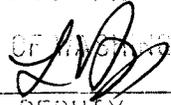


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STATE OF WASHINGTON  
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No. 37238-0-II

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

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IN RE THE RESTRAINT OF:

DAN STOCKWELL,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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

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**A. SUPPLEMENTAL ISSUE**

1. What effect do the Supreme Court's decisions in *State v. Strode*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 310 (No. 80849-0, 10/8/09), and *State v. Momah*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 321 (No. 81096-6, 10/8/09), have on the instant case?

**B. SUPPLEMENTAL ARGUMENT**

**1. The Holdings of *Strode* and *Momah***

On October 8, 2000, the Supreme Court issued two decisions bearing on the issue of when the partial closure of jury selection in a criminal case requires reversal of a conviction. *State v. Strode*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 310 (No. 80849-0, 10/8/09) & *State v. Momah*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 321 (No. 81096-6, 10/8/09). The decisions generated six separate opinions and the Court split different ways in each case.

*Momah* was a sex case out of King County, which had been the subject of extensive media coverage. Based upon concerns about publicity, at the urging of both the defense and the prosecution, the court conducted extensive questioning of the jurors individually in-chambers. *Momah*, Majority Opinion of J. C. Johnson, Slip Op. at 2-4. The goal of this in-chambers' voir dire was to prevent "'contamination' of the jury

pool by jurors with prior knowledge of Momah's case. Defense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning." *Momah*, Majority Opinion of J. C. Johnson, Slip Op. at 18.<sup>1</sup>

Because of the defense concerns about publicity and the defense involvement in urging the court to conduct voir dire partially in-chambers, six justices of the Supreme Court<sup>2</sup> voted to affirm Momah's convictions, distinguishing, but not overruling, its prior decisions in *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005). In those cases:

the closure errors were held to be structural in nature. Prejudice to the defendant in those cases was sufficiently clear and required the remedy of a new trial. In each case, the trial court closed the courtroom based on interests other than the defendant's; the closures impacted the fairness of the defendant's proceedings; the court closed the courtroom without seeking objection, input, or assent from the defendant; and in the majority of cases, the record lacked

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<sup>1</sup> In Justice Fairhurst's concurring opinion to *Strode*, she notes that in *Momah*, television stations had contacted the court about viewing jury selection, and the defense had objected to jury selection being televised. *Strode*, Concurring Opinion of J. Fairhurst at 2-3.

<sup>2</sup> Justice C. Johnson wrote the decision of the majority, concurred in by Justices Madsen, Owens, Fairhurst, James Johnson and Penoyar (pro tem).

any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom.

*Momah*, Majority Opinion of J. C. Johnson, Slip Op. at 11.

However, the *Momah* majority construed United States Supreme Court precedent as meaning that “not all courtroom closure errors are fundamentally unfair and thus not all are structural errors.” *Momah*, Majority Opinion of J. C. Johnson, Slip Op. at 9, citing *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). In *Momah*, in contrast to cases such as *Orange* and *Bone-Club*, the “closure occurred to protect Momah’s rights and did not actually prejudice him.” *Momah*, Majority Opinion of J. C. Johnson, Slip Op. at 19. In particular, the partial closure was required to protect Mr. Momah’s right to an impartial jury under Wash. Const. art. 1, § 22, a right which “may necessitate closure.” *Momah*, Majority Opinion of J. C. Johnson, Slip Op. at 14.

In *Momah*, the Court presumed that the defendant “made tactical choices to achieve what he perceived as the fairest result. Before in-chambers voir dire began, defense counsel, the prosecution, and the judge discussed numerous proposals concerning the juror selection.” *Momah*, Majority Opinion of J. C. Johnson, Slip Op. at 18. In-chambers’ questioning of some jurors was decided upon, with defense in-put, after

discussion of various alternatives. Thus, although the case did not present a “classic case of invited error,” *Id.* at 17, the error, if any, was not “structural” and was not grounds for reversal:

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. Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it. Thus, the underlying facts and impact of the closure in *Momah* are significantly different from those presented by our previous cases.

*Momah*, Majority Opinion of J. C. Johnson, Slip Op. at 19-20.

Justice Pro Tem Penoyar issued a short concurrence, stating that no one argued that “any person wishing to attend the proceedings was excluded. In sporting parlance, ‘No harm, no foul.’” *Momah*, Concurring Opinion of J.P.T. Penoyar, Slip Op. at 1.

Three justices (Alexander, Sanders and Chambers) dissented. The dissenters believed that the record showed that the trial court closed voir dire on its own initiative and that Mr. Momah “did not affirmatively assent to closure, did not argue for the expansion of it, was not asked if he objected to it, and did not benefit from it.” *Momah*, Dissenting Opinion of

C.J. Alexander, Slip Op. at 1. Because the trial judge never engaged in the balancing required under *Orange* and *Bone-Club*, the *Momah* dissenters concluded that partial closure of jury selection was structural error, and would have reversed the convictions. *Momah*, Dissenting Opinion of C.J. Alexander, Slip Op. at 1.

The *Momah* dissenters saw a difference between “questioning prospective jurors individually and, on the other hand, questioning them privately in chambers or in a jury room with the door closed.” *Momah*, Dissenting Opinion of C.J. Alexander, Slip Op. at 6. While Mr. Momah’s lawyers suggested that jurors be questioned individually, Momah did not ask the court to close the courtroom nor did he agree to the closure. *Momah*, Dissenting Opinion of C.J. Alexander, Slip Op. at 4. In contrast to the *Momah* majority’s reading of the record, the *Momah* dissenters concluded:

The record clearly demonstrates that the closure was primarily motivated by the trial judge's preference for questioning certain members of the jury voir dire in private. Unfortunately, the record lacks any hint that the trial judge considered any other interests prior to conducting a portion of juror voir dire in a nonpublic setting. Without explicit findings in the record, there is no way for this court to determine whether the trial judge considered whether keeping voir dire open to the public presented a "serious

and imminent threat" to the selection of a fair and impartial jury.

*Momah*, Dissenting Opinion of C.J. Alexander, Slip Op. at 7. While the defendant's right to an impartial jury is important, the dissenters countered that "it is the individual questioning of prospective jurors that protected that right, not the closure of voir dire to the public." *Momah*, Dissenting Opinion of C.J. Alexander, Slip Op. at 9.

The 6:3 alignment in *Momah* changed in *Strode*, a sex case out of Ferry County, where Chief Justice Alexander wrote a plurality opinion, reversing the conviction, joined by Justices Owens, Sanders and Chambers (the *Momah* dissenters joined by Justice Owens who had signed the majority opinion *Momah*). In *Strode*, jurors who answered "yes" on a written questionnaire that they (or anyone close to them) had either been the victim of sexual abuse or accused of committing a sexual offense were called one at a time into chambers for questioning, with the only persons present being the judge, the prosecutor, the defense counsel and the defendant. *Strode*, Plurality Opinion of C.J. Alexander, Slip Op. at 2.

The *Strode* plurality held that this procedure violated the right to a public trial, guaranteed under U.S. Const. amend. 6 and Wash. Const. art.

1, §§ 10 and 22.<sup>3</sup> Rejecting the State's arguments that the in-chambers' questioning could be justified on appeal,<sup>4</sup> the *Strode* plurality held that there was an absence of any on-the-record discussion by the trial court of the "reasons" for the closure:

Although 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.

The determination of a compelling interest for courtroom closure is "the affirmative duty of the trial court, not the court of appeals." *Bone-Club*, 128 Wn.2d at 261. Nor is it the responsibility of this court to speculate on the justification for closure. Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four *Bone-Club* steps to thoroughly weigh the competing interests.

*Strode*, Plurality Opinion of C.J. Alexander, Slip Op. at 7-8.

As for the State's argument that Mr. Strode invited the error or waived his right to challenge the error, when he "acquiesced, without any

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<sup>3</sup> The plurality also noted that Wash. Const. art. 1, § 35, provides that victims of crimes have the right to "attend trial and all other court proceedings that the defendant has the right to attend. *Strode*, Plurality Opinion of C.J. Alexander, Slip Op. at 5 n.2.

<sup>4</sup> The plurality also rejected the State's arguments that in-chambers questioning of jurors was not unconstitutional because it took place prior to the commencement of the trial. *Strode*, Plurality Opinion of C.J. Alexander, Slip Op. at 5-6.

objection, to the private questioning of jurors,” *Strode*, Plurality Opinion of C.J. Alexander, Slip Op. at 8, the *Strode* plurality held that the error was constitutional, that it could be raised for the first time on appeal, and that neither the failure to object nor defense participation in closed questioning constitutes a waiver, particularly because “Strode cannot waive the public’s right to open proceedings.” *Id.* at 8-9. Moreover, the plurality rejected the State’s argument that the error was harmless because it was “insignificant.” The *Strode* plurality held that the in-chamber’s questioning was not “brief and inadvertent,” that the Court had never found that the violation of the public trial right could be trivial or de minimis, and that the error is deemed to be prejudicial and structural. *Id.* at 9-10.

Justices Fairhurst concurred, joined by Justice Madsen. Justice

Fairhurst stated that she:

agreed to affirm Charles Momah's convictions because the facts presented circumstances where the trial court needed to close a portion of voir dire to the public in order to protect the defendant's right to a fair trial. I reach a different conclusion here because Tony L. Strode's right to a public trial has not been waived, nor has it been safeguarded as required under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

*Strode*, Concurring Opinion of J. Fairhurst, Slip Op. at 1.

Justice Fairhurst’s position (and that of Justice Madsen) is that the closure of portions of voir dire was required in *Momah* because of the highly publicized nature of the case and the dangers of jury contamination. She noted that both the defense and the trial court were keenly aware of the public trial right<sup>5</sup> and that, in essence, the trial court in *Momah* complied with the requirements of *Bone-Club*. *Strode*, Concurring Opinion of J. Fairhurst, Slip Op. at 1-4.

Moreover, the record in *Momah* made it clear to the defendant that there was a right to a public trial. Thus, the failure to object to closure in that particular case (*Momah*) was evidence of waiver and that “the defendant intentionally relinquished a known right.” *Strode*, Concurring Opinion of J. Fairhurst, Slip Op. at 5. Justice Fairhurst concluded that despite the defendant being aware that the proceedings were presumptively public, “the defense affirmatively sought individual questioning of the jurors in private, sought to expand the number of jurors subject to such

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<sup>5</sup> Indeed, the Supreme Court’s decision in *Brightman* came out during the trial, and that decision and the public trial right were referenced on the record while the court and parties were discussing how to structure jury selection. *Strode*, Concurring Opinion of J. Fairhurst, Slip Op. at 3.

questioning, and actively engaged in discussion about how to accomplish this.” *Id.*

Justice Fairhurst criticized the *Strode* plurality for conflating the defendant’s right to a public trial and the public’s right to a public trial, and would not allow a defendant to assert the right of the public or the press to overturn his or her conviction. *Strode*, Concurring Opinion of J. Fairhurst, Slip Op. at 8.<sup>6</sup> Moreover, Justice Fairhurst diverged from the plurality’s conclusion that an explicit on-the-record waiver would be required. *Strode*, Concurring Opinion of J. Fairhurst, Slip Op. at 6.

However, in *Strode*, unlike the situation in *Momah* where there were extensive discussions of the procedures and rights involved, in *Strode*, there was no evidence of any waiver and no evidence that the trial court engaged in the required *Bone-Club* balancing. *Strode*, Concurring Opinion of J. Fairhurst, Slip Op. at 7. Accordingly, Justice Fairhurst

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<sup>6</sup> Despite Justice Fairhurst’s criticism, in fact, the public’s right to access under the First Amendment and a defendant’s right to a public trial under the Sixth Amendment are “conflated” because “[t]he guarantee of a public trial is for the benefit of the defendant; a trial is far more likely to be fair when the watchful eye of the public is present.” *Owens v. United States*, 483 F.3d 48, 61 (1<sup>st</sup> Cir. 2007), *citing and quoting In re Oliver*, 333 U.S. 257, 270, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (“The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”); & *Gannett Co. v. DePasquale*, 443 U.S. 368, 380, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) (“Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.”).

concurrent “with the lead opinion’s holding requiring automatic reversal and remand.” *Strode*, Concurring Opinion of J. Fairhurst, Slip Op. at 8.

Justices C. Johnson, J. Johnson and J.P.T. Penoyar dissented, in an opinion authored by Justice C. Johnson which relied on the majority decision in *Momah*. *Strode*, Dissenting Opinion of J. C. Johnson, Slip Op. at 1. Justice C. Johnson accused the plurality of ignoring the legitimate privacy interests of the jurors, particularly in cases involving sexual abuse. *Strode*, Dissenting Opinion of J. C. Johnson, Slip Op. at 3-5. Justice C. Johnson looked at various procedural assurances given to jurors to assure juror privacy, including the juror questionnaire given in *Strode* that their answers would be confidential and remain under seal. *Strode*, Dissenting Opinion of J. C. Johnson, Slip Op. at 5-6. Given these interests, the *Strode* dissenters would have held that the trial court implicitly engaged in the proper balancing that protected the interests of the defendant and the jurors, and that adopting an automatic reversal rule gives a defendant a “windfall.” *Strode*, Dissenting Opinion of J. C. Johnson, Slip Op. at 7-9.

Looking at the vote breakdowns of the two cases, it is apparent that six justices of the Supreme Court (Justices Alexander, Sanders, Owens, Chambers, Fairhurst and Madsen) have endorsed the rule that the

*improper* closure of portions of jury selection in a criminal case is structural error leading to automatic reversal.<sup>7</sup> Justices Alexander, Sanders and Chambers had a different view of the record in *Momah* than the other justices, but the majority's conclusion that the Mr. Momah affirmatively sought private questioning of jurors in order to protect his right to an impartial jury, and the trial court closed the courtroom after much discussion including discussion of the public trial right, is the law. Thus, Justices Fairhurst, Madsen and Owens<sup>8</sup> differed from Justices Alexander, Sanders and Chambers only about whether partial closure in *Momah* was an error at all, not about the remedy of automatic reversal if there was non-compliance with *Bone-Club*.<sup>9</sup> Only two permanent members of the

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<sup>7</sup> If vote counting includes the anticipated future position of Justice Stephens, who did not participate in *Momah* or *Strode*, it should be noted that Justice Stephens is the author of the Division Three decision in *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007), *review pending and case stayed pending Momah and Strode* 2008 Wash LEXIS 745 (No. 80965-8). The majority decision in that case held that conducting a portion of voir dire in-chambers constituted structural error where there was no on-the-record compliance with *Bone-Club*, that the defendant could not waive the public's right to an open trial, and that participation in closed questioning did not constitute a waiver. 141 Wn. App. at 803-07, 809. Thus, seven members of the current court have adopted the structural error/automatic reversal test.

<sup>8</sup> Justice Owens voted with both the *Momah* majority and the *Strode* plurality, but did not write separately to explain her votes, and did not join in Justice Fairhurst's concurring opinion in *Strode*. One can only conclude that she has adopted the structural error analysis, but in *Momah* did not find error.

<sup>9</sup> Justices Fairhurst and Madsen also differed from the *Strode* plurality about whether an explicit waiver was required and whether the defense could assert the right of  
(continued...)

Supreme Court (J. Johnson and C. Johnson) and the one pro tem member (Penoyar) question the automatic reversal analysis.

Thus, *Momah* and *Strode* require automatic reversal where there is partial closure of jury selection, unless a record supporting partial closure was made at the time of trial – *i.e.*, there needs to be some recognition by the trial court at the time of closure of the *Bone-Club* balancing factors (even implicitly as in *Momah*).<sup>10</sup> Partial closure of jury selection cannot be just automatically accomplished in every sex case because it is “obvious,” as what took place in *Strode*. A record needs to be made at the time of closure that recognizes the public trial right, that sets out the compelling interest which requires partial closure, that gives people in the courtroom

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<sup>9</sup>(...continued)

the public or press to overturn a conviction. These criticisms of the *Strode* plurality do not effect their conclusion that if there is an improper closure of jury selection, the error requires automatic reversal.

<sup>10</sup> The view of the majority of members of the Supreme Court that the erroneous partial closure of jury selection is structural error is in accord with prevailing concepts of federal constitutional law under U.S. Const. amends. 1, 6 & 14. See *Campbell v. Rice*, 408 F.3d 1166, 1172 (9<sup>th</sup> Cir. 2005) (including violation of right to a public trial in categories of cases where the Supreme Court found structural error); *United States v. Montalvo*, 331 F.3d 1052, 1057 (9<sup>th</sup> Cir. 2003) (same). See also *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n. 4, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (holding of *Waller v. Georgia*, 467 U.S. at 49 n. 9, based on conclusion that violation of the public-trial guarantee is not subject to harmless review because “the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance”); *Owens v. United States*, 483 F.3d at 63 (“[O]nce a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way.”) quoting *Judd v. Haley*, 250 F.3d 1308, 1315 (11<sup>th</sup> Cir. 2001).

the opportunity to object, that adopts the least restrictive means for protecting the threatened interests, and that shows the trial court weighed the competing interests and adopted an order that was no broader in application or duration than was necessary. *Bone-Club*, 128 Wn.2d at 258-59.

2. **Momah and Strode Should Lead to the Granting of Mr. Stockwell's PRP**

*Momah* and *Strode* make it clear that the partial closure of jury selection violates the public trial right of U.S. Const. amend. 1, 6 & 14 and Wash. Const. art. 1, §§ 10 & 22 and is automatic reversible (or structural error) *unless supported by justification sufficient under Bone-Club*. In *Momah*, after extensive discussions about how to protect the defendant's right to an unbiased jury and after discussions about the right of public access to jury selection, the in-chambers' questioning of jurors passed constitutional muster. In *Strode*, where there was just a knee-jerk response that the need for partial closure was "obvious," the partial closure did not meet constitutional standards, and the acquiescence of the defendant and his lawyer was not considered "waiver."

In Mr. Stockwell's case, there was partial closure of jury selection when the court gave the jurors a confidential questionnaire and sealed their

answers. That the jury questionnaire procedure is part and parcel of the jury selection process has been recognized by two additional courts since the original briefing has been filed in this case. In *Forum Communications v. Paulson*, 2008 N.D. 140, 752 N.W.2d 177 (2008), the North Dakota Supreme Court followed the Ohio Supreme Court and other courts, holding:

The right of public access articulated in *Press-Enterprise*<sup>11</sup> has been applied to preliminary jury questionnaires. See, e.g., *United States v. King*, 140 F.3d 76, 82 (2nd Cir. 1998); *Cable News Network, Inc. v. United States*, 263 U.S. App. D.C. 66, 824 F.2d 1046, 1047 (D.C. Cir. 1987); *Dayton Newspapers, Inc. v. United States*, 109 F. Supp. 2d 768, 771-72 (S.D. Ohio 1999); *Bellas v. Superior Court*, 85 Cal. App. 4th 636, 102 Cal. Rptr. 2d 380, 385 (Cal. Ct. App. 2000); *Leshner Commc'ns, Inc. v. Superior Court*, 224 Cal. App. 3d 774, 274 Cal. Rptr. 154, 155 (Cal. Ct. App. 1990); *Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d 146, 2002 Ohio 7117, 781 N.E.2d 180, 188-89 (Ohio 2002). The foregoing authorities establish that the public and the media have a presumptive right of access to juror questionnaires that is not absolute and must be balanced against a defendant's right to a fair trial and jurors' privacy interests; that the presumption of openness can only be overcome by an overriding interest and must be articulated with findings specific enough to permit effective review, and that any closure must be narrowly tailored to serve the competing interests.

752 N.W.2d at 182-83.

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<sup>11</sup> *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

Moreover, Division One of the Court of Appeals recently held that jury questionnaires are part of the jury selection process and cannot be automatically sealed without a *Bone-Club* analysis. *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009). In *Coleman*, potential jurors filled questionnaires that included matters of sexual history. The jurors were then questioned in open court and selected. Three days later, the trial court, on its own motion, entered an order sealing the questionnaires, without objection. On appeal, the defense argued that the questionnaires were part of jury selection and were improperly sealed without a *Bone-Club* analysis. 151 Wn. App. at 618-19.

Division One rejected the State's arguments that there was a difference between private questioning of jurors and the sealing of questionnaires, followed by questioning of jurors in open court, and held that the questionnaires were still court records that should not be sealed: "The State offers no meaningful way to distinguish court records containing written responses to questionnaires from oral responses during voir dire." 151 Wn. App. at 621. *See also State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009) (GR 15's provisions regarding sealing of court records need to be construed in light of constitutional balancing tests under

*Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982)). Division One held: “[T]he court should have conducted a *Bone-Club* analysis before sealing the questionnaires.” 151 Wn. App. at 623.

In *Coleman*, though, Division One did not reverse the conviction on structural error grounds because the questionnaires “were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process.” 151 Wn. App. at 624. Thus, the error did not take place during the jury selection portion of the trial and did not require reversal.

In contrast, in the instant case, the jurors were told before they filled out the questionnaires (and before most of the jury selection process) that “[t]he information contained in this questionnaire will become part of the court’s permanent record, although all questionnaires will be sealed and will not be available to the general public.” Ex. 6. The trial judge then told the jurors, before they filled out the questionnaires, that the questionnaires would be copied “for the attorneys to look at. *These questionnaires are going to be given to the court and to the attorneys.*

The questionnaires, after voir dire proceedings are done, are returned back to the clerk of the court and they are shredded. *They are not seen by anybody outside of the attorneys and the court* that need to have this information. The copies are shredded. The originals are filed in a sealed file with the clerk of the court for record-keeping.” Ex. 8 at 22-23 (emphasis added).

This is a sealing order, entered before jury selection, instead of the post-selection order entered in *Coleman*. This order told the jurors that only the court and the attorneys (and not even the defendant) would see the information during jury selection and afterwards. Under *Coleman*, *Strode* and *Momah*, this order was entered in violation of the right to a public trial, protected under U.S. Const. amends. 1, 6 & 14, and Wash. Const. art. 1, §§ 10 & 22, because it was entered without a *Bone-Club* analysis.

As in *Strode*, the sealing order appears to have been a “knee-jerk” reaction, without consideration of the facts of the particular case, whether sealing was required to off-set issues of pre-trial publicity (as in *Momah*), whether sealing was justified in light of the right to a public trial, and whether sealing of any particular questionnaire was required (as opposed to a blanket sealing order). The sealing order was entered without regard to

any particular juror's request that his or her answers be considered privately,<sup>12</sup> and was just a blanket sealing order of the type the majority of the Supreme Court in *Strode* held to be improper.

As noted in Mr. Stockwell's reply brief, while defense counsel was asked if he "stipulated" to the use of the questionnaire and he answered "yes," 3 RP 226-27, the questionnaire and the instructions to the jurors regarding confidentiality and sealing were different documents, although filed together as one. "Stipulating" to the questions on the written questionnaire is not the same as stipulating to the sealing of the answers during jury selection and keeping the answers out of the reach of members of the public. Unlike the situation in *Momah*, there was never any on-the-record discussion of the right to a public trial and certainly there were never extended discussions about the necessity of partially closing jury selection (as in *Momah*). The defendant did not ask for partial closure, as the defendant did in *Momah*, and, at most, agreed to the use of the

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<sup>12</sup> While some of the questions on the questionnaire dealt with prior allegations of sexual abuse, the majority of the questions did not, and addressed such subjects as prior jury service, whether the jurors could follow the court's instructions as to the law, knowledge of various attorneys and witnesses, education, marital status, and the like. Ex. 6. Further, the jurors were asked if there was "anything you would like to discuss privately with the court?", Ex. 6, thereby providing a screening mechanism for private questioning if there truly was a need for such, as opposed to the blanket sealing of all questionnaires.

questions on the written form. The record in this case lacks “any hint the trial court considered the Defendant’s public trial right.” *Momah*, Majority Opinion of J. C. Johnson, Slip Op. at 11, *quoting Bone-Club*, 128 Wn.2d at 260.

Moreover, the general practice of keeping juror questionnaires confidential, as explained in Justice C. Johnson’s dissent to *Strode*, has not been recognized by a majority of the Court as a valid reason for closure. Here, the trial court apparently did what the trial court did in *Strode* – it closed a portion of jury selection simply because that is the way that it was usually done in that court, without any analysis under *Bone-Club*.

Accordingly, under *Momah* and *Strode*, it was constitutional error under U.S. Const. amends. 1, 6 & 14 and Wash. Const. art. 1, §§ 10 & 22, to close partially the jury selection process because of the lack of any balancing under *Bone-Club*. Under the analysis adopted by a majority of the members of the Supreme Court, this error was “structural” and is grounds for automatic reversal.

**C. CONCLUSION**

For the reasons set out above, and in the opening and reply briefs, this Court should grant the Personal Restraint Petition and vacate the convictions in this case.

Dated this 16 day of November, 2009.

Respectfully submitted,

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

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY   
DEPUTY

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

I, Bre Caldwell, certify and declare, that on the 16<sup>th</sup> day of November 2009, I deposited  
a copy of the Supplemental 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.

11/16/09 Seattle, WA  
DATE AND PLACE

  
BRE CALDWELL