

64676-1

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No. 64676-1-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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**TRAVIS WILLIAM COLEMAN, Appellant**

**v.**

**STATE OF WASHINGTON, Respondent**

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**REPLY BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

Travis Coleman filed his Opening Brief of Appellant on June 11, 2010. Mr. Coleman raised a single issue in sixteen pages of briefing. More than five months later, while Mr. Coleman waits in custody, the State finally filed a thirty-four page Brief of Respondent (hereinafter “BOR”).

Therein, the State concedes that this Court's prior decision in this case rested on a now demonstrably untenable understanding of the facts. The State also recognizes (some of) the existing law clearly supporting Mr. Coleman's position. Given this concession and recognition, the State devotes the bulk of its briefing to obfuscating the issue, advocating the creation of new law while largely ignoring this Court's own prior opinion herein as well as existing precedent from higher courts. The State's arguments should be rejected.

## **II. ARGUMENT**

- A. Making the Juror Questionnaires Unavailable for Public Inspection During the Jury Selection Process Without First Conducting the Required *Bone-Club* Analysis Requires Reversal.

In Mr. Coleman's initial appeal, this Court held that article 1, section 10 of the Washington state constitution ensures public access to

court records in precisely the same manner as to court proceedings. CP 90-92; *State v. Coleman*, 151 Wn. App. 614, 621, 214 P.3d 158 (2009) (“article I, section ensures public access to court records as well as court proceedings. . . . The State offers no meaningful way to distinguish court records containing written responses to questionnaires from oral responses during *voir dire*.” (Footnote omitted.)).

Recognizing that it was therefore error for the trial court to seal the questionnaires without first conducting the required *Bone-Club* analysis, this Court nonetheless held that reversal was not required because there was nothing in the then-existing record to indicate the sealed juror questionnaires were not available for public inspection during the jury selection process:

Coleman contends that sealing the questionnaires without conducting the *Bone-Club* analysis amounted to structural error, from which prejudice is presumed and for which a new trial is warranted. **On these facts**, we do not agree that structural error occurred. The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, **there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on Coleman's public trial right, and did not 'create defects affecting the framework within which the trial proceeds.**

CP 95; *Coleman*, 151 Wn. App. at 623-24 (emphasis added).

The State now concedes, “[a]s it turns out, the questionnaires appear to have been held by the Court, and the public was prevented from seeing those documents before and after the order sealing the documents, so this portion of the court's decision is untenable.” BOR at 13.<sup>1</sup> In other words, just like answers given verbally in closed courtrooms, the answers written in the questionnaires were not available for public inspection during jury selection. Contrary to this Court's initial understanding, it is now clear that this portion of the jury selection process was in fact closed to the public at all times. Given that there is no meaningful way to distinguish court records containing written responses to questionnaires from oral responses during *voir dire* and the record is now clear that the court records at issue were never available for public inspection during the jury selection process, the issue now before the Court is completely analogous to a courtroom closure during *voir dire* requiring reversal.

It is well established that closure of a courtroom during *voir dire*,

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<sup>1</sup> As it turns out again, the State makes similarly untenable factual assertions in their most recent briefing. Though not relevant to the public trial analysis, the State asserts, without citation, “[n]one of the people who addressed the court [on remand] had attended the trial.” BOR at 9. This is factually incorrect. As Mr. Coleman's parents explained, they did not attend *voir dire* because they were advised they could not attend any of the proceedings until after they testified. 11/24/09 RP at 21, 23. Mr. Coleman's parents did attend other portions of the trial proceedings. Likewise, Mr. Coleman's aunt was recognized by the trial court, *id.* at 23, precisely because she did in fact attend the trial proceedings.

without conducting a *Bone-Club* analysis and making appropriate findings constitutes a violation of the right to a public trial. *See, e.g., In re D.F.F.*, 144 Wn. App. 214, 223, 183 P.3d 302 (this Court emphasizing the mandatory and exacting obligations on the trial court pursuant to *Bone-Club* and its progeny: “the party seeking to close the hearing *must* advance an overriding interest that is likely to be prejudiced, the closure *must* be no broader than necessary to protect that interest, the trial court *must* consider reasonable alternatives to closing the proceeding, and it *must* make findings adequate to support the closure.” (Emphasis in original.)), *rev. granted*, 164 Wn.2d 1034 (2008). Prejudice is presumed and a defendant's failure to object does not waive this right. *State v. Sadler*, 147 Wn. App. 97, 118, 193 P.3d 1108 (2008); *Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S.Ct. 2557, 165 L. Ed. 2d 409 (2006); *State v. Erickson*, 146 Wn. App. 200, 205, 189 P.3d 245 (2008); *citing, State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), *rev. denied*, 146 Wn.2d 1006 (2002); *State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005). The remedy is reversal and remand for a new trial. *Id.*; *citing, In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

On this Court's own reasoning, reversal of Mr. Coleman's convictions is not required. Because the questionnaires were never

available for public inspection, their sealing absent the required *Bone-Club* analysis constituted a violation of the public trial right. This violation requires reversal.

B. A Violation of the Public Trial Right is Not Subject to 'Triviality' Analysis.

Unable to rely on existing precedent, the State argues that this Court should make new law, holding that the violation of the public trial right in this case is somehow *de minimis* and thereby unworthy of reversal. This argument ignores existing case law on point. Uncited by the State, this Court has reasoned, “a violation of article I, section 10 is not subject to 'triviality' or harmless error analysis.” *D.F.F.*, 144 Wn.App. at 226. More recently, the *de minimis* argument now made by the State has again been specifically rejected:

the State contends, and the dissent agrees, that any violation here of the public trial right was *de minimis*. Again, we disagree. As we previously stated in *Erickson*: We agree with the principle stated in *Duckett* that 'the guaranty of a public trial under our constitution has never been subject to a *de minimis* exception. . . . Similarly, our Supreme Court observed in *Strode* that it 'has never found a public trial right violation to be trivial or *de minimis*.'

*State v. Leyerle*, No. 37086-7-II, 2010 WL 3860487, \*4 (Wn. App. Div. 2 2010) (internal citations and quotations omitted).

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Likewise, the State makes no attempt to offer a meaningful analysis or comparison of the many public trial violations which have been found *not* to be *de minimis*. For example,

- closure during one witness' pretrial testimony warranted reversal in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995);
- questioning a single juror in the hallway outside the courtroom required reversal despite the fact that this juror was properly excused by the defense for cause in *State v. Leyerle*, No. 37086-7-II, 2010 WL 3860487 (Wn. App. Div. 2 2010);
- closure during codefendant's argument on pretrial motion to sever required reversal in *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006);
- hearing defense *Batson* challenge in jury room required reversal in *State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008);
- exclusion of one family member from courtroom during *voir dire* summarily required reversal in *Presley v. Georgia*, 558 U.S. ---, 130 S.Ct. 721, --- L. Ed. 2d --- (2010);
- questioning of four prospective jurors, none of whom ended up seated on the jury, required reversal in *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008);

- in chambers *voir dire* of five jurors who requested the process warranted reversal in *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212, *rev. granted*, 169 Wn.2d 1017 (2010); *see also*, *State v. Bowen*, No. 39096-5-II, 2010 WL 3666766 (Wn. App. Div. 2 2010);
- conducting individual *voir dire* in chambers required reversal even though jurors were subsequently questioned as a group in open court in *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007); and
- individual *voir dire* of selected prospective jurors in chambers based on their responses in written questionnaires likewise required reversal in *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007), and *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), notwithstanding subsequent questioning of jurors in open court.

As the *Frawley* Court reasoned, “[j]ury selection is jury selection” whether it is conducted individually or as a group, whether it is characterized as private under GR 31 or not. 140 Wn. App. at 720. Likewise, jury selection is jury selection whether conducted in writing via a written questionnaire or orally. The juror questionnaire employed herein was indeed used as a screening device, just as oral questioning during *voir dire* is used as a screening device. In both instances, the responses provided by individual jurors are taken into consideration by each side in

determining which jurors to challenge. As has been repeatedly recognized, this process is of importance, not just to the parties but to the criminal justice system and to the public. *Presley*, 130 S. Ct. at 724.

There is no material distinction between *voir dire* conducted via a written questionnaire, individual questioning of jurors, and/or *voir dire* of the panel as a whole. Just as courtroom closures during portions of oral *voir dire* required reversal in the cases noted above, the sealing of the juror questionnaires is not trivial and requires reversal of Mr. Coleman's conviction.

C. A Violation of the Public Trial Right is Not Subject to Harmless Error Analysis.

Citing 'The Riddle of Harmless Error,' the State makes a distinction without a difference in recognizing that denial of the public trial right is a structural error but arguing that the error here was nonetheless harmless. BOR at 22-28. This Court has already held that the analysis applicable to closures of the courtroom during oral *voir dire* applies with equal force to the sealing of juror questionnaires, observing, the “State offers no meaningful way to distinguish court records containing written responses to questionnaires from oral responses during *voir dire*.” CP 94; *Coleman*, 151 Wn. App. at 621. There is likewise no meaningful way to distinguish

the remedy required when the public trial right is denied by prohibiting access to written responses to questionnaires rather than by prohibiting access to the courtroom during oral *voir dire*. A violation of article I, section 10 is not subject to harmless error analysis. *D.F.F.*, 144 Wn. App. at 226. Reversal is required. *Id.*; *Orange*, 152 Wn.2d at 814.

This year, in *Presley v. Georgia*, the United States Supreme Court held that under the First and Sixth Amendments to the United States Constitution, *voir dire* of prospective jurors must be open to the public and that this requirement is binding on the states. 130 S. Ct. at 723. Just as the trial court in *Coleman* prohibited public access to written portions of *voir dire* without first conducting the required constitutional analysis, the trial court in *Presley* did the same in oral *voir dire*, excluding *Presley's* uncle from *voir dire* without first considering reasonable alternatives and making appropriate findings. *Id.*

The *Presley* Court did not remand for consideration of such factors and making of such findings. *Id.* The *Presley* Court neither required a showing of nor considered whether *Presley's* uncle or anyone else would have otherwise attended *voir dire*, whether there was a need for any one of them to do so, or whether the uncle could or would have participated in some meaningful way in the jury selection process. *Id.*

Rather, the *Presley* Court held clearly and simply that the public trial violation required reversal of Presley's conviction. *Id.* at 725. This holding is binding on the state courts. *Id.* at 723.

The *Leyerle* Court summarized the state of the law following *Presley* succinctly:

*Presley*, applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including *voir dire*. . . . [T]he trial court here conducted a portion of *voir dire* outside the public forum of the courtroom. By doing so, without first considering alternatives to such closure of this portion of the *voir dire* proceedings and making appropriate findings explaining why such closure was necessary, the trial court violated Leyerle's and the public's right to an open proceeding. *Presley* requires reversal of Leyerle's conviction for unlawful possession of methamphetamine, and we so hold.

2010 WL 3860487 at \*4; *see also*, *Paumier*, 155 Wn. App. at 685 (2010) (citing *Presley* for the proposition that “where the trial court fails to *sua sponte* consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant's conviction. Thus, *Presley*, applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including *voir dire*.” (Citation omitted.)); *Bowen*, 2010 WL 3666766 at \*5 (holding that individual questioning of potential jurors in

chambers “constituted structural error” and required reversal of the defendant's conviction as a result).

Here, the trial court conducted a portion of *voir dire* in writing and forbade the public access thereto without first considering alternatives thereto or making appropriate findings. By doing so, the trial court violated Mr. Coleman's and the public right to open proceedings. Harmless error analysis is not applicable. *Presley* requires reversal of Mr. Coleman's convictions and this Court should now so hold.

### **III. CONCLUSION**

For all of these reasons and in the interests of justice, Mr. Coleman respectfully asks that this Court reverse his convictions for Child Molestation in the First Degree and remand these charges for a new trial in accordance with the authorities cited herein.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of November, 2010.

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**CERTIFICATE OF SERVICE**

I certify that I mailed a copy of the foregoing Reply Brief of Appellant to James M. Whisman, of the King County Prosecuting Attorney, at the King County Courthouse, and to appellant Travis Coleman, at the Stafford Creek Corrections Center, postage prepaid, on November 2, 2010.

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