

64676-1

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No. 64676-I

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

TRAVIS WILLIAM COLEMAN, Appellant

v.

STATE OF WASHINGTON, Respondent

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Travis Coleman is a twenty-four year old, former Naval serviceman, with no prior criminal history serving an indeterminate sentence of seventy-eight months to life imprisonment following his conviction on two counts of Child Molestation in the First Degree. Mr. Coleman maintains his innocence.

Mr. Coleman focuses on a single issue herein: the right to a public trial where jurors' responses to questions posed in writing during *voir dire* were sealed and thereby kept from public inspection of any kind.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

Assignment of Error # 1: The trial court erred during Mr. Coleman's trial by sealing written juror questionnaires utilized in *voir dire* such that the questionnaires were never publicly available without first analyzing the public trial right as required by *Bone-Club* and its progeny.

Issues Pertaining to Assignment of Error # 1: Whether the record now establishes that the juror questionnaires utilized during *voir dire* were never available for public inspection. If so, whether this infringement on the public trial right requires reversal of Mr. Coleman's convictions.

Assignment of Error # 2: The trial court erred in analyzing the *Bone-Club* factors on remand.

Issues Pertaining to Assignment of Error # 2: Whether the public's "possibly prurient" interest in the proceedings constituted a serious and imminent threat to the jurors' privacy interests such that those privacy interests outweighed the interest in open proceedings sufficient to justify sealing. Whether affording members of the public an opportunity to object after the Court has already ruled on sealing was sufficient. Whether the order allowing questionnaires to be filed but redacting the jurors' names and numbers therefrom was the least restrictive means available of safeguarding the jurors' privacy interests.

III. STATEMENT OF THE CASE

Mr. Coleman was charged by Amended Information with one count of Rape of a Child in the First Degree and three counts of Child Molestation in the First Degree, all allegedly occurring between October 5 and November 15, 2006. CP 6-7. The alleged victim was Mr. Coleman's then nine-year-old nephew, TMB. *Id.* Mr. Coleman pleaded not guilty and the case proceeded to trial.

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Prior to the start of jury selection, the State provided a written juror questionnaire for use during *voir dire*. 01/28/08 RP(1) 212.¹ Therein, jurors' responses to questions such as whether they had ever been the victim of any form of sexual crime or whether they had been accused of the same were documented. *See, e.g.*, CP 132. The questionnaires were completed by the jurors on January 28, 2008. 01/28/08 RP(2) 18.

The questionnaires were filed under seal on February 5, 2008. CP 41. Neither the State nor Mr. Coleman moved to seal the questionnaires and the trial court did not mention the sealing on the record or offer any opportunity for objection. *See*, CP 89 (“the court, apparently on its own motion, ordered the questionnaire sealed.”). The trial court found the “Jury Questionnaires contain[ed] personal sexual history of prospective jurors related to issues in this case. The individual juror's right to privacy in this information greatly outweighs the public's right to access the court files.” CP 41. The trial court did not consider the *Bone-Club* factors. *See, id.* Mr. Coleman's trial counsel did not object.

¹ This report of proceedings was prepared and transmitted to the Court in Mr. Coleman's initial appeal, cause number 61498-3-I. A Motion to Transfer this report is filed herewith. All reports herein are cited by date and page number, e.g. 11/24/09 (date) RP 13 (page). There are two reports of proceedings from January 28, 2008, that do not have sequentially numbered page numbers. I have cited these 01/28/08 RP(1), denoting the initially prepared twenty-four page (pages numbered 211-35) partial transcription from January 28, 2008; and 01/28/08 RP(2), denoting the subsequently prepared two hundred twenty page (pages numbered 1-220) partial transcription from January 28, 2008.

Following a jury trial, Mr. Coleman was convicted of two counts of Child Molestation. CP 43-44. The jury found Mr. Coleman not guilty of one count of Child Molestation, CP 45, and was unable to reach a verdict on the charge of Rape of a Child in the First Degree. CP 42. Mr. Coleman timely appealed. CP 74.

This Court decided Mr. Coleman's appeal on August 17, 2009, in a partially published opinion. CP 87-103 (Court of Appeals Cause Number 61498-3-I); *State v. Coleman*, 151 Wn.App. 614, 214 P.3d 158 (2009) (publishing public trial right discussion and decision). Regarding the sealing of jurors' questionnaires, this Court agreed with Mr. Coleman that the jurors' responses to questions posed in writing during *voir dire* could no more be sealed than the courtroom could be closed during *voir dire*. CP 88-95. The Court reasoned:

article 1, section 10 ensures public access to court records as well as court proceedings. The State does not contend jury questionnaires filed with the clerk and sealed by the court are not court records. The State offers no meaningful way to distinguish court records containing written responses to questionnaires from oral responses during *voir dire*.

CP 92 (footnote collecting cases omitted). Thus, this Court reasoned, the trial court erred in failing to employ the five-factor analysis initially stated in *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), and

restated in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), prior to sealing. CP 95.

But this Court also ruled that reversal was not required under the facts in Mr. Coleman's case as understood and reflected in the record at that time. *Id.* This Court noted, “there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process.” *Id.* Thus, this Court reasoned, “the subsequent sealing order had no effect on Coleman's public trial right.” *Id.* Instead of ordering reversal, then, this Court remanded Mr. Coleman's case for “reconsideration of the closing order under *Bone-Club*.” *Id.*

On remand, the fact that these questionnaires were actually *never* available for public inspection, during the jury selection process or otherwise, was made clear. CP 124-25, 127, 132. The questionnaires themselves included notations that they were “available only to the judge, the defendant, and the attorneys for both parties in this case.” CR 127, 132. Also as stated therein, the questionnaire was *never* “available for public scrutiny.” CR 132; *see also*, CR 127-28 (quoting this portion of the questionnaires, the trial court indicated on remand, “the court entered the order consistent with the promise made to jurors in the questionnaire.”), CR 124-25 (per Mr. Coleman's trial counsel, “there was never a time that

the questionnaires were available for public inspection during the jury selection process or at any other time during Mr. Coleman's trial. To the contrary, it was my understanding that although I was entitled to use them in jury selection, these questionnaires were not to be made available for public inspection by myself or anyone else.”).

On remand, Mr. Coleman argued against sealing of the questionnaires. CR 104. Counsel for the State initially noted that she had not seen the questionnaires and was not asking the Court to seal the questionnaires. 11/24/09 RP 5 (“[t]he State is not asking the Court to (inaudible) seal the questionnaires, but having not seen the questionnaires, it's – I can't articulate to the Court what I believe should or should not be sealed. . .”). The Court ruled that the complete questionnaires should remain under seal nonetheless. 11/24/09 RP 13; CP 126-31.

In so ruling, the trial court noted a belief that the public interest in open and public trials and records was “possibly prurient:”

The interest of open access is more, if you will, on the one hand a good government interest in what happens in courts, but also I fear possibly prurient interest on the part of individuals who have a particular interest in sexual assault cases. And as a judge, I certainly see people come and watch sexual assault cases because they find them of some personal interest to them.

11/24/09 RP 13. The trial court also concluded that absent the promise of

sealing, jurors would have not been truthful or complete in answering the questions posed in the written questionnaire. 11/24/09 RP 11 (“had we not told jurors, '[w]e are using a questionnaire to protect your privacy and no one will have access to the questionnaire except for the lawyers and the Court,' had we not told them that, I am quite certain that jurors would have declined to be as forthright as they were.”).

After making this ruling, the trial court heard testimony from members of the public opposed to the sealing. 11/24/09 RP 20-29. The trial court subsequently entered a written order leaving the complete juror questionnaires under seal but allowing redacted versions of the questionnaires omitting the jurors' names *and* numbers to be filed without seal. CR 126-31.

Following the trial court's order on remand, Mr. Coleman again timely appealed. CR 213.

IV. ARGUMENT

A. Standard of Review

The Court reviews *de novo* whether a trial court procedure violates the right to a public trial. *State v. Erickson*, 146 Wn.App. 200, 204, 189 P.3d 245 (2008); *citing*, *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

B. The Public Trial Right was Infringed and Reversal is Required.

The constitutional preference for the open administration of justice applies to court closures as well as the sealing of files and records. CP 94; *Coleman*, 151 Wn.App. at 623; *State v. Waldon*, 148 Wn.App. 952, 960-61, 202 P.3d 325 (the sealing of court records implicates the “benchmark constitutional analysis regarding attempts to restrict access to courtroom proceedings. . . . The analysis is the same, whether under article I, section 10, or article I, section 22.”), *rev. denied*, 166 Wn.2d 1026 (2009); *Indigo Real Estate Serv.s v. Rousey*, 151 Wn.App. 941, 948, 215 P.3d 977 (2009).

It is very well settled that the right to a public trial includes the process of jury selection. *Presley v. Georgia*, 558 U.S. ---, 130 S.Ct. 721, 723 (2010) (“it is so well settled that the Sixth Amendment right extends to jury *voir dire* that this Court may proceed by summary disposition.”). Whether conducted via individual *voir dire* in chambers, prior thereto in a written juror questionnaire, or in general *voir dire* of the entire panel, the public nature of the jury selection process should not be altered absent specific considerations and findings. CP 95; *Coleman*, 151 Wn.App. at 162.

In the instant case, part of the jury selection process was conducted

via a written questionnaire. *See*, 01/28/08 RP 212. These questionnaires including the jurors' answers to the inquiries thereon, were sealed without reference to the *Bone-Club* factors. CP 41. On his initial appeal, this Court held that though this was error, it did not effect the public trial right and reversal was therefore not required, because “there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process.” CP 95.

In fact, these questionnaires were never available for public inspection. CP 124-25, 127-28, 132. The questionnaires themselves included notations that they were “available only to the judge, the defendant, and the attorneys for both parties in this case.” CR 127, 132. Also as stated therein, the questionnaires were never “available for public scrutiny.” CR 127, 132; see also, CR 124-25 (per Mr. Coleman's trial counsel, “there was never a time that the questionnaires were available for public inspection during the jury selection process or at any other time during Mr. Coleman's trial. To the contrary, it was my understanding that although I was entitled to use them in jury selection, these questionnaires were not to be made available for public inspection by myself or anyone else.”). This fact was made clear during the remand proceedings and there was absolutely no dispute thereof from the state. Because the

questionnaires were in fact not available during jury selection or at any other time, the public trial right was infringed by the trial court's erroneous sealing thereof without prior consideration of the *Bone-Club* factors.

If an erroneous court procedure violates the right to a public trial, prejudice is presumed and a defendant's failure to object does not waive this right. *Erickson*, 146 Wn.App. at 205; *citing*, *State v. Rivera*, 108 Wn.App. 645, 652, 32 P.3d 292 (2001), *rev. denied*, 146 Wn.2d 1006 (2002); *Brightman*, 155 Wn.2d at 514-15. The remedy for violation of the right to a public trial is reversal and remand for a new trial. *Id.*; *citing*, *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

In the recent United States Supreme Court case of *Presley v. Georgia*, the Court reaffirmed that reversal and remand for a new trial (rather than remand for *post hoc* consideration of the closure/sealing) was the required remedy. 130 S.Ct. at 725. In *Presley*, the trial court excluded a member of the defendant's family from *voir dire* without first considering reasonable alternatives to closure. *Id.* The state argued that there was in fact an overriding interest in closure and that the appellate court should affirm on that basis. *Id.* The Court declined to do so, reaffirming that failure to undertake the proper constitutional analysis prior to closure or sealing in the first instance requires reversal:

even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.

The Supreme Court of Georgia's judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Id.

Following *Presley*, this principal was recognized and reaffirmed in *State v. Paumier*, --- Wn.App. ---, 230 P.3d 212, 219 (2010). In *Paumier*, the trial court excluded the public from portions of *voir dire* without considering reasonable alternatives or making appropriate findings. *Id.* at 218; *citing, Presley*, 130 S.Ct. at 725. The *Paumier* Court reasoned:

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*. Here, the trial court closed a portion of *voir dire* by interviewing certain jurors in chambers. By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier's and the public's right to an open proceeding. *Presley* requires reversal of Paumier's burglary conviction.

230 P.3d at 219.

An unsupported closure of individual *voir dire* of jurors regarding responses to questions posed in written questionnaires requires reversal. *Bone-Club*, 128 Wn.2d at 261-62. An unsupported sealing of jurors'

responses to questions posed in written questionnaires should similarly require reversal. Mr. Coleman's convictions should be reversed and remanded for a new trial as a result.

C. The Trial Court did not Properly Consider the *Bone-Club* Factors on Remand.

The right to a public trial is guaranteed in both the federal and state constitutions. U.S. Const, Amend. I & VI; Wash. Const. Art. I, § 22. *Erickson*, 146 Wn.App. at 205; *citing*, *State v. Russell*, 141 Wn.App. 733, 737-38, 172 P.3d 361 (2007), *rev. denied*, 164 Wn.2d 1020 (2008). The Sixth Amendment provides, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The First Amendment also protects the public trial right. Article I, section 22, of the Washington Constitution similarly protects the right to a “speedy public trial.” Article I, section 10, of the Washington Constitution declares plainly, “[j]ustice in all cases shall be administered openly.” Together these provisions perform complementary interdependent functions that assure the very fairness of our state's judicial system. *Erickson*, 146 Wn.App. at 205-06; *citing*, *Bone-Club*, 128 Wn.2d at 259.

The right to public and open proceedings and records is not trivial. Rather, the right “operates as an *essential cog* in the constitutional design

of fair trial safeguards.” *Id.* (emphasis added). Among other things, the public trial right ensures the fairness of a trial by reminding the officers of the court of the importance of their functions, encouraging witnesses to come forward, and discouraging perjury. *Brightman*, 155 Wn.2d at 514. Where the closure or sealing pertains to jury selection, the public trial right ensures the fairness of the trial by allowing the defendant's family to contribute knowledge or insight to jury selection and making the jurors aware of the interest of such individuals. *Id.* at 515.

Echoing the sentiments of the United States Supreme Court, the *Bone-Club* Court lauded this right:

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

128 Wn.2d at 259; *citing, In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed.2d 682 (1948). Much more recently, the United States Supreme Court reaffirmed the vital importance of this right in the context of jury selection:

the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system. The public has a right to be present whether or not any party has asserted the right. . . . Trial courts are obligated to take every reasonable measure

to accommodate public attendance at criminal trials.

Presley, 130 S.Ct. At 724.

Because the right is of such importance, a trial court must resist non-public procedures “except under the most unusual circumstances.” *Erickson*, 146 Wn.App. at 206; *Bone-Club*, 128 Wn.2d at 259. A trial closure or sealing may be undertaken only if the trial court first considers five criteria enumerated in *Bone-Club* and enters specific findings on the record to justify the procedure. *Erickson*, 146 Wn.App. at 206; *Bone-Club*, 128 Wn.2d at 258-59.

In part, these criteria require that the proponent of closure or sealing must show a serious and imminent threat to a compelling interest justifying the sealing or closure. *In re Gentry*, 137 Wn.2d 378, 389, 972 P.2d 1250 (1999). A generic risk unsubstantiated by any specific threat is insufficient to override the right to public and open proceedings. *See, e.g., Presley*, 130 S.Ct. at 725. For example “[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course.” *Id.*

In this case, the State initially indicated on remand they had not seen the questionnaires and therefore could not articulate whether they should be sealed. 11/24/09 RP 5. The trial court held that sealing was justified in any event, relying in part on a general concern that the jurors' privacy could be compromised by members of the public with 'prurient interests' were sufficient. Such general concerns, without more should not suffice justify closure or sealing. Otherwise, sealing or closure would be justified in every case where sensitive topics such as sexual abuse were at issue.

Likewise the importance of the public trial right dictates that *before* any closure or sealing is effected, anyone present must be given an opportunity to object to the closure. *Bone-Club*, 128 Wn.2d at 258-59. Here, the trial court was informed during the proceedings following remand that there were several individuals who desired such an opportunity. 11/24/09 RP 9. The trial court ruled on the sealing motion without hearing from such individuals. 11/24/09 RP 10-15. It was only after the trial court had already decided the issue that these individuals were 'heard.' 11/24/09 RP 20-29. This procedure hardly constitutes a meaningful opportunity to object of the kind envisioned by *Bone-Club* and its progeny.

Finally, the importance of the public trial right dictates that in those most unusual of situations where a closure or sealing is justified, the proposed method for curtailing open access must be the least restrictive means available. *Id.* Here, the trial court purportedly sealed the jurors' questionnaires out of concern for the jurors' privacy interests. CP 41, 126-31. The trial court rejected requests that the questionnaires simply be redacted of jurors' names, leaving their numbers so that the responses could retain some meaning in the *voir dire* process. *Id.* But by redacting both the jurors' names *and* numbers, the trial court effectively ensured that the questionnaires would remain completely useless to anyone interested in the jury selection process. In this respect as well, the trial court erred in its consideration of these factors on remand.

V. CONCLUSION

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

RESPECTFULLY SUBMITTED this 11th day of June, 2010.

Law Offices of Cassandra Stamm, PLLC

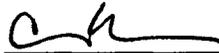


Cassandra L. Stamm, WSBA # 29265
Attorney for Appellant, T. Coleman

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Brief of Appellant to the King County Prosecuting Attorney, at the Maleng Regional Justice Center, and to appellant Travis Coleman, at the McNeil Island Corrections Center, postage prepaid, on June 11, 2010.

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Attorney for Appellant T. Coleman

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This Court decided Mr. Coleman's appeal on August 17, 2009, in a partially published opinion. CP 87-103 (Court of Appeals Cause Number 61498-3-I); *State v. Coleman*, 151 Wn.App. 614, 214 P.3d 158 (2009) (publishing public trial right discussion and decision). Regarding the sealing of jurors' questionnaires, this Court agreed with Mr. Coleman that the jurors' responses to questions posed in writing during *voir dire* could no more be sealed than the courtroom could be closed during *voir dire*. CP 88-95. The Court reasoned:

article 1, section 10 ensures public access to court records as well as court proceedings. The State does not contend jury questionnaires filed with the clerk and sealed by the court are not court records. The State offers no meaningful way to distinguish court records containing written responses to questionnaires from oral responses during *voir dire*.

CP 92 (footnote collecting cases omitted). Thus, this Court reasoned, the trial court erred in failing to employ the five-factor analysis initially stated in *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), and

restated in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), prior to sealing. CP 95.

But this Court also ruled that reversal was not required under the facts in Mr. Coleman's case as understood and reflected in the record at that time. *Id.* This Court noted, “there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process.” *Id.* Thus, this Court reasoned, “the subsequent sealing order had no effect on Coleman's public trial right.” *Id.* Instead of ordering reversal, then, this Court remanded Mr. Coleman's case for “reconsideration of the closing order under *Bone-Club*.” *Id.*

On remand, the fact that these questionnaires were actually *never* available for public inspection, during the jury selection process or otherwise, was made clear. CP 124-25, 127, 132. The questionnaires themselves included notations that they were “available only to the judge, the defendant, and the attorneys for both parties in this case.” CR 127, 132. Also as stated therein, the questionnaire was *never* “available for public scrutiny.” CR 132; *see also*, CR 127-28 (quoting this portion of the questionnaires, the trial court indicated on remand, “the court entered the order consistent with the promise made to jurors in the questionnaire.”), CR 124-25 (per Mr. Coleman's trial counsel, “there was never a time that

the questionnaires were available for public inspection during the jury selection process or at any other time during Mr. Coleman's trial. To the contrary, it was my understanding that although I was entitled to use them in jury selection, these questionnaires were not to be made available for public inspection by myself or anyone else.”).

On remand, Mr. Coleman argued against sealing of the questionnaires. CR 104. Counsel for the State initially noted that she had not seen the questionnaires and was not asking the Court to seal the questionnaires. 11/24/09 RP 5 (“[t]he State is not asking the Court to (inaudible) seal the questionnaires, but having not seen the questionnaires, it's – I can't articulate to the Court what I believe should or should not be sealed. . .”). The Court ruled that the complete questionnaires should remain under seal nonetheless. 11/24/09 RP 13; CP 126-31.

In so ruling, the trial court noted a belief that the public interest in open and public trials and records was “possibly prurient:”

The interest of open access is more, if you will, on the one hand a good government interest in what happens in courts, but also I fear possibly prurient interest on the part of individuals who have a particular interest in sexual assault cases. And as a judge, I certainly see people come and watch sexual assault cases because they find them of some personal interest to them.

11/24/09 RP 13. The trial court also concluded that absent the promise of

sealing, jurors would have not been truthful or complete in answering the questions posed in the written questionnaire. 11/24/09 RP 11 (“had we not told jurors, '[w]e are using a questionnaire to protect your privacy and no one will have access to the questionnaire except for the lawyers and the Court,' had we not told them that, I am quite certain that jurors would have declined to be as forthright as they were.”).

After making this ruling, the trial court heard testimony from members of the public opposed to the sealing. 11/24/09 RP 20-29. The trial court subsequently entered a written order leaving the complete juror questionnaires under seal but allowing redacted versions of the questionnaires omitting the jurors' names *and* numbers to be filed without seal. CR 126-31.

Following the trial court's order on remand, Mr. Coleman again timely appealed. CR 213.

IV. ARGUMENT

A. Standard of Review

The Court reviews *de novo* whether a trial court procedure violates the right to a public trial. *State v. Erickson*, 146 Wn.App. 200, 204, 189 P.3d 245 (2008); *citing*, *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

B. The Public Trial Right was Infringed and Reversal is Required.

The constitutional preference for the open administration of justice applies to court closures as well as the sealing of files and records. CP 94; *Coleman*, 151 Wn.App. at 623; *State v. Waldon*, 148 Wn.App. 952, 960-61, 202 P.3d 325 (the sealing of court records implicates the “benchmark constitutional analysis regarding attempts to restrict access to courtroom proceedings. . . . The analysis is the same, whether under article I, section 10, or article I, section 22.”), *rev. denied*, 166 Wn.2d 1026 (2009); *Indigo Real Estate Serv.s v. Rousey*, 151 Wn.App. 941, 948, 215 P.3d 977 (2009).

It is very well settled that the right to a public trial includes the process of jury selection. *Presley v. Georgia*, 558 U.S. ---, 130 S.Ct. 721, 723 (2010) (“it is so well settled that the Sixth Amendment right extends to jury *voir dire* that this Court may proceed by summary disposition.”). Whether conducted via individual *voir dire* in chambers, prior thereto in a written juror questionnaire, or in general *voir dire* of the entire panel, the public nature of the jury selection process should not be altered absent specific considerations and findings. CP 95; *Coleman*, 151 Wn.App. at 162.

In the instant case, part of the jury selection process was conducted

via a written questionnaire. *See*, 01/28/08 RP 212. These questionnaires including the jurors' answers to the inquiries thereon, were sealed without reference to the *Bone-Club* factors. CP 41. On his initial appeal, this Court held that though this was error, it did not effect the public trial right and reversal was therefore not required, because “there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process.” CP 95.

In fact, these questionnaires were never available for public inspection. CP 124-25, 127-28, 132. The questionnaires themselves included notations that they were “available only to the judge, the defendant, and the attorneys for both parties in this case.” CR 127, 132. Also as stated therein, the questionnaires were never “available for public scrutiny.” CR 127, 132; see also, CR 124-25 (per Mr. Coleman's trial counsel, “there was never a time that the questionnaires were available for public inspection during the jury selection process or at any other time during Mr. Coleman's trial. To the contrary, it was my understanding that although I was entitled to use them in jury selection, these questionnaires were not to be made available for public inspection by myself or anyone else.”). This fact was made clear during the remand proceedings and there was absolutely no dispute thereof from the state. Because the

questionnaires were in fact not available during jury selection or at any other time, the public trial right was infringed by the trial court's erroneous sealing thereof without prior consideration of the *Bone-Club* factors.

If an erroneous court procedure violates the right to a public trial, prejudice is presumed and a defendant's failure to object does not waive this right. *Erickson*, 146 Wn.App. at 205; *citing*, *State v. Rivera*, 108 Wn.App. 645, 652, 32 P.3d 292 (2001), *rev. denied*, 146 Wn.2d 1006 (2002); *Brightman*, 155 Wn.2d at 514-15. The remedy for violation of the right to a public trial is reversal and remand for a new trial. *Id.*; *citing*, *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

In the recent United States Supreme Court case of *Presley v. Georgia*, the Court reaffirmed that reversal and remand for a new trial (rather than remand for *post hoc* consideration of the closure/sealing) was the required remedy. 130 S.Ct. at 725. In *Presley*, the trial court excluded a member of the defendant's family from *voir dire* without first considering reasonable alternatives to closure. *Id.* The state argued that there was in fact an overriding interest in closure and that the appellate court should affirm on that basis. *Id.* The Court declined to do so, reaffirming that failure to undertake the proper constitutional analysis prior to closure or sealing in the first instance requires reversal:

even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.

The Supreme Court of Georgia's judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Id.

Following *Presley*, this principal was recognized and reaffirmed in *State v. Paumier*, --- Wn.App. ---, 230 P.3d 212, 219 (2010). In *Paumier*, the trial court excluded the public from portions of *voir dire* without considering reasonable alternatives or making appropriate findings. *Id.* at 218; *citing, Presley*, 130 S.Ct. at 725. The *Paumier* Court reasoned:

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*. Here, the trial court closed a portion of *voir dire* by interviewing certain jurors in chambers. By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier's and the public's right to an open proceeding. *Presley* requires reversal of Paumier's burglary conviction.

230 P.3d at 219.

An unsupported closure of individual *voir dire* of jurors regarding responses to questions posed in written questionnaires requires reversal. *Bone-Club*, 128 Wn.2d at 261-62. An unsupported sealing of jurors'

responses to questions posed in written questionnaires should similarly require reversal. Mr. Coleman's convictions should be reversed and remanded for a new trial as a result.

C. The Trial Court did not Properly Consider the *Bone-Club* Factors on Remand.

The right to a public trial is guaranteed in both the federal and state constitutions. U.S. Const, Amend. I & VI; Wash. Const. Art. I, § 22. *Erickson*, 146 Wn.App. at 205; *citing*, *State v. Russell*, 141 Wn.App. 733, 737-38, 172 P.3d 361 (2007), *rev. denied*, 164 Wn.2d 1020 (2008). The Sixth Amendment provides, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The First Amendment also protects the public trial right. Article I, section 22, of the Washington Constitution similarly protects the right to a “speedy public trial.” Article I, section 10, of the Washington Constitution declares plainly, “[j]ustice in all cases shall be administered openly.” Together these provisions perform complementary interdependent functions that assure the very fairness of our state's judicial system. *Erickson*, 146 Wn.App. at 205-06; *citing*, *Bone-Club*, 128 Wn.2d at 259.

The right to public and open proceedings and records is not trivial. Rather, the right “operates as an *essential cog* in the constitutional design

of fair trial safeguards.” *Id.* (emphasis added). Among other things, the public trial right ensures the fairness of a trial by reminding the officers of the court of the importance of their functions, encouraging witnesses to come forward, and discouraging perjury. *Brightman*, 155 Wn.2d at 514. Where the closure or sealing pertains to jury selection, the public trial right ensures the fairness of the trial by allowing the defendant's family to contribute knowledge or insight to jury selection and making the jurors aware of the interest of such individuals. *Id.* at 515.

Echoing the sentiments of the United States Supreme Court, the *Bone-Club* Court lauded this right:

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

128 Wn.2d at 259; *citing, In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed.2d 682 (1948). Much more recently, the United States Supreme Court reaffirmed the vital importance of this right in the context of jury selection:

the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system. The public has a right to be present whether or not any party has asserted the right. . . . Trial courts are obligated to take every reasonable measure

to accommodate public attendance at criminal trials.

Presley, 130 S.Ct. At 724.

Because the right is of such importance, a trial court must resist non-public procedures “except under the most unusual circumstances.” *Erickson*, 146 Wn.App. at 206; *Bone-Club*, 128 Wn.2d at 259. A trial closure or sealing may be undertaken only if the trial court first considers five criteria enumerated in *Bone-Club* and enters specific findings on the record to justify the procedure. *Erickson*, 146 Wn.App. at 206; *Bone-Club*, 128 Wn.2d at 258-59.

In part, these criteria require that the proponent of closure or sealing must show a serious and imminent threat to a compelling interest justifying the sealing or closure. *In re Gentry*, 137 Wn.2d 378, 389, 972 P.2d 1250 (1999). A generic risk unsubstantiated by any specific threat is insufficient to override the right to public and open proceedings. *See, e.g., Presley*, 130 S.Ct. at 725. For example “[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course.” *Id.*

In this case, the State initially indicated on remand they had not seen the questionnaires and therefore could not articulate whether they should be sealed. 11/24/09 RP 5. The trial court held that sealing was justified in any event, relying in part on a general concern that the jurors' privacy could be compromised by members of the public with 'prurient interests' were sufficient. Such general concerns, without more should not suffice justify closure or sealing. Otherwise, sealing or closure would be justified in every case where sensitive topics such as sexual abuse were at issue.

Likewise the importance of the public trial right dictates that *before* any closure or sealing is effected, anyone present must be given an opportunity to object to the closure. *Bone-Club*, 128 Wn.2d at 258-59. Here, the trial court was informed during the proceedings following remand that there were several individuals who desired such an opportunity. 11/24/09 RP 9. The trial court ruled on the sealing motion without hearing from such individuals. 11/24/09 RP 10-15. It was only after the trial court had already decided the issue that these individuals were 'heard.' 11/24/09 RP 20-29. This procedure hardly constitutes a meaningful opportunity to object of the kind envisioned by *Bone-Club* and its progeny.

Finally, the importance of the public trial right dictates that in those most unusual of situations where a closure or sealing is justified, the proposed method for curtailing open access must be the least restrictive means available. *Id.* Here, the trial court purportedly sealed the jurors' questionnaires out of concern for the jurors' privacy interests. CP 41, 126-31. The trial court rejected requests that the questionnaires simply be redacted of jurors' names, leaving their numbers so that the responses could retain some meaning in the *voir dire* process. *Id.* But by redacting both the jurors' names *and* numbers, the trial court effectively ensured that the questionnaires would remain completely useless to anyone interested in the jury selection process. In this respect as well, the trial court erred in its consideration of these factors on remand.

V. CONCLUSION

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

RESPECTFULLY SUBMITTED this 11th day of June, 2010.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Brief of Appellant to the King County Prosecuting Attorney, at the Maleng Regional Justice Center, and to appellant Travis Coleman, at the McNeil Island Corrections Center, postage prepaid, on June 11, 2010.

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