

SUPREME COURT NO. 84585-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RENE P. PAUMIER,

Respondent.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2010 SEP 10 AM 8:07
BY RONALD R. CHRISTNER
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE STATEMENT

1. Did the trial court violate respondent's constitutional right to a public trial, as guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution, by holding part of the voir dire of five prospective jurors in chambers without first conducting a "Bone-Club"¹ analysis?

2. Did the trial court violate respondent's constitutional right to represent himself, as guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution, by summarily denying his unequivocal motion to proceed pro se, made after jury voir dire, especially where he did not request additional time to prepare for trial?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The state charged Rene P. Paumier with residential burglary and second degree theft. CP 53-54. During jury voir dire, the trial court sua sponte announced, "[I]f there is anything that is of a sensitive nature and you would prefer not to discuss it in this group setting, please let us know. And I make a list and we take those jurors individually into chambers to

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

ask those questions because we don't intend to embarrass you in any way."

RP3 9-10.²

The court and parties questioned five panel members individually in chambers. RP3 13-17, 49-52. Of the five, defense counsel asked one prospective juror two questions and a second panelist one question.³

The day following jury selection began with the trial court granting the state's motion for leave to file an amended information. RP1 5-8. Defense counsel then notified the trial court Paumier wished to represent himself at trial, a desire he had disclosed to counsel the previous day. Counsel explained Paumier had a copy of discovery throughout the proceedings and was dissatisfied with his representation. RP1 8-9.

² The three-volume verbatim report of proceedings is cited as follows: RP1 – 5/8-9/2007; RP2 – 5/21/2007; RP3 – 5/8/2007 (voir dire).

³ Prospective juror 24 lived about two blocks from the burglarized home. Defense counsel asked, "Are you aware of any, for lack of a better term, criminal activity in your neighborhood?" RP3 16. After juror 24 said a possible burglary occurred to the neighbors who lived behind her residence, defense counsel asked, "Are you aware of other criminal activity in your neighborhood or –." RP3 17. The potential juror said no.

Later, prospective juror 27 disclosed he/she was a school district employee and thought he/she recognized Paumier's name. The panelist said the reason he/she would know a student's name was that the student had gotten into trouble. RP3 51-52. Defense counsel asked, "You indicated you could keep an open mind and would be fair and impartial, so . . ." to which juror 27 responded, "I believe so." RP3 52.

Paumier elaborated, stating counsel "should have spoke up for me instead of getting pissed off at me in court." RP1 9. He added, "I don't feel it should have gotten this far, and I'd just rather present my . . . case myself." RP1 9.

The trial court replied, "The Court will deny the request to allow Mr. Paumier to represent himself. I'm not even going to go through the normal colloquy because at this point the request comes too late. We have already picked our jury and we're ready to begin trial at this point, and the Court will find that the request is untimely." RP1 9.

After trial, a Mason County jury found Paumier guilty of residential burglary and the lesser offense of third degree theft. CP 23-25. The trial judge sentenced Paumier to 25 months for residential burglary and 365 days suspended for theft. CP 5-13.

Paumier appealed, arguing the in-chambers voir dire violated his constitutional right to a public trial and the trial court's summary denial of his motion to proceed without counsel violated his constitutional right to represent himself. Brief of Appellant (BOA) at 6-23. In a 2-1 decision, the Court accepted each argument and reversed Paumier's convictions. State v. Paumier, 155 Wn. App. 673, 230 P.3d 212 (2010) (attached as appendix).

The state filed a petition for review, requesting this Court to accept review of both holdings. Paumier filed an answer. This Court accepted review August 6, 2010.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED PAUMIER'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL AS PROVIDED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22.⁴

The trial court's use of in-chambers voir dire of five prospective jurors was a "closure" and therefore required a sua sponte Bone-Club analysis. Because the trial court did not engage in the analysis, did not consider alternatives to closure, and did not enter findings to justify the closure, it violated Paumier's right to a public trial under the Sixth Amendment and article I, section 22 of the Washington Constitution. Paumier did not waive a challenge to the improper closure by failing to object. The trial court's closure error was structural and requires reversal of Paumier's convictions and remand for a new trial.

a. Introduction

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a

⁴ This argument is taken verbatim from the supplemental brief of petitioner in State v. Wise, Sup. Ct. No. 82802-4. To foster efficient review, counsel has placed anything in addition to Wise in a separate section, called "Additional Developments," at the end of the argument.

public trial by an impartial jury. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 724, ___, ___ L. Ed. 2d. ___ (2010); State v. Bone-Club, 128 Wn.2d at 261-62.⁵ Additionally, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

Whether a trial court procedure violates the right to a public trial is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public trial right is considered to be of such constitutional magnitude that it may be raised for the first time on appeal. State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). The accused's right to a public trial under both the federal and state constitutions applies to voir dire. Presley, 130 S. Ct. at 724; State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).

⁵ The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury”

b. *The trial court "closed" a portion of Paumier's trial.*

The trial court conducted some of the questioning of five prospective jurors in chambers. This was unquestionably a "closure" under Momah and Strode. See Momah, 167 Wn.2d at 148-49 (holding that presumption of open judicial proceedings extends to voir dire and that courts apply Bone-Club factors⁶ to determine whether closure is appropriate); Strode, 167 Wn.2d at 227 (questioning of 11 potential jurors in chambers "was a courtroom closure and a denial of the right to a public trial."); State v. Sadler, 147 Wn. App. 97, 112, 193 P.3d 1108 (2008)

⁶ A Bone-Club analysis requires a trial court to consider the following factors before closing part of a trial:

1. The proponent of closure or sealing must make some showing [of a compelling state 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.

("trial court's affirmative act of moving the proceeding into the jury room, a part of the court not ordinarily accessible to the public, without inviting the public to attend, had the same effect as expressly excluding the public.").

c. The trial court erred by failing to apply the Bone-Club factors.

A judge violates a defendant's right to a public trial under the Sixth Amendment by conducting part of jury selection in the judge's chambers without sua sponte considering reasonable alternatives to closure, identifying an overriding interest likely to be prejudiced without closure, and entering specific findings justifying closure. Presley, 130 S. Ct. at 724-25. The same is true under article I, section 22 absent sua sponte consideration of the Bone-Club factors. Momah, 167 Wn.2d at 140; Strode, 167 Wn.2d at 228-29; see State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005) ("Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted.").⁷

⁷ This Court in Momah did not explicitly hold that the trial court erred by failing to use the Bone-Club factors. Instead, it observed, "To determine if closure is appropriate, we apply [the Bone-Club factors]." Momah, 167 Wn.2d at 149. Immediately thereafter, this Court launched into a discussion of whether the violation of a public trial right is necessarily structural error. Momah, 167 Wn.2d at 149.

The trial court in Paumier's case neither considered alternatives to closure nor applied the Bone-Club factors. Nor did the court mention -- at all -- Paumier's constitutional right to a public trial. This is error.

d. Paumier did not waive his public trial right by failing to object and by participating in the in-chambers voir dire.

This Court has consistently held the accused does not waive the right to challenge closure of a portion of trial on appeal by failing to timely object. Strode, 167 Wn.2d at 229; State v. Easterling, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006); Brightman, 155 Wn.2d at 517-18; Bone-Club, 128 Wn.2d at 261. This did not change in Momah. Momah argued his failure to object did not waive a challenge to the Court's improper closure. This Court agreed Momah could raise the issue on appeal. Momah, 167 Wn.2d at 154-55.

Nor did counsel waive, invite, or otherwise jeopardize Paumier's right to assert his public trial right by posing some questions during the in-

If the goal was to obfuscate, this Court has succeeded. See Paumier, 155 Wn. App. at 681 ("Momah curiously cites the five Bone-Club guidelines . . . and acknowledges that Bone-Club provides the appropriate criteria for determining if closure is appropriate, but it does not address the failure to comply with the obligatory language in those guidelines. . . . It merely notes that if the reviewing court determines that the defendant's right to a public trial was violated it should then "devise[] a remedy appropriate to that violation.") (quoting Momah, 167 Wn.2d at 149).

chambers voir dire. Strode, 167 Wn.2d at 230 ("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") (Alexander, C.J, lead opinion); 167 Wn.2d at 232 ("right to a public trial has not been waived nor has it been safeguarded") (Fairhurst, J., concurring).

Paumier's counsel did nothing more than counsel in Strode. Because this Court found no waiver there, it certainly should not here.

e. The trial court committed structural error.

The trial court's error was structural under the Sixth Amendment. See Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999) (violation of right to public trial is structural, citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)); Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (same); State v. Grenning, 169 Wn.2d 47, 60 n.11, 234 P.3d 169 (2010); State v. Levy, 156 Wn.2d 709, 724 n.3, 132 P.3d 1076 (2006).

The choice of remedy under article I, section 22, however, is not as clear. In Strode, the Court held "denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed." Strode, 167 Wn.2d at 231. This is consistent with Bone-Club, where the Court declared that "[t]he Washington Constitution provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment."

Bone-Club, 128 Wn.2d at 260. The Strode Court consequently reversed the convictions and remanded for a new trial because part of voir dire occurred in chambers. Strode, 167 Wn.2d at 231.

Yet in Momah, the Court held the closure of part of voir dire was not structural error. Momah, 167 Wn.2d at 156. The Court relied on Waller, which held the remedy for unjustified closure of a hearing on a motion to suppress evidence was a new suppression hearing, not a new trial. Momah, 167 Wn.2d. at 150. Waller held:

[T]he remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest.

Waller, 467 U.S. at 50.

The Momah Court acknowledged that in the four closure cases immediately preceding its decision, it found structural error and granted automatic reversal. This Court asserted that in those cases, "we have held that the remedy must be appropriate to the violation and have found a new trial required in cases where a closure rendered a trial fundamentally unfair." Momah, 167 Wn.2d. at 150-51. Careful review of those cases calls this claim into question; in three of the four cases, the Court found the structural error remedy necessarily followed unjustified closure.

In Easterling, the Court found the remedy was automatic:

The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. See Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325; Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Prejudice is necessarily presumed where a violation of the public trial right occurs. Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)). As a result, precedent directs that the appropriate remedy for the trial court's constitutional error is reversal of Easterling's unlawful delivery of cocaine conviction and remand for new trial.

Easterling, 157 Wn.2d at 181.

The Brightman court held similarly, finding the structural error remedy of a new trial necessarily followed where the trial court failed to apply the Bone-Club factors before closing voir dire to the accused's friends and family:

Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted. Id. at 261, 906 P.2d 325. Accordingly, we remand for a new trial. See id.

Brightman, 155 Wn.2d at 518.

In In re Personal Restraint of Orange, the trial court also excluded family and friends from part of voir dire without weighing the Bone-Club factors. Orange, 152 Wn.2d 795, 808-09, 100 P.3d 291 (2004). This

Court did not hesitate in finding the remedy for the improper closure was reversal and remand for a new trial:

As to the remedy for the violation of Orange's public trial right, we granted the defendant in Bone-Club a new trial, stating that "[p]rejudice is presumed where a violation of the public trial right occurs." 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923); Waller, 467 U.S. at 49 & n. 9, 104 S. Ct. 2210). Thus, had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial.

Orange, 152 Wn.2d at 814.

Finally, only in Bone-Club did the Court consider – and reject -- remanding only for a suppression hearing after concluding the trial court improperly ordered part of the hearing closed. Bone-Club, 128 Wn.2d at 261-62. It found persuasive the defendant's argument the undercover officer could testify differently in an open suppression hearing. It held, "Even if the new suppression hearing again results in the admission of [the defendant's statements to the officer], Defendant should have the opportunity to use any such variances in testimony for impeachment purposes in a new trial." Bone-Club, 128 Wn.2d at 262.

This review establishes that reversal and remand for a new trial has been considered by this Court as the "default" remedy for improper closure. This structural error remedy will always apply absent extraordinary circumstances. See Strode, 167 Wn. 2d at 226 (right to

public trial is "strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances"), citing Easterling, 157 Wn.2d at 174-75.

Momah presented those circumstances:

[W]e find the facts distinguishable from our previous closure cases. Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

Momah, 167 Wn.2d at 151-52.

Paumier's case has no comparable extraordinary facts. Defense counsel did not affirmatively assent to the closure, argue for its expansion, or decline an invitation to object. Unlike Momah's counsel, Paumier's attorney did not "make a deliberate choice to pursue" an in-chambers conference. Momah, 167 Wn. 2d at 155. The judge sought no input from Paumier's counsel and did not close the proceedings to protect Paumier's constitutional right to a fair trial by an impartial jury.

Counsel did ask some questions in chambers, but no more so than counsel in Momah or Strode. Finally, Paumier did not "benefit" from the closed portion of voir dire any more than he would have had the

proceeding been open to the public. Although the school district employee made a statement that could have tainted the other panel members, this does not excuse the trial court's improper closure. The proper procedure, which safeguards the public trial right, is to excuse the venire and question each individual juror in open court. State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008) (because other prospective jurors are officers of the court, their exclusion does not violate constitutional public trial right), review denied, 165 Wn. 2d 1024 (2009); see State v. Erickson, 146 Wn. App. 200, 216 n.2, 189 P.3d 245 (2008) (citing Vega for proposition that removing rest of panel and questioning individual venire members in open court "is not a closure of the courtroom and it secures the right to a public trial"), petition for review pending.

For all the reasons the Momah Court found against a finding of structural error, this Court should find for such a result.

Finally, as a practical matter, reversal and retrial is the only available remedy for improper closure of voir dire absent extraordinary circumstances. A suppression hearing, such as the one found to be improperly closed in Waller, can be easily redone. Voir dire, in contrast, involves a jury. Remand for public voir dire is a meaningless remedy absent a new trial. It is also a waste of time, for the new jury will have

nothing to do. The proper remedy for Paumier is the structural error remedy – a new trial.

f. Protecting privacy did not justify the in-chambers voir dire.

Prospective jurors' privacy is a compelling interest trial courts must protect. Strode, 167 Wn.2d at 235-36 (Fairhurst, J., concurring), 167 Wn.2d at 241 (C. Johnson, J, dissenting).

Paumier does not disagree with this general proposition. The presence of a compelling interest, however, does not of itself excuse a trial court's failure to apply the required standards under the Sixth Amendment and article I, section 22. Instead, the proponent of closure must show the compelling interest would likely be prejudiced by a public proceeding, Presley, 130 S. Ct. 724, or that an open proceeding would present a "serious and imminent threat" to that interest. Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). And even if this showing is made, a trial court must still perform the remainder of the analysis before ordering closure. Strode, 167 Wn.2d at 229.

Paumier questions the unsupported belief that the "privacy" of a closed procedure results in closer questioning of jurors and more honest answers. The opposite can also be true -- the absence of the watchful eye

of the public can result in less honest answers. Frankly, the danger a prospective juror might be unwilling to truthfully reveal sensitive or embarrassing information exists whether a court is open or closed. And, there is simply no reason to conclude that a juror would be more willing to tell the truth in a courtroom where the judge, the judge's staff, a court reporter, the prosecutor (and a law enforcement representative, if requested), defense counsel, the defendant, and jail security (if the defendant is in custody) are present, as opposed to a courtroom where members of the public can observe.

However, what is clear is that a generalized concern about the need for juror privacy is insufficient to overcome the strong presumption of openness—a presumption that can only be overcome based on specific, individualized findings, rather than a generalized concern about the need for privacy. See Strode, 167 Wn.2d at 236 (Fairhurst, J., concurring) (although agreeing that failure to close portion of voir dire would have thwarted court's procedural assurances that juror information would remain confidential and would have endangered jurors' openness and "*potentially* defendant's right to an impartial jury, the potential for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court."); see also People v. Gacy, 103 Ill.2d 1, 468 N.E.2d 1171, 82 Ill.

Dec. 391 (1984) (concern for juror embarrassment was insufficient basis upon which to invoke a limitation of the constitutional right of access of the press and general public to criminal trials), cert. denied, 470 U.S. 1037 (1985); Providence Journal Co. v. Superior Court, 593 A.2d 446, 449 (R.I. 1991) (trial court's belief that answers to voir dire questions about child abuse should not be aired or responded to publicly was unsupported by any facts in record that demonstrated open proceeding would have imperiled or prejudiced prospective jurors' privacy rights and defendant's right to fair trial); State ex rel. La Crosse Tribune v Circuit Court for La Crosse County, 115 Wis. 2d 220, 340 N.W.2d 460 (1983) (in-chambers voir dire to avoid "embarrassment" to prospective jurors violated state public trial law and constituted abuse of discretion).

Moreover, the assumption that private questioning of potential jurors generally benefits the defendant ignores this Court's statement that "a closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." Brightman, 155 Wn.2d at 515 (citing Orange, 152 Wn.2d at 812).

If private voir dire was so beneficial to the accused, defense counsel would routinely request it. But the opposite is true; trial courts almost universally initiate closed questioning.⁸

Even if prospective jurors tended to disclose more sensitive information in chambers or another secret place, there was no reason to believe a discussion of embarrassing subjects was even pertinent in Paumier's case. The state charged Paumier with second degree burglary and first degree theft. These are obviously not charges that call for questions requiring prospective jurors to reveal sensitive personal matters. Cf. Strobe, 167 Wn.2d at 238 (C. Johnson, J., dissenting) ("In cases such as this involving sexual abuse, counsel may voir dire jurors about experiences that may touch on deeply personal issues that might affect their ability to be fair and impartial. Jurors' willing and truthful disclosure

⁸ See, e.g., Strobe, 167 Wn.2d at 229 (court initiated private voir dire); Brightman, 155 Wn.2d at 511 (court); State v. Bowen, ___ Wn. App. ___, 236 P.3d 220, 222 (2010) (court); State v. Paumier, 155 Wn. App. 673, 676, 230 P.3d 212 (2010) (court); State v. Price, 154 Wn. App. 480, 485, 228 P.3d 1276 (2009) (court); State v. Heath, 150 Wn. App. 121, 125, 206 P.3d 712 (2009) (prosecutor's request); State v. Sadler, 147 Wn. App. at 107 (court conducted private Batson hearing in jury room); State v. Erickson, 146 Wn. App. 200, 204, 189 P.3d 245 (2008) (court); State v. Castro, 141 Wn. App. 485, 488, 170 P.3d 78 (2007) (court); State v. Duckett, 141 Wn. App. 797, 801, 173 P.3d 948 (2007) (court); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593, 596 (2007) (court).

of private information regarding such experiences is essential to ensuring the defendant's impartial jury right.").

Having said these things, Paumier maintains trial courts should be permitted to develop procedures that respect the privacy interests of prospective jurors and encourage more forthright answers to sensitive voir dire questions. Such procedures must, however, comply with Bone-Club. Dreiling v. Jain, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004) (the right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified).

g. Additional developments

In the most recent of three published opinions addressing a Mason County Superior Court use of in-chambers voir dire, the Court of Appeals unanimously reversed the appellant's convictions. Bowen, ___ Wn. App. ___, 236 P.3d at 220. This case is especially pertinent here given the reasoning of the Court of Appeals in Paumier's case.

Paumier argued in the Court of Appeals his case was more like Strode than Momah and that the proper remedy was therefore remand for a new trial. Supplemental Brief of Appellant at 2-9. The majority agreed, but held "Presley has eclipsed Momah and Strode and controls the outcome of Paumier's case." Paumier, 155 Wn. App. at 685. Because the

trial court did not consider reasonable alternatives to closure and make appropriate findings supporting closure, Presley required reversal. Paumier, 155 Wn. App. at 685-86.

In Bowen, a different three-judge panel distinguished Presley on the ground that unlike in that case, Bowen's trial counsel did not object to closure. Bowen, 236 P.3d at 222-23.⁹ The court instead concluded, as Paumier argued, "that the circumstances in this case are more similar those [sic] in Strode than those in Momah." Bowen, 236 P.3d at 224.

It is noteworthy that the trial court in Bowen came much closer to complying with Bone-Club than did Paumier's trial judge. First, in Bowen the court asked the parties whether they objected to in-chambers voir dire to take up sensitive matters. The prosecutor and defense counsel said they had no objections. Bowen, 236 P.3d at 222. Second, the trial court asked whether any members of the public objected to in-chambers questioning. The court noted on the record there were no observers present in the courtroom to object and there were no objections. Id.

The appellate court nevertheless found Momah distinguishable in two ways. First, the trial court in Momah recognized and balanced the defendant's right to a public trial and right to an impartial jury. Bowen, 236 Wn. App. at 224. Second, Momah's counsel took unique steps to

⁹ Of course, Paumier's trial counsel did not object, either.

essentially "waive" the public trial argument on appeal – counsel affirmatively assented to, participated in, argued for the expansion of, and ostensibly "benefitted" from private voir dire by learning things prospective jurors would not have divulged in public. Bowen, 236 Wn. App. at 224.

Contrary to the judge in Momah, the trial court in Strode did not consider the defendant's right to a public trial or balance competing interests. Neither did Bowen's trial judge. In addition, the court proposed individual, private voir dire and asked all the questions in chambers. Moreover, the record did not show the need for in-chambers voir dire as opposed to individual questioning in another public location. Finally, the record gives no indication either it or the parties considered the public trial right. Bowen, 236 P.3d 224. For those reasons, the Bowen court found structural error. Bowen, 236 P.3d at 224-25.

Bowen supports Paumier's position here. Therefore, under either Presley or Strode and Momah, Paumier is entitled to a new trial. See also United States v. Agosto-Vega, __ F.3d __, 09-1158, 2010 WL 3323724, at *5-*6 (1st Cir. 2010) (reversing convictions under Presley because trial court closed courtroom during jury selection because of space limitations).

2. THE TRIAL COURT VIOLATED PAUMIER'S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF AT TRIAL.

The Washington and United States constitutions guarantee a criminal defendant the right to self-representation. Wash. Const., art. I § 22;¹⁰ U.S. Const., amend. VI and XIV.¹¹ State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); State v. Bolar, 118 Wn. App. 490, 516, 78 P.3d 1012 (2003), review denied, 151 Wn.2d 1027 (2004). The state constitutional right is absolute and its violation is reversible error. In re Detention of J.S., 138 Wn. App. 882, 890-891, 159 P.3d 435 (2007). An appellate court reviews a denial of a request to proceed pro se for abuse of discretion. Madsen, 168 Wn.2d at 504.

As the Court of Appeals concluded, the trial court in Paumier's case abused its discretion by denying his request to represent himself because (1) Paumier's request was not designed to delay trial and (2) the court summarily denied the motion without first exercising its discretion. This Court should uphold the Court of Appeals decision.

¹⁰ "In criminal prosecutions the accused shall have the right to appear and defend in person"

¹¹ See Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) ("Although not stated in the [Sixth] Amendment in so many words, the right to self-representation-to make one's own defense personally-is thus necessarily implied by the structure of the Amendment.")

When an accused informs the trial court he wishes to represent himself, the court must determine whether the request is unequivocal and timely. State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). An accused may not use a motion to proceed pro se to delay trial or obstruct justice. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). Unless it finds the motion is equivocal or untimely, the court must decide if the request is voluntary, knowing, and intelligent, preferably by a colloquy reflecting that the defendant understood the seriousness of the charge, the maximum penalty involved, and the existence of the technical procedural rules governing the presentation of his defense. Madsen, 168 Wn.2d at 504-05; State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991).

It is the trial court's obligation to inform the accused of the nature of the charges, the possible penalties, and the risks of self-representation. United States v. Keen, 104 F.3d 1111, 1120 (9th Cir. 1996). Put another way,

If a defendant seeks to represent himself and the court fails to explain the consequences of such a decision to him, the government is not entitled to an affirmance of the conviction it subsequently obtains. To the contrary, the defendant is entitled to reversal and an opportunity to make an informed and knowing choice.

United States v. Arlt, 41 F.3d 516, 521 (9th Cir. 1994).

a. *Paumier's request to represent himself was unequivocal.*

Paumier's request was unwavering and unequivocal. He expressed dissatisfaction with counsel and told the judge simply, "I don't feel it should have gotten this far, and I'd just rather present my . . . case myself." RP1 9. At no time did Paumier request appointment of new counsel or time to either hire counsel or to prepare for trial. The Court of Appeals simply held, "Paumier's request to represent himself was clear" Paumier, 155 Wn. App. at 687.

The Court of Appeals is correct. A clear request to proceed pro se does not become equivocal merely because the accused is motivated by more than the single desire to present his own defense. This Court in Madsen called the Court of Appeals reasoning to the contrary "fallacious" and ignorant of this Court's precedent. Madsen, 168 Wn.2d at 507. It made clear "Madsen's inclusion of an alternative remedy [request for new counsel] is irrelevant to whether Madsen's request was unequivocal." Id.; see State v. Modica, 136 Wn. App. 434, 442, 149 P.3d 446 (2006) ("[W]hen a defendant makes a clear and knowing request to proceed pro se, such a request is not rendered equivocal by the fact that the defendant is motivated by something other than a singular desire to conduct his or her own defense."), aff'd., 164 Wn.2d 83, 186 P.3d 1062 (2008).

b. Paumier's request was timely.

Paumier made his request to proceed pro se after the jury was selected but before it was sworn. RP1 9. The Court of Appeals found the motion was timely because "there is no evidence that the trial would have been delayed or that granting [Paumier's] request would impair the orderly administration of justice." Paumier, 155 Wn. App. at 687.

Again, the court is correct. "Timeliness is determined on a continuum." Madsen, 168 Wn.2d at 508. If a request is made (a) well before trial and without an accompanying request to continue, the right of self-representation stands as a matter of law; (b) as the trial is about to begin or shortly before, the trial court retains a measure of discretion to be exercised after considering the particular circumstances of the case; and (c) during trial, the right to proceed pro se rests largely in the informed discretion of the trial court. State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979).

Even where, as here, the accused makes his request during trial, the trial court has a duty to inquire into the specific reasons for the request, thereby creating a meaningful record for appellate review. Fritz, 21 Wn. App. at 363. The trial judge in Paumier's case failed to create any record and instead simply declared "the request is untimely." 1RP 9. In other words, the court failed to exercise any discretion at all, which is an abuse

of discretion. Brunson v. Pierce County, 149 Wn. App. 855, 861, 205 P.3d 963 (2009).

This is especially true because Paumier did not request additional time to prepare for trial. See State v. Stenson, 132 Wn.2d at 770 (strong evidence request to proceed pro se is made for dilatory purposes when it is accompanied by a motion to continue); State v. Vermillion, 112 Wn. App. 844, 856, 51 P.3d 188 (2002) (in reversing trial court's denial of defendant's request to present his own case, appellate court noted defendant "did not request that the trial be continued on any of the occasions that he renewed his motion. There is no indication in the record that Vermillion made his request for the purpose of delaying trial."), review denied, 148 Wn.2d 1022 (2003); United States v. Price, 474 F.2d 1223, 1227 (9th Cir. 1973) (trial court abused discretion by refusing to permit defendant to proceed pro se where the "motion was made before the jury was sworn. The record contains no hint that the motion was a tactic to secure delay, and there is nothing that suggests that any delay would have attended the granting of the motion.")

"Washington courts have recognized that the timeliness requirement should not operate as a bar to a defendant's right to defend pro se[.]" Breedlove, 79 Wn. App. at 109. The trial court operated the timeliness requirement as a bar here. The Court of Appeals was correct to

reverse the trial court's denial of Paumier's motion to proceed pro se, and this Court should affirm.

c. The trial court is solely responsible for any ambiguity regarding the voluntariness of Paumier's waiver of counsel.

Because the trial court summarily found Paumier's request to proceed pro se untimely, it did not determine whether it was voluntary, knowing, and intelligent. A finding of involuntariness must be based "on some identifiable fact." Madsen, 168 Wn.2d at 505. The onus is on the trial court to make the necessary record:

[T]he court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met. As the court failed to ask further questions and there is no evidence to the contrary, the only permissible conclusion is that Madsen's request was voluntary, knowing, and intelligent.

Madsen, 168 Wn.2d at 506.

Madsen controls in Paumier's case. Nothing in the record indicates Paumier did *not* voluntarily, knowingly, and intelligently make his request. Indeed, indications are to the contrary. Paumier initially pleaded guilty to residential burglary and third degree theft, then was permitted to withdraw his pleas because the plea form set forth an incorrect offender score (four instead of the correct score of five). CP 62-69 (guilty plea statement); CP 61 (order authorizing plea withdrawal). Although the state

incorrectly notified Paumier of a lower offender score and consequent standard range sentence with respect to the residential burglary charge, it correctly notified him of the possible sentence for third degree theft as well as the maximum possible punishment for each offense. CP 62. The statement also set forth the possible community custody terms as well as other consequences of a guilty finding, such as the prohibition on possession of a firearm and the ability to vote. CP 63-64. The trial court presumably found Paumier understood these consequences because it accepted his plea. The record thus sufficiently shows Paumier understood the seriousness of the charges and possible punishment.

Moreover, Paumier properly objected to the trial court's continuance beyond his speedy trial expiration date and moved to dismiss for violation of CrR 3.3. CP 55-60. Paumier therefore demonstrated the ability to understand and follow court rules

Under these circumstances, a finding of involuntariness would be baseless and thus an abuse of discretion. For this reason as well, this Court should affirm the Court of Appeals, reverse Paumier's convictions, and remand for a new trial.

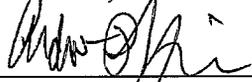
D. CONCLUSION

The Court of Appeals majority correctly concluded the trial court violated Paumier's constitutional rights to a public trial and to represent himself at trial. This Court should affirm, reverse Paumier's convictions, and remand for a new trial.

DATED this 9 day of September, 2010.

Respectfully submitted,

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APPENDIX

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Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.

Rene P. PAUMIER, Appellant.

No. 36346-1-II April 27, 2010.

Synopsis

Background: Defendant was convicted in the Superior Court, Mason County, Toni A. Sheldon, J., of residential burglary and third degree theft. Defendant appealed.

Holdings: The Court of Appeals, Bridgewater, J., held that:

1 by closing a portion of voir dire, without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, trial court violated defendant's and the public's right to an open proceeding, requiring reversal of defendant's convictions, and

2 trial court abused its discretion in denying defendant's request to represent himself.

Reversed and remanded.

Quinn-Brintnall, J., dissented and filed opinion.

West Headnotes (19)

1 **Criminal Law** Grounds of dismissal in general

Defendant's release from custody while his direct appeal was stayed pending Supreme Court's decision in another case addressing public trial issue did not render moot his appeal, where defendant asked appellate court in part to reverse his conviction.

0 Cases that cite this headnote

2 **Criminal Law** Jury selection
Criminal Law Findings
Criminal Law Public or open trial; spectators; publicity

In closing a portion of voir dire by interviewing certain jurors in the privacy of chambers, without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, trial court violated defendant's and the public's right to an open proceeding, requiring reversal of defendant's convictions. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, §§ 10, 22.

0 Cases that cite this headnote

3 **Criminal Law** Public Trial

The state and federal constitutions guarantee the right to a public trial. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

4 **Constitutional Law** Right of access to the courts and a remedy for injuries in general
Constitutional Law Right to obtain justice promptly

Section of state constitution providing that justice in all cases shall be administered openly, and without unnecessary delay, secures the public's right to open and accessible proceedings. West's RCWA Const. Art. 1, § 10.

0 Cases that cite this headnote

5 **Constitutional Law** Right of access to the courts and a remedy for injuries in general
Criminal Law Public Trial

Provisions of state and federal constitutions guaranteeing the right to a public trial and provision of state constitution requiring open administration of justice assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public

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scrutiny. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, §§ 10, 22.

0 Cases that cite this headnote

6 **Criminal Law** Considerations Affecting Propriety of Closure

While the public trial right is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

7 **Criminal Law** Jury selection

The guaranty of open criminal proceedings extends to voir dire. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, §§ 10, 22.

0 Cases that cite this headnote

8 **Criminal Law** Alternatives to closure

Criminal Law Findings

Criminal Law Public or open trial; spectators; publicity

Where a trial court fails to sua sponte consider reasonable alternatives to closure and fails to make the appropriate findings supporting its decision to close the proceedings, the proper remedy is reversal of the defendant's conviction.

0 Cases that cite this headnote

9 **Criminal Law** Alternatives to closure

Criminal Law Findings

A trial court is required to consider reasonable alternatives to closure and to make appropriate findings explaining why closure is necessary under the particular circumstances of the case before closing the proceeding.

0 Cases that cite this headnote

10 **Criminal Law** Delay or misuse of waiver or right of self-representation

Trial court abused its discretion in denying defendant's request to represent himself, on the sole basis that request, made after the jury was selected but before it was sworn, was untimely, where defendant did not ask for a continuance, and defendant's criminal history indicated he was familiar with the charges and perhaps the criminal court proceeding he faced; there was no evidence that the trial would have been delayed or that granting defendant's request would have impaired the orderly administration of justice.

0 Cases that cite this headnote

11 **Criminal Law** In general; right to appear pro se

A criminal defendant has an independent constitutional right to represent himself without the assistance of legal counsel. West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

12 **Criminal Law** In general; right to appear pro se

The exercise of right to represent himself must be requested by the defendant. West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

13 **Criminal Law** Capacity and requisites in general

Criminal Law Delay or misuse of waiver or right of self-representation

A defendant's request to represent himself must be knowingly and intelligently made, unequivocal, and timely, i.e., it may not be used to delay one's trial or obstruct justice. West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

14 **Criminal Law** Right of defendant to counsel

Appellate court reviews trial court's disposition of a request to proceed pro se for abuse of discretion, mindful that trial court's discretion lies along a continuum that corresponds with the timeliness of the request to proceed pro se. West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

15 **Criminal Law** In general; right to appear pro se

Where a defendant makes a proper demand for self-representation well before the trial, the right of self-representation exists as a matter of law. West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

16 **Criminal Law** Delay or misuse of waiver or right of self-representation

Where a demand to proceed pro se is made on the eve of trial, the existence of the right to proceed pro se depends on the particular facts of the case with a measure of discretion reposing in the trial court. West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

17 **Criminal Law** Delay or misuse of waiver or right of self-representation

Where a request to proceed pro se is made during the trial, the right to proceed pro se rests largely in the informed discretion of the trial court. West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

18 **Criminal Law** Delay or misuse of waiver or right of self-representation

If a request for self-representation is made just before or during trial, the trial court must exercise its discretion by balancing the important interests implicated by the decision, namely, the defendant's interest in self-representation and society's interest in the orderly administration of justice. West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

19 **Criminal Law** Appointment; waiver; appearance pro se

The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. West's RCWA Const. Art. 1, § 22.

0 Cases that cite this headnote

Attorneys and Law Firms

****214** Eric J. Nielsen, Andrew Peter Zinner, Nielsen Broman & Koch, PLLC, Seattle, WA, for Appellant. Edward P. Lombardo, Mason County Prosecuting Attorney's Office, Shelton, WA, for Respondent.

Opinion

BRIDGEWATER, J.

***675** ¶ 1 Rene Paumier appeals his convictions for residential burglary and third degree theft. Because we hold that the trial court improperly excluded the public from a portion of Paumier's trial and improperly denied his right to represent himself, we reverse his convictions and remand for further proceedings.

Facts

¶ 2 When Jason Howland returned home after a weekend outing, he discovered that the back door to his residence ***676** had been broken open and that several items had been taken from his bedroom, including three knives, two watches, belt buckles, baseball hats, and other clothing items. He called police, who began an investigation

regarding the burglary.

¶ 3 Police became interested in Paumier after they interviewed a neighbor who reported having seen Paumier during the weekend of the burglary exit the front of Howland's house and walk down the street. A police officer contacted Paumier, advised him why he wanted to speak with him, read Paumier his *Miranda* warnings, and requested to search his person and the backpack he was carrying. Paumier consented to being searched, and police found a knife and a belt buckle that Howland identified as having come from his bedroom. The State ultimately charged Paumier with residential burglary and second degree theft.

¶ 4 Following the trial court's rulings on motions in limine, jury selection began on May 8, 2007. The trial court stated at the outset that potential jurors who preferred to answer questions privately to avoid possible embarrassment would be taken into the judge's chambers. Several jurors indicated during the course of voir dire that they preferred to answer certain questions in chambers. The judge and the parties questioned five jurors in chambers, recording the jurors' responses.² Jury selection was completed that same day.

¶ 5 The following day, the trial court permitted the State to amend the information. 1 RP at 8. Paumier then pleaded not guilty and asked to represent himself, stating:

I just don't feel like a-I feel like there's [sic] things about the trial getting this far that it shouldn't have. And I feel that my attorney should have spoke [sic] up for me instead of getting *677 pissed off at me in court. And I just don't feel like he's doing his job like he should. I don't feel it should have gotten this far, and I'd just rather present my, you know, case myself.

1 RP at 9. The court denied the request noting that it came too late. "We have already picked our jury and we're ready to begin trial at this point, and the Court will find that the request is untimely." 1 RP at 9.

¶ 6 Following trial, the jury found Paumier guilty of residential burglary and the lesser included offense of third degree theft. The court sentenced Paumier to 25 months in prison for the burglary and 365 days in jail **215 for the theft, suspending the theft sentence upon compliance with a 24-month probation term.

1 ¶ 7 Paumier appealed, arguing that his right to a public trial had been violated and that the trial court improperly denied his request to proceed pro se. On May 1, 2008, we ordered proceedings stayed pending our Supreme Court's decision in *State v. Strode*, no. 80849-0, addressing the public trial issue. On October 8, 2009, our Supreme Court

issued its decision in *State v. Strode*, 167 Wash.2d 222, 217 P.3d 310 (2009), along with a companion case, *State v. Momah*, 167 Wash.2d 140, 217 P.3d 321 (2009).³ We lifted the stay on November 3, 2009, and ordered the parties to provide supplemental briefing on the impact of *Strode* and *Momah* on this case. The parties have provided that briefing and we now consider Paumier's appeal.

Discussion

Public Trial Right

2 ¶ 8 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.

3 4 5 6 *678 ¶ 9 The state and federal constitutions guarantee the right to a public trial. Article I, section 22 of the Washington Constitution provides: "In criminal prosecutions the accused shall have the right ... to have a speedy public trial." The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Moreover, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision secures the public's right to open and accessible proceedings. *State v. Easterling*, 157 Wash.2d 167, 174, 137 P.3d 825 (2006). These provisions assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny. *State v. Brightman*, 155 Wash.2d 506, 514, 122 P.3d 150 (2005); *Dreiling v. Jain*, 151 Wash.2d 900, 903-04, 93 P.3d 861 (2004). While the public trial right is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. *Easterling*, 157 Wash.2d at 174-75, 137 P.3d 825; *Brightman*, 155 Wash.2d at 509, 122 P.3d 150; *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 804-05, 100 P.3d 291 (2004); *State v. Bone-Club*, 128 Wash.2d 254, 258-59, 906 P.2d 325 (1995).

7 ¶ 10 The guaranty of open criminal proceedings extends to voir dire. *Orange*, 152 Wash.2d at 804, 100 P.3d 291. In *Bone-Club* and *Orange*, our Supreme Court set out the standards for closing all or any portion of a criminal trial. *Bone-Club*, 128 Wash.2d at 258-59, 906 P.2d 325; *Orange*, 152 Wash.2d at 805, 100 P.3d 291. *Bone-Club* adopted a five-part analysis designed to protect a criminal defendant's right to a public trial.⁴ *Bone-Club*, 128 Wash.2d at 258-60, 906 P.2d 325; see also *679 *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36-39, 640 P.2d

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716 (1982) (setting forth five-part analysis under article I, section 10). Relying on these cases, Division Three held in **216 *State v. Duckett*, 141 Wash.App. 797, 173 P.3d 948 (2007), that the trial court must engage in the five-part *Bone-Club* analysis before conducting all or a portion of voir dire outside of the public forum of the courtroom. *Duckett*, 141 Wash.App. at 802-03, 173 P.3d 948. In *Duckett*, as here, the trial court had conducted a portion of voir dire in chambers without engaging in the *Bone-Club* analysis. The *Duckett* court held that the failure to address the *Bone-Club* analysis and enter findings and conclusions on each factor required reversal and a new trial. *Duckett*, 141 Wash.App. at 803, 805, 809, 173 P.3d 948; see also *State v. Frawley*, 140 Wash.App. 713, 167 P.3d 593 (2007).

¶ 11 Noting “the court’s independent obligation to safeguard the open administration of justice,” *Duckett* held that “[a]ny closure of a public judicial proceeding required the trial court to engage in the *Bone-Club* analysis.” *Duckett*, 141 Wash.App. at 804, 807, 173 P.3d 948. Here, as in *Duckett*, “only a limited portion of voir dire was held outside the courtroom” but that “does not excuse the failure to engage in a *Bone-Club* analysis.” *Duckett*, 141 Wash.App. at 808, 173 P.3d 948. Here, as in *Duckett*, the trial court violated the defendant’s public trial right by conducting a portion of voir dire in chambers without first weighing the necessary factors. “Prejudice is presumed, and the remedy is a new trial.” *Duckett*, 141 Wash.App. at 809, 173 P.3d 948. *Duckett* was an accurate articulation of the law in Washington prior to our Supreme Court’s decision in *Momah*.

¶ 12 As noted, before *Momah*’s publication, Washington case law indicated that courtroom closure implicated considerations *680 in addition to the rights of the defendant, that courtroom closure is a circumstances where the burden is placed on the trial court, and that the court must show why closure is necessary. Before *Momah*, our Supreme Court’s precedent made the *Bone-Club* guidelines mandatory and directed that the trial court’s failure to employ those requirements was reversible error. Prejudice was presumed and remand for a new trial was required. *Orange*, 152 Wash.2d at 814, 821-22, 100 P.3d 291.

¶ 13 In *Momah*, our Supreme Court seemed to back away from its earlier articulation in *Orange* that application of the *Bone-Club* guidelines is required and that the failure to so employ them when closing the courtroom is reversible error. Instead, *Momah* seemed to downgrade the *Bone-Club* guidelines by referring to them as “the better practice” rather than as requirements. *Momah*, 167 Wash.2d at 152 n. 2, 217 P.3d 321. *Momah* noted that all courtroom closures do not trigger a conclusive presumption of prejudice warranting automatic reversal of convictions and a new trial and holds that “[i]n each case the remedy must be appropriate to the violation.” *Momah*,

167 Wash.2d at 156, 217 P.3d 321.

¶ 14 *Momah* purportedly applied the United States Supreme Court’s decision in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), reading that case to require “a showing that the defendant’s case was actually rendered unfair by the closure.” *Momah*, 167 Wash.2d at 150, 217 P.3d 321. *Momah* pointedly noted that the remedy employed in *Waller* was remand for a new suppression hearing, not a new trial. *Momah*, 167 Wash.2d at 150, 217 P.3d 321. *Momah* noted that had the court in *Waller* automatically granted the defendant a new trial without requiring a new suppression hearing, the result would have been an improper windfall for the defendant and such result would not be in the public interest. *Momah*, 167 Wash.2d at 150, 217 P.3d 321.

¶ 15 *Momah*’s treatment of the public’s interest in open court proceedings is also notable. Prior to *Momah*, this was a separate and equally compelling basis for requiring the trial court to comply with the *Bone-Club* guidelines before *681 closing the courtroom. “[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts.... When the courtroom doors are locked without a proper prior analysis under *Orange* and ... [*Bone-Club*], the people deserve a new trial.” *Easterling*, 157 Wash.2d at 187, 137 P.3d 825 (Chambers, J., concurring). But while *Momah* acknowledged the public’s constitutional interest in open proceedings, see **217 *Momah*, 167 Wash.2d at 147-49, 217 P.3d 321 (discussing Wash. Const. art. I, § 10), it opined that the requirement of a public trial “is primarily for the benefit of the accused.” *Momah*, 167 Wash.2d at 148, 217 P.3d 321. *Momah* seems to conflate the public’s and the defendant’s interests in an open proceeding and subsume the public’s interest under the defendant’s interest, at least in the particular circumstances present in *Momah*. *Momah*, 167 Wash.2d at 147-49, 217 P.3d 321.

¶ 16 Moreover, *Momah* curiously cites the five *Bone-Club* guidelines (complete with each guideline’s mandatory “must” language) and acknowledges that *Bone-Club* provides the appropriate criteria for determining if closure is appropriate, but it does not address the failure to comply with the obligatory language in those guidelines. *Momah*, 167 Wash.2d at 148-49, 217 P.3d 321. It merely notes that if the reviewing court determines that the defendant’s right to a public trial was violated it should then “devise[] a remedy appropriate to that violation.” *Momah*, 167 Wash.2d at 149, 217 P.3d 321.

¶ 17 Despite *Momah*’s seeming retreat from prior Washington precedent, *Momah* nevertheless acknowledged that “structural” error “warrants automatic reversal” and remand for a new trial. *Momah*, 167 Wash.2d at 149, 217 P.3d 321. *Momah* identifies

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“structural error” as one that necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Momah*, 167 Wash.2d at 149-50, 155-56, 217 P.3d 321. *Momah* acknowledged that the court closures in *Bone-Club*, *Easterling*, and *Orange* were such “structural” errors. *Momah*, 167 Wash.2d at 150-51, 217 P.3d 321. Key to *Momah*’s determination on that issue as to *Bone-Club* and *Easterling*, was the defendant’s exclusion from the *682 proceedings in those cases. *Momah*, 167 Wash.2d at 150-51, 155, 217 P.3d 321. In *Orange*, the defendant’s family was excluded. See *Momah*, 167 Wash.2d at 150-51, 217 P.3d 321 (discussing *Orange*).⁵ The *Momah* court distinguished the circumstance before it noting that the defendant affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in the closed proceeding, and benefitted from such closure. *Momah*, 167 Wash.2d at 151-52, 217 P.3d 321. Moreover, the purpose of the closure was to safeguard the defendant’s right to a fair trial by an impartial jury rather than to protect any other interests. *Momah*, 167 Wash.2d at 151-52, 217 P.3d 321. Accordingly, because the defendant in *Momah* affirmatively accepted and actively participated in the closed hearing, our Supreme Court held that the courtroom closure in that circumstance was “not a structural error” warranting reversal. *Momah*, 167 Wash.2d at 156, 217 P.3d 321.

¶ 18 In *Strode*, a plurality decision released the same day as *Momah*, the lead opinion reiterated and applied what was the established law in Washington prior to *Momah*—that it is the trial court’s independent obligation to perform the *Bone-Club* analysis prior to courtroom closure to protect both the defendant’s public trial right and the public’s right to open proceedings. *Strode*, 167 Wash.2d 222, 227-30, 217 P.3d 310. Where a *Bone-Club* analysis is not conducted prior to courtroom closure, prejudice is presumed (i.e. structural error which cannot be considered harmless) and automatic reversal is mandatory. *Strode*, 167 Wash.2d at 231, 217 P.3d 310. Only four justices agreed on all these points. Two more justices concurred in the result, agreeing that in the case under consideration the trial court was required to expressly engage in a *Bone-Club* analysis on the record and its failure to do so required automatic reversal and remand. The concurrence disagreed with the lead opinion to the extent it appeared to conflate the defendant’s public trial right with *683 the interests of the media and the public in open proceedings. “A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived.” **218 *Strode*, 167 Wash.2d at 236, 217 P.3d 310 (Fairhurst, J., concurring in result only).

¶ 19 Accordingly, despite *Momah*, it appears that six justices agree that a *Bone-Club* analysis (or some

equivalent) is required prior to closing the courtroom. What was not clear after *Momah* and *Strode* is what the appropriate remedy should be when *Bone-Club* guidelines are not employed prior to closure. Apparently, the reviewing court is to look to the record to see if the trial court employed some equivalent of *Bone-Club* and then fashion a remedy appropriate to the violation if the trial court failed to engage in an adequate inquiry. As noted, the remedy deemed appropriate in *Momah* (a new hearing) reflected the circumstances of that case; that is, defendant’s affirmative acceptance and active participation in the closed proceedings. The appropriate remedy in *Strode* was automatic reversal (six justices agreed) even though the defendant participated in the closed hearing. This was so because no *Bone-Club* analysis (lead opinion) or its equivalent (concurrence) had occurred.⁶

¶ 20 Three months after *Momah* and *Strode*, the United States Supreme Court decided *Presley v. Georgia*, --- U.S. ---, 130 S.Ct. 721, ---L.Ed.3d --- (2010), a per curiam opinion holding that under the First and Sixth Amendments, voir dire of prospective jurors *must* be open to the public. *Presley*, 130 S.Ct. at 723-24. This requirement is “binding on the States.” *Presley*, 130 S.Ct. at 723. The Court explained that while the accused has a right to insist that the voir dire of the jurors be public, there are exceptions to *684 this general rule. The right to an open trial “may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information.” *Presley*, 130 S.Ct. at 724 (quoting *Waller*, 467 U.S. at 45, 104 S.Ct. 2210). “Such circumstances will be rare, however, and the balance of interests must be struck with special care.” *Presley*, 130 S.Ct. at 724 (quoting *Waller*, 467 U.S. at 45, 104 S.Ct. 2210). The *Presley* Court stated that *Waller* provided the appropriate standards for courts to apply before excluding the public from any stage of a criminal trial.⁷ *Presley*, 130 S.Ct. at 724.

¶ 21 Noting that “[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials,” *Presley*, 130 S.Ct. at 725, the Court reiterated that “ [a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire.” *Presley*, 130 S.Ct. at 724 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 511, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*)). Moreover “trial courts are required to consider alternatives to closure even when they are not offered by the parties,” this is because “[t]he public has a right to be present whether or not any party has asserted the right.” *Presley*, 130 S.Ct. at 724-25.

8 ¶ 22 Additionally, the trial court must make appropriate findings supporting its decision to close the proceedings.

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*. But in those cases, the particular interest, and threat to that interest, must “be articulated along with findings specific *685 enough that a reviewing court can determine whether the closure order was properly entered.”

Presley, 130 S.Ct. at 725 (quoting *Press-Enterprise I*, 464 U.S. at 510, 104 S.Ct. 819). **219 The Court held that “even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure.” *Presley*, 130 S.Ct. at 725. Thus, where the trial court fails to sua sponte consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant’s conviction. *Presley*, 130 S.Ct. at 725.

¶ 23 Thus *Presley*, applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including *voir dire*. Here, the trial court closed a portion of *voir dire* by interviewing certain jurors in chambers. By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier’s and the public’s right to an open proceeding. *Presley* requires reversal of Paumier’s burglary conviction, and we so hold.

¶ 24 In his supplemental briefing, Paumier argues that this case is factually more like *Strode* than it is like *Momah*. That is so, but as we have explained *Presley* has eclipsed *Momah* and *Strode* and controls the outcome of Paumier’s case.

9 ¶ 25 The State argues in its supplemental briefing that applying *Momah* and *Strode* would violate a juror’s right to keep his or her medical conditions and treatment private under the federal Health Insurance Portability and Accountability Act (HIPAA). Again, *Presley* resolves the matter. As discussed above, *Presley* does not require all proceedings to be open in all circumstances. *Presley* requires a trial court to consider reasonable alternatives to closure and to make appropriate findings explaining why closure is necessary under the *686 particular circumstances of the case *before* closing the proceeding. Accordingly, a proceeding may be closed under *Presley*, when these requirements are met. *Presley*, 130 S.Ct. at 725.

¶ 26 In sum, for the reasons discussed, we reverse Paumier’s convictions for residential burglary and third degree theft.

Right to Self-Representation

10 ¶ 27 Paumier also asserts that the trial court violated his constitutional right to represent himself by summarily denying his request to so proceed. We agree.

11 12 13 14 ¶ 28 A criminal defendant has an independent constitutional right to represent himself or herself without the assistance of legal counsel. *State v. Breedlove*, 79 Wash.App. 101, 106, 900 P.2d 586 (1995). The exercise of this right must be requested by the defendant. The request must be knowingly and intelligently made, unequivocal, and “timely, i.e., it may not be used to delay one’s trial or obstruct justice.” *Breedlove*, 79 Wash.App. at 106, 900 P.2d 586. We review the trial court’s disposition of a request to proceed pro se for abuse of discretion, mindful of the guidelines enunciated in *State v. Fritz*, 21 Wash.App. 354, 361, 585 P.2d 173 (1978), *review denied*, 92 Wash.2d 1002 (1979).

15 16 17 18 ¶ 29 Under *Fritz*, the trial court’s discretion lies along a continuum that corresponds with the timeliness of the request to proceed pro se. Accordingly, where a defendant makes a proper demand for self-representation well before the trial, the right of self-representation exists as a matter of law. Where the demand is made on the eve of trial, the existence of the right depends on the particular facts of the case with a measure of discretion reposing in the trial court. Finally, where the request is made during the trial, the right to proceed pro se rests largely in the informed discretion of the trial court. *Fritz*, 21 Wash.App. at 361, 585 P.2d 173; *see also Breedlove*, 79 Wash.App. at 106-07, 900 P.2d 586. Thus, if the request is made just before or during trial, the trial court “must exercise its *687 discretion by balancing the important interests implicated by the decision,” namely, the defendant’s interest in self-representation and society’s interest in the orderly administration of justice. *Breedlove*, 79 Wash.App. at 107, 900 P.2d 586.

19 ¶ 30 Further, *Breedlove* held that “the timeliness requirement should not operate as a bar to a defendant’s right to defend pro se.” *Breedlove*, 79 Wash.App. at 109, 900 P.2d 586. The *Breedlove* court held that the **220 trial court abused its discretion in denying the defendant’s request to represent himself because there was no evidence that his motion was designed to delay his trial or that granting it would have impaired the orderly administration of justice. *Breedlove*, 79 Wash.App. at 110, 900 P.2d 586. “The erroneous denial of a defendant’s motion to proceed pro se requires reversal without any showing of prejudice.” *Breedlove*, 79 Wash.App. at 110, 900 P.2d 586; *see also State v. Stenson*, 132 Wash.2d 668, 737, 940 P.2d 1239 (1997) (unjustified denial of defendant’s right to represent himself requires reversal),

¶ 31 Here, Paumier's request to represent himself was made after the jury was selected but before it was sworn. Paumier expressed his dissatisfaction with his attorney and simply said he would rather present his case himself. He did not ask for a continuance.⁸ The trial court denied the request on the sole basis that it was untimely.

¶ 32 As in *Breedlove*, Paumier's request to represent himself was clear, and there is no evidence that the trial would have been delayed or that granting his request would impair the orderly administration of justice. Accordingly, we hold that the trial court abused its discretion in denying Paumier's request to represent himself.

*688 ¶ 33 Because the unjustified denial of this right requires reversal, we reverse Paumier's convictions and remand for further proceedings consistent with this opinion.⁹

I concur: HOUGHTON, P.J.

QUINN-BRINTNALL, J. (dissenting).

¶ 34 Because Rene P. Paumier failed to timely object and preserve the "closed courtroom" issue for our review, I disagree with the majority's decision to address the merits of the alleged public trial right violation and respectfully dissent. I also disagree with the majority's reliance on the United States Supreme Court opinion in *Presley v. Georgia*, --- U.S. ---, 130 S.Ct. 721, --- L.Ed.3d --- (2010), to reverse Paumier's convictions.

¶ 35 In *Presley*, without applying the standards set out in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), the trial court, over the defendant's objections, excluded *Presley's* uncle (and apparently any other member of the public) from attending the jury selection proceedings, stating that there was insufficient room in the courtroom to accommodate prospective jurors and one observer. 130 S.Ct. at 722. *Presley's* counsel expressly objected to the exclusion of his client's uncle, who might well have been of assistance to the defense in selecting a jury, as well as other members of the public, from the jury selection process. *Presley*, 130 S.Ct. at 722.

¶ 36 Thus, in *Presley*, our nation's highest Court had before it a trial court that over the clear objection of the defendant and the observer-closed the courtroom without applying standards necessary to insure protection of the defendant's Sixth and the public's First Amendment rights to a public trial. In contrast, Paumier did not assert,

and in my opinion waived, his Sixth Amendment right to a public *689 trial by failing to object to the trial court's decision to allow jurors to answer questions they considered embarrassing in chambers on the record with all parties present.

¶ 37 Although *Presley* holds that the defendant's Sixth Amendment right to a public trial extends to the jury selection process,¹⁰ it does not hold that this error cannot be waived or that the public trial right under **221 the federal constitution need not be preserved for review. See *Reid v. Georgia*, 286 Ga. 484, 690 S.E.2d 177, 181 (2010) (distinguishing *Presley* on the basis that Reid did not object to the trial court's temporary courtroom closure and reasoning, "The improper closing of a courtroom is structural error requiring reversal only if the defendant properly objected at trial and raised the issue on direct appeal."); but see *State v. Strode*, 167 Wash.2d 222, 229, 217 P.3d 310 (2009) (" 'defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver [of defendant's public trial right]' " (alterations in original) (quoting *State v. Brightman*, 155 Wash.2d 506, 517, 122 P.3d 150 (2005))). Under the invited error doctrine, a reviewing court should decline to address the merits of a claimed error if the appealing party induced the court to commit the error later asserted to be error. *State v. Henderson*, 114 Wash.2d 867, 870, 792 P.2d 514 (1990). The invited error doctrine applies even to manifest constitutional errors. *State v. McLoyd*, 87 Wash.App. 66, 70, 939 P.2d 1255 (1997), *aff'd by State v. Studd*, 137 Wash.2d 533, 973 P.2d 1049 (1999).

¶ 38 Here, although Paumier did not actively seek to have jurors questioned about sensitive matters in chambers, the record shows that he participated in the process and accepted the benefit of obtaining more candid answers to embarrassing questions. Accordingly, I would hold that Paumier has failed to preserve any objection to the trial court's in-chambers questioning of potential jurors for appellate *690 review. I am aware of contrary authority but cannot agree that it rests on sound constitutional basis.

¶ 39 In addition, Paumier lacks standing to assert the public's First Amendment right to a public trial. The standing doctrine generally prohibits a party from suing to vindicate another's rights. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). Neither *Presley* nor any other case expressly holds that a criminal defendant may assert the public's rights to a public trial, although it has ruled on the public's right through a criminal defendant's appeal. See, e.g., *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995).

¶ 40 I wholeheartedly agree with the statement in the plurality opinion in *Strode* that a defendant "cannot waive the public's right to open proceedings." 167 Wash.2d at

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229, 217 P.3d 310. But it does not follow that he has standing to assert that right to overturn a verdict entered by an impartial group, the public's representatives on the jury. Importantly, this is not a situation in which the defendant's and the public's right to a public trial are aligned to the degree that the defendant can fairly represent the public's interest in exercising its public trial rights or impartially decide whether to press to extend precious taxpayer resources on a new trial. In the context of jury selection, those rights may clearly be in conflict. As demonstrated here, Paumier had an interest in allowing jurors to be questioned privately in order to encourage candid answers to his questions. The public, in contrast, has an interest in knowing that the jury selection process was fair and to discover how, by whom, and, in challenges for cause, why potential jurors were challenged or removed from jury service. I continue to believe that the defendant's and the public's interests in a public trial are not sufficiently aligned to allow a defendant who does not object to a juror's request to be questioned on the record in chambers to remain silent and then allege a violation of the public's right to a public trial for the first time on appeal.

*691 ¶ 41 I also cannot agree that the record before us supports a determination that the trial court abused its discretion by denying Paumier's untimely request that he represent himself. Unlike the trial court's file, the record

before us in this appeal does not contain any indication of Paumier's level of function or a history of his relationships with counsel. I am loathe to baldly rule that a trial judge has abused her discretion on such an inadequate record.

¶ 42 In addition, Paumier chose to appeal the judgment in this case. Assuming the majority's opinion reversing that judgment stands, the correct remedy is a remand for a new trial. *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 814, 100 P.3d 291 (2004). As **222 always, following reversal of a defendant's conviction, the State may decide not to retry the defendant or the defendant and the State may reach an agreement. That does not, in my opinion, alter the proper statement of the remedy. The evidence presented at trial was sufficient to support the decision of the fair and impartial jury that rendered it and double jeopardy does not bar retrial. Accordingly, even under the majority analysis, our authority is limited to reversing the judgment and remanding to the superior court for a new trial or other proceeding consistent with the majority opinion.

Parallel Citations

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Footnotes

- 1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
- 2 Rather than a court reporter, the court used a digital recording system with cordless microphones to make the record.
- 3 While *Strode* was pending, the Department of Corrections released Paumier from custody in July of 2009. His appeal is not moot, however, because Paumier asks us in part to reverse his conviction.
- 4 The *Bone-Club* analysis provides:
 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 Wash.2d at 258-59, 906 P.2d 325 (quoting *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wash.2d 205, 210-11, 848 P.2d 1258 (1993)).
- 5 Notably, in *Waller*, upon which *Momah* primarily relies, the defendants were not excluded from the pre-trial suppression hearing that was closed to the public. See *Waller*, 467 U.S. at 42, 104 S.Ct. 2210.
- 6 After *Momah* and *Strode*, it seemed that we would have to await another case for our Supreme Court to clarify the rules and procedures for courtroom closures. That is, whether the five-part *Bone-Club* analysis was mandatory, and what repercussions would follow courtroom closure without such analysis, were issues that seemed to be unsettled after *Momah* and *Strode*.

7 The *Waller* standards require:

“[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.”

Presley, 130 S.Ct. at 724 (quoting *Waller*, 467 U.S. at 48, 104 S.Ct. 2210).

8 Moreover, Paumier’s criminal history, which includes multiple prior theft convictions and a prior burglary conviction, indicates that he was familiar with the charges and perhaps the criminal court proceeding that he faced. Also, defense counsel told the trial court that Paumier “has had copies of discovery throughout the proceedings.” 1 RP at 9.

9 We would normally order a new trial, but because Paumier is no longer in custody we leave to the parties the pursuit of further proceedings as they deem appropriate.

10 The United States Supreme Court has similarly held that the public’s First Amendment right to a public trial extends to the jury selection process. *Press-Enter. Co. v. Super. Ct. of Cal., Riverside County*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

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