

*Seele-3 2008 letter -
this was treated as
a reply to the
response to
the PRP.*

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of) No. 81225-0
RICHARD D. HARTMAN,)
Petitioner.) MOTION ON THE
MERITS, per
RAP 18.14

I. IDENTITY OF PETITIONER

COMES NOW the petitioner, RICHARD D. HARTMAN.

II. STATEMENT OF RELIEF SOUGHT

Rather than allow the time to elapse for the petitioner's reply in this case, he submits this Motion on the Merits to clarify the issues and to streamline and expedite the process.

III. ISSUES PRESENTED FOR REVIEW

The following issues are amenable to prompt judicial review on their merits and are dispositive to Hartman's entitlement to relief:

- (a) HARTMAN'S RIGHT TO PUBLIC TRIAL WAS VIOLATED ACCORDING TO CLEARLY ESTABLISHED LAW AND IT IS POINTLESS TO STAY HIS CASE PENDING THE DECISION IN State v. Strode, 80849-0.
- (b) HARTMAN'S OFFENDER SCORE ISSUE IS RIPE FOR REVIEW AND IS BASED UPON HIS COMPLETION OF PRIOR PLEA AGREEMENT'S STIPULATIONS TO ACHIEVE WASHOUT BEFORE ANY SRA AMENDMENT APPLIED RETROACTIVELY TO HIS OFFENDER SCORE.

IV. STATEMENT OF THE CASE

DECLARATION

I, RICHARD D. HARTMAN, hereby swear under penal-

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ty of perjury under the laws of the State of Washington that the following is true, and that I am competent to testify to these facts, except where indicated by context.

1. In my opening brief on the public trial issue (hereafter OB(a)), I noted, and the record supports without need to resort to a reference hearing, that my vior dire trial court proceedings were in fact closed to the public. See: OB(a) at p.2, at H. Compare: OB(a) at p.18.

2. The record also supports that I was prejudiced by this 'tacit closure' even though I am not required to show prejudice to obtain relief. See: the State's response (hereafter SR), at p.3. Compare: OB(a) p.2 at I, through ff.

3. The State has stipulated to these facts, rendering a reference hearing unnecessary. See: SR at p.2, at D, ¶1.

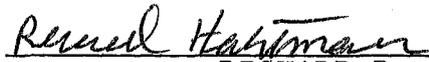
4. I had no felony convictions between my release from supervision on July 19, 1991, and April 16, 1998. See: opening brief on the offender score issue (hereafter OB(b)), exhibit 1, at its page 11 of 11, crimes listed as numbers 10 and 11.

5. It is incontestable at law that no SRA amendment preventing the washout of my prior class C

felonies applied to me until well after I completed the conditions of those prior contracts to remain felony-free for five years. See: OB(b) pp. 5-6.

6. My actions to remain felony-free in fulfillment of my prior plea agreement contracts, until beyond the time any SRA amendment applied to assert retroactivity for considering those crimes in future offender score calculations, created a 'vested right' of sorts equivalent to the jurisprudence analysis in State v. T.K., 139 Wn.2d 320; 987 P.2d 63 (1999).

SO SWORN, this 25 of May, 2008, in Grays Harbor County, Washington.


RICHARD D. HARTMAN

V. ARGUMENT

This is substantially a motion to affirm, on the merits, the petitioner's entitlement to relief. Rather than file a reply to the State's response, dated 14 May 2008, the petitioner seeks to access motion on the merits instrument forum to foreclose any dilatory effect upon the petitioner's desperate need for a liver transplant.

The respondent seeks a stay on the public trial issue pursuant to the pending case State v. Strode.

80849-0. The petitioner has received both the opening brief, and respondent's brief, in Strode (hereafter 'Strode OB' and 'Strode SR').

Strode involved the questioning of jurors about their being victims, or accused perpetrators, of sexual offenses. Strode was accused of Rape of a Child in the First Degree, Attempted same, and Child Molestation in the First Degree. Id. Strode SR, p.1, ¶1.

The State relies here on its argument against granting relief to Hartman on Momah and Duckett, SR p.7, ¶3. Hartman would exclude Momah as inapposite because the "express request of defendant Momah[] agreed to allow voir dire by individual questioning...". SR p.9, ¶3.

Here the respondent also seeks to draw distinctions between Frawley and Duckett that don't apply here: the extent to which Frawley held all in-chambers proceedings are per-se closed to the public supports Hartman's argument just as much as the fact that there is no record Hartman's trial court asked him to waive his public trial right. This is not a declining by Division 3 to follow Division 1's reasoning in the case. Hartman is entitled to relief under either analysis. SR p.11.

No matter how Strode is decided, Hartman is en-

titled to a new trial for public trial violation. In the Strode SR, at p.4, ¶4, respondents review Judge Madsen's analysis of Orange: "a court should not lose sight of the constitutional issue: whether a defendant's rights protected by the open court guarantee have actually been abridged."

Here the record refers to Hartman's advanced Hepatitis C and his incompetence to stand trial. OB(a) p.18 and 23. The prosecutor attributed Mr. Hartman's obvious incoherence to drug abuse at the time - even suggesting an UA. OB(a) p.21, ln.23 through p.23, ln.12.

Back to the pending case of Strode, the respondent's analysis of Judge Madsen's commentary on Orange: "She stated that a reviewing court must not only consider the closure ruling [and there wasn't one in Hartman's case], but also what actually occurred in response to the closure." (Referencing de minimus effect of closure.) Strode SR, pp. 4-5.

Putting Strode to bed as inapposite to Hartman's entitlement to relief, the respondent in Strode concludes "even if these interviews are found to be a [sic] unjustified closure of a public trial, it was de minimus and there was no infringement of the

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defendant's constitutional rights." Strode SR, p.6.

The outcome in Strode will not impact a decision on the merits in Hartman for two reasons: (1) the record in the case gives a very strong impression that Mr. Hartman was indeed prejudiced by the tacit closure; (2) this court's holding in Brightman will be undisturbed.

In State v. Brightman, 72919-1 (10/16/2005), this court remanded for a new trial upon a presumption that the trial court proceedings were in fact closed, based on plain language in the RP which lacked an actual closure order. Id. at VersusLaw ¶21-22 and 46.

The court should rule on the merits of Mr. Hartman's case as it stands. Alternately, it should remand the public trial issue to the trial court for a reference hearing to determine if tacit closure did in fact occur, and, whether Hartman's family was in fact excluded from the proceedings. See: OB(a), p.12, at 5.

As for the offender score issue, the respondent argues that Hartman should have an offender score of at least 9 because he had 14 prior felony convictions. SR p.14. Despite Hartman's concise calculation of his offender score at OB(b) pp. 3-4, only two pages, the respondent does not address

the argument for relief, but merely cites to the RP. SR pp. 14-16. Either that short argument is correct or it is incorrect. The following theories of relief should be considered on their merits.

This motion on the merits should be granted in whole or in part because the appeals are clearly meritorious. RAP 18.14(2). The public trial issue is clearly controlled by settled law. RAP 18.14(2) (a). These factors warrant submission of this case to a panel of judges pursuant to RAP 18.14(d).

VI. CONCLUSION

The petitioner's conviction should be reversed and remanded for a new trial, for violation of public trial protections, obviating the need to muck through the offender score issue.

Richard D. Hartman
RICHARD D. HARTMAN

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PROOF OF SERVICE

I, RICHARD D. HARTMAN, hereby swear under penalty of perjury under the laws of the State of Washington that I served the preceding MOTION ON THE MERITS to the following parties by mail from the postal system in my prison unit this _____ of _____, 2008:

Edward P. Lombardo
Attorney for Respondent
Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton WA 98584

Washington State Supreme Court
P.O. Box 40929
Olympia WA 98504-0929

SO SWORN this 30th of May, 2008, in
Grays Harbor County, Washington.


RICHARD D. HARTMAN

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