

No. 89571-6
COA No. 263541-III

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 25, 2015, 4:24 pm
BY RONALD R. CARPENTER
CLERK

E

RECEIVED BY E-MAIL

by h

**IN THE SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON

Respondent,

v.

JERRY ALLEN HERRON

Petitioner,

SUPPLEMENTAL BRIEF OF PETITIONER

Jeffry K. Finer
Attorney for Petitioner Herron

Law Offices of JEFFRY K FINER, P.S.
35 West Main • Suite 300
Spokane, WA • 99201
(509) 464-7611 jeffry@finer-bering.com



ORIGINAL

TABLE OF CONTENTS

A. ISSUES FOR WHICH REVIEW WAS GRANTED 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT

 I. HERRON HAS STANDING TO CHALLENGE
 THE TRIAL COURT’S VIOLATIONS OF ART. I,
 SECTION 10’S “OPEN COURT” PROVISIONS FOR
 VIOLATION OF THE *ISHIKAWA* PROCEDURES 9

 II. THE TRIAL COURT’S *SUA SPONTE*
 BROADENING OF HERRON’S LIMITED WAIVER
 UNDER ART. I, SECTION 22, VIOLATED THE
 DEFENDANT’S RIGHTS UNDER *BONE-CLUB* 17

 III. HERRON’S ART I, SECTION 22, WAIVER
 DID NOT AND CANNOT AUTHORIZE THE
 TRIAL COURT TO FOREGO THE FIVE
 PROCEDURES REQUIRED UNDER *ISHIKAWA*
 AND *BONE-CLUB* 19

Conclusion 25

TABLE OF AUTHORITIES

CASE AUTHORITY

<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	22
<i>Eisenstadt v. Baird</i> , 405 U.S. 446 (1972)	9
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	20
<i>In re: Orange</i> , 152 Wn. 2d 795 (2004)	24
<i>Jensen v. Hernandez</i> , 864 F. Supp. 2d 869 (E.D. Cal, 2012)	20
<i>Peters v. Kiff</i> , 407 U.S. 493, 92 S.Ct. 2163 (1972)	
<i>Powers v. Ohio</i> , 499 U.S. 400 (1991)	10, 11
<i>Press-Enterprise Co. v Superior Court</i> , 464 U.S. 501 (1984).....	14, 15, 16
<i>State v. Bone-Club</i> , 128 Wn.2d 254 (1995)	18, 20, 23, 24
<i>State v. Brandenburg</i> , 153 Wn. App. 944 (2009), <i>review denied</i> , 170 Wn.2d 1009 (2010)	21
<i>State v. Brightman</i> , 155 Wn.2d 506 (2005)	24
<i>State v. Erickson</i> , 146 Wn. App. 200 (Div. 2, 2008)	23
<i>State v. Frawley</i> , 181 Wn.2d 452 (2014)	20, 21
<i>State v. Herron</i> , 177 Wn.App. 99 (2013)	20
<i>State v. Holsworth</i> , 93 Wn. 2d 148 (1980)	7, 22

<i>State v. Iredale</i> , 16 Wn.App. 53 (1976)	22
<i>State v. Paumier</i> , 176 Wn.2d 29, (2012)	15
<i>State v. Wise</i> , 176 Wn.2d 1, (2012)	15
<i>State v. Strobe</i> , 167 Wn. 2d 222 (2009)	23, 24
<i>State v. Sublett</i> , 176 Wn.2d 58	23
<i>State v. Wilson</i> , 162 Wn. App. 409 (2011)	21, 23
<i>T.S. v. Boy Scouts of America</i> , 157 Wn.2d 416 (2006)	11
<i>United States v. Alcantara</i> , 396 F.3d 189 (2005)	15
<i>United States ex rel. Aleman v. Circuit Court of Cook County</i> , 967 F.Supp. 1022 (1997)	14

A. ISSUES FOR WHICH REVIEW WAS GRANTED

1. Whether Herron has standing to challenge the trial court's violations of Art. I, section 10's "open court" provisions for violation of the *Ishikawa* procedures.
2. Whether the trial court's *sua sponte* broadening of Herron's limited waiver under Art. I, section 22, violated the Defendant's rights under *Bone-Club*.
3. Whether a defendant may challenge the trial court's failure to properly effect the waiver of his personal Art. I, section 22 rights to an open courtroom.

B. STATEMENT OF THE CASE

a. Proceedings. The defendant was charged by information with one count of First Degree Rape (with a deadly weapon) in 2007 and was tried to a jury on June 18, 2007. He was found guilty and on July 27, 2007, was sentenced consecutively to a term of 24 months (without good time) and 207 months (with good time). Appeal to Division III was stayed for five years due to uncertainty regarding the application of *Bone-Club* standards to the procedures used during jury selection in Mr. Herron's trial. Supplemental briefing was ordered in 2010, again in 2013, and most recently in 2015. The

lower court's unpublished opinion issued on October 3, 2013.

b. Facts Relating to Jury Selection

Herron was charged with 1st Degree Rape on February 16, 2007, and tried before a jury on June 18, 2007.

During the pretrial readiness conference on June 15, 2007, the defense requested that the court give the venire a general questionnaire to aid in the selection of a fair and impartial jury. RP 6/15/07 66-67.¹ The lower court noted that in a sex case it would include questions regarding sex offenses, RP 6/15/07 67-68, adding that the court would question in chambers anyone who answered affirmatively to having had exposure directly or indirectly to a sex offense. RP 6/15/07 68. The prosecutor and court discussed the process and alternatives, including the use of a separate courtroom to sequester members of the panel during an individual member's questioning. RP 6/15/07 68-70. Defense counsel indicated that his client preferred to conduct individual questioning in chambers. RP 6/15/07 at 70. Mr. Herron agreed. RP 6/15/07 at 71. The trial court

¹ The trial transcripts issued in multiple volumes. Volume I contains several hearings, including the Readiness Hearing of 6/15/07. Pretrial Motions and Voir Dire, both held on 6/18/07, are contained in Volume I-A and I-B. Dates are included with the citations to reduce confusion.

summarized its concerns about open voir dire and recommended that Mr. Herron discuss it with his attorney. RP 6/15/07 at 71-72.

At the pretrial motions hearing on June 18, 2007, the issue of questioning the venire members individually in chambers arose again. The court asked Mr. Herron whether he understood that he had the right to a public trial. RP 6/15/07 at 104:9-15. Mr. Herron stated he understood. RP 6/15/07 at 104:16.

The court advised Mr. Herron that the defendant could waive the right to an open courtroom in the event the questions raised highly sensitive matters, such as sexual misconduct.

THE COURT: And by the same token, if you want to waive that right so that jurors will know that if they respond positively to some of these questions about things like have they ever been accused of a sex offense or been a victim of a sex offense or an unwanted sexual touching, have a close friend or family member – we discussed last week, very often individuals are very reluctant to disclose those things, and particularly to disclose those things if they know they are going to be talked about in front of, well, for instance, 50 other jurors and other members of the public.

RP 6/15/07 104:17-105:3. The court then reviewed with Mr. Herron its past practice, pre-*Bone-Club*, and explained the benefits of *in camera* review for sensitive issues:

the argument is that [venire panelists] tend to be more open and honest and disclose things that they might not otherwise disclose if they knew that 50, 75 people were going to hear

about these things, And it is totally your decision as to how that is handled.

RP 6/15/07 105:12-18. Mr. Herron stated he wanted such jurors questioned in chambers. RP 105:23. Ultimately Mr. Herron and his counsel agreed to in-chambers questioning. RP 6/15/07 at 108-09. The defendant clearly premised this waiver based upon the prosecutor's and trial court's remarks, RP 6/15/07 at 104-08, that sequestration of the venire from one another but within the view of the public, was insufficient to protect Mr. Herron's right to a fair and impartial jury. On that record, the court found Mr. Herron to have knowingly, voluntarily, and intelligently waived his right to an open courtroom; the court noted to Mr. Herron that he made the "safe, wise" decision. RP 6/15/07 at 108:23 to 109:3. The parties agreed that the venire questionnaires would be reviewed by the parties and the court, and that the court would be closed only so that such jurors as might be affected by the nature of the charge could be brought back to chambers for private questioning.

The court concluded: "And at this time it will be understood that unless I hear otherwise from the defense *this will be a chambers conference inquiry relating to the questionnaire.* * * * And in that regard the waiver of the public aspect of the trial in only this limited

regard is accepted.” RP 6/15/07 at 110:12-20 (emphasis added).

At trial, however, events took a different turn.

The trial began with the court’s introduction of the case and summary of the struck jury method. RP 6/18/07, Volume I-A, 4-6. The court addressed the jury questionnaire and informed the venire that their responses will be provided to both attorneys.

THE COURT: [B]ecause of the subject matter of today’s case you’ve been provided in advance with a written jury questionnaire form. The allegation here concerns an allegation of rape, and sometimes people have things, when there’s a sex offense that is being alleged, sometimes they have things that have occurred that they don’t like to talk about in open fashion.

RP 6/18/07, Vol I-A, 6:9-16. Next the court stated the following:

THE COURT: [T]hen if there were responses that need some follow-up I go in chambers with the parties and with the attorneys and then if we need to ask you some questions relating to those questionnaire reponses then we bring you in on an individual basis, one by one. Everything is recorded but we can make some inquires in a relative degree of confidentiality, so you don’t have to discuss sensitive things in front of the public in front of all the other jurors.

And again, this is to minimize the difficulty of having to answer these questions for the jury panel, and also to encourage full disclosure of things that might be important.

RP 6/18/07, Vol-IA ,7:3 to 7:15. At this point, no other notice was

made to the public or to any media. So far as the public (and Mr. Herron) knew, the *in camera* closed sessions were only to review highly confidential, sensitive matters based on answers given on the questionnaires.

The court conducted a few questions of the panel regarding rape, rape victims, and accusations of rape, and then stated:

THE COURT: Okay. And we will be going — What I'm going to do, as a matter of fact, is take a break from our sessions in court, and I'm going to turn off our amplification system here, so when we have discussion in chambers it's not broadcast here. But I want to meet with counsel and — parties in chambers.

RP 6/18/07, Vol I-A, 49:20 to 50:1. The next portion of voir dire was closed to the public.

The trial court explicitly re-opened the record in closed chambers, RP 6/18/07, Vol I-A, 50:13, and proceeded to strike several jurors before any motion had been made for cause. "Why don't we talk about some of these people that have issues — And we won't bring — we'll agree that some of these should be excused. We don't have to ask them any questions, don't have to bring them in." RP 6/18/07, Vol I-A, 50:16-20. The people with "issues" however included a number of panelists who had not provided sensitive or confidential answers to the questionnaire.

Counsel and the court first discussed which of the venire panel had been excused before court opened. RP 6/18/07, Vol I-A, 50:16 to 53:25. Additional discussion covered members of the venire who were still on the panel and were in fact present and waiting just outside the closed chamber's door. RP 6/18/07 Vol I-A, 53-59. Discussion covered scheduling issues, predispositions regarding the nature of the alleged offense, and other routine issues. RP 6/18/07 Vol I-A, 53-59.

At page 58, the trial court begins to drop jurors. "If you agree, I'll knock [the student from the panel]; if not, we can talk to her some more." Both parties appear to agree to removing the student, though the transcript indicates only one, unnamed, counsel. RP Vol I-A, 58:18-20.

At this point, there has not been a request by either party to expand the limited justification for a closed-courtroom as agreed on June 15 and as announced in open court on June 18, nor has the court completed the five *Bone-Club* procedures prior to court-closure.

After several jurors were excused for routine reasons, the trial judge summarized the for-cause eliminations made to that point. RP

6/18/07 Vol I-A, 59-62.

Finally, at page 62, the court turns for the first time to the questionnaire and the original purpose for a closed session — the only purpose for which Defendant gave his waiver. After passing on the need to bring back juror number one, the trial court determined that juror “Number eight” should be brought back to chambers. RP Vol I-A, 63:18 to 64:7. The court adds jurors 11 and 12. RP Vol I-A, 64:8. The court then adds jurors 24 through 26, as well as 28, 32, 33, 35, 36, 39, 41, 46, and 49. RP 65:11 to 67:8.

In all, the trial court determined while in chambers with counsel to have 19 jurors (numbers 54, 49, 46, 41, 36, 35, 32, 26, 25, 24, 23, 20, 17, 14, 12, 11, 8, 7, 6) interviewed in chambers. RP 6/18/07 Vol I-A, 67:9-12. The court, still in camera, also determined to excuse 15 jurors for miscellaneous reasons unrelated to the questionnaire — as to those 15, the court sought agreement. RP 6/18/07 Vol I-A, 67:15-21. The court also confirmed one juror’s release who had been released during open court. *See* RP 6/18/07 Vol I-A, 69:12-14.

The results of the in-chambers cull from the venire was announced in open court and the venire members instructed to remain for further in-chambers questioning or to go on their way.

RP 6/18/07 Vol I-A, 69:7 to 71:2. At no point was any public input requested nor notice given as to the actual scope of the in-chambers closed-court session.

C. ARGUMENT

I. HERRON HAS STANDING TO CHALLENGE THE TRIAL COURT'S VIOLATIONS OF ART. I, SECTION 10'S "OPEN COURT" PROVISIONS FOR VIOLATION OF THE *ISHIKAWA* PROCEDURES:

Mr. Herron asserts that he has third party standing to assert the public's rights under Art. I, section 10. Section 10 provides:

SECTION 10 ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

The United States Supreme Court has long recognized that standing may be conferred to a third party to assert the rights of one not present. *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972). The defendant in that case was a lecturer who was present at Boston University speaking about contraception and giving away "vaginal foam" to prevent conception. When he gave a sample to an unmarried woman he was arrested, charged, and convicted of delivery of medical goods without having a license to practice medicine or pharmacy. The Court noted that the statute under which

he was convicted prevented unmarried couples from obtaining contraception and, on its face, the defendant did not have standing to assert the couple's rights. *Id.*, at 443-44. Yet the Court found that his involvement, indeed his conviction, gave him a "sufficient interest" in the proceedings and the statute so he could assert the rights of the unmarried consumers of Massachusetts. *Id.*, 405 U.S. at 443-444. In that instance, the defendant's relationship to the third parties was not a "fortuitous connection, but was rather that of an advocate." *Id.* at 445.

In *Powers v. Ohio*, 499 U.S. 400 (1991), the Court expounded on third party standing, holding that a defendant could raise racial discrimination challenges in jury selection even where the defendant was not a member of the excluded racial group. The Court held that a third party could make a claim for standing

provided that three important criteria are satisfied: The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relationship to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interest.

Powers, 499 U.S. at 410-411 (internal quotes and citations omitted).

The *Powers* test has been referenced by this Court. See *T.S. v. Boy*

Scouts of Am., 157 Wn. 2d 416, 424 n.6 (2006) (citing *Mearns v. Scharbach*, 103 Wn. App 498, 512 (2000))

Under the facts of this case, Mr. Herron meets the *Powers* test for third party standing.

a. Petitioner Herron suffered an injury in fact.

Mr. Herron gave, and the court accepted, a limited waiver to permit an in-chambers review of a defined set of potential jurors based upon their responses to written questions regarding experience with sexual assault. RP 6/15/07 at 110:12-20.

The trial court did not scrupulously adhere to Mr. Herron's narrow waiver. Once inside chambers, the court opened discussion of a number of exclusions unrelated to the highly sensitive questionnaire responses and turned to routine challenges. The injury to Herron arises from the court's unauthorized and unconsented enlargement of the in-chambers discussion.

b. Petitioner Herron has a close relationship to the third party

Mr. Herron is the subject of this action and the subject of the public's interest in his prosecution. He is not a stranger to the proceedings, nor a disinterested non-party.

His close relationship to the public is limited to the ambit of the prosecution: he has no generalized nor cognizable concern with the public outside of the courtroom in which he is to be tried. Within the ambit of his interests, however, he has a profound relationship to the public's perception of the fairness and integrity of his prosecution. At the point in time that Mr. Herron gave his partial waiver he was presumed innocent and seeking acquittal. Although he is ostensibly exercising a right to exclude venire members from the jury in order to minimize the likelihood of a fair and impartial jury, he is also subject to and mindful of the public's preceptions. No less than the State, the defendant has a sharp and focussed interest in the public's preception of the fairness and impartiality of the proceedings. The need to maintain the appearance of legitimacy gives him a powerful connection to the public and its right to attend his trial.

This is not to say that a defendant is privileged to unilaterally waive the public's rights under section 10. In fact, a large number of the reported first amendment and Article I, section 10 cases involve a newspaper or other media outlet's challenge to a criminal defendant's attempt to close the courtroom. These media challenges proceed precisely because, notwithstanding the defendant's desire to

close a hearing, the public has a separate right that the defendant cannot override by fiat.

The problem in the mill-run criminal case — a case not involving headline allegations or a member of the celebrity *glitterati* — arises from the fact that the media is not typically present when courts decide to close the proceedings. In the absence of a mandamus filed by a financed media outlet, there are only two entities present to speak for the public's interest when a court closes the proceedings without prior notice to the public: the State and the defendant.

Thus, while a defendant is not entitled to waive the public's right to an open court, a defendant does have a highly personal interest in vindicating the integrity of the verdict. As the defendant constitutionally entitled to assert his innocence and seek acquittal despite the weight of evidence and the general beliefs of the public regarding guilt, the defendant is equally entitled to protect the *process* whereby he hopes to find vindication.

Put another way, a defendant's plea of not guilty and demand for jury trial inextricably engages the public's preception of the legitimacy of the proceeding. At one extreme, just as there is a risk that the State could win its conviction unfairly, there is a risk that an

acquitted defendant may be thought to have unfairly engineered an *acquittal*. The risk of a sham proceeding is real and the consequences severe. One example of this can be seen in the rare instance where the courts have found an exception to the rule that an acquittal is beyond challenge. If evidence supports a claim that the jury or judge was bribed, the acquittal is a sham. The taint of a sham trial is so powerful that the rules governing the attachment of jeopardy do not apply. *United States ex rel. Aleman v. Circuit Court of Cook County*, 967 F.Supp. 1022, 1027-28 (N.D. Ill. 1997); see David S. Rudstein, *Double Jeopardy and the Fraudulently Obtained Acquittal*, 60 Mo.L.Rev. 607, 639-40 (1995). The point is not that double jeopardy rules apply to Mr. Herron's appeal, but that the fundamental value of preserving the integrity of a fair and impartial court and jury can predominate over an otherwise sacrosanct acquittal. Thus, the defendant, no less than the State, has a profound interest and special relationship to the public insofar as the public perceives the trial as legitimate or illegitimate. A closed court erodes that perception and the decision to close a court — even for *voir dire* — must be governed by bright-line procedures. *Co. v. Superior Court*, 464 U.S. 501, 505 (1984). In *Press-Enterprises*, the Court noted that the

perception of fairness extends beyond the courtroom's immediate occupants:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S., at 569-571, 100 S.Ct., at 2823-2824.

Press-Enter, 464 U.S. at 508; *and see*, *State v. Paumier*, 176 Wn.2d 29 (2012), *State v. Wise*, 176 Wn.2d 1, 11 (2012); “[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trial permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.” *United States v. Alcantara*, 396 F.3d 189, 195 (2nd Cir. 2005) (court’s supervisory authority over public’s right to public proceeding sufficient to vacate sentence imposed in chambers).

This concern is not theoretical. The logic and experience of the common law show that significant harm can arise from the perception of a mis-functioning court system.

Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. [Citation omitted]. Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

Press-Enter, 464 U.S. at 508-09. Absent procedures to protect the public's interest in open jury selection, there is a strong belief that the public's confidence is damaged, leading to "a community urge to retaliate and desire to have justice done." Plainly Mr. Herron has a vital interest in the appearance of procedural regularity in his jury's selection.

c. The third party interests were hindered by the trial court's procedures.

The record shows that the trial court did not provide notice to the public or media before closing the court. See *Phoenix Newspapers v. United States District Court of the District of Arizona*, 156 F.3d 940, 949 (9th Cir. 1998) (requiring notice to media prior to court closure).

The record also shows that the trial court announced that it was closing the courtroom solely to consider the venire members who answered "yes" to specific private experiences with sexual assault. No person in the courtroom, and certainly no news media organization, had any reason to believe that the court was intending to make for-cause strikes to the panel while in chambers. At a minimum, the public could conclude that all the in-chambers strikes were due to private interviews with prospective jurors who had some personal history making them subject to a challenge for cause. Based on the actual discussions held in chambers, this was plainly not the case, but only those attending in chambers would know.

II. THE TRIAL COURT'S *SUA SPONTE* BROADENING OF HERRON'S LIMITED WAIVER UNDER ART. I, SECTION 22, VIOLATED THE DEFENDANT'S RIGHTS UNDER *BONE-CLUB*.

Mr. Herron agreed to a limited waiver of his rights under Article I, section 22. That section reads

SECTION 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed.

Const. art I, § 22. Two rights are germane to this appeal, the right to a public trial and the right to an impartial jury. In this case, Mr.

Herron was counselled at length, on the record, by the trial judge and by the prosecutor who both set forth their views on alternatives available to Mr. Herron. Following the colloquy, after consultation with his counsel, Mr. Herron elected to waive his right to a public trial only insofar as it aided his ability to select an impartial jury. He specifically agreed that the court could recess to chambers in order to interview certain self-identified jurors who had private issues regarding the nature of the charges. He did not agree that the court and counsel could recess to chambers to discuss mill-run concerns that did not involve highly sensitive issues.

The trial court, however, *sua sponte* broadened the purpose of the in-chambers session. The range of in-chambers discussion did not conform to the scope of the limited waiver.

Having *not* waived his right to public trial for general-purpose jury selection matters, Mr. Herron has a well-established right to complain that the trial court closed a portion of jury selection without justification and without fulfilling the five-step process mandated by *Bone-Club*.² Having *not* waived his right to public trial

² The intermediate appellate court recognized that two of the five-step procedures were not followed. *State v. Herron*, 177 Wn.App. 96 at 108 (“The only *Bone-Club* factors that [the trial court] missed

for general-purpose jury selection, it is evident that none of the Bone-Club requirements were met with respect to the general-purpose challenges discussed in chambers.

III. HERRON'S ART I, SECTION 22, WAIVER DID NOT AND CANNOT AUTHORIZE THE TRIAL COURT TO FOREGO THE FIVE PROCEDURES REQUIRED UNDER *ISHIKAWA* AND *BONE-CLUB*.

Mr. Herron affirmatively made a narrow waiver as to some closed court discussion regarding certain jurors. There is no evidence, however, that the defendant agreed to proceed without notice to the public or that Mr. Herron opted to waive any of *Bone-Club's* five-step requirements. In particular, the record does not show that the defendant waived the trial court's supervisory duty to adhere to the requirement of a public trial absent a proper showing on the record.

As far as the court below was concerned, the defendant got what he asked for — a partially closed voir dire — and his challenge to the court's handling of the procedures was barred by his waiver.

were the requirements that the public be given an opportunity to address the proposed closure and that any expressed concerns be weighed against the defendant's need to close the courtroom.”)

a. *Defendant cannot waive court's § 10 duties to insure a fair trial*

The court below determined that Herron waived his rights under Art. I, section 22 and was thereafter not permitted to be heard on any objection to how the closed portion of *voir dire* proceeded. *State v. Herron*, 177 Wn.App. at 99, 110-11 (“he cannot assert section 22 error on appeal”).

Here, defendant seeks review to determine whether the *Ishikawa/Bone-Club*'s mandatory procedures inhere to the defendant's benefit such that, even in view of his desire to waive his rights, the trial court's failure to follow those duties impairs the defendant's fundamental right to a “speedy public trial by an impartial jury.”

A right as fundamental as a public trial under § 22 requires strict adherence to the *Bone-Club* procedures. No other fundamental trial right may be so blithely waived. *See Faretta v. California*, 422 U.S. 806 (1975); and see *Jensen v. Hernandez*, 864 F. Supp. 2d 869, 901 (E.D. Cal. 2012) (*Faretta* waiver of counsel is *per se* prejudicial error if *Faretta* criteria not followed; here, failure to re-advise).

In *State v. Frawley*, 181 Wn. 2d 452 (2014), this Court noted that waiver of criminal trial rights — while all requiring a showing of the defendant's knowing, voluntary and intelligent decision — nonetheless

each require different procedures. *Frawley*, 181 Wn. 2d at 463. In some instances, conduct alone is sufficient; in others, such as jury waiver, an affirmative showing must be made, up to and including written acknowledgment or court-conducted colloquy. *Id.* But where fundamental procedures have been abridged, the defendant's waiver — even if subjectively desired and objectively expressed — will fail. In essence, some waivers are not self-executing.

In *State v. Wilson*, 162 Wn. App. 409 (2011) the court noted that a defendant who pleads guilty waives his right to challenge a questionable search. The court noted, however, “a guilty plea waives or renders irrelevant all constitutional violations ... *except those related to the circumstances of the plea.*” *Id.* at 415-16 (emphasis supplied), citing *State v. Brandenburg*, 153 Wn. App. 944, 948 (2009), *review denied*, 170 Wn. 2d 1009 (2010). Similarly, Mr. Herron asserts that his desire to waive his public trial does not give the trial court the right to proceed without regard to the provisions intended to protect the waiver process. If the rule were otherwise, no procedures would be necessary in any instance once the defendant expressed a firm request to close the courtroom.

Another example: In *State v. Holsworth*, 93 Wn.2d 148, 161 (1980) the Supreme Court held that a defendant may challenge the validity of a guilty plea (consisting of a broad amalgamation of waivers) in which the defendant can show that the procedures for taking the plea were defective. *Holsworth* was decided, in part, relying upon *Boykin v. Alabama*, 395 U.S. 238 (1969), a case in which the validity of a change of plea turned on whether the court properly followed the procedures required of the waiver.

Again, the procedures must be met or the waiver is ineffective: in a case where a change of plea proceeding did not put into evidence all the facts upon which the waiver relied, the procedures for effecting the waiver were impermissibly flawed and the plea improper. *State v. Iredale*, 16 Wn. App. 53 (1976) (reversed due to failure to address evidence of equivocation).

Merely asking for the waiver is insufficient to perfect the decision to waive: there are required steps the court must take for the protection of the defendant and for the process. A defendant should, therefore, be permitted to complain that procedures at the waiver were improperly followed despite having sought the waiver.

It is correct that Herron did not object to the trial court's shortcuts, it is also plain that the defendant did not ask or cause them. See *State v. Erickson*, 146 Wn. App. 200 (Div. 2, 2008) (defendants agreement to use questionnaire did not cause court to circumvent *Bone-Club* requirements). The lower court has an independent overriding responsibility to the defendant and to the public to handle a criminal defendant's waiver in a proper fashion, not to forego its duties upon a defendant's sincere on-the-record waiver.

Defendant's desire to waive public *voir dire* triggers the analysis, but does not substitute for the court's proper effectuation. *State v. Wilson*, 162 Wn. App. at 415-16.

It cannot be argued that any defendant has the right to ask the court to forego its independent duty to perform the *Bone-Club* analysis. No case supports the argument that the defendant may unilaterally waive the public's right to be present.

In *State v. Sublett*, the Court noted the following: "The way to secure a valid waiver of the public trial right is set forth in the *Bone-Club* analysis." *Sublett*, 176 Wn. 2d 58, 143 (2012) (citations omitted). In *State v. Strode*, the Court noted that the right to trial by jury should be afforded no less protection than the right to a jury

trial. *Strode*, 167 Wn. 2d 222, 229, n. 3. (2009). Similarly, waiver of trial (that is, entry of a guilty plea) is reversible for material error and, as analogized above, the same protection should be afforded one who waives the right to a public trial. While Herron's affirmative and unequivocal partial waiver on the record went further than Strode's mere acquiescence, neither defendant agreed to an abridgment of the procedures required of the judge prior to closing the trial.

The conceptual separation between a defendant's subjective waiver and the mandated procedures has been tacitly acknowledged by this Court. In *State v. Brightman*, 155 Wn. 2d 506, 514-15 (2005), this Court noted that failure to object "did not effect a waiver" of the right to a public trial, "neither did it free the court from having to consider the defendant's public trial rights." *Brightman*, 155 Wn. 2d at 515 citing *Bone-Club*, 128 Wn. 2d 254 at 257, 261 (1995); and see *In re Orange*, 152 Wn. 2d 795, 809 (2004) (conviction vacated based on counsel's failure to object to closure).

When the trial court abbreviates or fails to follow the necessary elements to effectuate a valid waiver, the defendant's right to a public trial under Article I, section 22, have been abridged. It

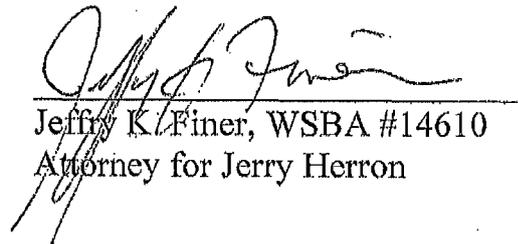
should not be enough to say, as the lower court here did, that the defendant got what he asked for. The defendant sought relief but did not receive the benefit of the court's required protections in effectuating that relief.

CONCLUSION

For the reasons set forth above, Jerry Herron respectfully asks this Court to vacate the opinion below and grant the Petition.

DATED THIS 25th day of March, 2015.

Law Offices of JEFFRY K FINER



Jeffrey K. Finer, WSBA #14610
Attorney for Jerry Herron

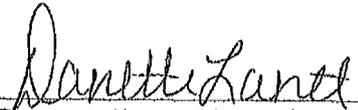
CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 25 day of March, 2015, I caused the foregoing *Supplemental Brief of Petitioner*, to be served, via USPS, postage prepaid, on the following:

Jennifer Joseph
King County Prosecutor
W554 King County Courthouse
Seattle, WA 98104

Jerry Herron
DOC #711463
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

DATED this 25 day of March, 2015.



Danette Lanet, Legal Assistant