

No. 92698-1

No. 35195-1

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

IN RE PERSONAL RESTRAINT PETITION OF
MICHAEL LOUIS RHEM,
Petitioner.

FILED
COURT OF APPEALS
DIVISION II
09 NOV 12 AM 11:09
STATE OF WASHINGTON
BY _____
DEPUTY

**SUPPLEMENTAL BRIEF OF PETITIONER
RE: CLOSED COURTROOM**

Jeffrey E. Ellis #17139
Attorney for Mr. Rhem

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

I. INTRODUCTION

Recently, the Washington Supreme Court decided two closed courtroom cases.¹ The cases were argued on the same day; decided on the same day; and involved similar facts. However, the court reached opposite outcomes (affirming in *Momah* and reversing in *Strode*). Thus, it is important to understand what made the cases different—legally speaking.

The answer (although admittedly not easily ascertained from a cursory reading of the two opinions) is simple: in *Momah*, the Court conducted the virtual equivalent of a *Bone-Club* hearing during which time the defense not only agreed to the closure, but sought to broaden its scope. In *Strode*, no closure hearing of any sort was conducted.

This case is much more like *Strode*, than *Momah*. Moreover, it is exactly like *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004), which remains good law.

Because the trial court did not conduct a *Bone-Club* hearing or anything resembling it prior to either of the two times the court was closed. Thus, reversal is required.

¹ The two cases are: *State v. Strode*, __ Wn.2d __, 217 P.3d 310 (2009), and *State v. Momah*, __ Wn.2d __, 217 P.3d 321 (2009). Although this Court dissolved the stay previously entered in this case shortly after the opinions were announced, as of this writing neither decision is final. In both cases, motions to reconsider have been filed.

II. FACTS

The facts are simple. According to the declaration supporting the PRP, all members of the public were excused at the start of jury selection. As a result, several family members and friends of Mr. Rhem were forced to leave the court. The court was closed until the completion of jury selection. No hearing preceded the closure of the courtroom.

According to the clerk's minutes, the closure was even longer—including several pre-trial hearings. *See Clerk's Minutes* for Jan. 13, 2009.

III. ARGUMENT

A. Basic Principles Found in the Closed Courtroom Cases

Rhem starts with a brief overview of the settled law—the common legal principles from both cases.

The right to an open and public trial includes jury selection. Strode, 217 P.3d at 314; Momah, 217 P.3d at 327.

A Bone-Club hearing must be conducted before the courtroom is closed. It cannot be conducted for the first time on appeal. *Strode, 217 P.3d at 314-15; Momah, 217 P.3d at 329.* In *Strode*, the Supreme Court held “the absence of any record showing that the trial court gave any consideration to the *Bone-Club* closure test prevents us from determining whether conducting part of the trial in chambers was warranted.” 217 P.3d at 315.

No objection is necessary to preserve a closed courtroom claim.

Instead, the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. *Strode*, 217 P.3d at 315;

Likewise, a defendant's failure to lodge a contemporaneous objection at trial does not constitute a waiver. *Id.*

A de minimis exception does not exist. Interviewing only a small number of jurors in a closed courtroom is a violation of the constitutional right. For example, in *Strode* the court rejected the State's argument that the closure of a trial for only a portion of jury selection is too trivial to implicate the constitutional rights at issue here. 217 P.3d at 316 (In *Strode*, at least 11 prospective jurors were examined in chambers. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. "This closure cannot be said to be brief or inadvertent.").

Where the trial court closes a court without a Bone-Club hearing, reversal is required. Denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed. *Strode*, 217 P.3d at 316; *Momah*, 217 P.3d at 326-27.

B. *Strode* and *Momah* Reaffirm that Closure Without a Bone-Club Hearing Constitutes a Structural Error Mandating Reversal

Although the Supreme Court could have made the distinction much more clear, the legal line that separates *Momah* from *Strode* is simple. In

Momah, the Court conducted a *Bone-Club* hearing or at least its equivalent. In *Strode*, no *Bone-Club* hearing took place.

When a *Bone-Club* hearing takes place in the trial court, the issue on appeal is whether the court abused its discretion in weighing the factors warranting closure. On the other hand, when no hearing takes place, the absence of any record showing that the trial court gave any consideration to the *Bone-Club* closure test prevents a reviewing court from determining whether conducting part of the trial in chambers was warranted.

Justice Fairhurst's (the swing vote) concurring opinion in *Strode* explains why *Strode* was reversed and *Momah* affirmed: the conduct of a hearing in one case, but not the other.

The *Strode* concurrence notes that "(t)he specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court." "Even if the requirements were not sufficiently satisfied on the record in *Momah*, the court could properly conclude that the defendant waived his public trial right." *Strode*, 217 P.3d at 318 (Fairhurst, J. concurring). While the *Bone-Club* factors could have been more explicitly detailed in the record, the Court concluded:

The purpose of the *Bone-Club* inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right. Under the circumstances in *Momah's* case, it is apparent that this purpose was served, and the defendant's right to a public trial was carefully balanced with another right of great magnitude-the right to an impartial jury.

Id.

The concurring opinion then recited the facts which upheld the trial court's decision to close the courtroom.

Prior to *voir dire*, the defendant was expressly advised that *all proceedings* are presumptively public. Nonetheless, the defense affirmatively sought individual questioning of the jurors in private, sought to expand the number of jurors subject to such questioning, and actively engaged in discussions about how to accomplish this. At no time did the defendant or his counsel indicate in any way that any of the proceedings held in a closed room that was not a courtroom violated his public trial right. The record shows the defendant intentionally relinquished a known right.

Id. (emphasis in original).

In contrast, “(u)nlike the situation presented in *Momah*, here [in *Strode*] the record does not show that the court considered the right to a public trial in light of competing interests.” And, “(t)he record does not show a knowing waiver of the right to a public trial.” *Strode*, at 318.

The opinion in *Momah* reinforces this distinction.

The *Momah* court noted that previous reversals occurred where “(t)he court closed the courtroom without seeking objection, input, or assent from the defendant; and in the majority of cases, the record lacked any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom.” 217 P.3d at 327. In contrast, “*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.” *Id.* In short, a closure hearing took place. “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.” During the hearing, (d)efense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning.” And, the trial court’s decision to close the courtroom was supported by the facts: “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.” *Id.* at 327.

While an adequate hearing took place in *Momah* prior to the closure of the courtroom, the Court reminded that “(i)n order to facilitate appellate review, the better practice is to apply the five guidelines and enter specific findings before closing the courtroom.” *Id.* at 327, n.2.

Although the dissent took a different view of the facts, it agreed that the outcome turned on whether an adequate hearing took place. “Except for Momah's tacit participation in the closed-door questioning, there is no support in the record for any of these conclusions.” *Id.* at 329 (Alexander, C.J., dissenting). “Where, as here, a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate.” *Id.*

Thus, *Momah* stands for the proposition that while closure of the courtroom after a hearing implicates a constitutional right, it does not mandate reversal where the court weighed the relevant concerns on the

record before closure. “The court, in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of *voir dire* to safeguard the accused’s right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial.” *Id.* at 324.

In contrast, the trial court in *Strode* did not conduct a constitutionally meaningful pre-closure hearing. Thus, reversal was required—there was “no indication in the record that the trial judge engaged in the required *Bone-Club* analysis or made the required formal findings of fact and conclusions of law relevant to the *Bone-Club* criteria.” *Strode*, 217 P.3d at 315.

It was not enough in *Strode* for the State to suggest to the appellate court *post-hoc* reasons supporting closure, even if those reasons arguably benefit the defendant (or resemble the reasons specified by the trial court in *Momah*). The findings must be made by the trial court, prior to closure. In *Strode*, “(a)lthough the trial judge mentioned several times that juror interviews were being conducted in private either for ‘obvious’ reasons, to ensure confidentiality, or so that the inquiry would not be ‘broadcast’ in front of the whole jury panel, the record is devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right.” *Id.* at 315.

Put another way, where there is no *Bone-Club* hearing, “the merit of the closure is not the issue. Instead, we focus only on the procedure used by the trial court prior to closure.” *Id.* at 316, n.5.

Thus, the focus in this case must be on the procedure used by the trial court before it closed the courtroom.

C. This Case Is Similar to *Strode*; Dissimilar From *Momah*; and Nearly Identical to *Orange*.

Rhem has established that the courtroom was closed to spectators during jury selection. The State has not disputed the declarations of Rhem and his counsel, Mr. Stewart, with its own competent evidence.

Thus, Rhem has established that no *Bone-Club* hearing preceded closure. Applying the holdings of *Strode* and *Momah* to the facts in this case mandates reversal.

Trial counsel did not request to close the courtroom. However, there is admittedly no evidence that counsel objected. Nevertheless, the rule remains that a defendant does not invite error by failing to object.

Where there is no pre-closure hearing, neither the failure to object, nor participation in *voir dire* constitutes a waiver. In *Strode*, the State contended that because Strode and his attorney were present and participated during this individual questioning, Strode waived his right to argue that his right to a public trial had been violated. The Court rejected this argument. “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.* at 315. Instead, the “right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.” 217 P.3d at 318.

Thus, the issue can be reviewed in this petition.

Further, while both *Strode* and *Momah* hold that a violation of the right to an open and public trial constitutes a structural error where there is no *Bone-Club* hearing, Rhem was further prejudiced because his supporters who appeared for trial were forced to leave. *See Momah*, 217 P.3d at 329 (Penoyer, J. concurring) (“I concur because it is not argued that any person wishing to attend the proceedings was excluded. In sporting parlance, ‘No harm, no foul.’”).

However, this Court does not necessary need to distinguish *Momah* from *Strode* in order to grant relief to Rhem.

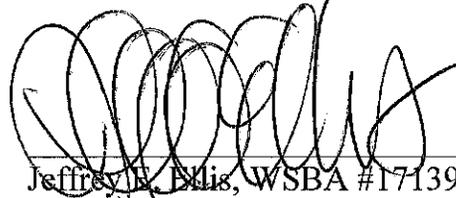
Because *Orange* was not overruled, it controls. *Orange* holds: “a trial court may not exclude the public or press from any stage of a criminal trial; in this case, neither the size of the courtroom nor a general concern for security provided an adequate basis for compromising the fundamental tenet ‘that an accused is *at the very least* entitled to have his friends,

relatives and counsel present, *no matter with what offense he may be charged.*” 152 Wn.2d at 800.

IV. CONCLUSION

Based on the above, this Court should either reverse and remand for a new trial or for an evidentiary hearing.

DATED this 17th day of November, 2009.



Jeffrey B. Ellis, WSBA #17139

Attorney for Mr. Rhem

Law Offices of Ellis, Holmes
& Witchley, PLLC

705 Second Avenue, Suite 401

Seattle, WA 98104

(206) 262-0300

(206) 262-0335 (fax)



99-1-04722-4 18379022 CME 01-31-03

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

vs.

RHEM, MICHAEL LOUIS

DEPT. 15
IN OPEN COURT

JAN 30 2003
Pierce County Clerk
By *[Signature]*
Deputy

Cause Number: 99-1-04722-4

MEMORANDUM OF JOURNAL ENTRY

Page 1 of 23

Judge: THOMAS J. FELNAGLE

Court Reporter: DIANE FARNING

Judicial Assistant: LINDA SHIPMAN

GREGORY L GREER

Prosecutor

MICHAEL A. STEWART

Defense Attorney

Proceeding Set: JURY TRIAL

Proceeding Date: 01/09/03 8:30

Proceeding Outcome: HELD

Resolution: Convict JV After Trial

<p>Clerk's Code: Proceeding Outcome code: JTRIAL Resolution Outcome code: CVJV</p>

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 99-1-04722-4
MEMORANDUM OF JOURNAL ENTRY

vs.

RHEM, MICHAEL LOUIS

Page: 2 of 23
Judge: THOMAS J. FELNAGLE

MINUTES OF PROCEEDING

Judicial Assistant: LINDA SHIPMAN
Start Date/Time: 01/09/03 10:39 AM

Court Reporter: DIANE FARNING

January 09, 2003 10:39 AM This cause comes on regularly for trial by jury. Plaintiff/State of Washington is represented by Gregory Greer; defendant Rhem (99-1-04722-4) is present (in custody) represented by Michael Stewart; co-defendant Wynn (99-1-04723-2) is present (in custody) and represented by E. Allen Walker. Scheduling issues addressed. 10:40 AM Comments by G. Greer. 10:43 AM Comments by E. A. Walker. 10:45 AM Court comments. 10:45 AM Comments by M. Stewart. 10:47 AM Responsive comments by G. Greer. 10:50 AM Comments by M. Stewart. 10:52 AM Court returns both cases to criminal presiding for re-assignment because of this department's time constraints. 10:54 AM Court at recess.

End Date/Time: 01/09/03 10:54 AMJudicial Assistant: GERI MARKHAM
Start Date/Time: 01/09/03 1:30 PM

Court Reporter: SHERI SCHELBERT

13:30 Court called to order

This matter before this court for trial; present Greg Greer for the State and defendant Kimothy Wynn with counsel E. Allen Walker; and Michael Rhem with counsel Michael Stewart; Motion for severance presented by Walker; Court denies severance (See journal entry notes under motion dated 1/9/03 at 1:30pm); 03:37 PM Walker would like Tuesday am off because of an arbitration; Court orders that Walker be present for trial on Tuesday am; 03:42 Court/counsel re: police reports for Stewart from State; 03:58 PM Greer re: motions; court/counsel colloquy; court grants motion in limine; 04:14 PM Greer motion re: other suspects' evidence (May 1 order); Stewart responds; 04:16 PM Court recessed until 2:00pm;

End Date/Time: 01/09/03 4:16 PM

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 99-1-04722-4
MEMORANDUM OF JOURNAL ENTRY

vs.

RHEM, MICHAEL LOUIS

Page: 3 of 23
Judge: THOMAS J. FELNAGLE

MINUTES OF PROCEEDING

Judicial Assistant: GERI MARKHAM
Start Date/Time: 01/10/03 2:28 PM

Court Reporter: Katie Eskew

January 10, 2003 02:28 PM

Court called to order; present Greg Greer for the State and defendant Rhem with Michael Stewart and Wynn with Allen Walker;
Greer re: Motion 404(b);

End Date/Time: 01/13/03 10:20 AM

Judicial Assistant: GERI MARKHAM
Start Date/Time: 01/13/03 10:20 AM

Court Reporter: SHERI SCHELBERT

January 13, 2003 10:20 AM

TRIAL

Court called to order; present Greg Greer for the State and defendants Michael Louis Rhem with Michael Stewart and Kimothy Maurice Wynn with E. Allen Walker; Court signs material witness orders for Kimberly Matthews and Michael Rollins; 10:22 AM Greer pre-trial motion re: no children under 18 years of age; Stewart argument; Walker argument; Court will let children stay in court while in trial; 10:23 AM Court advises that any visitors to remain in hall until room - for security reasons, fire, etc., courtroom is full; 10:24 AM Greer motion re: exclude any known gang members in court; Stewart argument; Walker argument; 10:36 AM **PEXHIBIT 1 (STIPULATION RE: DEFENDANT'S PRIOR CONVICTION - KIMOTHY WYNN)** marked; identified; offered; **PEXHIBIT 1 ADMITTED**; **PEXHIBIT 2 (REDACTED STATEMENT - KIMOTHY WYNN - REPORT 12/7/99)** marked; identified; offered; **PEXHIBIT 3 (REDACTED STATEMENT - MICHAEL RHEM - REPORT)** marked; identified; offered; January 13, 2003 10:42 AM Greer re: 404b motions; 11:15 AM former testimony of deceased grandmother admitted; 11:23 AM Court/counsel re: jury voir dire; preempts 7 State; 4 for each defendant; 11:33 AM Court recessed;

End Date/Time: 01/13/03 11:32 AM

JUDGE THOMAS J. FELNAGLE Year 2003

Page: _____

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 99-1-04722-4

MEMORANDUM OF JOURNAL ENTRY

vs.

Page: 4 of 23

RHEM, MICHAEL LOUIS

Judge: THOMAS J. FELNAGLE

MINUTES OF PROCEEDING

Judicial Assistant: GERI MARKHAM
 Start Date/Time: 01/13/03 11:51 AM

Court Reporter: SHERI SCHELBERT

January 13, 2003 11:51 AM 50 jurors seated; Court called to order; JA swears jurors for voir dire; Court introduction to jury panel; 12:00PM court recessed;

End Date/Time: 01/13/03 1:41 PM

Judicial Assistant: GERI MARKHAM
 Start Date/Time: 01/13/03 1:41 PM

Court Reporter: SHERI SCHELBERT

January 13, 2003 01:40 PM all parties and counsel present; court reconvened; court introduction of parties; Court general voir dire; Juror #8 excused for cause; 02:26 PM Juror #1 excused for cause; 02:28 PM Juror #7 excused for cause; 02:34 PM #12 excused for cause; #29 excused for cause; #42 excused for cause; #45 excused for cause; 02:37 PM Juror #20 excused for cause; Juror #16 excused for cause; Juror #31 excused for cause; Juror #33 excused for cause; 02:44 PM Greer 20 minute voir dire; 03:01 PM Court recessed for 15 minutes;

End Date/Time: 01/13/03 3:01 PM

Judicial Assistant: GERI MARKHAM
 Start Date/Time: 01/13/03 3:25 PM

Court Reporter: SHERI SCHELBERT

January 13, 2003 03:24 PM Court reconvened; Juror #28 excused for cause; Greer 30 minute voir dire; 03:49 PM Stewart 30 minute voir dire; 04:07 PM Court excuses jurors except Jurors 49 and 50; to assemble in jury administration at 9:30am until hear from court; Jurors 49 and 50 questioned in jury room; both jurors to remain on panel; 04:52 PM Court recessed until tomorrow at 9:30am;

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 99-1-04722-4
MEMORANDUM OF JOURNAL ENTRY

vs.

RHEM, MICHAEL LOUIS

Page: 5 of 23
Judge: THOMAS J. FELNAGLE

MINUTES OF PROCEEDING

End Date/Time: 01/13/03 4:51 PM

Judicial Assistant: GERI MARKHAM

Court Reporter: SHERI SCHELBERT

Start Date/Time: 01/14/03 9:49 AM

January 14, 2003 09:49 AM

All parties and counsel present; Court called to order; Greer re: motions; 9:50AM Court recessed; jury panel called to come up from Jury Administration; 10:04 AM Stewart 30 minute voir dire; 10:22 AM Walker 30 minute voir dire; 10:43 Court recessed for 5 minutes;

End Date/Time: 01/14/03 9:50 AM

Judicial Assistant: GERI MARKHAM

Court Reporter: SHERI SCHELBERT

Start Date/Time: 01/14/03 11:27 AM

January 14, 2003 10:50am Court reconvened; Walker continues with voir dire; 11:15am Greer 30 minute voir dire; 11:33 AM Stewart 30 minute voir dire; 11:55 AM Greer voir dire; Court recessed until 1:30pm;

End Date/Time: 01/14/03 11:55 AM

Judicial Assistant: GERI MARKHAM

Court Reporter: SHERI SCHELBERT

Start Date/Time: 01/14/03 1:41 PM

January 14, 2003 01:40 PM all parties present; court called to order; Greer re: Rollins and Mathews bench warrants; court quashes; Court signs Order Revoking Order for Bench Warrant;

End Date/Time: 01/14/03 1:48 PM

Judicial Assistant: GERI MARKHAM

Court Reporter: SHERI SCHELBERT

Start Date/Time: 01/14/03 1:57 PM

JUDGE THOMAS J. FELNAGLE Year 2003

Page: _____

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on November 17, 2009 I served the parties listed below with a copy of *Petitioner's Supplemental Brief RE: Closed Courtroom* as follows:

Kathleen Proctor
Deputy Prosecuting Attorney
930 Tacoma Ave. S Rm. 946
Tacoma, WA 98402-2171

Clerk of the Court
Division Two Court of Appeals
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

Michael Rhem
DOC NO. 723868
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

11-17-09, Seac WA
Date and Place

FILED
COURT OF APPEALS
DIVISION II
09 NOV 19 AM 11:09
STATE OF WASHINGTON
BY [Signature]
DEPUTY

[Signature]
Vance G. Bartley