No. 82802-4

MADSEN, C.J. (dissenting)—In my concurrence in *State v. Sublett*, No. 84856-4 (Wash. Nov. 21, 2012) (plurality opinion), I explain why I believe the court's jurisprudence regarding the right to a public trial is flawed. Rather than repeat the extended discussion in *Sublett* in each of the additional three cases now before the court that involve the right to a public trial, *State v. Paumier*, No. 84585-9 (Wash. Nov. 21, 2012); *State v. Wise*, No. 82802-4 (Wash. Nov. 21, 2012); and *In re Personal Restraint of Morris*, No. 84929-3 (Wash. Nov. 21, 2012) (plurality opinion), I have chosen in these three cases, including the present case, to highlight important points.

In brief, court-announced rules in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and later cases are not compelled by article I, section 22 of the Washington State Constitution. Nevertheless, this court has adopted a rigid doctrine: If there is a closure of the trial and no inquiry was made on the record that shows the closure was justified, then reversal of the defendant's conviction is required and a new trial is mandatory. In my concurrence in *Sublett*, I show why this absolute rule is without constitutional justification. No similar rule is compelled under the Sixth Amendment to

the United States Constitution or by any United States Supreme Court precedent.[1] In addition, it fails to accord with the prevailing case law regarding public trial rights under the Sixth Amendment and similar public trial provisions in other states' constitutions. It is a costly and unnecessary response that is not constitutionally required and the right to a public trial can be fully protected without it.

Moreover, in the public trial right cases, we have failed to follow our own established rules of appellate procedure and instead carve out a doctrine wholly apart from the established procedures for review of claimed constitutional error.

In the present case, the majority acknowledges that the right to a public trial is not absolute and that there are legitimate reasons for closing a trial. The five-part *Bone-Club* inquiry is used to determine whether in a given case closure is justified under article I, section 22 of the Washington State Constitution. *Bone-Club*, 128 Wn.2d at 258-59.[2] A parallel inquiry is required for purposes of the Sixth Amendment. *See Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). However, because no on-the-record *Bone-Club* inquiry was made, the majority holds that closure consisting of the in-chambers individual voir dire of a small number of potential jurors in this case violated

[1] Our *Bone-Club* analysis under article I, section 22 mirrors the United States Supreme Court's analysis under the Sixth Amendment. *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005); *Bone-Club*, 128 Wn.2d at 259-60.

[2] Under this inquiry (1) there must be a determination of whether a compelling interest necessitates closure, (2) before closure occurs there must be an opportunity for objections to closure, (3) the least restrictive means must be used that are required to protect the threatened interest, (4) before closure is ordered the court must weigh the competing interests involved, and (5) if ordered the closure must be no broader or longer than necessary to serve the purpose of the closure. *Bone-Club*, 128 Wn.2d at 258-59.

Mr. Eric Wise's constitutional rights to a public trial. The majority refuses to engage in an after-the-fact inquiry into whether this closure was justified and concludes that the trial court's failure to engage in the on-the-record *Bone-Club* inquiry is structural error requiring reversal and a new trial.

Thus, the failure to engage in the *Bone-Club* inquiry, itself, is transformed into the most serious type of constitutional error, for which there is no remedy except a new trial. It is entirely possible, and in fact highly probable, that the closure in this case would have been found to be justified had the on-the-record inquiry occurred at the time of the closure. Further, Mr. Wise benefited considerably from the individual private voir dire of the jury venire members—indeed, that 6 of the 10 potential jurors who were individually questioned were excused for cause suggests the importance of this candor. The private questioning allowed the potential jurors to be forthright about personal and sensitive matters bearing on their ability to decide Mr. Wise's case fairly and without bias. Whether potential jurors would be as forthcoming if required to relay personal information in a public setting is doubtful, but at the least it can be assumed that the same degree of candor would not have existed. Because of the questioning, Mr. Wise was much better positioned to make his decisions about jury selection.

In addition, the public's right to access the proceedings was not unduly hampered because the individual voir dire was recorded, transcribed, and made a part of the public record. Thus, the goals served by the right to a public trial were in fact protected and advanced by the procedure that occurred. The voir dire was contemporaneously

transcribed, assuring that the court and counsel were at all times aware of their responsibilities to carry out their functions properly. We have no reason whatsoever to think that any improper practices or conduct occurred. And because this was a part of jury voir dire and not of the trial itself, no issue was implicated regarding witnesses or their testimony.

We have good reason to believe that the closure that occurred in this case was justified. But not only does the majority refuse to consider this possibility on this record, it also flatly refuses to permit any after-the-fact inquiry into whether closure was justified, whether the inquiry is conducted by an appellate court or by the superior court on remand for either findings or a hearing and findings. The majority declares that we must presume prejudice.

I agree that by-passing the *Bone-Club* (or *Waller*) inquiry is error. But I do not agree it is error that must be presumed prejudicial. We have no basis for the conclusion and *only* the conclusion that an unjustified closure—and thus an unconstitutional closure—occurred, when a posttrial inquiry might well establish that closure was in fact justified. But the majority insists, treating the failure to engage in the *Bone-Club* inquiry *itself* as a constitutional violation independent of any actual violation of the right to a public trial. The treatment is unwarranted. The United States Supreme Court itself engaged in an after-the-fact, on-the-record-inquiry into whether the closure in *Waller* was justified.

As Justice J.M. Johnson's dissent correctly explains, the majority's approach is

also contrary to our rules of appellate procedure. We have no reason to depart from our settled rules for appellate review. The great majority of courts addressing the issue, for example, have found it highly significant if the defendant failed to object to closure, raising the issue for the first time on appellate review. We have an established set of principles that apply when claimed constitutional error is raised for the first time on appellate review. It is important that we adhere to these principles, for when we do not, justice is whatever we decide it is in the very case before the court, no more and no less.

But the first question is, of course, whether constitutional error occurred at all. There is no need, contrary to the majority's belief, to conclude that any and all closures without a *Bone-Club* analysis must conclusively be deemed a violation of the right to a public trial, much less that the failure to engage in the *Bone-Club* inquiry itself is the equivalent of an unconstitutional closure that constitutes structural error.

The only trial closure that has ever been identified by the United States Supreme Court as structural error was the complete closure of the suppression hearing in *Waller*. That such a closure would constitute structural error is hardly to be questioned. But it is exceedingly doubtful that any closure, no matter of what aspect of a trial and no matter of what duration or breadth, always must be deemed structural error that requires a new trial.

It is worthwhile to consider the standard of review that applies when a trial court engages in the *Bone-Club* analysis. As the majority correctly points out, a trial court's decision to close a courtroom after engaging in the *Bone-Club* analysis is reviewed for

abuse of discretion. When this deferential standard is juxtaposed against the rigid, inflexible rule of structural error for virtually any closure in the absence of the *Bone-Club* inquiry, regardless of whether closure was in fact justified, the difference is remarkable.

Finally, I cannot agree with the majority's decision to virtually ignore the majority decision of this court in *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010), in favor of a plurality decision in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). This approach turns precedent into pretense. *Momah* correctly shows that just because an error is structural error in one context does not mean that every error of the same kind is structural error. *Momah* also shows that when the record is sufficient, an after-the-fact *Bone-Club* inquiry can be made on the record by an appellate court. *Momah*, 167 Wn.2d at 151-56. But the majority in *Wise* ignores *Momah*. It should not.

I dissent. The court should consider the record on appeal and make a posttrial *Bone-Club* inquiry if possible. If the record is not sufficient for this inquiry, this case should be remanded to superior court for a determination of whether the private, limited questioning of a few potential jurors was a violation of the right to a public trial. If it ultimately proves impossible to make this inquiry, or if the proponent of closure cannot satisfy the burden of justifying closure under the *Bone-Club* factors, then the closure must be found unconstitutional. Only then would the issue of the proper remedy arise.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: