COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

NO: 263541-III

STATE OF WASHINGTON

v.

JERRY ALLEN HERRON

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE DAVID FRAZIER

SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
TABLE OF CASES

WASHINGTON CASES Page

FEDERAL AND OTHER STATE CASES

UNITED STATES CONSTITUTION

WASHINGTON STATE CONSTITUTION

I. SUPPLEMENTAL ARGUMENT

A. UNDER *STRODE*[1] AND *BONE-CLUB*, MR. HERRON'S CONVICTION MUST BE REVERSED.

The public's right to a public trial was violated when the trial was closed and prospective jurors were interviewed in judge's chambers without any inquiry of the public whether there were any objections to the private interviews.

1. Factual Review

This matter went to trial on June 18, 2007. During *voir dire* the court decided to interview some prospective jurors in chambers regarding their answers to questions on a questionnaire. (RP Vol I 68.) The court asked for and received a waiver from Mr. Herron to his right to a public trial in order to conduct these interviews in private. However, no inquiry was made of the public at the trial regarding any objections to jurors being interviewed in private, and the court failed to review on the record all of the *Bone-Club*[2]

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[1] *State v. Strode*, 167 Wn.2d 222, 217 P.3d 222 (2009).

[2] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). To assure careful, case-by-case analysis of a closure motion, a trial court faced with the question of whether a portion of a trial should be closed must ensure that the following five criteria are satisfied:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

criteria to be sure they were met. *Id.*

On appeal, Mr. Herron contends the trial court violated his constitutional rights and committed reversible error by failing to consider on the record all of the *Bone-Club* criteria before closing the courtroom and conducting private voir dire in chambers, thereby precluding the public from observing proceedings. (RP Vol I 68.)

2. *State v. Strode* Supports Reversal of Herron's Conviction.

The State charged Strode with three sex offenses. In a confidential Questionnaire the trial court asked the prospective jurors whether they or anyone close to them had ever been the victim of or accused of a sex offense. The prospective jurors who answered "yes" were questioned in judge's chambers to determine whether they could , in spite of their experience or association, render a fair and impartial verdict. *Strode,* 167 Wn.2d at 224. Before excluding the public from this private questioning, the trial court failed to hold a *"Bone-Club* hearing." *Id.*

While privately questioning potential jurors, the trial court indicated variously "the questioning was being done in chambers for 'obvious' reasons, to ensure confidentiality, or so the inquiry would not be 'broadcast' in front of the whole jury panel." *Id.* The trial judge, prosecutor and defense counsel

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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. *State v. Bone-Club*, 128Wn.2d 254, 259-60, 906 P.2d 325 (1995).

questioned the prospective jurors, and challenges for cause were heard and ruled upon resulting in six of the eleven prospective jurors excused for cause. *Strode,* 167 Wn.2d at 224. A majority of the Washington Supreme Court reversed Strode's conviction because the trial court failed to weigh the competing interests as required by *Bone-Club*. *Strode,* 167 Wn.2d at 229, 231 (Alexander, C.J. lead opinion); (Fairhurst, J. concurring) 167 Wn.2d at 231-36.

The lead and concurring opinions differed on whether a defendant can waive his right to a public trial through affirmative conduct and also whether the defendant could assert the rights of the public or press under article I, section 10. *Compare Strode,* 167 Wn.2d at 229-30 (lead opinion stating Strode could not waive the public's right to open proceedings), and 167 Wn.2d at 236 (concurring opinion chastising lead opinion for "its conflation of the rights of the defendant, the media and the public.")

In this case, the defendant waived his own rights to a public trial and chose to have the prospective jurors interviewed in chambers rather than another courtroom away from the other prospective jurors. (RP Vol 1 108-9.) However, as clearly laid out in *Strode*, Mr. Herron does not have the ability to waive the public's right to a public trial. *Strode,* 167 Wn.2d at 229-30.

3. The Federal and State Constitutions Provide the Accused the Right to a Public Trial and Also Guarantee Public Access to Court Proceedings.

Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*. 457 U.S. 596, 605, 102 S. Ct 2613, 73 L Ed.2d 248 (1982); *Richmond Newspapers. Inc. v. Virginia*, 448

U.S. 555, 564-73, 100 S. Ct. 2814, 65 L. Ed.2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). "A trial is a public event. What transpires in the court room is public property." *State v. Coe*. 101 Wn.2d 364, 380, 679 P.2d 353 (1984), quoting *Craig v. Harney*, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed.2d 1546 (1947).

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." Article I, section 22 of the Washington Constitution also guarantees "[i]n criminal prosecutions, the accused shall have the right to ... a speedy public trial." The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." Wash. Const, art. I, section 10; see U.S. Const, amend. 1. This clear constitutional provision entitles the public and the press to openly administered justice. *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publications Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

Public access to the courts is further supported by article 1, section 5, which establishes the freedom of every person to speak and publish on any topic. *Kurtz*, 94 Wn.2d at 58. In the federal constitution, the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial. *Globe Newspaper*, 457 U.S. at 603-05; *Richmond Newspapers*, 448 U.S. at 580 (plurality).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128Wn.2d 254, 259, 906 P.2d 325 (1995). The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. *Id.,* quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community concern or outrage concerning violent crimes. *Press-Enterprise Co. v. Superior Court.* 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984) (*Press-Enterprise I*). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. *Press-Enterprise I*, 464 U.S. at 508. Openness thus "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 501. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court.

> We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice.

> Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The right to a public trial includes the right to have public access to pre-trial proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (public trial right includes pre-trial hearing regarding co-defendant's interest in pleading guilty); *In re Personal Restraint of Orange*, 152 Wn.2d 75, 812, 100 P.3d 291 (2004) (public trial right applies to jury voir dire); *Bone-Club*, 128 Wn.2d at 257 (public trial right at pre-trial suppression hearing).

4. Washington Courts Apply a Five-part Test When Addressing a Request for Full or Temporary Exclusion of the Public from a Trial.

In order to protect the accused's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order." *Easterling*, 157 Wn.2d at 175.

The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed2d 31 (1984), citing *Press-Enterprise I*, 464 U.S. at 510. Moreover, **the trial court must enter specific findings identifying**

the interest so that a reviewing court may determine if the closure was proper. *Id.*

A Washington court faced with a request for closure must perform a weighing test based upon the five criteria adopted in *Bone-Club* and *Ishikawa* (see note 2 above), which mirror the *Waller* decision. *Bone-Club*, 128 Wn.2d at 259-60. *Bone-Club*, 128 Wn.2d at 258-59, quoting *Eikenberry*, 121 Wn.2d at 210-11. *Accord, Dreiling v. Jain*, 151 Wn.2d 900, 913-15, 93 P.3d 861 (2004) (test applied to motion to seal information filed in support of civil motions); *Orange*, 152 Wn.2d at 806-07; *Ishikawa*, 97 Wn.2d at

5. The trial court did not apply the five-part *Bone-Club* test before closing questioning jurors in private.

The Court of Appeals reversed a first degree murder conviction because a trial court conducted part of jury voir dire in chambers. *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 713 (2007). There was no discussion of the reasons for conducting individual voir dire in a closed courtroom in that case. *Id.* at 718, 720. The trial court "did not go through the *Bone-Club* requirements on the record, nor did it enter specific findings justifying the closure." *Id.* 721.

The *Frawley* Court refused to determine on appeal whether the *Bone-Club* factors would have been met since the trial court had not done so. *Id.* The court ruled that it would be an inappropriate exercise of appellate review. *Id.* The Supreme Court also rejected requests to conduct the *Bone-Club* analysis for the first time on appeal in *Bone-Club* and *Brightman. Bone-Club*, 128 Wn.2d at 261; *State v. Brightman*, 155 Wn.2d 506, 518, 122

P.3d 150 (2005).

A similar error occurred in *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007). In this case involving multiple rape allegations, the court told prospective jurors that it would discuss privately issues regarding sexual abuse and media exposure. *Id.* at 801. Writing for the majority, then-Judge Deborah Stephens ruled that any time the trial court closes portions of the proceedings to the public, including jury selection, its failure to engage in the necessary analysis is an error that cannot be cured by an appellate court's post hoc justifications. *Id.* at 805.

> . . . the burden is on the trial court to affirmatively provide the defendant and members of the public an opportunity to object. *See Easterling*, 157 Wn.2d at 176 & n. 8. There is no meaningful opportunity to object "unless the court informs potential objectors of the nature of the asserted interests." *Bone-Club*, 128 Wn.2d at 261; *Ishikawa*, 97 Wn.2d at 39.

Duckett, 141 Wn. App. at 806 (emphasis added).

The *Duckett* Court also rejected the prosecution's efforts to distinguish a juror's request to impart private information from other court proceedings that are presumptively open to the public. As with all court rules, GR 31's provisions regarding jury privacy are subject to the constitutional requirements of open court proceedings. *Id.* at 808. A court's legitimate reasons for conducting a portion of jury void dire in closed proceedings must simply comply with the requirements of *Bone-Club*. *Id.*

In the case at bar, the court conducted a portion of the jury voir dire in the judge's chambers, outside of the public at the suggestion of the court. (RP Vol I 68, 103.) The defense did not seek these private conferences, nor

did the prosecution but both agreed to the procedure. (RP Vol I 69-70.)

Prior to privately questioning prospective jurors in chambers, no party sought private questioning of jurors. The court did not discuss whether there was a serious and imminent threat that required private questioning of the jurors. The court did not give anyone present an opportunity to object to the private questioning of individual jurors, as it is required to do by the second *Bone-Club* factor. *Easterling*, 157 Wn.2d at 176.

Contrary to the remaining *Bone-Club* factors, the court did not make any finding that the proposed closure was the least restrictive method available for protecting the threatened interests.[3] Having failed to identify the compelling interests at stake, the court did not weigh the public's right of access and importance of a public trial against the need for closure. Because there was no finding, the court violated the constitutional requirement of open court proceedings.

6. The Court Violated the Public's Right of Access.

The requirements for protecting the public's right to open courtrooms "mirrors" the requirements used in criminal cases. *Easterling,* 157 Wn.2d at 175. The court may not close the courtroom without "first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Id.* (citing *Bone-Club*, 128

[3] The court, however, did discuss with counsel and the Mr. Herron the alternative of moving voir dire to another courtroom so the rest of the jury venire would not be exposed to the statements and concerns of the jurors questioned about their answers on the questionnaire. (RP Vol I 69-70.)

Wn.2d at 258-59; and *Ishikawa*, 97 Wn.2d at 37); see *Easterling*, 157 Wn.2d at 174-75 (trial court must "*resist a closure motion except under the most unusual circumstance*." Emphasis in original).

A member of the public is not required to assert the public's right of access in order to preserve this issue for appeal. *Easterling,* 157 Wn.2d at 176 n.8. In *Easterling,* the Supreme Court reversed a criminal conviction due to the trial court's closure of the courtroom during a pre-trial hearing that solely involved the co-defendant, whose case had previously been severed from the defendant. *Id.* at 178, 180 n.11. The trial court in *Easterling* erred by not articulating the necessary grounds for closing the courtroom, even absent any objection to the courtroom closure. *Id.*

In *Easterling*, there was no objection to the courtroom closure yet the court's failure to articulate a sufficiently compelling reason for closing the hearing to the public violated both the public's and the defendant's rights to an open and public trial. *Id.* at 179.

> This decision to close a part of a criminal trial to the public runs afoul of the article I, section 10 guarantee of providing open access to criminal proceedings. It also runs contrary to this court's consistent position of strictly protecting the public's and the press's right to view the administration of justice. *Accord Eikenberry*, 121 Wn.2d 205; *Ishikawa*, 97 Wn.2d 30.

Easterling, 157 Wn.2d at 179.

As the *Easterling* Court ruled, the public has a right to access court proceedings unless there is a compelling need for closure. Generic and even reasonable concerns for juror privacy do not trump the constitutional right of public proceedings. *Frawley,* 140Wn.App. at 10.

7. Reversal is required.

The remedy for a violation of the public's right of access is remand for a new trial. *Easterling,* 157 Wn.2d at 179-80. In *Easterling.* the court rejected the possibility that a courtroom closure may be de minimis, even for a limited closure applicable to a limited hearing for a separately charged co-defendant. *Easterling,* 157 Wn.2d at 180 ("a majority of this court has never found a public trial right de minimis. Where a portion of the proceedings are closed to the public, the closure is not trivial or de minimis and requires reversal. *Easterling,* 157 Wn.2d at 174, 180 n. 12. Beyond that, "[t]he denial of the Constitutional right to a public trial is one of the limited of classes of fundamental rights not subject to harmless error analysis. *Id.* at 181. In *Frawley* and *Duckett* the remedy was reversal and a new trial. *Frawley,* 140 Wn. App. at 721, *Duckett,* 141 Wn. App. at 809.

The Court in *Momah* dealt with the trial court's failure to formally enter findings on the record, regarding the *Bone-Club* criteria, in a footnote stating merely "In order to facilitate appellate review, the better practice is to apply the five guidelines and enter specific findings before closing the courtroom." *State v. Momah,* 167 Wn.2d 140, 217 P.3d 321 (2009). The clear signal there is that no formal findings are required as long as it appears from the record all *Bone-Club* factors were considered or met.

In *Momah,* the court did not conduct a formal hearing or enter any specific findings regarding its "weighing" of the competing interests of juror privacy and the defendant's right to a public trial. In addition, the public's right to open court proceedings were not considered at all. The only arguable

consideration of the public's right was the concurring opinion of Justice Pro Tem's brief opinion that "it is not argued that any person wishing to attend the proceedings was excluded. In sporting parlance, 'No harm, no foul.'" *Momah*, 167 Wn.2d at 56. In fact, that comment points out the obvious problem with not requiring formal findings and the requirement that "anyone present when the closure motion is made must be given an opportunity to object to the closure." *Bone-Club*, 128 Wn.2d at 258-59 (criteria no. 2.) Insisting that no argument was made does not in any way show criteria no. 2 of the *Bone-Club* analysis was fulfilled. It does, however, tend to highlight that *Bone-Club* criteria no. 2 (i.e. the public's right to open proceedings) is conspicuously absent in the majority opinion.

Clearly stated in the concurring opinion in *Strode*, the majority in *Momah* denied defendant the standing to assert the public's right to open court proceedings. *Strode*, 67 Wn.2d at 236. The question that must be answered is, **"if not the defendant, then who**?" Certainly in the newspaper press cases cited above, the press asserted the public's right to open proceedings, and those decisions have shaped the common law to protect the public's right. Does that mean, however, in cases where there is no attention or involvement the public right cannot be asserted? Does that mean that if the public doesn't assert it's right it is waived?

If the press is not interested or involved, the public has no champion, no one with the inclination or resources to take a trial court to task if it arbitrarily closes a public hearing. In every case, but especially those cases, the defendant must be able to assert the public's right to open court

proceedings.

In Mr. Herron's case, the court failed to formally address the *Bone-Club* factors, and specifically, nowhere in the record does the court inquire of the public whether anyone present in the courtroom objects to the private voir dire of prospective jurors in judge's chambers. Clearly, some of the *Bone-Club* factors were considered on the record, but the public's right was not protected. This is a structural defect that commands reversal and remand for a new trial. *Easterling*157 Wn.2d at 174, 180 n. 12; *Duckett*, 141 Wn. App. at 806.

II. CONCLUSION

The trial court vted the public's right to open court proceedings by closing the trial and stioning prospective jurors in chambers without conducting the prop e-*Club* analysis or asking if the public objected.

mitted on this 25th day of February, 2010.

Respect

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