

No. 39984-9

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

FRANK CHESTER EARL,

PETITIONER.

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**SURREPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Frank Earl is entitled to a new trial because eight jurors were questioned 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.

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.

Eight jurors were questioned privately—in the judge's chambers. No hearing preceded the private questioning of jurors. *Paumier* (and the cases upon which it relies) makes it clear that reversal is required.

The State argues, however, that while reversal might have been required on direct appeal, it is not required in a PRP without a particularized showing of prejudice.

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. 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 (9th Cir. 1994) (structural errors are not subject to the harmless error analysis and their existence requires automatic reversal of conviction).

There are two kinds of errors: trial errors which are subject to harmless error review, and structural defects, which require reversal of a challenged conviction because they affect the framework within which the trial proceeds. “Errors are properly categorized as structural only if they so fundamentally undermine the fairness or the validity of the trial that they require voiding its result *regardless* of identifiable prejudice.” *Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir.1996).

Conversely, errors that do not affect the framework of a trial, but rather are discrete events that occur during the presentation of the case and may be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless, do not automatically require reversal.

Structural errors affect the very “ ‘framework within which the trial proceeds, rather than simply ... the trial process itself.’ ” *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting

Fulminante, 499 U.S. at 310, 111 S.Ct. 1246). The Supreme Court has “found an error to be ‘structural,’ and thus subject to automatic reversal, only in a ‘very limited class of cases.’ ” *Neder*, 527 U.S. at 8, 119 S.Ct. 1827 (quoting *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)); *see also* *Rose*, 478 U.S. at 579, 106 S.Ct. 3101 (“We have emphasized ... that while there are some errors to which [harmless error analysis] does not apply, they are the exception and not the rule.”).

Examples of such errors include a total deprivation of the right to counsel, *see Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), lack of an impartial trial judge, *see Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), an unlawful exclusion of grand jurors of defendant's race, *see Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), the right to self-representation at trial, *see McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), an erroneous reasonable-doubt instruction to the jury, *see Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the seating of a juror who should have been removed for cause, *see United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); as well as the right to a public trial, *see Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *see also* *Neder*, 527 U.S. at

8, 119 S.Ct. 1827 (collecting structural error cases (citing *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997))). In each of these cases, a finding of the violation requires automatic reversal—no matter how overwhelming the evidence and no matter whether the claim is raised on direct appeal or in a post-conviction setting.

It is because such errors “ ‘infect the entire trial process’ ” that they require reversal *without regard to the evidence* in a particular case. *Neder*, 527 U.S. at 8, 119 S.Ct. 1827 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). As explicated by the United States Supreme Court, structural error encompasses defects in trial components that do not bear directly on the presentation or omission of evidence and argument to the jury, but rather that relate to the impartiality of the forum or the integrity of the trial structure writ large. Defects in these structural trial elements impact trials in ways that are so intangible and pervasive as to preclude a meaningful assessment of the prejudice deriving from the error. Indeed, many of the above-cited cases are cases that arise in habeas where the prejudice standard is similar to the standard in a PRP—and reverse without any discussion of prejudice.

The State does not even begin to discuss this distinction. Instead, the State seeks to transform the structural error of closing the courtroom

without first conducting a hearing back into a trial error for purposes of a PRP. Structural errors do not become trial errors when they are reviewed in post-conviction.

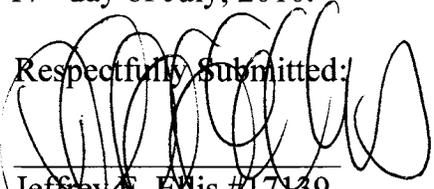
“A structural error resists harmless error review completely because it taints the entire proceeding.” *State v. Levy*, 156 Wn.2d 709, 724, 132 P.3d 1076 (2006). That statement remains true both on direct appeal and in a PRP.¹

D. CONCLUSION

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 a new trial.

DATED this 17th day of July, 2010.

Respectfully Submitted:


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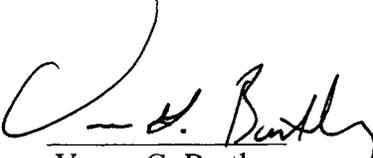
¹ The State cites several cases that impose a different “waiver” rule than Washington uses for closed courtroom cases. Waiver and prejudice are different issues.

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on July 19, 2010 I served the parties listed below with a copy of Petitioner's Surreply in Support of Personal Restraint Petition as follows:

Kathleen Proctor
Pierce County Prosecuting Attorney
930 Tacoma Ave S Rm 946
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7-19-10 Sea, WA
Date and Place


Vance G. Bartley

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