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STATE OF WASHINGTON

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SUPREME COURT OF THE STATE OF WASHINGTON BY RONALD R. CARPENTER

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NO. 36346-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RENE P. PAUMIER,

Appellant.

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SUPREME COURT
STATE OF WASHINGTON

FILED

BRIEF *AMICUS CURIAE* OF THE
WASHINGTON ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS (WACDL)

Jeffrey E. Ellis
WSBA No. 17139
Law Office of Alsept & Ellis
621 SW Morrison St.
Suite 1025
Portland, OR 98205
(206) 218-7076 (c)

Sheryl Gordon McCloud
WSBA NO. 16709
Co-Chair *Amicus* Committee,
Washington Association of Criminal
Defense Lawyers (WACDL)
710 Cherry St., Seattle, WA 98104
(206) 224-8777

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ATTACHMENT TO EMAIL

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I. INTRODUCTION

Washington Association of Criminal Defense Attorneys (WACDL) submits this amicus brief on the issue of whether fully closing a courtroom for part of jury selection constitutes reversible error, where the closure was not preceded by a *Bone-Club*¹ hearing and where no alternatives to closure were considered. WACDL takes the same position in this brief as it took in the nearly identical case of *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). Although juror privacy is a factor that should be considered and weighed with other factors in a pre-closure hearing, where a courtroom is closed without considering any factors other than jury privacy, automatic reversal is required.

This case is indistinguishable from *Strode*. As a result, this Court should apply precedent and reverse.

II. FACTS

Mr. Paumier was tried by a jury.

Jury selection began on May 8, 2007. At the beginning of jury selection, the trial court *sua sponte* announced that potential jurors who preferred to answer any questions privately would be taken into the judge's chambers. In response, several jurors indicated during the course

¹ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

of *voir dire* that they preferred to answer certain questions privately. The trial court did not ask the defendant, defense counsel, or any spectators in the courtroom for their position on the closure of the courtroom for questioning jurors on certain topics.

Several jurors were questioned in chambers—a process that was recorded on audiotape. During the in chambers questioning, the following information was revealed.

Juror 24 lived near the victims' burglarized home in this case and had a prior conviction for possessing cocaine. RP3 7, 15-17, 49-50.

Juror 27 recognized the defendant's name, possibly due to prior school misbehavior by defendant. RP3 51-52.

Juror No. 39 had been the victim of recent burglary and theft and had also been involved as a property manager in apprehending criminals. RP3 13-15. The juror was excused for cause. RP3 14-15.

Juror 7 wanted to discuss a "time" problem and "physical limitation" privately. RP3 10. When asked by the judge, in chambers, to explain, Juror 7 stated: "Okay, yesterday I got my first shot of insulin. I've just been diagnosed with diabetes and I have an appointment tomorrow. Otherwise, I would love to serve on a jury." RP3 12. The State did not object to the judge's inquiry or to the juror's answer. Juror 7 was excused by the Court. RP3 12.

After this private questioning, the Court and the parties returned to the courtroom and completed jury selection. Mr. Paumier was ultimately convicted, and he appealed.

III. ARGUMENT

A. Introduction

The Court of Appeals was correct when it held: “Paumier argues that by conducting a portion of the jury selection in the privacy of chambers the trial court violated his constitutional right to a public trial. We agree.” *State v. Paumier*, 155 Wn. App. 673, 677, 230 P.3d 212, review granted, 169 Wn.2d 1017 (2010). This case is squarely controlled by precedent. Because this case is indistinguishable from *State v. Strode*, *supra*, reversal is required.

B. Controlling Authority Holds That the Right to an Open and Public Trial Applies to Juror Questioning Like This

Article I, section 10 provides that “[j]ustice in all cases shall be administered openly.” The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a “public trial by an impartial jury.” These provisions have a common goal: they protect the right to a *public* proceeding.

This Court has scrupulously protected the accused’s and the

public's right to open public criminal proceedings. *State v. Strode, supra*; *State v. Momah*, 167 Wn.2d 140, 217 P.3d 221, *cert. denied*, 131 S.Ct. 160 (2010) (trial court's closure of a portion of voir dire to safeguard defendant's right to a fair trial was proper where closure was narrowly tailored and where defendant was aware of and sought to waive right to open trial); *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed before closing a courtroom or sealing documents).

As a result, this case does not reach this Court with a "clean slate." Instead, this case is squarely controlled by *Strode*. Comparing the facts of this case to the facts in *Strode* creates a sense of "déjà vu all over again." Yogi Berra, *The Yogi Book: "I Really Didn't Say Everything I Said,"* 29-

30 (1998).

In *Strode*, the potential jurors who answered “yes” to a preliminary question about whether they wanted to answer certain additional questions in private, were called one at a time into the judge’s chambers for questioning on the issue of whether their past experiences would preclude them from rendering a fair and impartial verdict in the case. *Strode*, 167 Wn.2d at 224. This Court’s decision further explains: “The trial court conducted this form of individual voir dire for at least 11 prospective jurors.” *Id.* “The only persons present during the individual questioning of the 11 prospective jurors were the trial judge, prosecuting attorney, defense counsel, and the defendant.” *Id.*

The same process happened in this case. Jurors were asked by the court whether they wanted to answer questions in private. Those who said, “yes,” were questioned in chambers. The only people present during the chambers questioning in this case were the judge, the prosecutor, defense counsel, and the defendant.

In *Strode*, no hearing on courtroom closure took place prior to the decision to question jurors privately. It is undisputed that the court did not conduct anything remotely approaching a *Bone-Club* hearing in this case, either. The courtroom closure was therefore just as unconstitutional in this case as it was in *Strode*.

C. Controlling Authority Holds That the Defendant's Failure to Object Does Not Waive This Constitutional Claim

In *Strode*, the State argued that any error was waived because the defense acquiesced, without objection to the private voir dire. *Id.*, 167 Wn.2d at 229. This Court rejected the State's waiver argument, stating: "However, the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. We have held that a 'defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver.' *Strode's* failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial." *Id.* (citations omitted)..

The State makes the identical argument in this case. It should be rejected for the identical reasons. In addition, the State's argument should be rejected because precedent now establishes that the failure to object and subsequent participation in private voir dire does not constitute a waiver.

This case is distinguishable from *Momah* in the same manner that *Strode*, which was argued on the same day as *Momah*, was distinguished. In *Momah*, the trial court closed a portion of voir dire to protect the defendant's right to a fair trial; the closure was narrowly tailored, and the defendant was personally aware of the presumptive right to an open and

public trial, but sought to waive that right in order to preserve a higher interest. *Momah*, 167 Wn.2d at 151-52. None of those factors are present in the case at bar.

It is also important to note that Mr. Paumier asserts that his own right to a public trial was violated—a right that he can raise for the first time on appeal. Thus, there is no reason for this Court to visit the thorny issue of whether and to what extent a defendant can raise the public’s right to an open trial, where he has not explicitly asserted his own right or the public’s right.

D. The Courtroom Closure in This Case Violated Both the United States and the Washington State Constitutions

The appellate court decision in this case expressed uncertainty about whether this Court had made the *Bone-Club* requirements optional in *Momah*. *Paumier*, 155 Wn. App. at 681. As a result, that court held that the United States Supreme Court in *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010), imposed on trial courts the responsibility to conduct a pre-closure hearing where certain factors are considered and weighed, and to enter findings supporting closure which demonstrate that no less restrictive alternatives to closure existed. *Id.*, at 685-85. WACDL does not read *Momah* in the manner suggested by the Court of Appeals, but agrees that *Presley* sets the federal constitutional

threshold.

E. **There is No Legal or Policy Ground to Overrule *Strode***

This case should not serve as an invitation to overrule *Strode*. Courts do not “lightly set aside precedent.” *State v. Kier*, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008). Instead, this Court will overrule precedent only when such precedent is both incorrect and harmful. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). Given the State’s utter failure either to distinguish *Strode* or to shoulder the burden of showing that *Strode* was incorrect and is harmful, this Court should not even consider that possibility.

F. **Jury Privacy on Medical Matters is Important, But That Issue is Not Presented By This Case**

The only new issue the State brings to the mix is its argument that asking a juror a question that elicits facts concerning medical conditions and treatment might violate some unspecified provision of the federal Health Insurance Portability and Accountability Act (HIPAA).² This

² It is far from clear that the HIPAA prevents a judge from asking a general question that involves a juror’s ability to sit through a trial. The HIPAA generally prevents disclosure of medical records by health care providers to the public. An interesting article that discusses the medical privacy interests of jurors during jury selection, but does not suggest that a question similar to the one asked by the judge in this case was improper, is *Medical Privacy and Voir Dire: Going Beyond Doctor and Patient*, and can be found at: <http://www.dcbabrief.org/vol220410art1.html>.

Court should not reach this question for several reasons. First, the State did not object to the Court's question or the juror's answer. Second, the State concedes the question and answer are irrelevant to the closed courtroom issue: according to the State, a violation of HIPAA takes place anytime a question is asked which may cause a juror to reveal medical information even if the juror is willing to reveal that information. In other words, it is the question that might be challenged, not who is present when the question is asked. Finally, because other jurors were questioned in a closed courtroom about non-medical matters, reversal is required regardless of HIPAA.

Because the HIPAA issue cannot affect the outcome in this case, this Court should wait until the issue is both material and preserved in order to address it.

This is not to say that WACDL is unconcerned with the privacy interests of potential jurors. Consistent with the position it took in *Strode*, WACDL reasserts that juror privacy is an important interest that should be considered and balanced by the court along with the litigants' interest in a fair and impartial jury, the defendant's right to a public trial, and the public's constitutional right of access to court proceedings. While WACDL agrees with United States Supreme Court Justice Marshall's statement that "the constitutional rights of the public and press to access to

all aspects of criminal trials are not diminished in cases in which ‘deeply personal matters’ are likely to be elicited in *voir dire* proceedings,” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 520, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), that should not result in potential jurors forfeiting the entirety of their privacy rights at the courthouse door.

There are, however, a number of ways to protect the legitimate privacy concerns of jurors without undermining the right to an open and public trial. For example, a judge can regulate the appropriate scope of *voir dire* and preclude irrelevant and improper questions. In addition, a trial judge can inform prospective jurors of the general nature of sensitive questions to which they will be subjected and advise them that they may request an *in camera* discussion with the judge, on the record and with counsel and the defendant present, concerning any question to which they object on privacy grounds, but that a judge will need to weigh that request along with the other interests she must protect during a trial. *See e.g.*, David Weinstein, *Protecting a Juror’s Right to Privacy: Constitutional Constraints and Policy Options*, 70 Temp. L. Rev. 1, 7 (1997) (arguing that the compelling interest of a prospective juror when interrogation touches on deeply personal matters that a person has legitimate reasons for keeping out of the public domain must be balanced against the defendant’s right to a fair trial, and the need for openness in trial proceedings).

A generalized concern about the need for juror privacy is only one of several concerns that a trial judge must consider and weigh. In a case like this where it was the only concern considered by the court, reversal is required.

IV. CONCLUSION

WACDL respectfully suggests that this Court should reverse and remand this case for a new trial.

DATED this 4th day of April, 2011.

Respectfully submitted,

s/Jeff Ellis

Jeff Ellis, WSBA No. 17139
Attorney for WACDL
Law Office of Alsept & Ellis
621 SW Morrison St., Suite 1025
Portland, OR 97205-3813
(206) 218-7076 (c)
jeffreyerwinellis@gmail.com

s/Sheryl Gordon McCloud

Sheryl Gordon McCloud, WSBA No. 16709
Attorney for WACDL
Law Offices of Sheryl Gordon McCloud
710 Cherry St.
Seattle, WA 98104
(206) 224-8777; (206) 623-5951 (fax)
sheryl@sgmccloud.com

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BY RONALD R. CARPENTER

I certify that on the 4th day of April, 2011, a true and correct copy of the foregoing BRIEF *AMICUS CURIAE* OF THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Andrew P. Zinner
Nielsen, Broman & Koch, PLLC
1908 E Madison St
Seattle, WA 98122-2842
Attorney for Petitioner

Edward P. Lombardo, DPA
Gary P. Burleson, Prosecuting Attorney
Mason County Prosecutor
P O Box 639
Shelton WA 98584
Attorney for Respondent

/s/Sheryl Gordon McCloud
Sheryl Gordon McCloud, WSBA No. 16709
Attorney for WACDL
Law Offices of Sheryl Gordon McCloud
710 Cherry St.
Seattle, WA 98104
(206) 224-8777; (206) 623-5951 (fax)
sheryl@sgmcloud.com

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