COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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Court of Appeals, Div. II

IN THE ~~SUPREME~~ COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of: MICHAEL LOUIS RHEM.	NO. 35195-1 PETITIONER'S SUPPLEMENTAL REPLY

I. INTRODUCTION

In declarations attached to his first supplemental brief, Mr. Rhem produced admissible evidence that the public was excluded from all of jury selection. Both Rhem and his counsel (Mr. Stewart) averred that members of the public were excluded at the start of jury selection, but were not permitted "back in the courtroom until the jury was seated." *See Declaration of Stewart. See also Declaration of Rhem* ("...the spectators were required to say outside until later.").

The State disputed these facts, but did not produce any competent evidence to the contrary. Instead, the State simply asserts in its *Response* that because the transcript does not include a formal order by the trial court closing the courtroom, no closure happened. There is no caselaw requiring a formal closure order in order to raise this claim. Indeed, in most of the published cases, the closure happened without an express order—one of

the obvious consequences of failing to conduct a *Bone-Club* hearing.

The State then argues, ignoring Rhem's extra-record evidence, that the transcript does not reveal a temporary, but full closure of the courtroom. That is true. However, it is equally true that nothing in the transcript contradicts Rhem's declarations. In a PRP, the State is required to do more than simply write that it disputes extra-record evidence. Instead, it must present its own competent extra-record evidence that creates disputed material facts. Where, as here, the State fails to do so, the petition should be granted. However, if this Court concludes that disputed facts exist, the Court should remand for an evidentiary hearing.

II. ARGUMENT

A Court Can Be Closed Without an Order

Courts are closed both as the result of reasoned decisions and unwittingly. Where a trail court fails to conduct a *Bone-Club* hearing, it is usually because the court failed to appreciate that its actions constituted a closure of the courtroom. That is especially true, given the repeated insistence by the appellate court of the need to conduct a hearing every time closure is contemplated.

To illustrate, there was no closure order in *State v. Strode,* 167 Wash.2d 222, 217 P.3d 310 (2009). Nevertheless, the Court reversed. Likewise, there was no formal order closing the courtroom in *Pers. Restraint of Orange,* 152 Wash.2d 795, 100 P.3d 291 (2004). Instead, in both cases the court focused on what happened—whether the public was excluded during trial.

In this case, Rhem has presented competent admissible evidence showing that the

public, including members of his family were excluded from all of *voir dire*. Exclusion for only a portion of *voir dire* mandates reversal. *Strode,* 217 P.3d at 316 (noting that there was no *de minimis* exception). Thus, Rhem has carried his burden of showing the court was closed.

The State Has Not Disputed Any of Rhem's Facts With Competent Evidence

Rhem met his burden of pleading. As the Supreme Court explained in *Pers. Restraint of Rice,* 118 Wash.2d 876, 886, 828 P.2d 1086 (1992):

> .....the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

However, the State has not met its corresponding burden:

> Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

Id. at 887.

Here, the State has identified disputed facts, but has not met the petitioner's evidence with its own competent evidence. Thus, at a minimum an evidentiary hearing is

required. However, Rhem asserts that he is now entitled to relief.

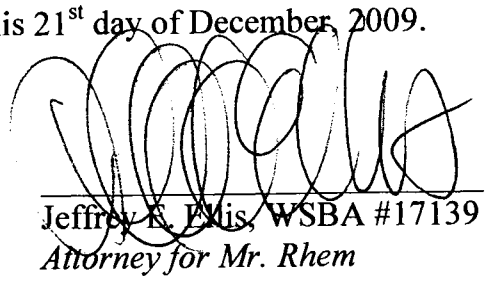
Rhem was Prejudiced

The final issue is prejudice. Like this case, *Orange* was a PRP. There, the Washington Supreme Court reversed. Denial of the public trial right continues to be a structural error and prejudice is necessarily presumed. *Strode,* 217 P.3d at 316; *Momah,* 217 P.3d at 326-27. However, Rhem has shown specific prejudice in this case.

III. CONCLUSION

This Court should reverse and remand for a new trial. In the alternative, this Court should either remand to the trial court for an evidentiary hearing or for a determination of the merits of this petition after an evidentiary hearing.

DATED this 21st day of December, 2009.



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CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on December 21, 2009 I served the parties listed below with a copy *Petitioner's Supplemental Reply* as follows:

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