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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY Cm

NO. 36346-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RENE P. PAUMIER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT<sup>1</sup>

UNDER STRODE AND MOMAH, PAUMIER'S CONVICTIONS  
MUST BE REVERSED

1. *Factual Review*

The trial judge at the outset of voir dire sua sponte announced that potential jurors for Paumier's trial who wished to speak privately would be taken into the judge's chambers for individual questioning to avoid possible embarrassment:

Lastly, if there is anything that is of a sensitive nature and you would prefer not to discuss it in this group setting, please let us know. And I make a list and we take those jurors individually into chambers to ask those questions because we don't intend to embarrass you in any way.

RP3 9-10. The judge and parties questioned three potential jurors individually in chambers. RP3 13-17. There is no indication the judge advised Paumier of his right to open voir dire or afforded him the chance to object to private questioning.

The court later informed the parties that "[w]e do have one more juror to talk to in chambers." RP3 49. After the court and parties finished with that prospective juror and returned to the courtroom, the judge asked if any other panelists wanted to follow up on a previous answer either in the

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<sup>1</sup> On November 3, 2009, this Court ordered additional briefing to address the decisions in State v. Strode, \_\_\_ Wn.2d \_\_\_, 217 P.3d 310 (2009) and State v. Momah, \_\_\_ Wn.2d \_\_\_, 217 P.3d 321 (2009).

courtroom or in chambers. RP3 51. One more potential juror asked to converse in chambers, and the court granted the request. RP3 51-52.

On appeal, Paumier contends the trial court violated his constitutional rights to a public trial by conducting private voir dire in chambers, thereby precluding the public from observing proceedings. Brief of Appellant at 6-14; Reply Brief of Appellant at 1-6. The recent decisions in *Strode* and *Momah* support Paumier's argument.

2. *State v. Strode Supports Reversal of Paumier's Convictions.*

Strode was charged with three sex offenses. His prospective jurors were asked in a confidential questionnaire whether they or anyone they were close to had ever been the victim of or accused of committing a sex offense. The prospective jurors who answered "yes" were individually questioned in the judge's chambers to determine whether they could nonetheless render a fair and impartial verdict. *Strode*, 217 P.3d at 312. Before excluding the public from this private questioning, the trial court failed to hold a "Bone-Club<sup>2</sup> hearing." *Strode*, 217 P.3d at 313.

While privately questioning some of the potential jurors, the trial court state variously that "the questioning was being done in chambers for 'obvious' reasons, to ensure confidentiality, or so that the inquiry would not

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

be 'broadcast' in front of the whole jury panel." *Strode*, 217 P.3d at 313. The trial judge, prosecutor and defense counsel questioned the prospective jurors, and challenges for cause were heard and ruled upon. *Id.*

A majority of the Supreme Court reversed Strode's conviction because the trial court failed to weigh the competing interests as required by *Bone-Club*. *Strode*, 217 P.3d at 314-15 (Alexander, C.J., lead opinion); 217 P.3d at 318-19 (Fairhurst, J. concurring).

The lead and concurring opinions differed, however, on whether a defendant can waive the issue through affirmative conduct.<sup>3</sup> The lead opinion concluded a defendant's failure to object to courtroom closure does not constitute a waiver of the issue for appeal, and that waiver occurs only if it is shown to be knowing, voluntary and intelligent. *Strode*, 217 P.3d at 315 n.3 (Alexander, C.J.).

The concurring opinion, however, concluded that defense participation in the closed courtroom proceedings can, under certain circumstances, constitute a valid waiver of the right to a public trial. *Strode*,

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<sup>3</sup> The concurring opinion also disagreed with the lead opinion on whether a defendant could assert the rights of the public and/or press under article I, section 10. Compare 217 P.3d at 315 (lead opinion noting Strode could not waive the public's right to open proceedings) and 217 P.3d at 316, 319 (concurring opinion chastising lead opinion for conflating the right of a defendant, the media and the public). Because Paumier relies on his personal right as guaranteed by article I, section 22, this split should not affect this Court's decision in his case.

217 P.3d at 318 (Fairhurst, J., concurring). As an example, Justice Fairhurst noted that in *Momah*, the trial court expressly advised that all proceedings are presumptively public. *Strode*, 217 Wn.2d at 318. Despite this admonishment, defense counsel affirmatively requested individual questioning of panel members in private, urged the court to expand the number of jurors subject to private questioning, and actively engaged in discussions about how to accomplish this. *Id.* "At no time," Justice Fairhurst observed, "did the defendant or his counsel indicate in any way that any of the proceedings held in a closed room that was not a courtroom violated his public trial right." *Strode*, 217 P.3d at 318. Justice Fairhurst concluded counsel's conduct "shows the defendant intentionally relinquished a known right." *Id.*

The facts in Paumier's case mirror those in *Strode*. The trial court unilaterally announced there would be private questioning in chambers of those potential jurors who requested it. The court neither addressed the *Bone-Club* factors nor in any other way weighed the competing interests before closing a portion of the voir dire. As in *Strode*, the trial court violated Paumier's constitutional right to a public trial.

3. *State v. Momah is Distinguishable and Does Not Control the Outcome of Paumier's Appeal.*

The state charged Momah, a gynecologist, with committing sex offenses against several patients. *Momah*, 217 P.3d at 324. Unlike the "unexceptional circumstances" in *Strode*, 217 P.3d at 312 (Alexander, C.J., lead opinion), Momah's case was "heavily publicized" and "received extensive media coverage." *Momah*, 217 P.3d at 324.

As a result, the court summoned more than 100 prospective jurors and gave them a written questionnaire. By agreement of the parties, jurors who said they had prior knowledge of the case, could not be fair, or requested private questioning, were questioned individually in chambers. *Id.*

Concerned about poisoning the entire panel, defense counsel also argued for expansion of the private voir dire:

Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

*Momah*, 217 P.3d at 324.

The trial court compiled a list of jurors to be questioned individually. Defense counsel agreed with the list. *Id.* Both the defense and prosecution actively participated in the in-chambers jury selection. Most of the questions concerned prospective jurors' knowledge of the case gained from media

publicity. *Id.* at 324 n.1.

The six-justice majority in *Momah* noted that when "the record lack[s] any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom[.]" the error is "structural in nature" and reversal is required. *Momah*, 217 P.3d at 326-27. The majority found reversal was not required because, despite failing to explicitly discuss the *Bone-Club* factors, the trial court balanced *Momah's* right to a public trial with his right to an impartial jury. *Momah*, 217 Wn.2d at 329.

In addition, the court essentially found *Momah* "waived" his public trial right:

*Momah* affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard *Momah's* constitutional right to a fair trial by an impartial jury, not to protect any other interests.

217 P.3d at 327.

The court reiterated this theme later in the opinion, presuming *Momah* made the following "tactical choices to achieve what he perceived as the fairest result[:]"

- Before any private voir dire, the parties and the judge discussed numerous proposals concerning juror selection;
- Although *Momah* was given a chance to object to the in-

chambers procedure, he never objected;

- Momah never suggested closed voir dire might violate his right to public trial;
- Defense counsel deliberately chose to pursue in-chambers questioning to avoid tainting the panel; counsel "affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning."

Momah, 217 P.3d at 328-29.

Counsel's affirmative and aggressive pursuit of private voir dire is an atypical and distinctive feature of Momah. Much more common is the unexceptional case where a trial court merely informs the parties it will honor prospective jurors' requests to be spared the embarrassment of revealing sensitive matters in open court. In short, Momah is the aberration and Strode is the ordinary. And because the Momah Court relied so heavily on counsel's unusually assertive conduct, its holding will apply only in the rare case.

Paumier's case is hardly rare; it is instead ordinary, like Strode. Unlike in Momah, the trial court did not discuss various courses of action with the parties; instead, the court declared those prospective jurors who wished private questioning would have it. Unlike in Momah, there was no opportunity to object to private voir dire. Unlike in Momah, Paumier's counsel neither requested closed voir dire nor sought its expansion.

Further, and consistent with the unilateral nature of the court's

declaration, the trial court dominated the in-chambers examination. The court solicited no questions from the parties before excusing the first prospective juror for cause. RP3 11-13. Paumier's counsel passed on his opportunity to ask the second panelist any questions. RP3 13-15. Paumier's counsel posed only two questions to the third potential juror. RP3 15-17. When the third juror was back in chambers later during voir dire, defense counsel asked no questions. RP3 49-50. And defense counsel asked the final panelist one question. RP3. This does not constitute the type of "active participation" in individual juror questioning the Momah Court repeatedly noted. Momah, 217 P.3d at 324, 327, 329.

In addition, Momah's trial counsel exercised "numerous challenges for cause." Momah, 217 P.3d at 324, 329. Paumier's counsel exercised one. RP3 14.

Finally, the trial judge in Momah closed proceedings to protect Momah's constitutional right to an impartial jury. Momah, 217 P.3d at 327. In Paumier's case, the trial court expressed no interest in safeguarding the right to an impartial jury. Instead, the trial court's concern was respecting the privacy of panel members. The court made this clear when it told the venire, "[W]e don't intend to embarrass you in any way." RP3 10.

As in Strode, the trial court gave no consideration to Bone-Club factors before moving part of voir dire into chambers. It failed to identify a

compelling interest justifying closure, failed to give anyone present the opportunity to object to the closure, failed to evaluate whether closure was the least restrictive means to protect whatever interest the court may have perceived was threatened, failed to weigh that interest against the public's interest in an open proceeding, and failed to ensure the closure was no broader or longer than necessary. Bone-Club, 128 Wn.2d at 258-59.

For all the reasons stated above, this Court should conclude that the trial court violated Paumier's right to a public trial, that the violation was structural error, and that reversal is warranted. Strode, 217 P.3d at 312.

B. CONCLUSION

For the reasons set forth here and in his opening and reply briefs, Paumier requests this Court to reverse his convictions.

DATED this 16 day of November, 2009.

Respectfully submitted

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DIVISION II**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 36346-1-II
	)	
RENE P. PAUMIER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16<sup>TH</sup> DAY OF NOVEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF NOVEMBER 2009.

x Patrick Mayovsky