automatically requires a new trial.<sup>226</sup> This remains a point of contention in Washington; only two Supreme Court public trial cases since *Bone-Club* have resulted in unanimous decisions.<sup>227</sup>

*State v. Brightman*<sup>228</sup> featured facts analogous to those of *Orange*: the trial court in a murder trial *sua sponte* ordered the exclusion of the public during voir dire, citing unspecified concerns about space and security.<sup>229</sup> The court of appeals affirmed the defendant’s conviction, citing the absence of a written order and the lack of evidence that the trial court enforced its ruling.<sup>230</sup> The Supreme Court of Washington reversed.<sup>231</sup> Because the trial court record lacked “any hint” that the court conducted a *Bone-Club* analysis to weigh the closure interests against Brightman’s right to a public trial, the Court was unable to determine whether the closure was warranted.<sup>232</sup> The Court remanded the case for a new trial.<sup>233</sup>

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223. *Id.* at 825–26, 100 P.3d at 306–07 (Madsen J., concurring in majority; she was joined by Bridge, J.).

224. *Id.* at 827, 100 P.3d at 307 (Madsen, J., concurring in majority); *id.* at 828, 100 P.3d at 307. (Ireland, J., dissenting).

225. *Id.*

226. *Id.* at 822, 827, 100 P.3d at 305, 307.

227. *State v. Lormor*, 172 Wash. 2d 85, 257 P.3d 624 (2011); *State v. Brightman*, 155 Wash. 2d 506, 122 P.3d 150 (2005).

228. 155 Wash. 2d 506, 122 P.3d 150.

229. *Id.* at 511, 122 P.3d at 153. The judge stated:

In terms of observers and witnesses, we can’t have any observers while we are selecting the jury, so if you would tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can’t observe that. It causes a problem in terms of security.

*Id.*

230. *Id.* at 512–13, 100 P.3d at 153.

231. *Id.* at 518, 100 P.3d at 156.

232. *Id.*

233. *Id.*

2. *In State v. Easterling, the Court Holds Unconstitutional the Exclusion of Both the Public and the Defendant*

At the request of a codefendant's counsel, a judge excluded the public, defendant Easterling, and his counsel from the courtroom in *State v. Easterling*.<sup>234</sup> Prosecutors, court personnel, the codefendant, and his counsel were permitted to remain.<sup>235</sup> What followed were closed-courtroom plea negotiations between prosecutors and Easterling's codefendant that resulted in a plea agreement contingent on the codefendant's testimony against Easterling.<sup>236</sup> The trial resumed, and the jury convicted Easterling.<sup>237</sup> The court of appeals affirmed.<sup>238</sup> The Supreme Court of Washington held that the trial court had committed reversible error not only by violating Easterling's right to a public trial under Article I, Section 22, but also by violating the public's right to an "open public trial" under Article I, Section 10.<sup>239</sup>

The State in *Easterling* argued that the closure was de minimis, citing Justice Madsen's *Orange* concurrence and cases from other jurisdictions that held that certain closures are "too trivial" to implicate the right to public trial.<sup>240</sup> The Court, however, pointed out that a majority of the Washington State Supreme Court, unlike many federal courts, has never found the violation of the right to public trial to be de minimis.<sup>241</sup> The Court surmised that the reluctance of the Washington State Supreme Court to find trivial or de minimis closures may stem from the additional emphasis Section 10 gives to the value of the open administration of justice.<sup>242</sup> The Court concluded that appellate courts will not need to engage in a de minimis analysis as long as trial courts apply the *Bone-Club* test.<sup>243</sup> *Waller* had already established that where a violation of the

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234. 157 Wash. 2d 167, 137 P.3d 825 (2006).

235. *Id.* at 172, 137 P.3d at 827.

236. *Id.* at 173, 137 P.3d at 827.

237. *Id.*

238. *Id.*

239. *Id.* at 179, 137 P.3d at 830. The Court also cited *Press-Enterprise II* here and its assertion that the right to an open public trial is a shared right of the accused under the Sixth Amendment and the public under the First Amendment, "the common concern being the issue of fairness." *Press-Enterprise II*, 478 U.S. 1, 7 (1986).

240. *Easterling*, 157 Wash. 2d at 180, 137 P.3d at 831 (citing *In re Orange*, 152 Wash. 2d 795, 824–25, 100 P.3d 291, 305–06 (Madsen, J., concurring in majority) (collecting federal cases where brief or inadvertent closures were deemed too trivial to implicate the Sixth Amendment)).

241. *Id.* at 180, 137 P.3d at 831.

242. *Id.* at 180 n.12, 137 P.3d at 831 n.12.

243. *Id.*

public trial right occurs, a defendant is not required to show specific prejudice.<sup>244</sup> Here, both Easterling's right to a public trial under Section 22 and the public's right to open access to justice under Section 10 were violated by the improper closure.<sup>245</sup> The remedy, as in *Bone-Club, Orange*, and *Brightman*, was reversal and remand for a new trial.<sup>246</sup>

Concurring again in *Easterling*, Justice Madsen argued that “[d]epending upon the factual circumstances in a case, a closure may be so trivial that the defendant’s right to a public trial is not implicated.”<sup>247</sup> She argued again that “the de minimis or trivial trial closure standard may . . . permit avoidance of a constitutionally unnecessary retrial when a defendant’s right to a public trial has not been violated.”<sup>248</sup> She supported her argument with a list of cases from other state and federal jurisdictions in which courts applied some kind of “triviality standard” to hold that closures did not violate the Sixth Amendment.<sup>249</sup> In his separate concurrence, Justice Chambers agreed that there may be closures that do not implicate the accused’s right to public trial.<sup>250</sup> However, he argued that there is no de minimis violation of Article I, Section 10:

[T]here is no case where the principle of openness, as enshrined in our state constitution, can properly be described as de minimis. . . . [T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts. It is integral to our system of government. . . . When the courtroom doors are locked without a [*Bone-Club*] analysis, the people deserve a new trial.<sup>251</sup>

### 3. *State v. Strode and State v. Momah: Two Closures of Voir Dire Dictate Two Different Results*

In 2009, the Court decided two public-trial cases the same day, with opposite results.<sup>252</sup> *State v. Strode*,<sup>253</sup> a child rape case, involved the

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244. *Waller v. Georgia*, 467 U.S. 39, 49 (1984).

245. *Easterling*, 157 Wash. 2d at 181–82, 137 P.3d at 832.

246. *Id.* at 182, 137 P.3d at 832.

247. *Id.* at 185, 137 P.3d at 833 (Madsen, J., concurring).

248. *Id.* at 183, 137 P.3d at 832 (Madsen, J., concurring).

249. *Id.* at 183–85, 137 P.3d at 832–33 (Madsen, J., concurring).

250. *Id.* at 186, 137 P.3d at 834 (Chambers, J., concurring).

251. *Id.* at 186–87, 137 P.3d at 834–35 (Chambers, J., concurring).

252. *State v. Strode*, 167 Wash. 2d 222, 217 P.3d 310 (2009); *State v. Momah*, 167 Wash. 2d 140, 217 P.3d 321 (2009).

questioning of individual jurors in chambers.<sup>254</sup> The Court held that this private questioning constituted a closure, and that the trial court had violated the defendant's right to a public trial by not engaging in a *Bone-Club* analysis.<sup>255</sup> The Court reversed Strode's conviction and remanded for a new trial.<sup>256</sup> *State v. Momah*<sup>257</sup> was also a sex-crime case involving a similar private questioning of jurors.<sup>258</sup> The Court held there, however, that a partial closure of voir dire to safeguard the defendant's right to a fair trial was not a structural error and affirmed his convictions.<sup>259</sup>

How did the Court distinguish *Strode* and *Momah*, which both involved partial closure of voir dire? First, certain members of the Court emphasized the different interests that each closure sought to protect.<sup>260</sup> In *Momah*, "the trial judge closed the courtroom to safeguard [Charles] Momah's constitutional right to a fair trial[,] . . . not to protect any other interests."<sup>261</sup> In *Strode*, the trial judge closed portions of voir dire to protect the privacy of jurors.<sup>262</sup>

The Court also distinguished the two cases by whether the "requirements and purposes" of the *Bone-Club* analysis were met.<sup>263</sup> In *Momah*, the majority observed that the trial court had "sought input from the defendant, [and] closed the courtroom [only] after consultation with the defense and the prosecution."<sup>264</sup> In *Strode*, by contrast, the record did not show that the trial court had considered the right to public trial in light of competing interests.<sup>265</sup> Additionally, the Court in *Momah* asserted that the defendant "affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively

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253. 167 Wash. 2d 222, 217 P.3d 310.

254. *Id.* at 223–24, 137 P.3d at 312–13. At least eleven prospective jurors were questioned in chambers after completing a confidential questionnaire asking whether they or anyone close to them had been the victim or accused of sexual abuse. Six prospective jurors were excused for cause after private questioning with the trial judge, both counsel, and defendant present. *Id.*

255. *Id.* at 231, 137 P.3d at 316.

256. *Id.*

257. 167 Wash. 2d 140, 217 P.3d 321.

258. *Id.* at 145–46, 217 P.3d at 323–24. Counsel questioned approximately twenty-four jurors privately in chambers; the record shows that most questions regarded prior knowledge of the case from the extensive pretrial media coverage. *Id.* at 147 n.1, 217 P.3d at 324 n.1.

259. *Id.* at 156, 217 P.3d at 329.

260. *Strode*, 167 Wash. 2d at 231–32, 217 P.3d at 316–17 (Fairhurst, J., concurring).

261. *Momah*, 167 Wash. 2d at 151–52, 217 P.3d at 327.

262. *Strode*, 167 Wash. 2d at 224, 217 P.3d at 313.

263. *Id.* at 234, 217 P.3d at 318 (Fairhurst, J., concurring).

264. *Momah*, 167 Wash. 2d at 151, 217 P.3d at 327.

265. *Strode*, 167 Wash. 2d at 235, 217 P.3d at 318 (Fairhurst, J., concurring).

participated in it, and benefited from it.”<sup>266</sup> While not explicitly holding that Momah had waived his right to a public trial, the Court observed that Momah “made tactical choices to achieve what he perceived as the fairest result.”<sup>267</sup> On the contrary, the Court in *Strode* rejected the State’s argument that the defendant’s failure to object to the private questioning of jurors constituted waiver of his right to a public trial.<sup>268</sup> Moreover, the Court pointed out that while a defendant can waive his own right to a public trial, he cannot waive the public’s right to open proceedings under Section 10.<sup>269</sup>

Finally, the Court distinguished the cases by the type of error that occurred with each closure, and the remedy. In *Strode*, the Court held that the partial closure of voir dire constituted a denial of Tony Strode’s constitutional right to a public trial, which is “one of the limited classes of fundamental rights not subject to harmless error analysis,”<sup>270</sup> but rather is a “structural error, and prejudice is necessarily presumed.”<sup>271</sup> In *Momah*, however, the Court held that the closure was not structural error.<sup>272</sup> Rather, the closure occurred to protect Momah’s rights and had not prejudiced him.<sup>273</sup> Concluding that the error was not structural, that the trial court had recognized the competing Section 22 interests (public trial and impartial jury) in the case, and that Momah had accepted and benefited from the closure, the Court held that reversal and remand “cannot be the remedy under these circumstances.”<sup>274</sup> The Court affirmed Momah’s conviction.<sup>275</sup>

*Momah* was a 6-3 decision,<sup>276</sup> and *Strode* was a 4-2-3 plurality.<sup>277</sup> The various arguments of the five opinions illustrate the persistent disagreement among the justices that feeds the continuing uncertainty of trial courts. Justice Charles Johnson, in his dissent in *Strode*, takes the

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266. *Momah*, 167 Wash. 2d at 151, 217 P.3d at 327.

267. *Id.* at 155, 217 P.3d at 328.

268. *Strode*, 167 Wash. 2d at 229, 217 P.3d at 315.

269. *Id.* at 229–30, 217 P.3d at 315.

270. *Id.* at 231, 217 P.3d at 316 (quoting *State v. Easterling*, 157 Wash. 2d 167, 181, 137 P.3d 825, 831 (2006)).

271. *Id.* (citing *Neder v. United States*, 527 U.S. 1, 8 (1999)).

272. *State v. Momah*, 167 Wash. 2d 140, 145, 156, 217 P.3d 321, 324, 329 (2009). An error is structural in nature when it “necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Id.* at 155–56, 217 P.3d at 329.

273. *Id.* at 156, 217 P.3d at 329.

274. *Id.*

275. *Id.*

276. *Id.* at 140, 217 P.3d at 322.

277. *State v. Strode*, 167 Wash. 2d 222, 222, 217 P.3d 310, 310 (2009).

majority to task for “ignor[ing] Strode’s right to an impartial jury under article I, section 22 and dismiss[ing] the legitimate privacy interests of jurors,”<sup>278</sup> and for giving the defendant a “windfall” for participating in a closure that likely benefited him.<sup>279</sup> In his vigorous dissent in *Momah*, Justice Alexander, the author of the *Strode* plurality opinion, retorts that “a new trial is not a ‘windfall’ for anyone when public trial rights are set aside for the sake of expediency.”<sup>280</sup> After reiterating his position that there is no exception to the rule that a courtroom may be closed without a proper hearing and order,<sup>281</sup> he concludes that “the expense of a retrial pales in comparison to the harm done to the constitutionally guaranteed right to have justice in this state administered openly.”<sup>282</sup>

#### IV. MANY COURTS OF APPEALS’ DECISIONS DEMONSTRATE TRIAL COURTS’ CONTINUING DIFFICULTIES APPLYING WASHINGTON’S CLOSURE TEST

All three divisions of the Washington Courts of Appeals have addressed cases involving the right to public trial,<sup>283</sup> and five such cases

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278. *Id.* at 242, 217 P.3d at 321 (C. Johnson, J., dissenting).

279. *Id.*

280. *Momah*, 167 Wash. 2d at 165, 217 P.3d at 333 (Alexander, J., dissenting).

281. *Id.* at 166, 217 P.3d at 334 (Alexander, J., dissenting).

282. *Id.*

283. For cases from Division I, see, for example, *State v. Hummel*, 165 Wash. App. 749, 770–77, 266 P.3d 269, 281–82 (2012); *State v. Applegate*, 163 Wash. App. 460, 464–72, 259 P.3d 311, 314–18 (2011); *State v. Njonge*, 161 Wash. App. 568, 573–80, 255 P.3d 753, 755–59 (2011); *State v. Tinh Trinh Lam*, 161 Wash. App. 299, 303–07, 254 P.3d 891, 892–96 (2011); *State v. Tarhan*, 159 Wash. App. 819, 824–35, 246 P.3d 580, 583–89 (2011), *rev. granted*, 172 Wash. 2d 1013, 259 P.3d 1109 (2011); *In re Detention of Ticeson*, 159 Wash. App. 374, 379–87, 246 P.3d 550, 552–57 (2011); *State v. Price*, 154 Wash. App. 480, 485–89, 228 P.3d 1276, 1278–80 (2010); *State v. Coleman*, 151 Wash. App. 614, 617–24, 214 P.3d 158, 159–63 (2009); *State v. Waldon*, 148 Wash. App. 952, 957–67, 202 P.3d 325, 328–33 (2009); *State v. Rivera*, 108 Wash. App. 645, 652–53, 32 P.3d 292, 296–97 (2001). For a list of cases from Division II, see, for example, *State v. Bennett*, 168 Wash. App. 197, 200–07, 275 P.3d 1224, 1226–29 (2012); *In re Stockwell*, 160 Wash. App. 172, 177–81, 248 P.3d 576, 578–80 (2011); *State v. Smith*, No. 38868-5-II, slip op. at 1 (Wash. Ct. App. Feb. 23, 2011); *State v. Leyerle*, 158 Wash. App. 474, 478–501, 242 P.3d 921, 923–28 (2010); *State v. Bowen*, 157 Wash. App. 821, 828–33, 239 P.3d 1114, 1118–20 (2010); *State v. Sublett*, 156 Wash. App. 160, 181–83, 231 P.3d 231, 242–43 (2010); *rev. granted*, 170 Wash. 2d 1016, 245 P.3d 775 (2010); *State v. Paumier*, 155 Wash. App. 673, 677–86, 230 P.3d 212, 215–19 (2010), *rev. granted*, 169 Wash. 2d 1017, 236 P.3d 206 (2010); *State v. Heath*, 150 Wash. App. 121, 125–39, 206 P.3d 712, 714–16 (2009); *State v. Wise*, 148 Wash. App. 425, 432–45, 200 P.3d 266, 269–75 (2009), *rev. granted*, 170 Wash. 2d 1009, 236 P.3d 207 (2010); *State v. Sadler*, 147 Wash. App. 97, 109–18, 193 P.3d 1108, 1114–19 (2008); *State v. Erickson*, 146 Wash. App. 200, 204–11, 189 P.3d 245, 247–51 (2008); *State v. Russell*, 141 Wash. App. 733, 737–41, 172 P.3d 361, 362–65 (2007). For a list of cases from Division III, see, for example, *State v. Castro*, 159 Wash. App. 340, 342–44, 246 P.3d 228, 229–30 (2011); *State v. Koss*, 158 Wash. App. 8, 16–19, 241 P.3d 415, 418–19

are under review at the Washington State Supreme Court.<sup>284</sup> Appeals of cases in which the trial court has ordered closures of voir dire have resulted in numerous reversals of convictions. In their decisions reversing the trial court, the courts of appeals have held that court rules regarding juror privacy cannot “trump constitutional requirements that the trial be public,”<sup>285</sup> and “[o]ur Supreme Court has made clear that the trial court must engage in the five-part analysis set out in *State v. Bone-Club* before conducting all or a portion of voir dire outside of the public forum of the courtroom.”<sup>286</sup> In a 2010 voir dire closure case, *State v. Paumier*,<sup>287</sup> the court of appeals engaged in a detailed comparative analysis of the Supreme Court’s decisions in *Strode* and *Momah*.<sup>288</sup> It noted that *Momah*’s “remedy . . . appropriate to the violation” language from *Waller* seemed to back off the bright-line rule of automatic reversal to which the Court had been adhering since *Bone-Club*.<sup>289</sup> The *Paumier* court observed that while six justices in *Strode* agreed that some kind of *Bone-Club* analysis was required before closing the courtroom, it “was not clear after *Momah* and *Strode* . . . what the appropriate remedy should be” when no *Bone-Club* test is applied.<sup>290</sup> The *Paumier* panel then cited the case it believed was controlling: *Presley v. Georgia*,<sup>291</sup> decided three months after *Momah* and *Strode*.<sup>292</sup> While *Presley* does not require all proceedings to be open in all circumstances, it requires a trial court to consider reasonable alternatives to closure and to justify such a

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(2010); *State v. O’Connor*, 155 Wash. App. 282, 291–93, 229 P.3d 880, 883–84 (2010); *State v. Vega*, 144 Wash. App. 914, 916–18, 184 P.3d 677, 679 (2008); *State v. Duckett*, 141 Wash. App. 797, 802–13, 173 P.3d 948, 950–54 (2007); *State v. Frawley*, 140 Wash. App. 713, 719–26, 167 P.3d 593, 595–97 (2007).

284. Four of these cases were decided as this issue went to press: *State v. Sublett*, No. 84856-4 (Wash. Nov. 21, 2012); *State v. Paumier*, No. 84585-9 (Wash. Nov. 21, 2012); *State v. Wise*, No. 82802-4 (Wash. Nov. 21, 2012); *In re Personal Restraint of Morris*, No. 84929-3 (Wash. Nov. 21, 2012) (also involving in-chambers questioning of prospective jurors). See author’s note, *supra*. A fifth case remains to be decided: *State v. Tarhan*, 159 Wash. App. 819, 246 P.3d 580 (2011), *rev. granted*, 172 Wash. 2d 1013, 259 P.3d 1109 (2011).

285. *Frawley*, 140 Wash. App. at 720, 167 P.3d at 596.

286. *Duckett*, 141 Wash. App. at 802–03, 173 P.3d at 950–51.

287. 155 Wash. App. 673, 230 P.3d 212.

288. *Id.* at 679–83, 230 P.3d at 216–18.

289. *Id.* at 680, 230 P.3d at 216.

290. *Id.* at 683, 230 P.3d at 218.

291. 558 U.S. 209, 130 S. Ct. 721 (2010); see *supra* notes 127–32 and accompanying text.

292. *Paumier*, 155 Wash. App. at 685, 230 P.3d at 219. The Washington Supreme Court released opinions for both *Momah* and *Strode* on October 8, 2009. *State v. Momah*, 167 Wash. 2d 140, 217 P.3d 321 (2009); *State v. Strode*, 167 Wash. 2d 222, 217 P.3d 310 (2009). *Presley* was decided by the U.S. Supreme Court on January 19, 2010. *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 721, 722 (2010).



closure in findings.<sup>293</sup> Because there had been no consideration of alternatives or findings justifying the closure, the court of appeals in *Paumier* held that the defendant's convictions must be reversed.<sup>294</sup>

In upholding a conviction in a factually analogous case, however, a different court of appeals panel in *State v. Wise*<sup>295</sup> employed a kind of de minimis analysis, holding that the trial court's private questioning of eight prospective jurors in chambers, on the record, and with defendant and counsel present, did not constitute a closure requiring a *Bone-Club* analysis: "Closure, if any, was temporary and partial, below the 'temporary, full closure' threshold of *Bone-Club*."<sup>296</sup> *State v. Wise* and *State v. Paumier* are currently under review by the Washington State Supreme Court.<sup>297</sup>

Over the last five years, the courts of appeals have reversed over ten convictions for private questioning of jurors outside of open court,<sup>298</sup> and one for closure of a *Batson* hearing.<sup>299</sup> The courts of appeals have also faced questions surrounding the sealing of documents.<sup>300</sup> In cases of the sealing of jury questionnaires, the courts have often not found structural error requiring reversal, but rather a *Waller*-style "remedy . . . appropriate to the violation,"<sup>301</sup> likely a remand to the trial court for reconsideration of the sealing order.<sup>302</sup> One of these cases is also under review by the Washington State Supreme Court: *State v. Tarhan*,<sup>303</sup> which concerned the sealing of confidential jury questionnaires in a rape case.<sup>304</sup>

Finally, in *State v. Sublett*,<sup>305</sup> the Court will decide whether the public trial right applies to a trial court's conference with counsel on how to

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293. *Paumier*, 155 Wash. App. at 685, 230 P.3d at 219.

294. *Id.*

295. 148 Wash. App. 425, 200 P.3d 266 (2009).

296. *Id.* at 436, 200 P.3d at 272 (citation omitted).

297. *See supra* note 284.

298. *See supra* note 286.

299. *State v. Sadler*, 147 Wash. App. 97, 106, 193 P.3d 1108, 1113 (2008).

300. *See, e.g., In re Stockwell*, 160 Wash. App. 172, 175, 248 P.3d 576, 577 (2011); *State v. Tarhan*, 159 Wash. App. 819, 821, 246 P.3d 580, 582 (2011), *rev. granted*, 172 Wash. 2d 1013, 259 P.3d 1109 (2011); *State v. Coleman*, 151 Wash. App. 614, 617, 214 P.3d 158, 159 (2009); *State v. Waldon*, 148 Wash. App. 952, 955, 202 P.3d 325, 327 (2009).

301. *Waller v. Georgia*, 467 U.S. 39, 50 (1984).

302. *Tarhan*, 159 Wash. App. at 821, 246 P.3d at 582; *Coleman*, 151 Wash. App. at 617, 214 P.3d at 159.

303. 159 Wash. App. 819, 246 P.3d 580.

304. *Id.* at 821, 246 P.3d at 582.

305. 156 Wash. App. 160, 231 P.3d 231 (2010).

resolve a legal question submitted by the jury during its deliberations in a murder trial.<sup>306</sup> In addition, the petitions for review of more cases have been stayed pending the decisions in the cases currently under review.<sup>307</sup> As one court of appeals judge recently observed, “[t]he law regarding a defendant’s and the public’s right to public trial proceedings is under scrutiny and continues to evolve as our Supreme Court addresses issues surrounding trial court closures.”<sup>308</sup>

#### V. THE WASHINGTON STATE SUPREME COURT SHOULD CLEARLY DEFINE CLOSURE AND THEN REVISE THE *BONE-CLUB* TEST

Washington open courts jurisprudence has become increasingly complex and confusing. Although the *Bone-Club* test enumerated factors for evaluating proposed closures, the test has left some questions unanswered, and the unsettled state of the law demonstrates that it has not always been an effective tool for trial courts. What can courts use to more effectively analyze open courts issues? For years, pilots and medical professionals have used deceptively simple checklists to manage routine practices in increasingly complex areas.<sup>309</sup> These checklists help prevent the overlooking of routine but crucial matters that might get lost amidst the strain of more pressing events. Checklists also provide reminders of minimum necessary procedures, making them explicit.<sup>310</sup> They act as a kind of “cognitive net.”<sup>311</sup> An “open courts checklist” will help trial courts, which handle heavy caseloads with scarce resources, to manage what is becoming an increasingly complex area of Washington law. A checklist will also facilitate the creation of a clear record for review.

To protect the constitutional rights to public trial and open administration of justice while also respecting other important interests, Washington courts should first answer the threshold question: What is a closure? Whether the proposed action constitutes a closure should be the

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306. *Id.* at 160, 169, 231 P.3d at 231, 236–37.

307. *State v. Smith*, 162 Wash. App. 833, 262 P.3d 72 (2011) (sealing of jury questionnaires); *State v. Koss*, 158 Wash. App. 8, 241 P.3d 415 (2010) (jury instruction conference in chambers); *State v. Sadler*, 147 Wash. App. 97, 193 P.3d 1108 (2008) (closed *Batson* hearing). All of these cases were cited in *State v. Bennett*, 168 Wash. App. 197, 201 n.5, 275 P.3d 1224, 1226 n.5 (2012).

308. *Bennett*, 168 Wash. App. at 197, 201 n.5, 275 P.3d at 1226 n.5.

309. *See supra* note 15.

310. *See GAWANDE, supra* note 15, at 36.

311. *Id.* at 48.

first checklist question in a revised *Bone-Club* test.<sup>312</sup> The remaining checklist questions will provide clear guidance to the trial courts for evaluating proposed closures, and facilitate the creation of a clear record for review. The goals are improved judicial economy, increased public confidence, and clear and constitutional public trial/open justice jurisprudence.

A. *Courts Should Apply an “Open Courts Checklist”*

The first question in a revised *Bone-Club* test should be whether the proposed action constitutes a closure.<sup>313</sup> If the answer is no, public trial and open access rights are not implicated.<sup>314</sup> If the proposed denial of access is or may be a closure, then the court must answer the remaining checklist questions set forth below, creating a record for review.

1. *Would this Denial of Access Constitute a Closure?*

In the oral arguments at the Washington State Supreme Court for *State v. Lormor*<sup>315</sup> on May 3, 2011, the attorney representing the State asked the Justices “to articulate clearly what is a closure and what isn’t.”<sup>316</sup> This question is at the very heart of cases involving the right to public trial and the open administration of justice and is the first question that a court must answer. It is possible at this point to derive some rules about what does and does *not* constitute a closure requiring the test.

a. *The Court Should Distinguish Between Adversarial and Ministerial Proceedings and Clearly Define What Is in the Trial Court’s Discretion*

Washington cases provide some guidance on what constitutes a closure. Full exclusion of the public from proceedings within a courtroom is a closure.<sup>317</sup> Wholesale exclusion of the defendant’s family is a closure.<sup>318</sup> Exclusion of one person, even a family member, in order

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312. See *supra* note 205 and accompanying text.

313. See *State v. Lormor*, 172 Wash. 2d 85, 93–94, 257 P.3d 624, 629 (2011).

314. *Id.* at 96, 257 P.3d at 630.

315. 172 Wash. 2d 85, 257 P.3d 624.

316. Oral Arguments at 24:43, *State v. Lormor*, 172 Wash. 2d 85, 257 P.3d 624 (2011), available at [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2011050034B](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2011050034B).

317. *Lormor*, 172 Wash. 2d at 92, 257 P.3d at 628.

318. See, e.g., *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 721, 722 (2010); *In re Oliver*, 333 U.S. 257, 272 (1948); *In re Orange*, 152 Wash. 2d 795, 800–01, 100 P.3d 291, 293–94 (2005).

to reduce noise and possible distractions, however, is not a closure and is within the discretion of the trial court.<sup>319</sup> Private questioning of jurors when the public is fully excluded is a closure, though the interests of juror privacy<sup>320</sup> and the integrity of the jury pool are interests a court may consider in deciding whether such a closure is justified.<sup>321</sup> Questioning of jurors one at a time is not a closure if the questioning occurs in open court, even if the remaining venire is kept elsewhere.<sup>322</sup> The trial judge in both *Wise* and *Paumier* privately questioned prospective jurors on matters regarding not only administrative empanelment, but also regarding their fitness to serve on this particular jury. This private questioning constituted a closure. The sealing of documents, as in *State v. Tarhan*, is also a closure that implicates the public's right to open administration of justice.<sup>323</sup>

A trial court has both inherent and statutory<sup>324</sup> authority to preserve and enforce order in the proceedings before it.<sup>325</sup> Management of space and accommodation is within the discretion of the trial court and does

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319. *Lormor*, 172 Wash. 2d at 96–97, 257 P.3d at 630.

320. Trial courts in smaller communities have raised heightened privacy concerns that they would argue constitute overriding interests. Even statutory qualification and hardship discussions not pertaining to the defendant's trial may necessitate a prospective juror's revelation of personal matters regarding health or finances. While the Court has been clear that a court rule (i.e., GR 31(j) safeguarding juror privacy) cannot trump a constitutional provision (i.e., WASH. CONST. art. I, § 10), the Court's decisions seem to indicate that an interest such as juror privacy could justify a closure. *See supra* note 278, and *infra* note 324. The key step is still to weigh interests via application of the *Bone-Club* factors and to articulate a clear rationale in specific findings.

321. *State v. Strobe*, 167 Wash. 2d 222, 236, 217 P.3d 310, 318 (2009) (Fairhurst, J., concurring) (“I agree that jurors’ privacy is a compelling interest that trial courts must protect.”); *State v. Momah*, 167 Wash. 2d 140, 152, 217 P.3d 321, 327 (2009) (stating that a fair and impartial jury, secured by effective voir dire, is among rights guaranteed by WASH. CONST. art. I, § 22).

322. *State v. Vega*, 144 Wash. App. 914, 917, 184 P.3d 677, 679 (2008).

323. *See supra* discussion of *Seattle Times v. Ishikawa*, notes 153–85 and accompanying text; *see also State v. Tarhan*, 159 Wash. App. 819, 246 P.3d 580 (2011), *rev. granted*, 172 Wash. 2d 1013, 259 P.3d 1109 (2011); *State v. Coleman*, 151 Wash. App. 614, 617, 214 P.3d 158, 159 (2009).

324. The Washington Revised Code provides in pertinent part:

Every court of justice has power—(1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority. (3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein. (5) To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto. (6) To compel the attendance of persons to testify in an action, suit or proceeding therein, in the cases and manner provided by law. (7) To administer oaths in an action, suit or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties.

WASH. REV. CODE § 2.28.010(1)–(7) (2012).

325. *State v. Lormor*, 172 Wash. 2d 85, 93–94, 257 P.3d 624, 628–29 (2011).

not constitute closure when the public has been accommodated as far as possible.<sup>326</sup> The court has the authority to manage photography in the courtroom,<sup>327</sup> and order the screening or searching of spectators entering the courtroom.<sup>328</sup>

But many questions remain. The Washington State Supreme Court has not yet ruled on whether in-chambers conferences for issues such as jury instructions constitute closure.<sup>329</sup> Nor has it addressed courtroom sidebars, which trial judges are increasingly reluctant to conduct in light of the unsettled state of the law.<sup>330</sup> The courts of appeals have held that public trial rights apply to “adversary proceedings,” such as presentation of evidence, suppression hearings, and jury selection, as opposed to ministerial proceedings.<sup>331</sup> The Washington State Supreme Court has granted review in a case involving in-chambers conferences for questions submitted by the jury, and has stayed several petitions for review involving similar issues.<sup>332</sup> In *State v. Sublett*, the case granted review, the question sent to the trial judge by the deliberating jury involved a purely legal matter not requiring the resolution of disputed facts.<sup>333</sup> It was not part of the evidentiary phase or other “adversarial

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326. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 600 (1980) (Stewart, J., concurring in the judgment).

327. *State v. Russell*, 141 Wash. App. 733, 741, 172 P.3d 361, 364–65 (2007) (holding that trial court balanced interests of defendant’s right to public trial with court’s authority to control courtroom photography under GR 16).

328. *State v. O’Connor*, 155 Wash. App. 282, 293, 229 P.3d 880, 884 (2010).

329. A case involving this issue is under review by the Washington State Supreme Court. *See supra* notes 305–06.

330. Interview with the Hon. Susan Craighead, King Cnty. Superior Court Judge, in Seattle, Wash. (Dec. 1, 2011); Interview with the Hon. Anne Ellington, Wash. State Court of Appeals Judge, in Seattle, Wash. (Dec. 29, 2011).

331. *State v. Koss*, 158 Wash. App. 8, 16–17, 241 P.3d 415, 418–19 (2010) (determining that closed proceedings involving language of jury instructions were of purely ministerial legal nature and not in violation of public trial right); *State v. Sadler*, 147 Wash. App. 97, 114, 193 P.3d 1108, 1117 (2008) (stating that defendant does not have right to public hearing on purely ministerial or legal matters that do not require the resolution of disputed facts); *State v. Rivera*, 108 Wash. App. 645, 653, 32 P.3d 292, 296–97 (2001) (holding that closed hearing to discuss a juror’s complaint about another juror’s hygiene was ministerial matter, not adversary proceeding, and thus did not implicate right to public trial).

332. *See supra* notes 13 and 307.

333. The jury asked the following question:

Clarification of Instruction 21. The structuring of the 2nd sentence in the 1st paragraph is unclear. Which of the following is correct for intent? A person (X) is legally accountable for the conduct of another person (Y) when he or she (X) is an accomplice of such other person (Y) in the commission of the crime.—OR—A person (X) is legally accountable for the conduct of another person (Y) when he or she (Y) is an accomplice of such other person (X) in the commission of the crime.

*State v. Sublett*, 156 Wash. App. 160, 178, 231 P.3d 231, 241 (2010). The judge, after conferring

proceedings.” As such, it was a purely legal proceeding not touching on the defendant’s rights, and thus not a closure requiring application of the checklist.

Sidebar and in-chambers conferences to discuss legal issues or ministerial aspects of the proceeding arguably do not implicate either the appellant’s right to a public trial or the public’s right to open administration of justice.<sup>334</sup> Ministerial proceedings may include scheduling, order of witnesses, statutory or administrative empanelment of jurors, including general qualifications and even hardship not specific to a defendant’s case.<sup>335</sup> The court of appeals held that closing the courtroom for a brief hearing on a juror’s complaint about another juror’s hygiene did not violate the defendant’s right to public trial.<sup>336</sup> While at least one court has observed that jury instruction conferences may involve disputed facts, and therefore may not be purely an administrative or legal matter,<sup>337</sup> questions about whether evidence supports instructions are questions of law, not fact. These conferences typically involve questions such as formatting and proofreading, or pure questions of law that do not touch on a defendant’s rights.<sup>338</sup> A historical survey of what Washington judges have been able to do “at chambers” since the earliest days of the state reveals that sidebars and in-chambers conferences to discuss legal matters have long been seen as constitutional and within the authority of the trial judge.<sup>339</sup> Remarks that

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with counsel in chambers, answered “I cannot answer your question please re-read your instructions.” *Id.*

334. *In re Detention of Ticeson*, 159 Wash. App. 374, 384–86, 246 P.3d 550, 555–56 (2011); *accord* *State v. Castro*, 159 Wash. App. 340, 343, 246 P.3d 228, 229–30 (2011); *State v. Smith*, No. 38868-5-II, slip op. at 1 (Wash. Ct. App. Jan. 4, 2011, as amended on Denial of Motion to Publish Feb. 23, 2011); *Koss*, 158 Wash. App. at 16–17, 241 P.3d at 418; *Rivera*, 108 Wash. App. at 653, 32 P.3d at 296–97. *But see* *State v. Bennett*, 168 Wash. App. 197, 204, 275 P.3d 1224, 1228 (2012) (“[E]ven in proceedings involving *purely legal matters*, the public’s presence may ensure the fairness of such proceedings, although the same cannot be said for ministerial or administrative matters that do not impact the defendant’s rights.”) (emphasis added).

335. *See* *State v. Irby*, 170 Wash. 2d 874, 887, 246 P.3d 796, 803 (2011) (Madsen, J., dissenting) (arguing that excusal of potential jurors for personal reasons such as general hardship is distinct from voir dire when the potential jurors are introduced to the substantive legal and factual issues of a defendant’s case; while the latter is a critical stage at which the defendant has a right to be present, the former is not). The U.S. Supreme Court has “expressly distinguished ‘voir dire’ from the ‘administrative empanelment process.’” *Id.* at 888, 246 P.3d at 803 (citing *Gomez v. United States*, 490 U.S. 858, 874 (1989)).

336. *State v. Rivera*, 108 Wash. App. 645, 653, 32 P.3d 292, 296–97 (2001) (“This was a ministerial matter, not an adversarial proceeding.”).

337. *Bennett*, 197 Wash. App. at 206, 275 P.3d at 1229.

338. *Koss*, 158 Wash. App. at 16–17, 241 P.3d at 418.

339. *Ticeson*, 159 Wash. App. at 384–85, 246 P.3d at 555–56 (2011). *Ticeson* was a matter of a

the trial judge may wish to make to counsel regarding specific conduct or lines of questioning may be most efficiently and fairly handled in a brief sidebar.<sup>340</sup>

Sidebar conferences have an important role for the judge's administrative control of the proceedings. So long as the issues are legal or ministerial and not adversarial, they should not be held to constitute closures. The practical effects of characterizing them as closures are significant. Trial judges would be forced to interrupt trial, perhaps excusing the jury to a jury room located some distance from the courtroom, every time she wished to address, question, or admonish counsel.<sup>341</sup> The likely result—the risk of a jury exasperated by long and seemingly pointless delays—“would do nothing to make the trial more fair, to foster public trust, or to serve as a check on judges by way of public scrutiny.”<sup>342</sup>

The Washington State Supreme Court should exclude sidebars and in-chambers conferences from its definition of unconstitutional closure so long as their purpose is to discuss ministerial and legal matters. To ensure a clear record for review and emphasize the importance of openness, the Court can require trial courts to state for the record the nature and result of any sidebar discussion or chambers conferences.<sup>343</sup> The Court should at the same time reiterate that matters such as management of space, order and decorum, as long as the public has been accommodated as far as possible, are squarely within the trial court's discretion and are not closures.

*b. The Key Question Is Not “Is This a Trivial or De Minimis Closure?” but Rather “Is This a Closure at All?”*

As described above,<sup>344</sup> the justices of the Washington State Supreme Court have disagreed about whether Washington courts should apply a “trivial” or “de minimis” closure standard. Examination of the “trivial closure” cases from other jurisdictions cited by Justice Madsen, however, suggests that most of these cases should not be characterized

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Sexually Violent Predator (SVP) commitment trial, and thus was a civil, not criminal proceeding. However, the closure questions the court discussed were similar to those at issue in the criminal context. *Id.* at 380, 246 P.3d at 553.

340. *Id.* at 386, 246 P.3d at 556.

341. *Id.* at 386 n.38, 246 P.3d at 556 n.38.

342. *Id.*

343. *Id.* at 384, n.27, 246 P.3d at 555 n.27.

344. *See supra* notes 223–51 and accompanying text.

as closures at all, but rather as actions within the trial court's inherent discretion to manage the proceedings. These include cases in which the court excluded one or two persons for a specific reason,<sup>345</sup> or briefly limited access for reasons of order, when the public and press had been largely accommodated.<sup>346</sup> Justice Madsen's list also included cases in which brief closures were inadvertent.<sup>347</sup> An inadvertent closure is still error, but is arguably not a violation of the right to public trial if it involved no deliberate action or order denying access. A clear definition of what does and does not constitute a closure will make the trivial closure question—already inapposite under Washington law<sup>348</sup>—unnecessary.

## 2. *Whose Interest Does the Closure Aim to Protect?*

The *Bone-Club* test requires that the proponent of closure make some showing of a compelling interest.<sup>349</sup> This Comment suggests that another question logically precedes the first *Bone-Club* factor:<sup>350</sup> “For whose interest was the closure proposed?” Depending on whose interest the closure aims to protect, the standard of review and potential remedy for a violation will be different.

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345. *See, e.g.*, Carson v. Fischer, 421 F.3d 83, 91–95 (2d Cir. 2005) (exclusion of defendant's mother-in-law during testimony of confidential informant); Braun v. Powell, 227 F.3d 908, 917–20 (7th Cir. 2000) (exclusion of former member of jury venire not selected as juror); State v. Lindsey, 632 N.W.2d 652, 659–61 (Minn. 2001) (exclusion of two minors). All of these cases were cited in *State v. Easterling*, 157 Wash. 2d 167, 183–85, 137 P.3d 825, 832–33 (2006) (Madsen, J., concurring).

346. *See, e.g.*, People v. Woodward, 841 P.2d 954, 955 (Cal. 1992) (evaluating constitutional implications after bailiff locked doors and posted sign reading “Trial in progress—Please do not enter” and listing break times, during prosecutor's closing argument); State v. Shaw, 619 S.W.2d 546, 548 (Tenn. 1981) (considering order that courtroom be closed during closing arguments to prevent distractions from people who were arriving for judge's daily calendar call). Both of these cases were cited in *Easterling*, 157 Wash. 2d at 183–84, 137 P.3d at 832–33 (Madsen, J., concurring). *But see* United States v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003) (holding that closure of courtroom while jurors were questioned about safety concerns was too trivial to implicate right to public trial). Under Washington precedent, this would most properly be classified as a closure warranting a *Bone-Club* analysis. *See, e.g.*, State v. Strode, 167 Wash. 2d 222, 230, 217 P.3d 310, 316 (2009).

347. *Easterling*, 157 Wash. 2d at 183–84, 137 P.3d at 832–33 (Madsen, J., concurring) (citing Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996); United States v. Al-Smadi, 15 F.3d 153 (10th Cir. 1994); Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975); Blackwell v. State, 663 P.2d 12, 17 (Okla. Crim. App. 1983)).

348. *See supra* note 251 and accompanying text.

349. State v. Bone-Club, 128 Wash. 2d 254, 258–59, 906 P.2d 325, 327–28 (1995).

350. *Id.* at 258, 906 P.3d at 327.



a. *Under Section 22, “Likelihood of Jeopardy to Constitutional Rights” May Support a Closure*

According to the *Ishikawa* test, a closure that proposes to protect a defendant’s right to a fair trial need only show a likelihood of jeopardy to constitutional rights.<sup>351</sup> A violation of a defendant’s right to a fair trial, under the Sixth Amendment or Section 22, constitutes a structural error. Prejudice is presumed, and the appropriate remedy is a new trial.<sup>352</sup>

b. *Under Section 10, a “Serious and Imminent Threat” Is Necessary to Support a Closure*

In cases where closure or sealing is sought to further any right or interest besides the defendant’s right to a fair trial, a “serious and imminent threat to some other important interest” must be demonstrated.<sup>353</sup> Violation of the Section 10 rights of the public, without more, will not require the remedy of a new trial for the defendant. It will likely call for some restoration of access, through reconsideration of a sealing order or the provision of transcripts. The Washington State Supreme Court has held that defendants may not waive the public’s Section 10 right,<sup>354</sup> but the courts of appeals have disagreed about whether defendants have standing to assert Section 10 rights on their own behalf.<sup>355</sup> In *State v. Bennett*,<sup>356</sup> a court of appeals panel recently opined that the defendant’s and the public’s right to open and public trials includes circumstances in which the mere presence of the public passively contributes to the fairness of the proceedings, by “detering deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.”<sup>357</sup> Thus, even purely legal matters may

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351. *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 37, 640 P.2d 716, 720 (1982).

352. *State v. Strobe*, 167 Wash. 2d 222, 231, 217 P.3d 310, 316 (2009) (citing *Neder v. United States*, 527 U.S. 1, 8 (1999)).

353. *Ishikawa*, 97 Wash. 2d at 37, 640 P.2d at 720.

354. *Strobe*, 167 Wash. 2d at 229, 217 P.3d at 315.

355. *In re Detention of Ticeson*, 159 Wash. App. 374, 381–82, 246 P.3d 550, 554 (2011) (rejecting approach taken in *State v. Wise*, 148 Wash. App. 425, 200 P.3d 266 (2009), *rev. granted*, 170 Wash. 2d 1009, 236 P.3d 207 (2010), in which the court held a criminal defendant lacked third party standing to raise Section 10 rights). The *Ticeson* court stated that defendant, as a member of the public, is protected by Section 10. *Id.*

356. 168 Wash. App. 197, 275 P.3d 1224 (2012).

357. *Id.* at 204, 275 P.3d at 1228.

implicate the public's and defendant's right to public trial.<sup>358</sup> When these rights have been violated in such a way as to also implicate a defendant's Section 22 right to a public trial, the error is likely to be deemed structural, requiring the remedy of a new trial.<sup>359</sup>

In public trial cases in Washington, juror privacy has figured prominently.<sup>360</sup> Questioning in open court and public access to confidential questionnaires has the potential to violate the privacy of prospective jurors, particularly in smaller communities. A prospective juror explaining hardship may not wish his neighbors to know that if he misses a week of work for the trial, he could lose his house. A prospective juror in *Wise*,<sup>361</sup> a trial in the superior court of rural Mason County, was reluctant to openly discuss the health issues that posed a hardship for his service.<sup>362</sup> Prospective jurors in a small community are likely also to be neighbors or acquaintances. Discussing issues of personal financial and health hardship could be more difficult in this setting than in a venire of strangers in a more densely-populated county. Moreover, jurors in Washington State receive guarantees in court rules,<sup>363</sup> in literature related to jury service,<sup>364</sup> and in juror questionnaires seeking sensitive information, that any information beyond their names is presumed confidential.<sup>365</sup> The record seems to indicate that judges

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358. *Id.* (noting that the panel in *In re Detention of Ticeson*, 159 Wash. App. 374, 246 P.3d 550 (2011), would disagree).

359. *State v. Momah*, 167 Wash. 2d 140, 149–50, 217 P.3d 321, 325–26 (2009).

360. *See supra* notes 252–98 and accompanying text.

361. 148 Wash. App. 425, 200 P.3d 266 (2009), *rev. granted*, 170 Wash. 2d 1009, 236 P.3d 207 (2010).

362. *Id.* at 431, 200 P.3d at 269–70.

363. Washington State Court Rule GR 31(j) provides:

Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

WASH. STATE CT. R. GR 31(j).

364. Prospective jurors are told that if they are uncomfortable answering a question during voir dire, they may tell the judge, who will ask the question privately. *A Juror's Guide*, WASHINGTON COURTS, [http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo\\_jury.jury\\_guide](http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.jury_guide) (last visited Oct. 27, 2012).

365. The juror questionnaires in *Strode* and *Tarhan*, for example, requested information about prospective jurors' sexual histories and experiences with child sexual abuse. *State v. Tarhan*, 159 Wash. App. 819, 823, 246 P.3d 580, 582–83 (2011), *rev. granted*, 172 Wash. 2d 1013, 259 P.3d 1109 (2011); *State v. Strode*, 167 Wash. 2d 222, 224, 217 P.3d 310, 312 (2009). The questionnaire in *Strode* stated: "Your answers will be revealed only to [counsel, the judge, her staff and the Clerk], each of whom are under court order to keep the information confidential and under seal." *Strode*, 167 Wash. 2d at 240, 217 P.3d at 320 (C. Johnson, J., dissenting).

juggling concerns such as space and privacy did not believe that they were closing the courtroom, or in the case of sealed jury questionnaires, impermissibly denying access to public records, but on the contrary believed they were fulfilling their responsibility to balance the interests of justice with the needs of their communities.<sup>366</sup> The Washington State Supreme Court has not discounted concerns such as juror privacy.<sup>367</sup> But the Court has reiterated that such concerns must be weighed against the constitutional values of public trial and open administration of justice before a closure is ordered.<sup>368</sup>

Thus courts should ask “whose interest?” Then, reaching back to *Ishikawa*, courts should evaluate the purported need for closure under the standards of “a likelihood of jeopardy” to constitutional rights<sup>369</sup> (for a closure protecting a defendant’s right to a fair trial) or a “serious and imminent threat”<sup>370</sup> (for a closure to protect another interest). Courts must answer this question clearly on the record because it is pivotal in determining whether a proposed closure is justified.

### 3. *Has There Been an Opportunity for Those Present to Object?*

Affording an opportunity to object to those present when the denial of access is proposed is the second factor in both the *Ishikawa*<sup>371</sup> and *Bone-Club* tests.<sup>372</sup> A valid opportunity to object presupposes that those present have enough information about the proposed denial of access to make a reasoned judgment about whether to object.<sup>373</sup> Giving all parties and the public enough information about a proposed closure and an opportunity to register their objections furthers the objectives of open courts. In the event of an objection, the court can hear and assess the arguments. In the event that there are no spectators or objectors, a frequent occurrence,<sup>374</sup> the court should note that for the record.

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366. *State v. Momah*, 167 Wash. 2d 140, 155–56, 217 P.3d 321, 328–29 (2009); *Tarhan*, 159 Wash. App. at 827, 246 P.3d at 584–85.

367. *Strode*, 167 Wash. 2d at 236, 217 P.3d at 318 (C. Johnson, J., dissenting).

368. *Id.* at 231, 217 P.3d at 316.

369. *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 37, 640 P.2d 716, 720 (1982).

370. *Id.*

371. *Id.* at 37–39, 640 P.2d at 720–21.

372. *State v. Bone-Club*, 128 Wash. 2d 254, 258–59, 906 P.2d 325, 327–28 (1995).

373. *Ishikawa*, 97 Wash. 2d at 38, 640 P.2d at 720.

374. Interview with the Hon. Susan Craighead, King Cnty Superior Court Judge, in Seattle, Wash. (Dec. 1, 2011); Interview with the Hon. Anne Ellington, Wash. State Court of Appeals Judge, in Seattle, Wash. (Dec. 29, 2011).

4. *Has the Court Weighed Competing Interests of the Public and the Proponent of Closure?*

A trial judge must begin with a presumption of openness, and bears the burden of defending the public's right to open proceedings under Section 10. This is the fourth *Bone-Club* factor.<sup>375</sup> Public access cases suggest that Washington constitutional law in this area is more stringent than federal case law analyzing public trial and public access under the U.S. Constitution. Federal cases such as *Waller* and *Presley* seem merely to indicate the "floor" of these constitutional rights; Washington law requires more. First, Section 10 emphasizes the value of open administration of justice in language absent from the First Amendment. Second, the Washington State Supreme Court has argued in at least one decision that Section 22 may also confer greater protections on the accused than its federal counterpart, the Sixth Amendment.<sup>376</sup> The fact that the Washington State Supreme Court, unlike many federal courts,<sup>377</sup> has never found a violation of the right to public trial to be trivial or de minimis is further evidence that the Washington State standard for public trial is also broader than the federal standard.<sup>378</sup> A proposed closure must therefore be weighed carefully against constitutional interests. Washington case law in this area is congruent with *Waller*, which rejected a harmless error analysis for violations of the public trial right.<sup>379</sup> Even as courts have broadened the application of the federal harmless error rule to include more constitutional errors, they have repeatedly reaffirmed that any violation of the public trial right is structural error.<sup>380</sup>

5. *Has the Court Considered Alternatives to Closure?*

The third *Bone-Club* factor ("the proposed method . . . must be the

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375. *Bone-Club*, 128 Wash. 2d at 259, 906 P.2d at 328.

376. *State v. Irby*, 170 Wash. 2d 874, 884–85, 246 P.3d 796, 801–02 (2011). The Washington Constitution, unlike the United States Constitution, provides an explicit guaranty of right to be present, in "the right to appear and defend." WASH. CONST. art. I, § 22.

377. *See supra* notes 241–43 and accompanying text.

378. *See State v. Easterling*, 157 Wash. 2d 167, 181 n.12, 137 P.3d 825, 831 n.12 (2006).

379. *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) ("The harmless error rule is no way to gauge the great, though intangible, societal loss that flows from closing courtroom doors." (quoting *People v. Jones*, 47 N.Y.2d 409, 416 (1979))).

380. *Waller v. Georgia*, 467 U.S. 39, 49 (1984); *see also Johnson v. United States*, 520 U.S. 461, 468–69 (1997); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). For a helpful discussion of cases and standards of review in the public trial context, *see generally supra* Levitas, note 7.

least restrictive means available”)<sup>381</sup> implies a consideration of alternatives, but does not specify whose responsibility it is to consider those alternatives. It is the court’s responsibility, and the court should make a record of the alternatives considered,<sup>382</sup> which it may suggest *sua sponte*.<sup>383</sup> This may take many forms. When a small courtroom must accommodate both a large venire and the public, the court can reserve a number of seats for the press, people personally interested in the proceedings, and other members of the public.<sup>384</sup> The venire can be divided.<sup>385</sup> Prospective jurors may be questioned in open court while the rest of the venire waits elsewhere.<sup>386</sup>

6. *Has the Closure Been Narrowly Tailored so as to Be No Broader than Necessary?*

This checklist question consolidates two related *Bone-Club* factors.<sup>387</sup> A problem with many closures has been their indiscriminate breadth. The U.S. Supreme Court rejected a closed voir dire that lasted six weeks in *Press-Enterprise I*.<sup>388</sup> The *Waller* Court remanded for a new suppression hearing after the first one was closed for two and a half weeks for the sake of about seven minutes of protected recordings.<sup>389</sup> The *Bone-Club* trial court closed the courtroom for the duration of an officer’s pretrial testimony, without evaluating whether there were any less extreme alternatives.<sup>390</sup> SHB 2348 would have decreed a blanket closure that sealed all public records containing the names of child sexual assault victims.<sup>391</sup> The courts in cases such as *Press-Enterprise I*,

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381. *State v. Bone-Club*, 128 Wash. 2d 254, 258–59, 906 P.2d 325, 327–28 (1995).

382. *Presley v. Georgia*, \_\_ U.S. \_\_, 130 S. Ct. 721, 724 (2010); *Waller v. Georgia*, 467 U.S. 39, 48 (1984); *In re Orange*, 152 Wash. 2d 795, 811, 100 P.3d 291, 299 (2005); *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 38, 640 P.2d 716, 720–21 (1982).

383. *See, e.g., Press-Enterprise I*, 464 U.S. 501, 520 (1984) (Marshall, J., concurring in the judgment) (suggesting redaction of transcripts in such a way as to protect the anonymity of jurors while making public the substance of their responses); *Orange*, 152 Wash. 2d at 810–11, 100 P.3d at 298–99 (suggesting ways to address space concerns while preserving public trial right).

384. *Orange*, 152 Wash. 2d at 810–11, 100 P.3d at 298.

385. *Id.* at 810, 100 P.3d at 298.

386. *State v. Vega*, 144 Wash. App. 914, 917, 184 P.3d 677, 679 (2008).

387. *State v. Bone-Club*, 128 Wash. 2d 254, 258–59, 906 P.2d 325, 327–28 (1995) (“3. The proposed method . . . must be the least restrictive means available . . . [and] 5. The order must be no broader in its application or duration than necessary to serve its purpose.”).

388. *Press-Enterprise I*, 464 U.S. at 510–11.

389. *Waller v. Georgia*, 467 U.S. 39, 49–50 (1984).

390. *Bone-Club*, 128 Wash. 2d at 256, 906 P.2d at 326.

391. *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wash. 2d 205, 208–11, 848 P.2d

*Waller*, *Bone-Club*, *Allied Newspapers*, and *Strode* each recognized the validity of the interests the closure aimed to protect,<sup>392</sup> but found the closures too sweeping and the concerns too broadly generalized.<sup>393</sup> When the court has considered alternatives and still finds closure to be necessary, it must ensure the closure is no broader than necessary.<sup>394</sup>

Court records such as jury questionnaires, evaluated on a case-by-case basis, could be redacted so as to remove certain private information, yet remain accessible to the public in the interest of open administration of justice.<sup>395</sup> The *Waller* pretrial hearing could have been closed after weighing interests on the record for only several hours and still protected the ongoing government investigation. A judge who, after weighing the interests in her case, decided that limited private questioning of certain jurors was in order, would carefully delimit the scope and duration of such questioning, and make her reasoning clear in specific findings.

7. *Has the Court Made Findings Specific Enough to Support the Closure and Provide a Record for Review?*

The test proposed by the U.S. Supreme Court in *Press-Enterprise I* and echoed in *Waller* required the trial court to articulate the interest protected by closure in findings specific enough for the reviewing court to find whether the closure order was properly entered.<sup>396</sup> The Washington State Supreme Court emphasized in *Ishikawa* that these findings and conclusions should be specific rather than conclusory.<sup>397</sup> Oddly, although the all-important *Bone-Club* decision cited this provision of *Ishikawa*,<sup>398</sup> the test itself, reiterated over the next seventeen years in dozens of Section 10 and Section 22 decisions, does not mention the need for specific findings.<sup>399</sup> In many public trial/public

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1258–61 (1993).

392. For example, the defendant's right to a fair trial; ongoing government investigations or undercover work; the privacy and protection of child victims of sexual assault; and juror privacy.

393. *Press-Enterprise I*, 464 U.S. at 510–11; *Waller*, 467 U.S. at 48–49; *Bone-Club*, 128 Wash. 2d at 261, 906 P.2d at 329; *Allied Newspapers*, 121 Wash. 2d at 211, 848 P.2d at 1261.

394. *Bone-Club*, 128 Wash. 2d at 259, 906 P.2d at 327–28; *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 39, 640 P.2d 716, 721 (1982).

395. It is possible that juror guides and confidential questionnaires that stress the presumption of privacy are misleading on this point. Prospective jurors should be advised in clear terms that court records are subject to public disclosure upon petition through proper channels, but that the court takes responsibility for redacting information so as to protect juror privacy.

396. *Waller*, 467 U.S. at 48.

397. *Ishikawa*, 97 Wash. 2d at 38, 640 P.2d at 721.

398. *Bone-Club*, 128 Wash. 2d at 260, 906 P.2d at 328.

399. *Id.* at 258–59, 906 P. 2d at 327–28.

access cases since *Bone-Club*, reviewing courts have cited the lack of findings supporting a closure as a reason they found it necessary to reverse a conviction.<sup>400</sup> The findings must identify the protected interest, demonstrate that persons present had an opportunity to object, consider alternatives to closure, weigh the interests supposedly protected by the closure against those of the public, and demonstrate careful tailoring so that the closure is no broader than necessary.

*B. Appellate Courts Should Use the Checklist to Determine the Correct Standard of Review and Devise Remedies Appropriate to the Violation*

The checklist supplies a generally applicable set of standards for evaluating the distinct facts of each case and will enable a reviewing court to devise a remedy appropriate to any violation. If the trial court's action did not constitute a closure, review will be for abuse of discretion.<sup>401</sup> A court abuses its discretion if the decision is based on untenable grounds or for untenable reasons.<sup>402</sup>

When there has been a closure, but the trial court fails to provide an analysis of the open courts checklist questions, the remedy will depend on the violation. An improper sealing of documents, as in *Tarhan*, could require remand for reconsideration of the sealing order using the open courts checklist. Denial of the federal right to a public trial is among the rare cases in which the error is structural, with prejudice presumed.<sup>403</sup> The federal right to public trial applies to the states.<sup>404</sup> Sections 10 and 22 of the state constitution may be even more protective of the defendant's, as well as the public's, rights.<sup>405</sup> A majority of the Washington State Supreme Court has consistently held—unlike the federal courts—that there is no de minimis violation of the right to

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400. See, e.g., *State v. Strobe*, 167 Wash. 2d 222, 228, 217 P.3d 310, 314–15 (2009); *State v. Brightman*, 155 Wash. 2d 506, 518, 122 P.3d 150, 156 (2005); *In re Orange*, 152 Wash. 2d 795, 811–12, 100 P.3d 291, 299 (2005); *Ishikawa*, 97 Wash. 2d at 45, 640 P.2d at 724; *State v. Paumier*, 155 Wash. App. 673, 685, 230 P.3d 212, 219 (2010), *rev. granted*, 169 Wash. 2d 1017, 236 P.3d 206 (2010).

401. *State v. Lormor*, 172 Wash. 2d 85, 96–97, 257 P.3d 624, 630 (2011).

402. *State v. Suttle*, 61 Wash. App. 703, 710, 812 P.2d 119, 123 (1991).

403. *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 721, 722–25 (2010); *Johnson v. United States*, 520 U.S. 461, 468–69 (1997); *Waller v. Georgia*, 467 U.S. 39, 49 (1984); *Strobe*, 167 Wash. 2d at 231, 217 P.3d at 316 (citing *Neder v. United States*, 527 U.S. 1, 8 (1999)); *State v. Momah*, 167 Wash. 2d 140, 156, 217 P.3d 321, 329 (2009).

404. *Presley*, 130 S. Ct. at 723.

405. See *supra* notes 377–80 and accompanying text.

public trial.<sup>406</sup> When this constitutional right has been violated, as it was in *Wise* and *Paumier*, the remedy is reversal and remand: for a new trial, or for a new suppression hearing, as in *Waller*;<sup>407</sup> or for reconsideration of a sealing order, as in *Tarhan*.<sup>408</sup> As a manifest constitutional error, it may be noticed for the first time on appeal.<sup>409</sup> A defendant may waive this right, as he or she may waive other constitutional rights, but waiver must be “knowing, voluntary, and intelligent.”<sup>410</sup> The defendant cannot waive the public’s right to open proceedings under Section 10.<sup>411</sup>

## CONCLUSION

Washington has a robust open courts jurisprudence based primarily on state law, which is more protective of the rights of the public and the accused than is federal law. There is persistent disagreement on the Washington State Supreme Court about the extent of the differences between state and federal law, and this continuing disagreement has contributed to uncertainty among trial courts. A court employing an effective open courts checklist will first answer the threshold question of what is, and is not, a closure; this will eliminate from the closure analysis matters properly in the trial court’s discretion. The court will then weigh the constitutional rights and other interests at stake, and be able to narrowly tailor any necessary closure or sealing. The court will make specific findings based on the checklist, which will enable effective review on appeal. In this way, Washington courts will be able to preserve the value of openness, the “soul of justice” enshrined in our constitution, while still addressing the daily flesh-and-blood concerns of trial courts across the state.

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406. *See supra* notes 240–51 and accompanying text.

407. *Waller*, 467 U.S. at 50.

408. *State v. Tarhan*, 159 Wash. App. 819, 821, 246 P.3d 580, 582 (2011), *rev. granted*, 172 Wash. 2d 1013, 259 P.3d 1109 (2011).

409. Rule of Appellate Procedure 2.5 provides in pertinent part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

R. APP. P. 2.5(a); *see also* *State v. Strobe*, 167 Wash. 2d 222, 229, 217 P.3d 310, 315 (2009).

410. *Strobe*, 167 Wash. 2d at 229 n.3, 217 P.3d at 315 n.3 (explaining that right to public trial is protected in same constitutional provision as right to trial by jury, and so can likewise be waived only in a knowing, voluntary, and intelligent manner).

411. *See supra* note 269 and accompanying text.