

NO. 37238-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAN STOCKWELL,

Appellant.

FILED  
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JAN 11 2010  
PORT ORCHARD, WA

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 03-1-01319-4

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SUPPLEMENTAL BRIEF OF RESPONDENT

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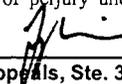
RUSSELL D. HAUGE  
Prosecuting Attorney

RANDALL AVERY SUTTON  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

SERVICE

Neil Fox  
Ste. 302, 1008 Western Ave  
Seattle, WA 98104

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED December 24, 2009, Port Orchard, WA   
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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## **I. COUNTERSTATEMENT OF THE SUPPLEMENTAL ISSUE**

Whether the decisions in *Strode* or *Momah* change the analysis in the present case?

## **II. SUPPLEMENTAL ARGUMENT**

### **A. STOCKWELL MAY NOT SEEK TO APPLY A NEW RULE OF LAW ON COLLATERAL REVIEW.**

#### **1. *Momah and Strode do not compel the conclusion that sealing of jury questionnaires violates the right to a public trial.***

As extensively discussed in the State's original brief, Stockwell is not entitled to relief because he seeks to apply a "new rule" on collateral review. *See* Brief of Respondent, at 8-14. Notably, *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), and *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), were direct appeal cases. Moreover, as with the earlier open-court cases, nothing in these cases compels the conclusion that the sealing of questionnaires constitutes a "closure" of the courtroom for open-trial purposes. Even if they did, however, Stockwell fails to show this rule should be applied in his case on collateral review. As such, *Strode* and *Momah* do nothing to change the analysis presented in the State's original brief.

**2. Stockwell's interpretation of Coleman would create a new rule of law not applicable on collateral review.**

In his supplemental brief, Stockwell relies on the holding in *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009), that sealing of questionnaires violates the right to a public trial under Const. art. I, § 10 & 22. Supp. Brief of Petitioner, at 16-17.<sup>1</sup> Even assuming that that were the holding in *Coleman*, but see *infra*, such a holding would clearly constitute a new rule not *dictated* by existing precedent. As such it could not be applied on collateral review to Stockwell's case.

**B. COLEMAN DOES NOT DICTATE THAT STOCKWELL BE GRANTED RELIEF BASED ON THE SEALING OF THE JUROR QUESTIONNAIRES IN HIS CASE.**

Stockwell concludes that under *Coleman*, the sealing of jury questionnaires without a *Bone-Club*<sup>2</sup> analysis constitutes a violation of the right to a public trial under Const. art. I, § 10 & 22. Stockwell overstates the holding of that case. Nevertheless, even its actual, more limited, holding is incorrect and should not be followed. Finally, even if it were correct, Stockwell cannot claim its benefit where he agreed to the procedure.

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<sup>1</sup> Although discussion of *Coleman* is arguably outside the scope of this Court's order for supplemental briefing, the State will address the case, as it was raised by Stockwell.

<sup>2</sup> *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

**1. *Coleman's holding relies solely on Const. art. I, § 10.***

In discussing *Coleman*, Stockwell conflates a defendant's right to a public trial under Const. art. I, § 22, with the public's rights to open trials and court records under Const. art. I, § 10. The Court, however, maintained the distinction between the two provisions.

In *Coleman*, the defendant argued "a jury questionnaire is part of jury selection and must therefore remain open to the public." *Coleman*, 151 Wn. App. at ¶ 13. The Court did not accept this proposition, however, and noted the State's response that the cases *Coleman* cited, "involved private voir dire, whereas here, the jury was questioned in open court." *Coleman*, 151 Wn. App. at ¶ 14. The Court did not reject the State's contention, but instead relied on Const. art. I, § 10, which, it noted, "ensures public access to court records as well as court proceedings." *Coleman*, 151 Wn. App. at ¶ 14. The Court went on to conclude that this provision governing the *public's* right to open courts was implicated. It pointedly did not accept the contention that sealing of questionnaires was the equivalent of closing voir dire.

**2. *Coleman was wrongly decided.***

The *Coleman* court then concluded that sealing such records without a *Bone-Club* analysis violated the public's right to open court records. For the reasons extensively discussed in the State's original brief, *Coleman* is simply wrong. *See* Brief of Respondent, at 14-28.

*Coleman* relies in part on the majority opinion in *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007). As discussed in the State’s original brief, that holding is also questionable:

The [*Duckett*] Court concluded that GR 31 is subject to GR 15(c), which requires a Bone-Club type hearing before closure or sealing may occur. GR 31(j), however, specifically provides that juror information other than name is presumed private, and further specifies the procedure that must be followed before disclosure. It is an absurd conclusion that a court must hold a hearing before “sealing” information that is already not available to the public. See also *Duckett*, 141 Wn. App. at ¶ 27 (Brown, J., dissenting).

Brief of Respondent, at 20 n.5.

Although *Coleman* acknowledges GR 31(j), it discounts it on the ground that a Court rule cannot supersede a constitutional mandate. *Coleman*, 151 Wn. App. at ¶16. It then relied on the conclusion in *Duckett* noted above that GR 31(j) is subject to *Bone-Club*. *Coleman*, 151 Wn. App. at ¶18-19. In so doing, it rejected the State’s observation that questionnaires are not themselves a proceeding subject to such an analysis:

But as pointed out above, the State offers no rationale for distinguishing between court records and court proceedings for purposes of this analysis, and we held in *Waldon* that an order sealing court records requires a Bone-Club analysis

*Coleman*, 151 Wn. App. at ¶18.

*State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009), however, involved the sealing of a criminal conviction, which is the judgment of the

court and clearly a presumptively public record and subject to GR 15 and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).<sup>3</sup> It does not address documents which are by another court rule presumptively private and which are subject to a specific procedure by which they may be made public. While *Coleman* is correct that a court rule may not overrule a constitutional mandate, it fails to seriously discuss why that constitutional mandate applies to confidential jury questionnaires.

*Coleman* and *Duckett*, like the other authorities cited in Stockwell's original brief, fail to apply the experience and logic test set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*). The *Press-Enterprise II* test is designed to answer the question that *Coleman* and *Duckett* glide past: whether particular actions violate the right to an open court. As discussed in the State's original brief, proper application of this test leads to the conclusion that sealing juror questionnaires does not violate open-court rights. See Brief of Respondent, at 18-28.<sup>4</sup>

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<sup>3</sup> Like *Coleman*, *Waldon* was decided under Const. art. I, § 10.

<sup>4</sup> Note that in *Strode*, "confidential juror questionnaire[s]" were used, *Strode*, 167 Wn.2d at ¶ 3 (plurality), and were apparently sealed, *Strode*, 167 Wn.2d at ¶ 41 (C. Johnson, J., dissenting). None of the three opinions in the case in any way suggested that the use and sealing of such questionnaires violated any open-trial right.

**3. Momah and Strode do not permit Stockwell to raise the public's open-court rights under Const. art I, § 10.**

The holding in *Coleman* was clearly based on a violation of Const. art. I, § 10 – the public's right to open courts. As discussed in the State's original brief, there is no basis for a petitioner in a collateral proceeding to assert another's constitutional rights. Brief of Respondent, at 33-41.

Furthermore, even were this issue being raised on direct appeal, neither *Momah* nor *Strode* authorize a defendant to raise the public's rights. *Momah* clearly only applied Const. art I, § 22. In *Strode*, the plurality makes reference to the public's rights under Const. art I, § 10. *Strode*, 167 Wn.2d at ¶ 15 (plurality). Justice Fairhurst in her concurrence, however, strongly rejected the notion that a defendant may assert the public's open-courts rights:

While I agree with the lead opinion's result in this case, I do not agree with its conflation of the rights of the defendant, the media, and the public. A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safe-guarded as required under Bone-Club or has been waived.

*Strode*, 167 Wn.2d at ¶ 28 (Fairhurst, J., concurring). "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). Moreover,

even the plurality opinion conceded in response to the concurrence that it was not addressing Strode's public trial rights:

The concurring justice asserts that any discussion of the public's right to open trials conflates the rights of the defendant and the public because a defendant should not be able to assert the rights of the public or press. Strode has not asserted any rights belonging to the public or press concerning public trials.

*Strode*, 167 Wn.2d at ¶ 15 n.4 (plurality). *See also State v. Wise*, 148 Wn. App. 425, ¶ 32, 200 P.3d 266 (2009) (defendant did not have standing to raise the public's open trial rights).

**C. UNDER *MOMAH*, STOCKWELL MAY NOT CLAIM THAT STRUCTURAL ERROR OCCURRED.**

As noted above, Stockwell fails to show that the sealing of juror questionnaires can be equated with the closure of a courtroom under Const. art. I, § 22. Even if it were considered to be such, however, *Momah* makes it clear that there was no structural error in this case.

Contrary to the contention of the dissent in *Momah*, 167 Wn.2d at ¶ 50 (Alexander, C.J., dissenting), and the plurality in *Strode*, 167 Wn. 2d at ¶ 13 n.3 (plurality opinion), a defendant's waiver of public-trial rights under Const. art I, § 22 need not be explicit. To the contrary, the majority in *Momah* concluded that although not a "classic case of invited error" *Momah*, 167 Wn.2d at ¶ 27, *Momah's* participation in and affirmative agreement with

the closure of the courtroom caused any error to not be structural, and to not warrant reversal. Momah, 167 Wn.2d at ¶ 31. Likewise, the concurrence<sup>5</sup> in *Strode* also rejected the notion that a waiver could not occur without an explicit colloquy:

The lead opinion here states that the right to a public trial is set forth in the same provisions as the right to a jury trial and, therefore, “[i]t seems reasonable ... that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.” Lead opinion at 315 n.3. If the lead opinion means that only an on-the-record colloquy showing such a waiver will suffice, I disagree. Waiver of many important constitutional rights may occur without an on-the-record colloquy. See, e.g., *State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994) (waiver of the right to a 12-person jury may be shown by a personal statement from the defendant expressly agreeing to waiver or an indication that the judge or defense counsel discussed the issue with the defendant prior to the attorney’s waiving the right); *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996) (no requirement of on-the-record waiver of the right to testify is required); *State v. Woods*, 143 Wn.2d 561, 608-09, 23 P.3d 1046 (2001) (no on-the-record colloquy required for waiver of a capital defendant’s right to present mitigating evidence); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-11, 691 P.2d 957 (1984) (on-the-record colloquy is preferred for waiver of right to representation of counsel and choice of self-representation, but absent such evidence, court will examine record and waiver may be found if it shows actual awareness of risks of self-representation); *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003) (waiver of right to be present at trial must be voluntary and knowing, but once trial has begun in the defendant’s presence, a subsequent voluntary absence acts as implied waiver of the right).

*Strode*, 167 Wn. 2d at ¶ 26 (Fairhurst, J., concurring).

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<sup>5</sup> As noted above, where there is no majority in a case, the holding must be deemed the narrowest grounds agreed to by the concurrence.

Contrary to Stockwell's contention, Supp. Brief of Petitioner, at 19, the proceedings here are far more analogous to those in *Momah* than those in *Strode*. Regardless of whether the trial court's explicit comments that the questionnaires would be sealed were on "contained in the same document" as the questionnaires, the two were presented and filed as a single item. Moreover, as in *Momah*, Stockwell agreed to and benefitted from the procedure followed. Further, unlike in either *Momah* or *Strode*, here all actual interviewing of the jurors by the court and parties was done in open court, and all peremptory and cause challenges were heard and decided in open court. As in *Momah*, Stockwell fails to show any structural error justifying the reversal of his conviction.

**D. REMEDY.**

As discussed in the State's original brief, Brief of Respondent at 41-43, even were Stockwell's arguments accepted, the remedy would not be a new trial. Reversal has never been held to be the proper remedy for improperly sealed *documents*. As *Momah* and *Strode* did not concern the sealing of documents these cases have no affect on this rule.

Nor can *Coleman* be read for authority to the contrary. Although that case was affirmed based on the conclusion that the error was not structural, *Coleman*, 151 Wn. App. at ¶ 21, its suggestion that reversal might be a

remedy is not supported by the authority it cites. To the contrary, all the cases cited involved the closure not of court documents, but of court *proceedings*. See *Id.* n. 27 (citing cases). The case cited in *Coleman* that is instructive in this regard is *Waldon*. There, the Court applied the normal remedy for improperly sealed documents: remand for compliance with the legal rule before sealing. *Waldon*, 148 Wn. App. at ¶ 33. This is the remedy actually applied in *Coleman* as well. *Coleman*, 151 Wn. App. at ¶ 23 (“We remand for reconsideration of the closing order under *Bone-Club* and *Waldon*, but otherwise affirm.”).

The distinction makes sense. A closed proceeding cannot be re-created; moreover, part of the reason for the rule is to permit contemporaneous observation of the court’s actions. Plainly closure stymies this process. The sealing of a document is different, however. The documents continue to exist, and the reason for open court *records* is so that the public may go back and examine them in the future. A remand for unsealing, if appropriate serves this purpose without the extraordinary expense of a new trial where the proceedings themselves were all open to the public.

### III. CONCLUSION

For the foregoing reasons, and those contained in the State's original brief, Stockwell's conviction and sentence should be affirmed.

DATED December 24, 2009.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney

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