

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

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IN RE THE PERSONAL RESTRAINT PETITION OF:

**FRANK CHESTER EARL,**

PETITIONER.

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**REPLY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Frank Earl is entitled to a new trial because a portion of jury selection was conducted in a private setting (the judge's chambers) and because the closure of the courtroom was not preceded by a *Bone-Club* hearing. This case is squarely controlled by *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), and this Court's more recent decision in *State v. Paumier*, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_ (April 27, 2010). This Court should reverse and remand for a new trial.

If this Court disagrees, then the Court should reverse and remand for an evidentiary hearing. That evidentiary hearing should include testimony on the issue of Earl's ability to hear material portions of his own trial; his ability to read the confidential questionnaire; and whether the insult directed to a juror by another was racially motivated or biased. RAP 16.11.

If this Court disagrees with all of the above, this Court should remand for resentencing even if it is merely to correct a scrivener's error. It indisputable that Earl did not strike out under the "three strikes" provisions.

B. ARGUMENT

1. MR. EARL'S RIGHT TO AN OPEN AND PUBLIC TRIAL WAS VIOLATED WHERE THE TRIAL COURT CLOSED A PORTION OF JURY SELECTION WITHOUT FIRST CONDUCTING THE REQUIRED *BONE-CLUB* HEARING.

The record now reflects that several jurors were questioned privately—in the judge's chambers.

No hearing preceded the private questioning of jurors. Caselaw makes it clear that reversal is required—it makes no legal difference that this claim is raised in a PRP, rather than on direct appeal.

#### *Additional Facts*

A transcript now exists of the portion of jury selection conducted in private. No hearing preceded the closure of the courtroom. Instead, the judge simply remarked: “Now, we’re going to adjourn to chambers and inquire of some members of the venire.” RP 26. Before adjourning to chambers the Court addressed those individuals in open court and stated “stay where you are, if you would, please.....We will adjourn to chambers now.” RP 26. Present in chambers, were the Court, counsel, Mr. Earl, and the court reporter. RP 27.

A total of eight jurors were questioned privately. Some were excused for cause; others were not. *See e.g.*, RP 30; 34. One juror, Juror 6, stated he knew two of the witnesses. RP 57. In addition, the court and counsel briefly discussed the findings from the CrR 3.5 motion, as well as the conduct of the remainder of voir dire. RP 55-56.

#### *Controlling Caselaw*

This case is controlled by *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), and *State v. Paumier*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (April 27, 2010).

The facts in *Strode* are strikingly similar to the case at bar. The *Strode* court explained: “Because the case against Strode centered on allegations that Strode had sexual contact with a child, prospective jurors were given a confidential juror questionnaire to complete. In it they were asked whether they, or anyone close to them, had either been the victim of sexual abuse or accused of committing a sexual offense. Those who answered ‘yes’ to either question were called one at a time into the judge's chambers for questioning on the issue of whether their past experiences would preclude them from rendering a fair and impartial verdict in the case. The trial court conducted this form of individual voir dire for at least 11 prospective jurors” *Id.* at 224.

The record in *Strode* was devoid of any indication that the trial judge held a *Bone-Club* hearing prior to these interviews being conducted in chambers. *Id.* at 224. “The only persons present during the individual questioning of the 11 prospective jurors were the trial judge, prosecuting attorney, defense counsel, and the defendant. In questioning some of these prospective jurors, the judge alluded to the fact that the questioning was being done in chambers for ‘obvious’ reasons, to ensure confidentiality, or so that the inquiry would not be “broadcast” in front of the whole jury panel. During this process, the trial judge and counsel for both parties asked questions of the potential jurors about their backgrounds, based on their

answers to the questionnaire. Challenges for cause were registered in chambers and either granted or denied following the examination of each of these prospective jurors.” *Id.* at 224.

The Court began its legal analysis in *Strode* opinion by noting: We have plainly articulated the guidelines that every trial court must follow before it closes a courtroom to the public citing *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). In *Bone-Club*, the Court held that a courtroom may be closed to the public only when the criteria for closure are identified and addressed in a hearing that *precedes* closure. Where a trial is closed without first conducting such a hearing, it constitutes a structural error that cannot be considered harmless. *Strode*, 167 Wn.2d at 225.

Much like this case, the State in *Strode* asserted “that Strode invited or waived his right to challenge the closure when he acquiesced, without any objection, to the private questioning of jurors.” In response, the Court noted that “Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial.” *Id.* at 229. In addition, the Court reiterated that the “public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal.” Importantly, the Supreme Court then noted

that “the right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner. *Id.* at 229, n.3. *See also City of Bellevue v. Acrey*, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984) (waiver of the jury trial right must be affirmative and unequivocal after colloquy with defendant).

In this case, there is absolutely no evidence of a *Bone-Club* hearing. This Court need go no farther to reject the State’s argument of invited error. However, there is also no evidence that Mr. Earl, personally or even through counsel, made a knowing, intelligent, and voluntary waiver of his right to an open and public trial. To the contrary, there is simply no indication anywhere in the record that Earl (or counsel) was aware that he was waiving these constitutional rights. The fact that counsel signed an order sealing confidential questionnaires does not justify dispensing with a *Bone-Club* hearing prior to private oral *voir dire* and falls far short of what is required by a defendant to waive his right to an open and public trial.

This Court’s recent decision in *State v. Paumier*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2010), provides further support for Earl’s position. In *Paumier*, several jurors indicated during the course of *voir dire* that they preferred to

answer certain questions in chambers. The judge and the parties questioned five jurors in chambers, recording the jurors' responses.

In response to the State's arguments that an error was invited or harmless, this Court held:

Three months after *Momah* and *Strode*, the United States Supreme Court decided *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 721, \_\_\_ L.Ed.3d \_\_\_ (2010), a per curiam opinion holding that under the First and Sixth Amendments, voir dire of prospective jurors *must* be open to the public. *Presley*, 130 S.Ct. at 723-24. This requirement is "binding on the States." *Presley*, 130 S.Ct. at 723. The Court explained that while the accused has a right to insist that the voir dire of the jurors be public, there are exceptions to this general rule. The right to an open trial " 'may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information.' " *Presley*, 130 S.Ct. at 724 (quoting *Waller*, 467 U.S. at 45). " 'Such circumstances will be rare, however, and the balance of interests must be struck with special care.' " *Presley*, 130 S.Ct. at 724 (quoting *Waller*, 467 U.S. at 45). The *Presley* Court stated that *Waller* provided the appropriate standards for courts to apply before excluding the public from any stage of a criminal trial. *Presley*, 130 S.Ct. at 724.

Noting that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," *Presley*, 130 S.Ct. at 725, the Court reiterated that " '[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire.' " *Presley*, 130 S.Ct. at 724 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 511, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ( *Press-Enterprise I* )). Moreover "trial courts are required to consider alternatives to closure even when they are not offered by the parties," this is because "[t]he public has a right to be present whether or not any party has asserted the right." *Presley*, 130 S.Ct. at 724-25.

Additionally, the trial court must make appropriate findings supporting its decision to close the proceedings.

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*. But in those cases, the particular interest, and threat to that interest, must “be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Presley*, 130 S.Ct. at 725 (quoting *Press-Enterprise I*, 464 U.S. at 510). The Court held that “even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure.” *Presley*, 130 S.Ct. at 725. Thus, where the trial court fails to sua sponte consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant's conviction. *Presley*, 130 S.Ct. at 725.

Thus *Presley*, applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including *voir dire*. Here, the trial court closed a portion of *voir dire* by interviewing certain jurors in chambers. By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier's and the public's right to an open proceeding. *Presley* requires reversal of Paumier's burglary conviction, and we so hold.

*Id.* at \_\_\_\_.

Because a material portion of Earl's trial was closed to the public and because nothing approaching a *Bone-Club* hearing was conducted, Earl is entitled to relief.

#### *Strode Did Not Announce a New Rule*

The State next argues that Earl relies on a new rule that cannot be applied to him—the so-called *Teague* doctrine. See *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The State fails, however, to not that it is now clear that states are no longer bound to the

federal *Teague* doctrine, calling into questions the cases cited by the State. *Danforth v. Minnesota*, 550 U.S. 956, 127 S.Ct. 2427, 167 L.Ed.2d 1129 (2007). *Danforth* held that the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed “nonretroactive” under *Teague*. It appears that no Washington cases have discussed the impact of *Danforth* on Washington cases.

Fortunately, there is no need for this Court to wade into the murky waters of federalism, comity, and retroactivity. Earl does not rely on a “new rule”—a doctrine that the State spends precious little time explaining. Instead, *Strode*, *Momah*, and *Paumier* all apply the long-standing rule that a trial court cannot close a courtroom without first holding a hearing. It is not “new” to hold that jury selection is part of trial. Indeed, there are a number of cases holding that *voir dire* is part of the right to a public trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)). Instead, it was the State who sought, but was denied an exception to the rule in *Strode*

*Teague* defined what constitutes a “new rule”:

In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

*Teague*, 489 U.S. at 301-02 (citations omitted) (italics in original). See also Hertz, R. & Liebman, J., *Federal Habeas Corpus Practice and Procedure* (5<sup>th</sup> Ed. 2008 Supp.), § 25.5. Ultimately, a claim that conducting a portion of voir dire in writing and privately violated a petitioner's rights to an open and public trial is a classic "mixed question" of law and fact which requires a case-by-case examination of the evidence. While the general rule may be clear and simple—the closing of a portion of trial without a *Bone-Club* hearing is prohibited—its application will necessarily vary from case to case based on the underlying facts. This does not mean that the rule itself is changing or that a "new rule" is being announced in every case. As the Supreme Court observed regarding the "mixed question" of whether trial counsel was ineffective: That the *Strickland* test of necessity requires a case-by-case examination of the evidence obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court. This Court's precedent dictated that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective-assistance claim. And it can hardly be said that recognizing the right to effective counsel breaks new ground or imposes a new obligation on the States. *Williams v. Taylor*, 529 U.S. at 391 (quotations and citations

omitted). Put another way, in “mixed question” situations where the Court’s decision is dependent on the particular facts presented, the Supreme Court will “tolerate a number of specific applications without saying that those applications themselves create a new rule.” *Wright v. West*, 505 U.S. 277, 308 (1992) ( Kennedy, J., concurring). When a rule is “designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.” *Id.* at 309.

This perfectly describes the rule that Earl seeks to apply in this case.

However, perhaps the best indicator of the fact that *Strode* does not create a new rule is the fact that the *Strode* court never indicates that it is breaking new ground. Instead, it simply applies existing caselaw:

The State asserts that the trial was not closed to the public because the interviews of prospective jurors that took place in chambers occurred prior to the commencement of trial. This argument fails. The guaranty of open proceedings extends in criminal cases to the process of juror selection, which is itself a matter of importance, not simply to the adversaries but to the criminal justice system. *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)). In this regard, we have expressly noted that a closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals. *Brightman*, 155 Wash.2d at 515, 122 P.3d 150 (citing *Orange*, 152 Wash.2d at 812, 100 P.3d 291).

167 Wn.2d at 226-27 (internal quotations removed). Then, the Court rejects the State proposed “new” exception, an exception that the State still clings to in its briefing:

The State's final argument is that even if the interviewing of prospective jurors in chambers is deemed an unjustified closure, the violation was insignificant and did not infringe the constitutional right to a public trial. Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. *United States v. Ivester*, 316 F.3d 955 (9th Cir.2003). Trivial closures have been defined to be those that are brief and inadvertent. *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir.1994); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir.1975). This court, however, ‘has never found a public trial right violation to be [trivial or] de minimis.’ *Easterling*, 157 Wash.2d at 180, 137 P.3d 825. Furthermore, the closure here was analogous to the closures in *Bone-Club* and *Orange*. *Orange*, 152 Wash.2d at 804-05, 100 P.3d 291; *Bone-Club*, 128 Wash.2d at 259, 906 P.2d 325. As we have stated above, the trial court and counsel for the State and Strode questioned at least 11 prospective jurors in chambers. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. This closure cannot be said to be brief or inadvertent.

*Id.* at 230. Earl does not rely on a new rule.

*A Structural Error Mandates Automatic Reversal in a PRP*

The State’s final argument is that Earl has not identified sufficient prejudice from the improper closure of the courtroom. However, because the closure of the courtroom without any procedure resembling a *Bone-Club* hearing is a structural error, no specific showing of prejudice is required—even in a PRP. The error mandates reversal on direct appeal and in a collateral attack. *See In re Orange*, 152 Wn.2d at 814 (applying the

presumption of prejudice and reversing in a PRP). Indeed, the reason that structural errors require reversal without any analysis of prejudice, on direct or collateral review, is because they defy prejudice analysis. *Arizona v. Fulminante*, 499 U.S. 279, 290, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991). *See also Lee v. Marshall*, 42 F.3d 1296 (9<sup>th</sup> Cir. 1994) (structural errors are not subject to the harmless error analysis and their existence requires automatic reversal of conviction).

Thus, Earl is entitled to a new trial.

2. MR. EARL WAS UNABLE TO READ OR HAVE READ TO HIM THE CONFIDENTIAL QUESTIONNAIRES AND COULD NOT HEAR THE TESTIMONY OF THE COMPLAINING WITNESS. THIS RESULTED IN A FUNCTIONAL VIOLATION OF HIS RIGHT TO BE PRESENT; TO EFFECTIVE ASSISTANCE OF COUNSEL; TO CONFRONT AND CROSS-EXAMINE, AND TO DUE PROCESS.
3. THE TRIAL COURT SHOULD HAVE INQUIRED OR ALLOWED AN INQUIRY INTO WHETHER THE INSULT DIRECTED TO JUROR 7 WAS RACIALLY BIASED IN NATURE. THIS COURT SHOULD REMAND FOR A HEARING LIMITED TO THIS TOPIC.

The State has disputed the facts which underpin these claims. Thus, Court should remand these claims to the trial court for an evidentiary hearing pursuant to RAP 16.11. If a personal restraint petitioner presents a prima facie case of error, but the issues cannot be resolved on the existing record, the case will be transferred to superior court for a reference hearing. RAP 16.11(b); *In re Pers. Restraint of Rice*, 118 Wash.2d 876, 885, 828 P.2d 1086 (1992). As required, Earl has supported his claims based on

competent, admissible evidence. See *In re Pers. Restraint of Lord*, 123 Wash.2d 296, 303, 868 P.2d 835 (1994) (to obtain an evidentiary hearing, a personal restraint petitioner must present competent, admissible evidence to establish facts entitling him to relief). Likewise, Earl candidly admits that the State has carried its more limited burden of contesting Earl's factual claims. As *Rice, supra*, explains:

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.

118 Wn.2d at 886-87.

However, there is no reason for this Court to reach these issues if it reverses on Earl's closed courtroom claim. If this Court orders an evidentiary hearing, Earl will seek leave to file a supplemental reply once the findings have been entered and transmitted to this Court. However, Earl respectfully suggests there is no reason to reach these issues given that reversal is required on Earl's first claim of error.

4. MR. EARL IS NOT A "THREE STRIKES" PERSISTENT OFFENDER.

The parties agree that the judgment is an error and must be corrected, if a new trial is not ordered.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should refer this case to a panel since it is clearly not frivolous and then either reverse and remand this case for (1) a new trial; or (2) an evidentiary hearing.

DATED this 24<sup>th</sup> of May, 2009.

Respectfully Submitted:

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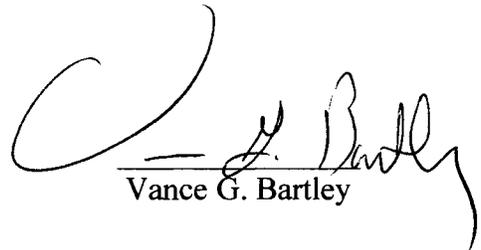
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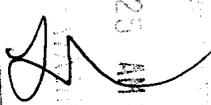
**CERTIFICATE OF SERVICE**

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on May 24, 2010 I served the parties listed below with a copy of *Reply in Support of PRP* as follows:

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