

39984-9

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

FRANK CHESTER EARL,

PETITIONER.

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PERSONAL RESTRAINT PETITION

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Jeffrey E. Ellis #17139
Attorney for Mr. Earl

Law Offices of Ellis, Holmes
& Witchley, PLLC
705 Second Ave., Ste. 401
Seattle, WA 98104
(206) 262-0300 (ph)
(206) 262-0335 (fax)

A. STATUS OF PETITIONER

Frank Earl (hereinafter “Earl”) challenges his Pierce County convictions arising out of Case No. 03-1-06167-2 . The *Judgment and Sentence* are attached as *Appendix A*.

Mr. Earl (DOC # 928854) is currently incarcerated at the Washington State Penitentiary in Walla Walla, Washington serving the life sentence imposed in this case.

This is Mr. Earl’s first collateral attack on this judgment. He currently has a direct appeal arising from his resentencing on this case pending (Case No. 38689-5).

He also has a separate PRP pending (No. 39906-7). However, that PRP attacks a separate judgment (Pierce County No. 03-1-05739-0).

B. FACTS

Procedural History

The State charged Earl with two counts of first degree child rape, one count of attempted first degree child rape, one count of second degree child rape, and one count of second degree child molestation. His first jury trial ended in mistrial based on a discovery violation. His second jury trial ended in mistrial as a result of juror misconduct.

The jury found Earl guilty as charged on all five counts. The trial court sentenced him to 318 months for each first degree child rape conviction, 318 months for the attempted first degree child rape conviction,

and 116 months for the second degree child molestation conviction. On the second degree child rape count, the trial court found that Earl was a persistent offender and imposed a sentence of life without the possibility of parole and community custody.

Earl appealed. On direct appeal, his sentence was vacated on one count and the case “remanded for resentencing.”

Mr. Earl was resentenced on November 14, 2008. On December 22, 2008, Earl filed a timely notice of appeal from his resentencing. That appeal (Case No. 38689-5) is currently pending in this Court.

Facts¹

This Court described the facts on appeal as follows:

When AK was 12, she told her stepmother, Benita, that Frank Earl, whom AK called ‘grandpa,’ had been sexually abusing her when her mother, Florenda, and Florenda's boyfriend, Harris, took AK to Earl's house to visit. Earl had told AK not to tell anyone about the abuse because they would get in trouble.

Following interviews with child protective services (CPS), AK was removed from her mother's home and placed in protective custody with her father, Youell, or in foster care. Although these visits were supposed to be supervised, AK had unsupervised visits with her mother. While charges were pending, Earl went to Florenda's house when AK was visiting, prompting the court to take away Florenda's visitation rights.

AK later recanted her accusations against Earl. About three months before trial, AK returned to live with her mother and Harris

Additional facts appear in the argument sections below.

C. ARGUMENT

1. MR. EARL'S RIGHT TO AN OPEN AND PUBLIC TRIAL WAS VIOLATED WHERE THE TRIAL COURT CLOSED A PORTION OF JURY SELECTION WITHOUT FIRST CONDUCTING THE REQUIRED *BONE-CLUB* HEARING.

The trial court conducted part of Earl's trial—a portion of jury selection—in violation of Earl's rights to an open and public trial. To begin, during Earl's trial the Court provided all prospective jurors with a “confidential questionnaire.” The trial court did not conduct a hearing before deciding to place those documents under seal.

At all times, the questionnaire remained private. Put another way, no members of the public were permitted to view the questionnaires at any time. *See* Declaration of Anthony Savage attached as *Appendix B*. The Court entered an order to seal the questionnaires on December 5, 2005. *See Appendix C*. In addition, it appears that several jurors were later questioned both individually—one by one—and privately—in a courtroom where spectators were not allowed to observe. *Appendix D and E*.

¹ Earl seeks, and will submit a separate motion, to transfer the direct appeal record for consideration in this PRP.

The conduct of a portion of jury selection in violation of the right to an open and public trial violated Mr. Earl’s constitutional rights—a structural error which must result in reversal.

The Washington Supreme Court recently decided two cases involving the claimed closure of the courtroom during part of jury selection: *State v. Strode*, ___ Wn.2d ___, 217 P.3d 310 (2009); and *State v. Momah*, ___ Wn.2d ___, 217 P.3d 321 (2009). The Court reversed in *Strode*, but affirmed in *Momah*.² This case is easily distinguished from *Momah*, which was distinguished from *Strode* because *Momah* involved circumstances where the trial court “needed” to close a portion of *voir dire* to the public due to “high publicity” and the need to protect the defendant’s right to a fair trial and because the court concluded that the record showed an affirmative request, rather than a simple failure to object, by defense counsel to close the courtroom. Because neither of those *Momah* factors is present in this case, reversal is required.

The Court began the *Strode* opinion by noting: We have plainly articulated the guidelines that every trial court must follow before it closes a courtroom to the public citing *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). In *Bone-Club*, the Court held that a courtroom may be closed to the public only when the criteria for closure are identified and addressed in a hearing that *precedes* closure. Where a trial is closed

without first conducting such a hearing, it constitutes a structural error that cannot be considered harmless. *Strode, supra*.

Whether a defendant's constitutional right to a public trial has been violated is a question of law, subject to a *de novo* review on direct appeal. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial.” Article I, section 22 of the Washington Constitution similarly guarantees that “[i]n criminal prosecutions the accused shall have the right . . . to have a . . . public trial.” The Washington Constitution also provides in article I, section 10 that “[j]ustice in all cases shall be administered openly.” The public trial right protected by both our state and federal constitutions is designed to “ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *Brightman*, 155 Wn.2d at 514 (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996) (citing *Waller v. Georgia*, 467 U.S. 39, 46-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984))).

Consistent with those purposes, the United States Supreme Court has stated that public trials embody a “view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret

² As of this writing, both cases have motions to reconsider pending.

proceedings.” *Waller*, 467 U.S. at 46 n.4 (quoting *Estes v. Texas*, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring)).

While the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. *Easterling*, 157 Wn.2d at 174-75. The guaranty of open proceedings extends in criminal cases to “[t]he process of juror selection,’ which ‘is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

The presumption that trials should be open 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.” *Orange*, 152 Wn.2d at 806 (quoting *Waller*, 467 U.S. at 45 (quoting *Press-Enter.*, 464 U.S. at 510)). To assure careful, case-by-case analysis of a closure motion, a trial court faced with the question of whether a portion of a trial should be closed must ensure that the following five criteria are satisfied:

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 closure and the public;

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (citing *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). "Thus, in order to support full courtroom closure during jury selection, a trial court must engage in the *Bone-Club* analysis; failure to do so results in a violation of the defendant's public trial rights." *Brightman*, 155 Wn.2d at 515-16 (citing *Orange*, 154 Wn.2d at 809).

When the record "lacks any hint that the trial court considered [the defendant's] public trial right as required by *Bone-Club*, [the appellate court] cannot determine whether the closure was warranted." *Id.* at 518 (citing *Bone-Club*, 128 Wn.2d at 261).

As noted above, there is no indication in the record that the trial judge in this case engaged in the required *Bone-Club* analysis or made the required formal findings of fact and conclusions of law relevant to the

Bone-Club criteria. Instead, the trial judge's consideration of the issue appears to be non-existent. None of the *Bone-Club* factors are discussed on the record.³

In stark contrast, in *Strode* the trial judge mentioned several times that juror interviews were being conducted in private either for "obvious" reasons, to ensure confidentiality, or so that the inquiry would not be "broadcast" in front of the whole jury panel. Nevertheless, the Supreme Court still held "the record was devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right." "Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four *Bone-Club* steps to thoroughly weigh the competing interests." *Strode, supra*. "As far as we can tell, the trial court did not consider whether there were less restrictive alternatives to closure available. Unfortunately, the absence of any record showing that the trial court gave any consideration to the *Bone-Club* closure test prevents us from determining whether conducting part of the trial in chambers was warranted." *Id. See also Brightman*, 155 Wn.2d at 518.

The *Strode* court also rejected the State's argument that Strode invited or waived his right to challenge the closure when he acquiesced,

³ Earl has ordered additional portions of the transcript, which he will transmit to this court.

without any objection, to the private questioning of jurors. “However, the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal.” *Strode, supra*. See also *Easterling*, 157 Wn.2d at 173 n.2; *Brightman*, 155 Wn.2d at 514; *Orange*, 152 Wn.2d at 800; *Bone-Club*, 128 Wn.2d at 257. Thus, it is well established that a “defendant’s failure to lodge a contemporaneous objection at trial [does] not effect a waiver.” *Brightman*, 155 Wn.2d at 517 (citing *Bone-Club*, 128 Wn.2d at 257).

Just as *Strode*’s failure to object to the closure or his counsel’s participation in private questioning of prospective jurors did not constitute a waiver of his right to a public trial, so to must that result follow in this case. Instead, like the right to a jury trial, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner. *Strode, supra*; *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984) (waiver of the jury trial right must be affirmative and unequivocal).

Strode also affirmed its earlier statement that it “has never found a public trial right violation to be [trivial or] *de minimis*.” *Easterling*, 157 Wn.2d at 180.

The State may point out in response that these cases involved private oral *voir dire*, whereas here, the jury was questioned in open court. However, in this case jury selection was conducted on paper and in court—and it appears that in both instances the public was excluded from learning

about the proceedings. The questionnaires were certainly part of jury selection. Further, the whole point of the questionnaires was so that certain questions would not need to be asked in court. In addition, article 1, section 10 ensures public access to court records as well as court proceedings. The State cannot contend jury questionnaires filed with the clerk and sealed by the court are not court records. Under these authorities, the court should have conducted a *Bone-Club* analysis before sealing the questionnaires.

Further, unlike *State v. Waldon*, 148 Wash.App. 952, 957, 202 P.3d 325 (2009), there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. To the contrary, trial counsel's declaration, consistent with the court order, establishes that the questionnaires were never available to the public.

In determining the remedy in this case, Earl notes that “[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” *Strode, supra; Easterling*, 157 Wn.2d at 181 (citing *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed .2d 35 (1999)). This is so because denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed.

Strode is the most recent case holding that any closure of a trial constitutes a structural error that mandates reversal even if trial counsel did

not object. The exception carved out in *Momah* is narrow and inapplicable to this case.

Thus, Earl is entitled to a new trial.

2. MR. EARL WAS COMPLETELY UNABLE TO READ OR HAVE READ TO HIM THE CONFIDENTIAL QUESTIONNAIRES AND COULD NOT HEAR ANY OF THE TESTIMONY OF THE COMPLAINING WITNESS. THIS RESULTED IN A FUNCTIONAL VIOLATION OF HIS RIGHT TO BE PRESENT; TO EFFECTIVE ASSISTANCE OF COUNSEL; TO CONFRONT AND CROSS-EXAMINE, AND TO DUE PROCESS.

To be “present” implies more than being physically present. It assumes that a defendant will be informed about the proceedings so he can assist in his own defense. “[I]f the right to be present is to have meaning [it is imperative that every criminal defendant] possess ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.’” *United States ex rel. Negron v. State of New York*, 434 F.2d 386, 389 (2d Cir.1970), quoting, *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 788, 4 L.Ed.2d 824 (1960) (vacating murder conviction where interpreter provided defendant with summaries rather than verbatim account of the proceedings).

In this case, Mr. Earl was denied the right to be present (and all of the implicated constitutional trial rights) both when the victim testified so softly that he could not hear a single word of her testimony and when he was unable to read the confidential questionnaires (which he was also not permitted to show to a family member so that they could be read to him).

The trial transcript reveals several instances where trial counsel (who was provided an audio enhancement device, which was not also provided to Mr. Earl), could not hear the witness. Mr. Earl could not hear any of her testimony. As a result, Mr. Earl was functionally not present.

Mr. Earl's situation during trial is analogous to trying a non-English speaker without the aid of an attorney.

In this State and Nation, the right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and "the right inherent in a fair trial to be present at one's own trial." *State v. Woo Won Choi*, 55 Wash.App. 895, 901, 781 P.2d 505 (1989), *review denied*, 114 Wash.2d 1002, 788 P.2d 1077 (1990). *See United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir.1970). Effective assistance of counsel is impossible unless the client can provide his or her lawyer with intelligent and informed input. Counsel, however expert, is still just an "aid to a willing defendant-not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Faretta v. California*, 422 U.S. 806, 820, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975).

The constitutional right to confrontation includes the right to have trial proceedings presented in a way that the accused can understand. The confrontation clause requires that "the accused ... know ... the nature and cause of the accusation he is called upon to answer, and all necessary

means must be provided to this end.” *Terry v. State*, 21 Ala.App. 100, 105 So. 386, 387 (1925) (reversing conviction of a deaf mute). *See also State v. Vasquez*, 101 Utah 444, 121 P.2d 903, 906 (1942) (reversing conviction of a Mexican national who was denied an interpreter).

The due process clause also prohibits trying the criminal defendant who lacks capacity to understand the proceedings, to consult with counsel or to assist in the preparation of his defense. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). This prohibition refers not only to “mental incompetents,” but also to those who are hampered by their inability to communicate in the English language. *United States ex rel. Negron v. State of New York*, 434 F.2d 386 (2d Cir.1970). *See also Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir.1984) (due process requires that the Immigration and Naturalization Service furnish an alien faced with deportation with “an accurate and complete translation of official proceedings”); *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir.1980), *cert. denied*, 450 U.S. 994, 101 S.Ct. 1694, 68 L.Ed.2d 193 (1981); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir.1973), *cert. denied*, 416 U.S. 907, 94 S.Ct. 1613, 40 L.Ed.2d 112 (1974) (“The right to an interpreter rests most fundamentally ... on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.”); *cf. Rex v. Lee Kun*, 1 K.B. 337, 343 (1916) (although

inconvenient and more time-consuming, supplying an interpreter is “in consonance with the scrupulous care of the interests of the accused which has distinguished the administration of justice in our [English] criminal Courts.”).

In addition, a defendant's right to have “real notice of the true nature of the charge against him [is] the first and most universally recognized requirement of due process.” *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859 (1941). “Because potential prejudice inheres in the denial of [this right], prejudice is usually assumed” when it is shown to be denied. *Dickey v. Florida*, 398 U.S. 30, 54-55, 90 S.Ct. 1564, 1577, 26 L.Ed.2d 26 (1970).

Mr. Earl, who was understandably reluctant to do anything during the complaining witness's testimony that would be misconstrued by jurors, complained to trial counsel on several occasions about his inability to hear. However, trial counsel did not seek to stop proceedings and seek remedial action so that Mr. Earl could hear the testimony. To the contrary, he told Mr. Earl that Earl's comments interfered with his own ability to hear. *See Declaration of Earl*.

Because Earl could not hear any of the complaining witness's testimony he was denied his right to be present at trial—a structural error which mandates automatic reversal.

3. THE TRIAL COURT SHOULD HAVE INQUIRED OR ALLOWED AN INQUIRY INTO WHETHER THE INSULT DIRECTED TO JUROR 7 WAS RACIALLY BIASED IN NATURE. THIS COURT SHOULD REMAND FOR A HEARING LIMITED TO THIS TOPIC.

On the morning of the second day of deliberations, Juror 7 went to the jury administration room with a letter from her psychologist indicating she should not continue with further deliberations because she was in a “psychological crisis.” The psychologist's letter indicated that (1) Juror 7 was reporting “abdominal pain, nausea, constant crying, anxiety, depression, irritability, and fear for her safety since an incident that occurred during her jury deliberations on December 15, 2005”; (2) Juror 7 had told her that during a break another juror had “verbally attacked her, called her insulting names, and impugned her integrity”; (3) Juror 7's psychologist had been treating Juror 7 for a number of years for anxiety and stress related issues; and (4) he (the psychologist) feared that Juror 7's mental health would deteriorate if she continued as a juror.

Juror 7 told the trial court that during a break another juror had used a “disrespectful term” to refer to some of the jurors, including her. Still out of the presence of the other jurors, the trial court then excused Juror 7 and called the presiding juror into the courtroom. The trial court asked the presiding juror, “Are you aware of any problems that I should know about that have occurred in your deliberations?” RP (Dec. 16, 2005) at 685. When the presiding juror started to answer, “Yes, sir, it's,” the trial court

interjected, “I should also advise you, I don't want you to say anything that's going to reveal the status of your deliberations.” RP (Dec. 16, 2005) at 685. The presiding juror responded, “I understand. No, sir. No problems.” RP (Dec. 16, 2005) at 685. The trial court then excused the presiding juror.

However, the trial court did not conduct any further inquiry—either of Juror 7, the presiding juror, or any other juror. Thus, the trial court prohibited any inquiry into the exact nature of the offensive comments.

Mr. Earl wrote a note, which said:

You did not resolve the problem. The problem is still in the jury room. In [the judge from the previous two trials] courtroom each jury member was questioned. I am concerned that there is still cause for a mistrial.

This Court held on direct appeal that the trial court's inquiry was sufficient. However, this Court did not consider the possibility that the comment was racially biased in nature.

Earl agrees that where there is potential juror misconduct, the trial judge is faced with a “delicate and complex task,” in that he or she must adequately investigate the allegations, but also must take care to respect the principle of jury secrecy. *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir.1997)). The trial court's inquiry should not risk violating “the cardinal principle that juror deliberations must remain secret.” *Elmore*, 155 Wn.2d at 770, 123 P.3d 72. A personal remark, even a derogatory one, between

jurors during a deliberation break, is not juror misconduct if it does not involve the substance of the jury's deliberations. For that reason, the Court found that Earl has not met his burden of showing juror misconduct or resulting prejudice.

However, the personal remark would be sufficient to warrant a mistrial if it was racially biased. Courts and commentators have struggled with the apparent conflict between protecting a defendant's right to a fair trial, free of racial bias, and protecting the secrecy and sanctity of jury deliberations. *See generally Developments in the Law-Race and the Criminal Process: VII. Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595 (1988); Victor Gold, *Juror Competency to Testify that a Verdict was the Product of Racial Bias*, 9 St. John's J. Legal Comment. 125 (1993). Even without characterizing racial bias as “extraneous,” a powerful case can be made that ER 606 (b) is wholly inapplicable to racial bias because, as the Supreme Court has explained, “[a] juror may testify concerning any mental bias in matters *unrelated to the specific issues that the juror was called upon to decide*” *Rushen v. Spain*, 464 U.S. 114, 121 n. 5, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (per curiam)

Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the

judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony. That was the approach adopted by the court in *Tobias v. Smith*, 468 F.Supp. 1287 (W.D.N.Y.1979), a case in which one juror, following the verdict, swore in an affidavit that two other jurors had made patently racist comments during deliberations before voting to convict the African-American defendant. After noting that Rule 606(b) permits testimony regarding whether extraneous prejudicial influences were improperly brought to the jury's attention, the court concluded "that the statements in the juror's affidavit [were] sufficient to raise a question as to whether the jury's verdict was discolored by improper influences and that they [were] not merely matters of juror deliberations." *Id.* at 1290. The court ordered that a hearing be held during which the parties would "have an opportunity to question those jurors who [could] be found as to what was said and what occurred." *Id.* at 1291.

In sum, the rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, this Court should remand for an evidentiary hearing limited to this issue.

4. MR. EARL IS NOT A "THREE STRIKES" PERSISTENT OFFENDER.

Mr. Earl's judgment reveals a plain error. The judgment finds that he is a persistent offender under the "three strikes" provision (in addition to the two strikes provision). However, in order to make such a finding, the

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sentencing court must have necessarily included Earl's "other current" incest offense as a "prior most serious offense."

This finding is plainly error. RCW 9.94A.030 (37) provides that a persistent offender is an offender who has, before the commission of the current offense, been convicted as an offender on at least two separate occasions, provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

In this case, at the time he committed the current "most serious" offense Earl had not been convicted on *two* occasions of most serious offenses. His conviction for incest did not occur until years after the current offense was committed.

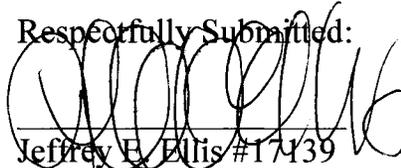
Thus, the judgment is in error. *In re Carle*, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). Earl is entitled to be resentenced.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should refer this case to a panel since it is clearly not frivolous and then either reverse and remand this case for (1) a new trial; or (2) an evidentiary hearing.

DATED this 13th of November, 2009.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'Jeffrey B. Ellis', written over a horizontal line.

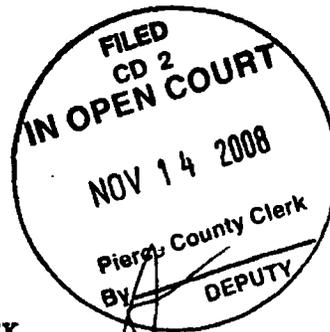
Jeffrey B. Ellis #17439

Attorney for Mr. Earl

Law Offices of Ellis,
Holmes & Witchley, PLLC
705 Second Ave., Ste. 401
Seattle, WA 98104
(206) 262-0300 (ph)
(206) 262-0335 (fax)

APPENDIX A

03-1-06167-2



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-06167-2

NOV 14 2008

vs.

FRANK CHESTER EARL

Defendant.

JUDGMENT AND SENTENCE (FJS)

- Prison RCW 9.94A.712 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Breaking The Cycle (BTC)
- Clark's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: WA13427773
DOB: 07/17/1952

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on December 19, 2005. by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	RAPE OF A CHILD IN THE FIRST DEGREE (Charge Code I36)	9A.44.073	N/A	7/4/99-7/13/03	Tacoma PD 033620727
II	RAPE OF A CHILD IN THE FIRST DEGREE (Charge Code I36)	9A.44.073	N/A	7/4/99-7/13/03	Tacoma PD 033620727
III	ATTEMPTED RAPE OF A CHILD IN THE FIRST DEGREE (Charge Code I36-A)	9A.44.073 9A.28.020	N/A	7/4/99-7/13/03	Tacoma PD 033620727

03-1-06167-2

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
IV	CHILD MOLESTATION IN THE SECOND DEGREE (Charge Code I40)	9A.44.086	N/A	7/14/03-12/25/03	TPD 033620727
V	RAPE OF A CHILD IN THE SECOND DEGREE (Charge Code I37)	9A.44.076	N/A	1/27/03-12/25/03	TPD 033620727

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present

as charged in the Third Amended Information

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	STATUTORY RAPE (2X)	05/29/87	Pierce Cty, WA	11/22/86	Adult	
2	UPFA 1	08/15/96	Pierce Cty, WA	4/25/96	Adult	
3	INCEST 1 (2X) OTHER CURRENT 03-1-05739-0		Pierce Cty, WA		Adult	
4	DISORDERLY CONDUCT	06/06/82	Tacoma Muni, WA		Adult	Misd
5	ASLT 4	11/13/95	Pierce Cty, WA	07/06/95	Adult	Misd
6	DWLS	04/25/96	Tacoma Muni, WA		Adult	Misd

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

03-1-06167-2

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9+	XII	240-318 Months	N/A	240-318 Months	LIFE/ \$50,000
II	9+	XII	240-318 Months	N/A	240-318 Months	LIFE/ \$50,000
III	9+	XII	240-318 Months	N/A	240-318 Months	LIFE/ \$50,000
IV	9+	VI	87-116 Months	N/A	87-116 Months	10 yrs/ \$20,000
V	9+	XI	Life Sentence DOC/Lifetime Community-Custody	N/A	Life Sentence DOC/Lifetime Community Custody	LIFE/ \$50,000

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence: above below the standard range for Court(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 **LEGAL FINANCIAL OBLIGATIONS.** The judgment shall upon entry be collectable by civil means, subject to applicable exemptions set forth in Title 6, RCW, Chapter 379, Section 22, Laws of 2003.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows:

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in Paragraph 2.1.

3.2 The court **DISMISSES** Courts _____ The defendant is found **NOT GUILTY** of Courts _____

03-1-06167-2

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN \$ 368.45 Restitution to: CVC claim #VR 56687
 \$ Restitution to:
 (Name and Address—address may be withheld and provided confidentially to Clerk's Office).
 PCV \$ 500.00 Crime Victim assessment
 DNA \$ 100.00 DNA Database Fee
 PUB \$ Court-Appointed Attorney Fees and Defense Costs
 FRC \$ 110.00⁰⁰ Criminal Filing Fee
 FCM \$ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ Other Costs for: _____

\$ Other Costs for: _____

\$ 1078.45 TOTAL

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ _____ per month commencing. _____ RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

4.2 RESTITUTION

[] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[] shall be set by the prosecutor.

[] is scheduled for _____

[] defendant waives any right to be present at any restitution hearing (defendant's initials): _____

RESTITUTION. Order Attached - *Penalty - signed* -

4.3 COSTS OF INCARCERATION

[] In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

4.4 COLLECTION COSTS

The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

4.5 INTEREST

03-1-06167-2

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

4.6 COSTS ON APPEAL

An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.

4.7 [X] HIV TESTING

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.8 [X] DNA TESTING

The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.9 NO CONTACT

The defendant shall not have contact with A.K. - SEE NO CONTACT ORDER (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).

[] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.10 OTHER:

Empty rectangular box for other information.

4.11 BOND IS HEREBY EXONERATED

03-1-06167-2

4.12 CONFINEMENT OVER ONE YEAR: PERSISTENT OFFENDER. The defendant was found to be a Persistent Offender.

[X] The court finds Count RAPE CHILD 2 is a most serious offense and that the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

[X] The court finds Count RAPE CHILD 2 is a crime listed in RCW 9.94A.030(31)(b)(i) (e.g., rape in the first degree, rape of a child in the first degree (when the offender was sixteen years of age or older when the offender committed the offense), child molestation in the first degree, rape in the second degree, rape of a child in the second degree (when the offender was eighteen years of age or older when the offender committed the offense) or indecent liberties by forcible compulsion; or any of the following offenses with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree or burglary in the first degree; or an attempt to commit any crime listed in RCW 9.94A.030(31)(b)(i)), and that the defendant has been convicted on at least one separate occasion, whether in this state or elsewhere, of a crime listed in RCW 9.94A.030(31)(b)(i) or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in RCW 9.94A.030(31)(b)(i).

Those prior convictions are included in the offender score as listed in Section 2.2 of this Judgment and Sentence. RCW 9.94A.030, RCW 9.94A.

(a) CONFINEMENT. RCW 9.94A.570 and RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

Life without the possibility of early release on Court		<u> V </u>
<u> 318 </u>	months on Court	<u> I </u>
<u> 318 </u>	months on Court	<u> II </u>
<u> 238.5 </u>	months on Court	<u> III </u>
<u> 116 </u>	months on Court	<u> IV </u>

Actual number of months of total confinement ordered is: Life without the possibility of early release.

(b) CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

_____ The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

_____ The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here.

[] The sentence herein shall run consecutively to the felony sentence in cause number(s) _____

_____ The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here:

_____ Confinement shall commence immediately unless otherwise set forth here:

03-1-06167-2

4.13 OTHER: _____

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03-1-06167-2

4.12. CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

_____ months on Court	_____	_____ months on Court	_____
_____ months on Court	_____	_____ months on Court	_____
_____ months on Court	_____	_____ months on Court	_____

CONFINEMENT. RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count _____	Minimum Term: _____	Months _____	Maximum Term: _____
Count _____	Minimum Term _____	Months _____	Maximum Term: _____
Count _____	Minimum Term _____	Months _____	Maximum Term: _____

The Indeterminate Sentencing Review Board may increase the minimum term of confinement.

Actual number of months of total confinement ordered is: _____

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____

03-1-06167-2

4.13 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months

[X] COMMUNITY CUSTODY is ordered as follows:

Count I for a range from: 36 to 36 Months;

Count II for a range from: 36 to 36 Months;

Count III for a range from: 36 to 36 Months;

Count IV for a range from 36 to 48 Months

Count _____ for a range from _____ to _____ Months

[X] COMMUNITY CUSTODY is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

Count _____ until _____ years from today's date [] for the remainder of the Defendant's life.

Count _____ until _____ years from today's date [] for the remainder of the Defendant's life.

Count _____ until _____ years from today's date [] for the remainder of the Defendant's life.

Count _____ until _____ years from today's date [] for the remainder of the Defendant's life

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of

03-1-06167-2

the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[] The defendant shall not consume any alcohol.

[] Defendant shall have no contact with: _____

[] Defendant shall remain [] within [] outside of a specified geographical boundary, to wit: _____

[] The defendant shall participate in the following crime-related treatment or counseling services: _____

[] The defendant shall undergo an evaluation for treatment for [] domestic violence [] substance abuse

[] mental health [] anger management and fully comply with all recommended treatment.

[] The defendant shall comply with the following crime-related prohibitions: _____

SEE ALSO APPENDIX H OF PSI

Other conditions may be imposed by the court or DOC during community custody, or are set forth here:

4.14 [] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.15 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

~~CONFINEMENT.~~ RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

~~Court _____ Minimum Term: _____ Months Maximum Term: _____~~

~~Court _____ Minimum Term _____ Months Maximum Term: _____~~

~~Court _____ Minimum Term _____ Months Maximum Term: _____~~

~~Court _____ Minimum Term _____ Months Maximum Term: _____~~

~~Court _____ Minimum Term _____ Months Maximum Term: _____~~

~~The Indeterminate Sentencing Review Board may increase the minimum term of confinement. []~~

COMMUNITY CUSTODY is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

- Count _____ until _____ years from today's date [] for the remainder of the Defendant's life
- Count _____ until _____ years from today's date [] for the remainder of the Defendant's life
- Count _____ until _____ years from today's date [] for the remainder of the Defendant's life
- Count _____ until _____ years from today's date [] for the remainder of the Defendant's life
- Count _____ until _____ years from today's date [] for the remainder of the Defendant's life

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.5 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

03-1-06167-2

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3 If you leave the state following your sentencing or release from custody but later move back to
4 Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if
5 you are under the jurisdiction of this state's Department of Corrections. If you leave this state following
6 your sentencing or release from custody but later while not a resident of Washington you become employed
7 in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within
8 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or
9 within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

10 If you change your residence within a county, you must send written notice of your change of residence to
11 the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you
12 must send written notice of your change of residence to the sheriff of your new county of residence at least
13 14 days before moving, register with that sheriff within 24 hours of moving and you must give written
14 notice of your change of address to the sheriff of the county where last registered within 10 days of
15 moving. If you move out of Washington State, you must also send written notice within 10 days of moving
16 to the county sheriff with whom you last registered in Washington State.

17 If you are a resident of Washington and you are admitted to a public or private institution of higher education,
18 you are required to notify the sheriff of the county of your residence of your intent to attend the institution
19 within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

20 Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of
21 release in the county where you are being supervised if you do not have a residence at the time of your
22 release from custody or within 48 hours excluding weekends and holidays after ceasing to have a fixed
23 residence. If you enter a different county and stay there for more than 24 hours, you will be required to
24 register in the new county. You must also report weekly in person to the sheriff of the county where you
25 are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur
26 during normal business hours. The county sheriff's office may require you to list the locations where you
27 have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in
28 determining an offender's risk level and shall make the offender subject to disclosure of information to the
public at large pursuant to RCW 4.24.550.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you
must register a new address, fingerprints, and photograph with the new state within 10 days after
establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state.
You must also send written notice within 10 days of moving to the new state or to a foreign country to the
county sheriff with whom you last registered in Washington State.

03-1-06167-2

5.7 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 11/14/08

Sven Nelson
Deputy Prosecuting Attorney
Print name: Sven Nelson
WSB # 24235

JUDGE Katherine M. Stolz
Print name: **KATHERINE M. STOLZ**
Anthony Savage
Attorney for Defendant
Print name: ANTHONY SAVAGE
WSB # 2208

Frank Earl
Defendant
Print name: FRANK CHESTER EARL

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: Frank Earl



APPENDIX B

DECLARATION OF ANTHONY SAVAGE

I, Anthony Savage, declare:

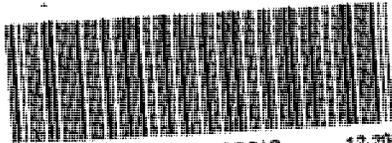
1. I was trial counsel for Frank Earl.
2. During trial, as part of jury selection, the trial court used a confidential questionnaire for all prospective jurors.
3. Eventually, I assume, those questionnaires were filed under seal.
4. However, there never was a time when those questionnaires were available to the public. In other words, the questionnaires were always private—only the Court, the lawyers, and the defendant were permitted to view the questionnaires.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

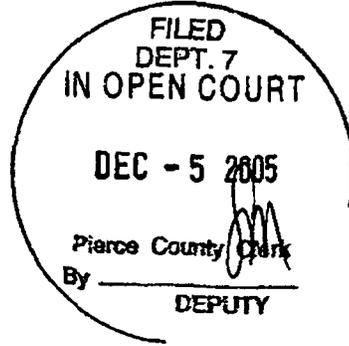
11/12/09 Seattle, Wa.
Date and Place

Anthony Savage
Anthony Savage

APPENDIX C



03-1-06167-2 24289583 ORSJQ 12-20-05



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff

Cause No. 03-1-06167-2

vs.

ORDER TO SEAL JURY
QUESTIONNAIRES

EARL, FRANK CHESTER,
Defendant

THIS MATTER having come on regularly by stipulation/motion of the parties to seal jury questionnaires, and the Court having read the files and record herein, Now, Therefore, it is hereby ORDERED that the jury questionnaires in the above matter be sealed and not opened, except by counsel of record or upon order by the above-entitled Court.

DATED December 5, 2005.

SVEN NELSON
Attorney for Plaintiff
WSBA # 24235

Judge FREDERICK W. FLEMING

ANTHONY SAVAGE
Attorney for Defendant
WSBA # 2208

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APPENDIX D

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 03-1-06167-2

MEMORANDUM OF JOURNAL ENTRY

vs.

EARL, FRANK CHESTER

Page: 10 of 15

Judge: FREDERICK W. FLEMING

MINUTES OF PROCEEDING

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 03-1-06167-2

MEMORANDUM OF JOURNAL ENTRY

vs.

EARL, FRANK CHESTER

Page: 11 of 15

Judge: FREDERICK W. FLEMING

MINUTES OF PROCEEDING

End Date/Time: 12/12/05 12:00 PM

Judicial Assistant: LOUANNE MARTIN

Court Reporter: DORYLEE REYES

Start Date/Time: 12/13/05 9:38 AM

December 13, 2005 09:38 AM Court convened outside the presence of the jury. All parties present and represented by counsel. Pltfs Atty Hammond moves to limit the questioning of the States next witness. Deft Atty responds. Court rules. **09:51 AM** Jury seated. Pltfs Atty

JUDGE FREDERICK W. FLEMING Year 2005

Page: _____

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 03-1-06167-2
MEMORANDUM OF JOURNAL ENTRY

vs.

EARL, FRANK CHESTER

Page: 12 of 15
Judge: FREDERICK W. FLEMING

MINUTES OF PROCEEDING

calls **Jennifer Knight**, who is duly sworn to testify on direct. **10:05 AM** Jury excused. Pltfs Atty Hammond responds to Deft Atty's objection. **10:15AM** Recess. **10:33AM** Court reconvened outside the presence of the jury. Pltfs Atty advises the Court they were unable to find case law on the issue at hand. **10:34 AM** Deft Atty responds. **10:36 AM** Court responds. **10:40 AM** Pltfs Atty calls **Jennifer Knight** for offer of proof. **10:47 AM** Witness excused. Deft Atty continues with objection. **11:03 AM** Jury seated. Direct exam of witness Knight continues. **11:18 AM** Cross exam. **11:19 AM** Redirect. **11:20 AM** Witness excused. Jury excused. Deft Atty argues regarding the next witnesses opinion stated in her report. Pltfs Atty Nelson responds. **11:29 AM** Jury seated. Pltfs Atty Nelson calls **Michelle Breland**, who is duly sworn to testify on direct. **11:57 AM** Cross exam. **11:58 AM** Redirect. **11:59 AM** Witness excused. Jury excused. **12:01 PM** Deft Atty addresses scheduling issues. **12:02 PM** Pltfs Atty Nelson files third amended information. Instructions discussed at this time. Recess.

End Date/Time: 12/13/05 1:27 PM

Judicial Assistant: LOUANNE MARTIN
Start Date/Time: 12/14/05 9:06 AM

Court Reporter: DORYLEE REYES

December 14, 2005 09:32 AM PEXHIBIT # 12 MARKED FOR ID. 09:38 AM Court convened outside the presence of the jury. All parties present and represented by counsel. Deft arraigned on third amended information. Deft plead not guilty. Third amended information filed in open court. **09:43 AM** Jury seated. Pltf Atty Nelson calls **Stacy Sampson**, who is duly sworn to testify on direct. **PEXHIBIT # 12 OFFERED, ADMITTED FOR ILLUSTRATIVE ONLY. 10:02 AM** Cross exam. **10:02 AM** State rest. Jury excused. Deft Atty moves to dismiss Count III. Pltfs Atty Hammond responds. Court denies. Deft Atty moves to dismiss Court V. Pltfs Atty Hammond responds. Court denies motion to dismiss Ct V. **10:22 AM** Jury seated. Deft Atty rest. Court advises the jurors that we will hear closing argument at 1:30PM. **10:23 AM** Jury excused. Instructions are discussed at this time. **10:40 AM** Recess. **01:45 PM** Court reconvened in the presence of the jury. Court

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 03-1-06167-2

MEMORANDUM OF JOURNAL ENTRY

vs.

EARL, FRANK CHESTER

Page: 13 of 15

Judge: FREDERICK W. FLEMING

MINUTES OF PROCEEDING

instructs the panel regarding the law. **01:58 PM Recess. 02:12 PM** Court reconvened in the presence of the jury. Pltfs Atty Nelson gives closing argument. **03:13 PM Recess. 03:34 PM** Court reconvened outside the presence of the jury. Court advises counsel that juror #6 has an airline ticket for Monday morning. Colloquy. Juror remains. **03:36 PM** Deft Atty gives closing argument. **03:58 PM** Pltfs Atty Hammond gives rebuttal argument. **04:22 PM Alternates will be jurors # 3 & 6.** Jurors excused. **04:26 PM** Jurors seated. Court advises the jurors of the alternates duty. Alternates excused. Court instructs the panel regarding deliberations. **04:43 PM Recess.**

End Date/Time: 12/14/05 4:43 PM

Judicial Assistant: LOUANNE MARTIN
Start Date/Time: 12/15/05 10:27 AM

Court Reporter: DORYLEE REYES

December 15, 2005 9:00AM Jury present and begin deliberations. **10:25AM** Jury knocked with a question. All parties called. **10:58 AM** Court reconvened outside the presence of the jury. Court advises counsel of the jurors question. Colloquy. Court responds in writing " Please refer to your exhibits and instructions " signed by Judge Fleming. 4:15PM Jury excused to return tomorrow @ 9:00AM.

End Date/Time: 12/16/05 9:56 AM

Judicial Assistant: LOUANNE MARTIN
Start Date/Time: 12/16/05 9:56 AM

Court Reporter: DORYLEE REYES

December 16, 2005 09:00AM All jurors present. Jury is not able to begin deliberations as juror # 7 has a doctors note and is unwilling to return to jury room and continue deliberations. All counsel called. **10:01 AM** Court convened outside the presence of the jury. Court advises counsel and the Deft of juror # 7's issue. Pltfs Atty Nelson request time to consult appellate unit. So granted. **10:10 AM Recess. 10:31 AM** Court reconvened outside the presence of the jury. Court advises counsel that he suggest the juror inquestion

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 03-1-06167-2

MEMORANDUM OF JOURNAL ENTRY

vs.

EARL, FRANK CHESTER

Page: 14 of 15

Judge: FREDERICK W. FLEMING

MINUTES OF PROCEEDING

be brought back up to the jury room and he will read the deliberation instruction and several of the Courts instructions given the panel before deliberation. **10:35 AM** Pltfs Atty suggest the juror #7 be questioned outside the presence of the other jurors. **10:37 AM** Deft Atty suggest the juror be excused, as well the offending juror. Colloquy. **10:40 AM** Court addresses the issue further. **10:44 AM** Juror #7 called to return to the Court room for questioning by Court and counsel. **10:46 AM** Juror #7 present and questioned by the Court. Court affirms with counsel that juror #7 be excused. Both counsel request the name of offending juror.

11:04 AM Juror #7 excused to foyer. Court advises counsel that this juror will be excused and an alternate will be called in and deliberation will begin anew. Colloquy. **11:13 AM** Juror #7 excused. Presiding juror seated in the Court room. Court advises Presiding juror of the next steps and that we have excused #7. **11:17 AM** Juror # 3 called to return. Recess. **01:44 PM** Court reconvened outside the presence of the jury. Juror # 3 the alternate is seated in her chair. **01:46 PM** Court advises the jury panel that juror #7 is excused. Juror # 3 is taking her place. **01:48 PM** Jury excused to begin deliberations. **01:49 PM** Recess. **01:50 PM** Deft Atty files a letter from Deft. Court reads the letter on the record. Ja files letter in open court. Pltfs Atty Nelson request marking the letter from juror #7's Dr.as an exhibit. Court orders Pltfs Atty Nelson to bring an order to seal and he will sign it..Recess. **04:11 PM** Jury excused to return on Monday @9:00AM.

End Date/Time: 12/16/05 4:12 PM

Judicial Assistant: DWAYNE CHRISTOPHER

Court Reporter: NOT ON RECORD

Start Date/Time: 12/19/05 9:13 AM

December 19, 2005 09:12 AM Jury continues with deliberations.

12:25 PM Jurors break for lunch: lunch ordered in. (ake)

01:01 PM Deliberations resume. (ake)

02:36 PM Juror knocks on door. Verdict has been reached. Counsel contacted. 03:28 PM Jury enters Courtroom, seated. Court reads verdict: Verdict Form #1 - guilty; Verdict Form

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MEMORANDUM OF JOURNAL ENTRY

vs.

Page: 15 of 15

Judge: FREDERICK W. FLEMING

EARL, FRANK CHESTER

MINUTES OF PROCEEDING

#2 - guilty; Verdict Form #3 - guilty; Verdict Form #4 - guilty; Form #5 - guilty. 03:31 PM Court polls jury. 03:33 PM Court thanks, excuses jury. 03:34 PM Court/counsel: colloquy re: sentencing. Sentencing set for January 20, 2006 at 1:30 PM. Court signs Scheduling Order & Conditions of Release. 03:41 PM Court at recess.

End Date/Time: 12/19/05 1:04 PM

APPENDIX E

DECLARATION OF FRANK EARL

I, Frank Earl, declare:

1. I am the Petitioner in this case. I make this declaration according to my best memory. My current counsel read this declaration to me before I signed it.
2. During trial, as part of jury selection, the trial court used a confidential questionnaire for all prospective jurors. As I recall, those questionnaires were filed under seal.
4. There never was a time when those questionnaires were available to the public. In other words, the questionnaires were always private—only the Court, the lawyers, and the defendant were permitted to view the questionnaires. If the questionnaires had been available to the public, I would have wanted a family member to read them for me and tell me how prospective jurors answered the questions.
5. Because I cannot read most things, I need them read to me. During this case I sought to have my family read documents to me, since my lawyer apparently did not have the time to do so—or at least to do so thoroughly.
6. I was told, however, that the confidential questionnaires were just that—confidential. Thus, I could not have a family member view them, much less read them. In addition, my attorney did not read them to me. I was unable to read them. So, I have no idea what they said.
7. After the lawyers reviewed the questionnaires, several jurors were questioned one-by-one. Although my memory is not clear on this point, I believe that no one was allowed to watch the trial during this process. I had several family members who attended trial regularly.
8. During the complaining witness's testimony, my attorney wore a device which enabled him to hear the witness. I was not provided with a similar device. Because the witness spoke so softly, I could not hear a single word she said. Several times I told my attorney that I could not hear, but each time he told me to be quiet so he could hear himself.
9. I did not object to the court because I told my attorney who did not bring it up to the judge; I did not know I had the right to hear the witness; and because I did not want to upset the judge during the witness's testimony.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

11-06-09 WSP
Date and Place

Frank Earl
Frank Earl

FILED
COURT OF APPEALS
DIVISION II
09 NOV 16 AM 9:43
STATE OF WASHINGTON
BY _____
DEPUTY

VERIFICATION BY PETITIONER

I, Frank Earl, verify under penalty of perjury that the attached PRP is true and correct and is filed on my behalf.

11-6-09 WSP
Date and Place

Frank Earl
Frank Earl

FILED
COURT OF APPEALS
DIVISION II
09 NOV 16 AM 9:43
STATE OF WASHINGTON
BY _____
DEPUTY