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COURT OF APPEALS

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT
PETITION OF:

NO. 39984-9

FRANK CHESTER EARL,

Petitioner.

STATE'S SUPPLEMENTAL RESPONSE
TO PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO DEFENDANT'S PERSONAL RESTRAINT
PETITION:

1. Should this Court dismiss claims where petitioner has failed to show either prejudicial constitutional error or a fundamental defect resulting in a complete miscarriage of justice?
2. Should this court find that petitioner is not entitled to the standard of review applicable to cases on direct review that treats improper closure of the courtroom as structural error when only when it was objected to at trial and pursued on appeal?
3. Should this court dismiss petitioner's claim that the public's right to a public trial was violated when he does not have the standing to raise a

1 violation of someone else's rights in a collateral attack and the court is
2 precluding from granting any such relief?

- 3 4. Should this court find that because petitioner did not object to the closed
4 proceeding and actively participated in, and benefited from, the closed
5 proceeding that he has failed to show either constitutional error or actual
6 prejudice necessary to obtain relief by personal restraint petition?
7

8 B. STATUS OF PETITIONER:

9 Petitioner, Frank Chester Earl, is restrained pursuant to a Judgment and Sentence
10 entered in Pierce County Cause No. 03-1-06167-2. Appendix A. He was found guilty
11 following a jury trial of two counts of rape of a child in the first degree, attempted rape of
12 a child in the first degree, rape of a child in the second degree and child molestation in the
13 second degree. Appendix B. He appealed his convictions; the Court of Appeals, in a
14 partially published decision, affirmed the convictions but remanded for correction of
15 some sentencing errors. Appendix B. The mandate from this appeal issued on October
16 14, 2008. *Id.*
17

18 After the re-sentencing hearing, the petitioner again appealed. In an unpublished
19 decision, the Court of Appeals dismissed the appeal. Appendix C. The mandate issued
20 on April 14, 2010.

21 On November 13, 2009, while this second appeal was pending, petitioner filed this
22 timely personal restraint petition which included the claim that the court improperly
23 conducted voir dire in a closed courtroom situation. The State filed its initial response
24 noting that it had not yet received a copy of a transcript of voir dire proceedings that
25 appeared to be conducted in the judge's chambers. This transcript revealed that eight

1 jurors were brought into the judge's chambers and questioned privately, primarily about
2 issues where the jurors had requested privacy. Excerpt of Proceedings 12/5/05 RP 26-57.

3 This court has now asked the parties to file supplemental briefing addressing its
4 recent decision in *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (2010), which
5 issued after the respondent filed its initial response.

6
7 C. ARGUMENT:

- 8 1. THIS COURT SHOULD DISMISS PETITIONER'S CLAIM
9 REGARDING THE ALLEGED VIOLATION OF HIS RIGHT TO
10 A PUBLIC TRIAL AS HE HAS NOT SHOWN THAT THE
11 INDIVIDUALIZED QUESTIONING OF EIGHT POTENTIAL
12 JURORS IN THE JUDGE'S CHAMBERS VIOLATED HIS
13 CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL WHEN HE
14 ACTIVELY PARTICIPATED IN THE PROCEEDING AND
15 BENEFITED FROM IT; NOR HAS HE SHOWN THAT HE WAS
16 PREJUDICED BY THIS ACTION, A SHOWING NECESSARY
17 TO SUCCEED IN A COLLATERAL ATTACK.

18 Criminal defendants and the public have a right to a public criminal trial. *Presley*
19 *v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 2d ___ (2010). The Sixth
20 Amendment to the United States Constitution, and article I, section 22 of the Washington
21 Constitution, both protect a defendant's right to a public trial. *State v. Brightman*, 155
22 Wn.2d 506, 514, 122 P.3d 150 (2005); *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291
23 (2004); *Waller v. Georgia*, 467 U.S. 39, 44-45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984);
24 *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). The public's right to a
25 public trial is protected by the first amendment and article I, § 10 of the Washington
Constitution. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed.
2d 608 (1999); *Press-Enterprise v. Superior Court of California*, 464 U.S. 501, 509-10,
104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) ("*Press-Enterprise I*"); *Federated Publications*,

1 *Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980); *Seattle Times Co. v. Ishikawa*,
2 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).

3 In the recent decision by this court in *State v. Paumier*, 155 Wn. App. 673, 230
4 P.3d 212 (2010), this court relied heavily upon the recent United States Supreme Court
5 decision of *Presley v. Georgia*, *supra*; therefore examination of that case is warranted.

6 In *Presley v. Georgia* the United State's Supreme Court held for the first time that
7 a defendant's Sixth Amendment right to a public trial extends to the voir dire of
8 prospective jurors. *Presley*, 130 S. Ct. at 723-24 (noting previous cases concerning voir
9 dire had addressed the public's right under the first amendment). In *Presley*, the trial
10 court excluded spectators from courtroom during voir dire. A relative of the defendant
11 was present, but was told by the court to leave the courtroom and to vacate that floor of
12 the courthouse and to come back when the trial began. *Id.* at 722. Defense counsel
13 objected to the exclusion of the public and asked the court for some accommodation for
14 the relative; the court refused to accommodate and indicating that the relative could return
15 once the trial started. *Id.* In a motion for new trial, Presley renewed his objection to the
16 exclusion of the public from voir dire and presented evidence that the entire venire could
17 have been seated in a manner that would have left room for public spectators; the motion
18 was denied. *Id.* On appellate review the Georgia Supreme Court affirmed, rejecting
19 Presley's contention that the trial court was required to consider any alternatives prior to
20 closing the courtroom. *Id.* The United States Supreme Court reversed finding that prior
21 to closing a courtroom to the public, a trial court must consider alternatives to closure and
22 articulate the overriding interest likely to be prejudiced absent the closure of voir dire. *Id.*
23 at 725.
24
25

1 The facts of *Presley* show that both the defendant's right and the public's right to
2 a public trial were asserted in the trial court and that these claims were preserved for
3 appellate review. In this respect the facts of *Presley* were similar to those in *Waller v.*
4 *Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984), the first case to expand the defendant's
5 right to a public trial beyond the actual proof at trial and the first to treat a violation of the
6 defendant's right to a public trial as structural error. 467 U.S. at 47-50. In *Waller*, there
7 was a full closure of the courtroom during a pre-trial suppression hearing lasting seven
8 days; this closure was over the defendant's objection. *Waller* pursued his claim of
9 improper closure on direct review, but was unsuccessful in the Georgia Supreme Court;
10 the United States Supreme Court granted certiorari and reversed, holding that the Sixth
11 Amendment right to a public trial extends to a suppression hearing and that the trial court
12 had failed to make the necessary showing to justify closure. 467 U.S. at 43-47. In
13 deciding what the appropriate remedy was for this violation, the Supreme Court agreed
14 with lower federal courts that the defendant should not be required to show specific
15 prejudice in order to obtain relief, treating it as structural error, but declined to find that a
16 new trial was the appropriate remedy under the circumstances of that case. 467 U.S. at
17 49. The court remanded for a new suppression hearing, noting that if essentially the same
18 evidence is suppressed the new trial would be a windfall and not in the public interest. *Id.*

19
20
21 *Presley*, *Waller*, and this court's decision in *Paumier* all involve cases that were
22 on direct review. The case currently before this court is on collateral review,
23 necessitating inquiry as to whether that alters the standard of review applicable to such
24 claims. Case law shows that it is not appropriate to apply standards applicable to direct
25 review to collateral attacks.

1 First, as argued in the initial response, a Washington court is precluded from
2 granting collateral relief to a petitioner who is contending that he is entitled to have his
3 conviction set aside due to violations of the constitutional rights of others, such as a
4 violation of the public's Const. art. I, § 10, right to open justice or public criminal trial
5 under the First Amendment. RCW 7.36.130 is a statute placing strict limitations on the
6 writ of habeas corpus. The court is again referred to the State's initial response at pages
7 27-30 for relevant law as to why petitioner is limited to claims involving only alleged
8 violations of his own constitutional rights and not the rights of others. This means that
9 petitioner may not assert a violation of the public's right to open justice under Const. art.
10 I, §10 or to public trials under the First Amendment.

12 Secondly, under controlling Washington law, a petitioner must show both
13 constitutional error and actual prejudice to obtain collateral relief, including those
14 stemming from a defendant's right to public trial. The Washington Supreme Court
15 addressed a closed court room claim in a collateral attack in *In Re Orange*, 152 Wn.2d
16 795, 100 P.3d 291 (2004). The trial court in *Orange* decided to close the courtroom to
17 spectators during voir dire. As the defendant in *Presley* did, Orange asked that the trial
18 court accommodate his family so that they could stay in the courtroom during voir dire.
19 152 Wn.2d at 801-02. The court denied the request and ruled that no spectators –
20 including the defendant's and victim's family members who were present- would be
21 allowed to be in the courtroom during voir dire. The trial court did not make any findings
22 regarding its closure of the courtroom. Orange appealed his subsequent convictions, but
23 his appellate counsel did not raise the closed courtroom issue on direct review. His
24 convictions were affirmed by the Court of Appeals and the Supreme Court denied review.
25

1 **State v. Orange**, 140 Wn.2d 1015, 5 P.3d 9 (2000). In a timely filed personal restraint
2 petition, Orange reasserted that his right to a public trial had been violated by the trial
3 court's closure of the courtroom during voir dire and claimed that he had received
4 ineffective assistance of appellate counsel as this claim had not been pursued on direct
5 appeal. The Supreme Court agreed that Orange's right to a public trial had been violated
6 as the courtroom had been subject to a full, temporary closure without the trial court's
7 engaging in the required analysis under **State v. Bone-Club**, 128 Wn.2d 254, 906 P.2d
8 325 (1995). **Orange**, 152 Wn.2d at 806-813. The court found that:

9
10 [H]ad Orange's appellate counsel raised the constitutional violation on
11 appeal, the remedy for the presumptively prejudicial error would have
12 been, as in **Bone-Club**, remand for a new trial. Consequently, we agree
13 with Orange that the failure of his appellate counsel to raise the issue on
14 appeal was both deficient and prejudicial and therefore constituted
15 ineffective assistance of counsel. *See State v. McFarland*, 127 Wn.2d
322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d
222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in
Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d
674 (1984))).

16 **Orange**, 152 at 814. It is important to note that the court in **Orange** applied the standards
17 of review applicable to collateral attacks, requiring the petitioner to show not only an
18 error of constitutional magnitude, but also that he was actually prejudiced by the error.
19 *See Orange*, 152 Wn.2d at 804-05. The Court again rejected the concept that errors that
20 are per se prejudicial on direct appeal will also be presumed prejudicial in collateral
21 review. *Id.* at 804, citing **In re PRP of St. Pierre**, 118 Wn.2d 321, 328, 823 P.2d 492
22 (1992). In a collateral action, the petitioner has the duty of showing constitutional error,
23 and that such error was actually prejudicial. The rule that constitutional errors must be
24 shown to be harmless beyond a reasonable doubt has no application in the context of
25 personal restraint petitions. **In re Mercer**, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987);

1 **Hagler**, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to
2 demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of
3 the judgment and sentence and not against it. **In re Hagler**, 97 Wn.2d at 825-26. On
4 collateral review this means that showing a trial court erred in failing to consider
5 alternatives prior to closure will not guarantee relief; a petitioner must show that he was
6 prejudiced by the closure in order to prevail on collateral attack.

7
8 In **Orange**, the prejudice shown was that flowing from appellate counsel's failure
9 to pursue a meritorious constitutional claim which had been preserved in the trial court
10 and which would have entitled Orange to a new trial had it been raised on appeal. The
11 court did not refer to the prejudice to his right to a public trial that flowed from the closed
12 courtroom as the proof of prejudice, but the loss of the "structural error" standard that
13 would have been applicable had the issue been raised on direct review. The respondent
14 can find no Washington Supreme Court or United States Supreme Court case where the
15 court has granted collateral relief for a violation of a criminal defendant's right to a public
16 trial without a showing of actual prejudice or where the claim had not been preserved in
17 some way in the trial court.

18 The decision in **Orange** is consistent with authority from other jurisdiction that
19 treat closed courtroom violations raised on collateral review under a different standard
20 than the structural error analysis applicable to direct review cases. Several jurisdictions
21 have held that the **Waller** standard finding the improper closing of a courtroom to be
22 structural error requiring reversal is only applicable if the defendant properly objected at
23 trial and raised the issue on direct appeal. **Purvis v. Crosby**, 451 F.3d 734, 740-741(11th
24 Cir.2006); **State v. Butterfield**, 784 P.2d 153, 156-157 (Utah 1989); **Reid v. State**, 286
25 Ga. 484, 488, 690 S.E.2d 177 (Ga. 2010). The Eleventh Circuit found that structural error

1 is presumed when there is a full closure and the defendant properly preserves the issue at
2 trial and presents it on direct appeal; under these circumstances a criminal defendant is
3 not required to establish that he was specifically prejudiced by the closure. *Purvis*, 451
4 F.3d at 740, citing *Waller*, 467 U.S. at 49-50 & n. 9, 104 S. Ct. at 2217 & n. 9 (1984).

5 But unlike *Waller*, Purvis was raising his claim of a closed courtroom for the first time in
6 a habeas petition citing ineffective assistance of trial counsel for failing to object. The
7 court stated:

8 It is one thing to recognize that structural errors and defects obviate any
9 requirement that prejudice be shown on direct appeal and rule out an
10 application of the harmless error rule in that context. It is another matter
entirely to say that they vitiate the prejudice requirement for an ineffective
assistance claim.

11 *Purvis*, 451 F.3d at 740. The Eleventh Circuit went on to conclude that as this claim did
12 not fall under the type of Sixth Amendment claims where prejudice was presumed, such
13 as a complete denial of counsel or being represented by an attorney with an actual
14 conflict. Consequently, the petitioner was required to show prejudice to succeed on his
15 ineffective assistance of counsel claim. In so holding, the Eleventh Circuit relied upon
16 the decisions in *Davis v. United States*, 411 U.S. 233, 93 S. Ct. 1577, 36 L. Ed. 2d 216,
17 (1973), and *Francis v. Henderson*, 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149
18 (1976). In *Davis*, the Supreme Court held that a federal prisoner who had failed to make
19 a timely challenge in the trial court to the allegedly unconstitutional composition of the
20 grand jury that indicted him could not after his conviction attack the grand jury's
21 composition in an action for collateral relief. In *Francis*, 425 U.S. 536, 96 S. Ct. 1708
22 (1976), the Supreme Court held that a state prisoner who had failed to make a timely
23 challenge under state law to the allegedly unconstitutional composition of the grand jury
24 that indicted him could not bring that challenge in a federal habeas corpus proceeding.
25

1 These cases are important because the Supreme Court considers racial discrimination in
2 the selection of a grand jury to be structural error when it is timely challenged and
3 pursued on direct appeal. *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d
4 598 (1986) (granting federal habeas relief to defendant who timely challenged racial
5 discrimination in selection of grand jury in trial court and pursued issue on appeal in state
6 courts).

7
8 The case currently before the court is distinguishable from *Presley, Waller*, and
9 *Paumier* in that it is before the court on collateral review. It is distinguishable from
10 *Presley, Waller*, and *Orange* in that petitioner did not object to the closing of the
11 courtroom in the trial court. Here the record shows that petitioner participated in the
12 closed proceedings –which consisted of the questioning of some jurors in the judge’s
13 chambers, primarily on topics where the jurors had requested privacy. Excerpt of
14 Proceedings 12/5/05 RP 26-57. Not only is there no objection to this procedure, defense
15 counsel suggests that the court expand the number of jurors questioned in chambers so as
16 to include a juror who had not requested privacy, but who had indicated association with
17 a number of the State’s witnesses. *Id.* at RP 50, 56. A total of eight jurors were
18 questioned in chambers. Several had been victims of some form of sexual abuse. RP 27-
19 29, 31-32, 40, 50. One had a son who had been raped. RP 38-39. Another had a son who
20 had been prosecuted by the Pierce County Prosecutor’s Office for a sex offenses. RP 40-
21 45. Of the eight questioned in chambers, four were excused for cause –three because they
22 could not be fair to the defendant and one because she was friends with the State’s
23 witnesses. RP 34, 37, 40, 57. Thus, the record shows that petitioner participated in and
24 benefited from the closed hearing he now alleges violated his rights.

25 The facts of this case are similar to those found in *State v. Momah*, 167 Wn.2d
140, 217 P.3d 321 (2009), where the court found that a defendant’s active participation in

1 the closed proceeding and received benefit made the remedy of a new trial inappropriate
2 to the nature of the violation. 167 Wn.2d at 151-156.

3 Petitioner raises a claim of improper closure of the court room for the first time on
4 collateral review. As such he is required to prove both constitutional error and actual
5 prejudice. His failure to object to the closed proceedings and his active participation in
6 the closed hearing shows that *petitioner's* right to a public trial was not violated by the
7 trial court's action. These are the only rights, petitioner may assert on collateral review.
8 Thus, petitioner has failed to show a violation of his constitutional rights. Petitioner has
9 also failed to demonstrate that he was actually prejudiced by the closed proceedings.
10 Questioning of three of these jurors regarding sensitive and personal history showed that
11 they could not be fair to the defendant due to the nature of the case. These jurors were
12 excused for cause to the benefit of petitioner. RP 34, 37, 40. The fourth excusal was a
13 juror who was brought into chambers at the petitioner's suggestion and who was
14 ultimately excused for cause because of her friendship with several of the State's
15 witnesses. RP 57-58. Again, this was to his benefit. Petitioner fails to articulate how his
16 was prejudiced by these proceedings; the record shows to the contrary. Even if this court
17 were to find some violation of petitioner's right to a public trial, he has not shown that he
18 was actually prejudiced. Petitioner seeks a windfall of a new trial when that remedy is
19 not appropriate for the nature of the violation and when he has failed to meet his burden
20 to obtain relief by collateral attack.

21 As petitioner has not met his burden of showing that he is entitled to relief this
22 claim should be dismissed.

1 D. CONCLUSION:

2 The State respectfully requests that this court dismiss all but one of petitioner's
3 claims as being meritless. As stated in the original response, petitioner is entitled to the
4 correction of a scrivener's error in the judgment.

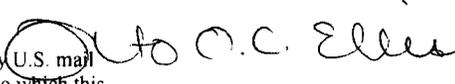
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6 DATED: July 13, 2010.

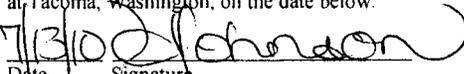
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8 MARK E. LINDQUIST
Pierce County Prosecuting Attorney

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10 
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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12 Certificate of Service:

13 The undersigned certifies that on this day she delivered by U.S. mail to the petitioner a true and correct copy of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



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Date Signature

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