RECEIVED
COURT OF APPEALS
DIVISION II
JUN 23 2008

No. 37238-0-II

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2008 JUN 23 PM 1:10

IN RE THE RESTRAINT OF:

DAN STOCKWELL,

Petitioner.

REPLY BRIEF OF PETITIONER

Judgment in Kitsap County Superior Court No. 03-1-01319-4
The Hon. Karlynn Haberly, Presiding

FILED
COURT OF APPEALS
DIVISION II
08 JUN 25 PM 2:23
STATE OF WASHINGTON
BY DEPUTY

NEIL M. FOX
WSBA No 15277
Cohen & Iaria
1008 Western Ave. Suite 302
Seattle WA 98104

Phone: 206-624-9694
Fax: 206-624-9691
e-mail: nmf@cohen-iaria.com

ORIGINAL

TABLE OF CONTENTS

Page

A. ISSUES IN REPLY 1

B. ARGUMENT 2

1. This Court Should Re-examine the Issues Regarding Comparability 2

2. The Sealing of the Jury Questionnaires Should Lead to the Vacation of the Conviction 4

a. *Retroactivity is Not an Issue in this Case* 4

b. *Portions of Jury Selection Were Improperly Closed* 7

c. *The Error Was Not Invited and Can Be Raised for the First Time Now in a PRP* 10

d. *Prejudice is Presumed and the Remedy is Vacation of the Conviction* 13

3. There Were Clearly Difference Standards Used to Determine Challenges for Cause 16

4. Other Issues 19

C. CONCLUSION 20

TABLE OF CASES

Page

Washington Cases

Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993) 5,6

Association of Wash. Stevedoring Cos. v. Department of Rev., 88 Wn.2d 315, 559 P.2d 997 (1977), *rev'd*, 435 U.S. 734 (1978) 2

Federated Publ'ns, Inc. v. Kurtz, 94 Wn.2d 51, 615 P.2d 440 (1980) 5

In re Dalluge, 152 Wn.2d 772, 100 P.3d 279 (2004) 7

In re Hegney, 138 Wn. App. 511, 158 P.3d 1193 (2007) 3,4

In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) 5,6,11,12,14,15

In re Detention of D.F.F., ___ Wn. App. ____, 183 P.3d 302 (2008) 8,9,12

National Can Corp. v. Department of Rev., 105 Wn.2d 327, 715 P.2d 128 (1986) 2

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) 5,10,11

State v. Abrams, 163 Wn.2d 277, 178 P.3d 1021 (2008 5

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) 6,10,11,13,14,15

State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957) 11

State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007) 9,12,15

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006). 11,12,14

State v. Evans, 154 Wn.2d 438, 114 P.3d 627 (2005) 5

State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001) 19

State v. Frawley, 140 Wn. App. 713, 167 P.3d 593 (2007) 15

State v. Kitchen, 46 Wn. App. 232, 730 P.2d 103 (1986),
aff'd 110 Wn.2d 403, 756 P.2d 105 (1988) 2

State v. Momah, No. 81096-6 1

State v. Stockwell, 159 Wn.2d 394, 150 P.3d 82 (2007) 3

State v. Strode, No. 80849-0 1

State v. Vreen, 143 Wn.2d 923, 26 P.3d 236 (2001) 18,19

Tricon, Inc. v. King Cy., 60 Wn.2d 392, 374 P.2d 174,
appeal dismissed, cert. denied, 372 U.S. 908 (1962) 2

Federal and Other State Cases

Campbell v. Rice, 408 F.3d 1166 (9th Cir. 2005) 14

Danforth v. Minnesota, 128 S.Ct. 1029 (2008) 5

People v. LeFebre, 5 P.3d 295 (Colo. 2000) 19

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)
(*Press-Enterprise I*) 5,8

State ex rel. Beacon Journal Publishing Co. v. Bond, 98 Ohio St. 3d
146, 781 N.E.2d 180 (2002) 7

Teague v. Lane, 489 U.S. 288 (1989) 4,5

United States v. Antar, 38 F.3d 1348 (3rd Cir. 1994) 15,16

United States v. Montalvo, 331 F.3d 1052 (9th Cir. 2003) 14

Waller v. Georgia, 467 U.S. 39 (1984) 5,14,15

Statutes, Constitutional Provisions, and Rules

GR 15 9

GR 31 9

Sup. Ct. Mental P. Rule 1.3 8

U.S. Const. amend. 1 . . . . . *passim*

U.S. Const. amend. 6 . . . . . *passim*

U.S. Const. amend. 14 . . . . . *passim*

Wash. Const. art. 1, § 3 . . . . . *passim*

Wash. Const art. 1, § 10 . . . . . *passim*

Wash. Const. art. 1, § 21 . . . . . *passim*

Wash. Const. art. 1, § 22 . . . . . *passim*

Washington State Jury Commission, Report to the Board for Judicial Administration, July 2000, http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf 9

A. ISSUES IN REPLY

1. Regarding the issue of the comparability of the statutory rape conviction to the present offense of rape of a child, has the State addressed Mr. Stockwell's arguments regarding due process and effective assistance of counsel?

2. Regarding the issue of the sealing of the jury questionnaires:[1]

a. Is there any issue of retroactivity?

b. Was there a closure of jury selection?

c. Was this closure constitutional under settled state and federal precedent?

d. Can this issue be raised for the first time on collateral review?

e. Was the error "invited?"

f. Has the Washington State Supreme Court already recognized a petitioner's right to obtain relief in a Personal Restraint Petition based upon a violation of the right to have a public trial?

---

[1] Mr. Stockwell notes that the Washington State Supreme Court has before it two cases dealing with the issues of closure of portions of voir dire. Both cases were argued on June 10, 2008. State v. Momah, No. 81096-6 & State v. Strode, No. 80849-0.

g. What is the remedy for the illegal closure of part of jury selection?

3. Should there be a remedy for the trial court's disparate treatment of challenges for cause from the State and the defense?

B. ARGUMENT

1. This Court Should Re-examine the Issues Regarding Comparability

While the State correctly notes that this Court is "bound" by decisions of the Washington State Supreme Court,[2] Mr. Stockwell has raised issues in this Personal Restraint Petition that were not raised previously. For instance, Mr. Stockwell has argued that, by retroactively

---

[2] Actually, as Judge Worswick of this Court once noted:

> We are bound by our Supreme Court's decisions announcing Washington law and interpreting the Washington Constitution. However, decisions of the United States Supreme Court control us in deciding federal constitutional issues.
>
> Our State Supreme Court has explicitly recognized its lack of authority in federal constitutional matters. See National Can Corp. v. Department of Rev., 105 Wn.2d 327, 715 P.2d 128 (1986); Association of Wash. Stevedoring Cos. v. Department of Rev., 88 Wn.2d 315, 559 P.2d 997 (1977), *rev'd*, 435 U.S. 734 (1978); Tricon, Inc. v. King Cy., 60 Wn.2d 392, 374 P.2d 174, *appeal dismissed, cert. denied*, 372 U.S. 908 (1962). In the face of this, it is illogical to suggest that we are bound to follow a mistaken application of federal constitutional principles by our Supreme Court.

State v. Kitchen, 46 Wn. App. 232, 239-240, 730 P.2d 103 (1986) (Worswick, C.J., concurring), *aff'd* 110 Wn.2d 403, 756 P.2d 105 (1988).

changing the elements of statutory rape in the first degree, twenty years after Mr. Stockwell's conviction for that offense, the Supreme Court's decision in State v. Stockwell, 159 Wn.2d 394, 150 P.3d 82 (2007), itself violated due process of law guaranteed by U.S. Const. amend. 14 and Wash. Const. art. 1, § 3. This is an argument that was not raised previously and was not considered by the Supreme Court when it issued its decision.

Similarly, Mr. Stockwell has argued that his prior attorney's failure to explore the legislative history of the element of non-marriage constituted ineffective assistance of counsel on direct appeal, in violation of due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, and the right of an appeal under Wash. Const. art. 1, § 22. This is an issue that was not raised previously, and an issue to which the State has not responded.

As this Court recently held:

> In personal restraint petitions, we ordinarily will not review issues previously raised and resolved on direct review. [Citation omitted] In order to renew an issue rejected on its merits on appeal, a petitioner must show the ends of justice would be served by reexamining the issue. [Citation omitted]. A petitioner can meet this burden by showing an intervening change in the law or some other justification for having failed to raise a crucial point or

> argument in the prior application. [Citation and internal quotes omitted]. Finally, we take seriously that collateral attacks should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant.

In re Hegney, 138 Wn. App. 511, 543-44, 158 P.3d 1193 (2007).

Thus, given the fact that Mr. Stockwell has raised new arguments that either were not raised previously or could not have been raised previously, this Court should reexamine the comparability issue.

2. The Sealing of the Jury Questionnaires Should Lead to the Vacation of the Conviction

a. *Retroactivity is Not an Issue in this Case*

The State spends many pages of its brief (pp. 8-14) arguing that the principles of Teague v. Lane, 489 U.S. 288 (1989), preclude granting relief to Mr. Stockwell on the issue of the improper sealing of the jury questionnaires. There are two responses to these arguments.

First, even assuming this Court must follow the Teague decision,[3] this is not a case about newly developed principles of criminal procedure. The principles involved – the right to an open and public trial, including jury selection – are not newly evolved concepts, but have been part of this state's jurisprudence (as well as federal law) for many years. In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), which incidentally was issued while Mr. Stockwell's case was pending on direct review, did not announce any new rule of law, but merely applied long-settled principles under Wash. Const. art. 1, §§ 10 & 22, and U.S. Const. amends. 1, 6 & 14. See Orange, 152 Wn.2d at 804-12, citing *inter alia* Waller v. Georgia, 467 U.S. 39 (1984); Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984) ("Press Enterprise I"); Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982); Federated Publ'ns, Inc. v. Kurtz, 94 Wn.2d 51, 615 P.2d 440 (1980); Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d

---

[3] The Washington Supreme Court has noted that "*[g]enerally*, we have followed the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law." State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (emphasis added). Thus, the Washington Supreme Court has just "generally" followed the dictates of Teague. See State v. Abrams, 163 Wn.2d 277, 290, 178 P.3d 1021 (2008). Yet, there is no constitutional *requirement* that Washington courts follow the restrictive retroactivity analysis of Teague, which was designed for application to federal habeas law, with its concerns about federalism and respect for state sovereignty. States remain free to apply less restrictive retroactivity rules to newly developed rules of federal criminal procedure than federal courts must apply under Teague. Danforth v. Minnesota, 128 S.Ct. 1029 (2008).

205, 848 P.2d 1258 (1993); State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Mr. Stockwell is not asking this Court, on collateral review, to adopt any new principle of law, but merely to apply settled law to his case.

Second, even if some issue of retroactivity arises, Mr. Stockwell is also arguing that his prior appellate counsel was ineffective because she did not raise the jury questionnaire issue on direct appeal. The Supreme Court addressed this very issue in Orange:

> 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. Consequently, we agree with Orange that the failure of his appellate counsel to raise the issue on appeal was both deficient and prejudicial and therefore constituted ineffective assistance of counsel. [Citations omitted] The failure to raise the courtroom closure issue was not the product of "strategic" or "tactical" thinking, and it deprived Orange of the opportunity to have the constitutional error deemed per se prejudicial on direct appeal. [Citation omitted] The remedy for counsel's failure to raise on appeal the violation of Orange's public trial right is remand for a new trial.

152 Wn.2d at 814.

Thus, the remedy for ineffective assistance of counsel on appeal (in violation of the federal right to due process of law under U.S. Const. amend. 14, and the state right to due process and to an appeal under Wash.

Const. art. 1, §§ 3 & 22) is to reinstate the direct appeal standard of review, In re Dalluge, 152 Wn.2d 772, 787-89, 100 P.3d 279 (2004), thereby avoiding any retroactivity issues.

b. *Portions of Jury Selection Were Improperly Closed*

The State argues that the fact that the jury questionnaires were sealed and kept from the public during jury selection did not mean that the trial was not public. Brief of Respondent at 14-28. The State disputes the conclusions of the Ohio State Supreme Court's decision in State ex rel. Beacon Journal Publishing Co v. Bond, 98 Ohio St. 3d 146, 781 N.E.2d 180 (2002), that written jury questionnaires are part of the voir dire process. While the State characterizes the Ohio Supreme Court's analysis as lacking in critical analysis, and similarly dismisses the reasoning of the six decisions relied upon by the Ohio court, the State points to no case that has adopted a rule of law that is different from the holding of Bond or any of the decisions cited therein. While the State may disagree with the holdings, the fact remains is that "virtually every other court" to address the issue of jury questionnaires "has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness." 781 N.E.2d at 188 & n.3. While in some instances, the analysis in the cited

decisions was terse, that may be due to the fact that the courts had no difficulty with the concept that the Supreme Court's holding in Press-Enterprise mandated the result.

The State, though, disputes these cases and argues that "experience" and a "tradition of accessibility" do not mandate that written questionnaires be open to the public. While the State does not cite to any judicial opinion adopting this position, the State does point to a series of court rules from other states that support keeping questionnaires confidential.[4] Of course, there can be many court rules regarding closure of courtrooms that violate state and federal constitutional protections. See In re Detention of D.F.F., ___ Wn. App. ____, 183 P.3d 302 (2008) (reversing commitment order where trial court had unconstitutionally closed proceedings under Sup. Ct. Mental P. Rule 1.3). But, apart from

---

[4] The State also does not cite to any cases or research that address the issue of whether juror questionnaires were ever used historically (at the time of the adoption of the United States or Washington Constitutions), and whether those written questionnaires were traditionally sealed. In fact, the historical record is that juror selection in the Anglo-American tradition was open, with no historic precedent for the blanket sealing of juror information used in the voir dire process. See Press-Enterprise, 565 U.S. at 505-08 (surveying common law history).

the constitutional issues, there is similar no court rule in Washington State that requires confidentiality of juror questionnaires.[5]

The expression of the Washington State Jury Commission that in "appropriate cases, the trial court should submit written questionnaires to potential jurors regarding information they may be embarrassed to disclose before other jurors," does not establish a rule that all questionnaires should be sealed, in all cases, without a particularized request by a juror.[6] Mr. Stockwell has no dispute with the principle that jurors who have sensitive information to reveal can ask that a trial court seal their questionnaires. Jurors can be told that if they do not feel comfortable revealing certain facts in writing, they can tell the court, and the court can consider their

---

[5] The State cites to GR 31(j), but then disagrees with the Court of Appeals' decision in State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007), which held that GR 31 must be read in conjunction with GR 15. However, the analysis in Duckett is not "absurd" and comports with constitutional requirements. Again, even if CR 15 does not apply, a blanket rule, urged by the State, that all juror information is presumptively confidential violates state and federal constitutional provisions of openness. In re Detention of D.F.F., supra.

[6] The State cites to only a portion of the Jury Commission's Recommendation No. 20. Respondent's Brief at 21 However, the recommendation continues and actually recommends the adoption of a rule that the questionnaires be destroyed or sealed, and should remain confidential. http://www.courts.wa.gov/committee/pdf/ Jury_ Commission_Report.pdf. Not only has this recommendation not been adopted, but the fact that the Jury Commission had to propose such a rule supports Mr. Stockwell's position that the law in Washington (and federally for that matter) is that jury questionnaires are not presumptively confidential and that there is no authority to seal all questionnaires on a blanket basis.

requests. Common experience tells us that in the majority of instances such requests will be granted.

However, in such cases, there will be an individualized determination, required under Bone-Club and other cases, that justifies sealing a particular juror's questionnaire. What a court cannot do is just decide to seal *all* questionnaires on a routine basis, without any individualized determination of need. Such a blanket practice violates U.S. Const. amends. 1, 6 & 14, and Wash. Const. art. 1, §§ 3, 10 & 22.

c. *The Error Was Not Invited and Can Be Raised for the First Time Now in a PRP*

The State argues that Mr. Stockwell "invited" the error, Brief of Respondent at 28-31, and cannot raise it on collateral attack. Brief of Respondent at 32-41. The Court should reject these arguments.

First, the State ignores controlling precedent. In State v. Bone-Club, supra, the Washington Supreme Court held:

> We also dismiss the State's argument that Defendant's failure to object freed the trial court from the strictures of the closure requirements. To the contrary, this court has held an opportunity to object holds no "practical meaning" unless the court informs potential objectors of the nature of the asserted interests. Ishikawa, 97 Wn.2d at 39. The motion to close, not Defendant's objection, triggered the trial court's duty to perform the weighing procedure. The summary closure thus deprived Defendant of a

> meaningful opportunity to object. See Ishikawa, 97 Wn.2d at 39.
>
> Lacking a trial court record showing any consideration of Defendant's public trial right, we cannot determine whether closure was warranted. We hold the trial court's failure to follow the five-step closure test enunciated in this court's section 10 cases violated Defendant's right to a public trial under section 22.

128 Wn.2d at 261.[7] Accord State v. Easterling, 157 Wn.2d 167, 176 n.8, 137 P.3d 825 (2006). Similarly, in In re Orange, supra, the Supreme Court approved of raising this issue on collateral attack even if it had not been raised on direct appeal. Indeed, in Orange, the issue was not even properly

---

[7] The holding of Bone-Club is easily harmonized with the Court's earlier decision in State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957), a case upon which the State relies. Brief of Respondent at 30. Rather than standing for the proposition that a defendant who does not object to closure waives the issue on appeal, Collins only involved an order to lock the door to the courtroom during the reading of jury instructions to minimize interruptions to the jurors from the noise of the opening and closing:

> Finally, where a trial court ordered the courtroom doors locked while allowing a reasonable number of spectators to remain, the Collins court held a partially closed hearing did not rise to the level of a constitutional violation.

Bone-Club, 128 Wn.2d at 258. There being no constitutional violation, the issue about waiver really never was significant.

raised at the trial level.[8] Thus, the failure to object to the sealing can be raised now, for the first time in this Personal Restraint Petition.[9]

The State points to Mr. Stockwell's defense counsel's affirmative answer when the trial judge asked him whether he "stipulated to the use of this questionnaire." 3 RP 226-27. It is not clear, however, that Mr. Stockwell's counsel was being asked to "stipulate" to the sealing of the questionnaires as opposed to the questionnaire itself. Notably, there are two separate documents attached to the State's pleading, filed on April 20, 2004:

1. A document entitled "To Prospective Jurors," which contains the wording about sealing, and

---

[8] In Orange, while defense counsel requested that the defendant's family be permitted to be present during jury selection, he never actually objected to the trial court's rulings on this issue. 152 Wn.2d at 801–02. Thus, the issue about the closure of voir dire was raised for the first time on collateral attack.

[9] As for the State's argument that Mr. Stockwell does not have "standing" to raise a violation of the *public's* right to an open trial (U.S. Const. amend. 1 and Wash. Const. art. 1,§ 10), Brief of Respondent at 33-41, Division Three in Duckett held clearly that criminal defendants have standing to raise claims based upon the public's exclusion from judicial proceedings. 141 Wn. App. at 804. See also State v. Easterling, 157 Wn.2d at 179 ("Were we to conclude that the closure did not violate Easterling's constitutional right to a public trial, the trial court's failure to comply with Bone-Club still constitutes a violation of the public's right under article I, section 10 of our state constitution to an open public trial, which exists separately from Easterling's right."); In re Detention of D.F.F., supra (analyzing closure of civil commitment case under art. 1, § 10). If a defendant has standing to raise an issue under art. 1, §. 10, on behalf of the public on direct appeal, the issue can be raised now by Mr. Stockwell – either on its own merits or under effective assistance of counsel on direct appeal guaranteed by the Due Process Clauses of U.S. Const. amend. 14 and Wash. Const. art. 1, §. 3 and the right to an appeal under Wash. Const. art. 1, § 22. See Orange, 152 Wn.2d at 814.

2. The questionnaire itself, labeled "Jury Questionnaire." The jury questionnaire is separately pagenated from the document entitled "To Prospective Jurors." It does not contain any indication that the answers would be sealed. The questionnaire contains instructions that if the jurors have particular answers that they would like to discuss in private, they could circle the pertinent questions.

Ex. 6.

Affirmatively answering "yes" to a question about stipulating to the use of the questionnaire itself is different from being asked to "stipulate" to the sealing of the questionnaires. In light of the Supreme Court's clear mandate in Bone-Club that a trial court needs to make on-the-record findings regarding closure, and that a defendant's objection does not trigger this obligation, this vague reference to stipulation to the use of the questionnaire does not rise to the level of an affirmative invitation to seal the questionnaires.

d. *Prejudice is Presumed and the Remedy is Vacation of the Conviction*

The State argues that Mr. Stockwell cannot show prejudice and that the remedy is not a new trial. Brief of Respondent at 32-33, 41-43. These arguments should be rejected.

The Washington Supreme Court has held that "[p]rejudice is presumed where a violation of the public trial right occurs." Bone-Club, 128 Wn.2d at 261-62. Applying this presumption in the context of collateral attack, as noted, the Supreme Court in Orange held that if counsel did not raise the issue on direct appeal, there was ineffective assistance of counsel on direct appeal, and, therefore, prejudice was established for purposes of granting a Personal Restraint Petition. Orange, 152 Wn.2d at 815. Similarly, given the federal constitutional rights at stake (U.S. Const. amends. 1, 6 & 14), federal courts have held where there are violations of the public trial right defendants do not need to prove specific prejudice. See, e.g., Waller v. Georgia, 467 U.S. at 49; Campbell v. Rice, 408 F.3d 1166, 1172 (9th Cir. 2005) (categorizing violation of right to public trial as structural error, citing Waller); United States v. Montalvo, 331 F.3d 1052, 1057 (9th Cir. 2003) (same).[10]

---

[10] The State suggests that some closures can be written off as *de minimis*. Brief of Respondent at 41. However, only Justice Madsen has adopted this theory. State v. Easterling, 157 Wn.2d at 182-85 (Madsen, J., concurring). Her views are not shared by the remaining members of the Supreme Court. See State v. Easterling, 157 Wn.2d at 180 n. 12 (limiting *de minimis* cases to federal law) and State v. Easterling, 157 Wn.2d at 186 (Chambers, J., concurring, joined by Justices Sanders and Owens) ("While a defendant may not herself be harmed by a hearing in a closed courtroom, there is no case where the harm to the principle of openness, as enshrined in our state constitution, can properly be described as de minimis.").

In terms of the remedy for the violation, the State relies on Waller to argue that a new trial is not necessary if some other remedy can be afforded – such as a new suppression hearing, as opposed to a new trial, as was ordered in Waller. There are two problems with this argument. First, in Bone-Club, the Washington Supreme Court departed from Waller and ordered a new trial, rather than just a new suppression hearing. 128 Wn.2d at 262. But, more importantly, the only possible remedy for the improper closure of part of the voir dire is a new trial. Holding new voir dire proceedings cannot be a remedy, since a new group of jurors would have to be selected. This is exactly the remedy granted in prior cases. See, e.g., In re Orange, supra; State v. Duckett, supra; State v. Frawley, 140 Wn. App. 713, 167 P.3d 593 (2007).

The State suggests unsealing the jury questionnaires as a remedy. However, the error took place at the time of the trial. Giving the public access to the voir dire proceedings now, years later, is not a substitute for access at the time of the trial. The fact that there may have been a transcript of the closed jury selection proceedings in Orange that the public could have reviewed at a later time could not cure the constitutional violation caused by the closure. See also United States v. Antar, 38 F.3d

1348, 1360 n. 13 (3rd Cir. 1994) ("[D]ocumentary access is not a substitute for concurrent access, and vice versa. The right of access encompasses both forms, and both are vitally important. Thus, where a right of access exists, a court may not deny access to a live proceeding solely on the grounds that a transcript may later be made available.").

Accordingly, the convictions should be vacated.

3. <u>There Were Clearly Difference Standards Used to Determine Challenges for Cause</u>

Despite the State's attempts to rationalize the trial court's different responses to challenges to Juror Nos. 2, 39 & 56, it is apparent that the trial court used different standards for deciding the challenges. All three jurors said they would try to be fair, but each had different experiences in their pasts which would make it difficult.

When answering the question in the written questionnaire about whether she could be fair and impartial, Juror No. 2 stated: "I don't know" and repeated in court that if she had any biases, "it would probably be on behalf of a child." Ex. 8 at 39.[11] Juror No. 39 stated in his questionnaire that the "affect on the victims" would interfere with his ability to be fair

---

[11] By separate order, this Court has directed the Kitsap County Superior Court Clerk to transmit the questionnaires to this Court for review.

and impartial, it would be hard for him to be fair, although he would try to compartmentalize. Ex. 9 at 190-93.

Similarly, while in his answers to the written questionnaire, Juror No. 56 stated in court that although he could follow the Court's instructions, his cousin's experiences of being falsely accused with child molestation would make him side "a little more" with the defense. Ex. 9 at 228. His cousin's experiences would lead him to listen to the prosecutor's witnesses with a "tainted ear" and that he would assume that the witnesses were not telling the truth. RP 9 at 231.

All three jurors were quite honest and about the effect of their prior experiences on their ability to be fair. Yet, the trial court's rulings on the defense's challenges for cause to Nos. 2 and 39 differed from its ruling on the State's challenge to Juror No. 56. It is apparent that the only difference between the jurors was whether they came to the case with a pre-existing bias towards the alleged victim or towards the defendant.

The State disputes this disparate treatment, and argues that there is no authority for Mr. Stockwell's argument that the law favors jurors who have a pre-existing bias against the State in a criminal case. But, the essence of the presumption of innocence – the bedrock of due process

under U.S. Const. amend. 14 – is that the two parties to a criminal case, the State and defendant, do not come to court on an equal footing. The trial process requires that jurors assume the defendant is innocent until the State proves the charges beyond a reasonable doubt. This means that the State and the defendant do not begin on a level playing field. If this is an undisputed principle of constitutional law, how can a juror who repeats this principle during voir dire be deemed to be too biased to serve as a juror?

Of course, all three jurors were removed, a fact that the State concludes leaves Mr. Stockwell remediless, arguing that if all the jurors who actually served were qualified and not biased, then there can be no complaints by the defense. However, in the State's rather exhaustive briefing on this subject, there is one case that the State ignored – State v. Vreen, 143 Wn.2d 923, 26 P.3d 236 (2001). In Vreen, the Washington Supreme Court clearly rejected the State's theory here that if the jurors who end up serving on the jury are fair and impartial there is no remedy for a violation of the jury selection procedures. While Vreen addressed a situation where the trial court had improperly denied a defense peremptory challenge, and that juror ended up on the deliberating panel, still, the logic

of the decision conflicts with the State's proposition and an expansive view of the holding of State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001).

Moreover, the State does not address the federal constitutional problems that arise when a trial court essentially gives the prosecution an amplified role in shaping jury composition. See Opening Brief of Petitioner at 48-49. Forcing the defense to use additional peremptory challenges, based upon a improper standard for challenges for cause, violates due process, under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, by denying the defendant "parity with the prosecution in the exercise of peremptory challenges." People v. LeFebre, 5 P.3d 295, 304 (Colo. 2000), cited with approval State v. Vreen, 143 Wn.2d at 927.

Accordingly, for these reasons, and the reasons set out extensively in the opening brief, this Court should vacate the convictions.

4. Other Issues

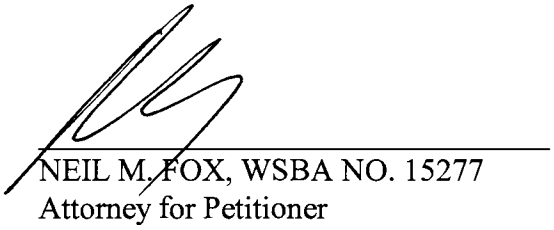
Without abandoning any issue, Mr. Stockwell rests on the extensive briefing already submitted for any other issue not discussed in this reply brief.

C. CONCLUSION

For the foregoing reasons, and the reasons set out in the PRP and the Opening Brief, Mr. Stockwell requests that the convictions be vacated.

Dated this 23 day of June 2008.

Respectfully submitted,



NEIL M. FOX, WSBA NO. 15277
Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE PERSONAL RESTRAINT OF DAN STOCKWELL, Petitioner.	COA NO. 37238-0-II CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS DIV II
STATE OF WASHINGTON
2008 JUN 23 PM 1:11

I, Bre Caldwell, certify and declare, that on the 23rd day of June 2008, I deposited a copy of the Reply Brief of Petitioner with proper postage attached, addressed to:

Russell Hauge
Kitsap County Prosecuting Attorney
Randall Avery Sutton, Deputy
MS-35
614 Division St.
Port Orchard WA 98366

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

6/23/08, Seattle, WA
DATE AND PLACE

BRE CALDWELL

FILED
COURT OF APPEALS
DIVISION II
08 JUN 25 PM 2:
STATE OF WASHINGTON
BY
DEPUTY

COHEN & IARIA
National Building, Suite 302
1008 Western Avenue
Seattle, Washington 98104
206-624-9694