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DIVISION II

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY JK
DEPUTY

IN RE: THE PERSONAL RESTRAINT PETITION OF
MICHAEL RHEM, PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 99-1-04722-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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Constitutional Provisions

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A. ISSUES PERTAINING TO PETITIONER'S CLAIMS.

1. Has Petitioner failed to meet his burden of showing unlawful closure of the courtroom during voir dire?

B. STATEMENT OF THE CASE.

The statement of the case may be found in the previously filed Response.

C. ARGUMENT.

1. PETITIONER HAS FAILED TO MEET HIS BURDEN OF SHOWING THAT THE TRIAL JUDGE ORDERED CLOSURE OF THE COURTROOM; WHERE THERE WAS NO CLOSURE OF THE COURTROOM, THERE WAS NO VIOLATION OF PETITIONER'S RIGHT TO A PUBLIC TRIAL.

To obtain relief through a personal restraint petition, a petitioner claiming constitutional error must show that such an error was made and that it "worked to his actual and substantial prejudice." *In re Pers. Restraint of Lile*, 100 Wn.2d 224, 225, 668 P.2d 581 (1983). The petitioner bears the burden of establishing prejudice by a preponderance of the evidence, but that burden "may be waived where the error gives rise to

a conclusive presumption of prejudice.” *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992) (the court explicitly rejected a suggestion made in prior dicta that constitutional errors that are per se prejudicial on direct appeal “will also be presumed prejudicial for the purposes of personal restraint petitions.”)

Criminal defendants have a right to a public trial. The Sixth Amendment to the United States Constitution, and article I, section 22 of the Washington Constitution, both protect a defendant’s right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *In re PRP of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004); *Waller v. Georgia*, 467 U.S. 39, 44-45, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984); *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). The right to a public trial applies not only to the evidentiary phase of a criminal trial, but also to other proceedings such as jury voir dire. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L.Ed.2d 608 (1999); *Press-Enterprise v. Superior Court of California*, 464 U.S. 501, 509-10, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984) (“*Press-Enterprise I*”); *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

Without weighing the five factors¹ listed in *State v. Bone-Club, supra*, the court may not close the trial or courtroom to the public.

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect.

Orange, 152 Wn.2d at 807-08. In *Orange*, the parties discussed access for family members during the voir dire process. After a short colloquy, the judge stated:

... I am ruling no family members, no spectators will be permitted in this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic].
That's my ruling.

Orange, 152 Wn.2d at 801 (emphasis in original). The court made no written findings on the issue of courtroom space. The Supreme Court ultimately decided, based solely on the transcript of the trial court's oral ruling, that the closure in *Orange* was a permanent, full closure. *Id.* at 808

¹ The *Bone-Club* factors are: 1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right; 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure; 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; 4. The court must weigh the competing interests of the proponent of closure and the public; 5. The order must be no broader in its application or duration than necessary to serve its purpose. 128 Wn.2d at 258-59.

(“Looking solely at the transcript of the trial court's ruling..., the court ordered a permanent, full closure of voir dire”). The trial court therefore should have engaged in the five-step analysis mandated by *Bone-Club*.

Similarly, in *Brightman*, the court found that the following ruling by the trial court constituted a permanent full closure:

In terms of observers and witnesses, we can't have any observers while we are selecting the jury, so if you would tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that. It causes a problem in terms of security.

When we move to the principal trial, anybody can come in here that wants to. It is an open courtroom.

Any other problem?

State v. Brightman, 155 Wn.2d at 511 (2005). In *State v. Easterling*, 157 Wn. 2d 167, 137 P.3d 825 (2006), the closure occurred in a pretrial motion by the co-defendant, rather than in jury selection. There, co-defendant's counsel requested, and the court ordered, the courtroom cleared for the motion. *Id.*, at 172. Similarly, in *Bone-Club*, the prosecutor requested the courtroom be cleared for the pretrial hearing, and the court so ordered. 128 Wn. 2d at 256. *See, also, United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (“The denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.”) (quoting *United States v. Al-Smadi*, 15 F.3d 153, 155 (10th Cir. 1994)). In contrast,

individual questioning of a juror in an open courtroom, but outside the presence of the rest of the venire panel, is not a courtroom closure where consideration of the *Bone-Club* factors was necessary. *State v. Vega*, 144 Wn. App. 914, 917, 184 P.3d 677 (2008).

Two recent Supreme Court cases show that individual questioning of venire persons outside of the main courtroom, be it in chambers or the jury room, also creates a situation of a temporary closure of a courtroom. *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009); *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). However, neither of these cases are particularly helpful where the issue is whether a closure occurred. The issue in petitioner's case is whether the courtroom was ever closed. The State disputes that it was.

As noted in the State's initial response, petitioner contends that the trial court violated his right to a public trial by two different rulings. One of these rulings shows that the courtroom was open to spectators, but that the court had posted a sign on the door that entry into the courtroom must occur during a break in the proceedings -presumably to limit disruptions to the proceedings. RP 391. Petitioner provided no authority that such a limitation on ingress and egress of the spectators is equivalent to a closure of the courtroom and the State is aware of none.

The other challenged ruling occurred after the State made a motion to exclude anyone under 18 from the courtroom during trial. RP 74. The record indicates that a young child (or children) related to petitioner had

been present in the court during the pretrial hearings. RP 73-74. In response, both defense counsel objected to the State's motion, arguing that "[i]t's an open courtroom" and to exclude them, in the absence of them being disruptive, raises a constitutional issue. RP 74. The court denied the motion stating:

COURT: All right. It's not the Court's job to determine what's appropriate for people and what's not. That's the parent's job or the family member's job. And as long as the children aren't disruptive and aren't being somehow used as a trial tactic, which I haven't perceived any of that so far, the family members are welcome.

Now I will say this: When we begin jury selection, it is just too crowded in here, and we have already been advised at a previous time that we need to keep the doors free, so family members are going to have to wait outside until we can at least get some of the jurors out of here. I anticipate we will get some of the jurors out, because a lot of people will be dismissed because they won't be able to accommodate a trial this long, and that will shrink out pool and we can get the family members back in. *But when we get the whole 50 up here, we need to have the doors clear and the courtroom available only for the jurors. But after that, anybody is welcome.*

RP 75 (emphasis added). Neither defense counsel reacted to this statement as if this was a ruling closing the courtroom. RP 75.

The plain language of this ruling shows that the court directed the temporary clearing of the courtroom in order to give priority seating to the venire but welcomed spectators to fill in any available space after the venire was seated. The trial court did not remove or ban any family

members, press, or other spectators from the courtroom, and did not conduct individual juror questioning in chambers or the jury room. Under the plain wording of this ruling, the court did not close the courtroom. It committed no error.

The record further indicates that some family members were in the courtroom during the venire process, as well as waiting in the hallway outside. The venire was brought to the courtroom just before the lunch recess. RP 128. The court read some preliminary instructions then dismissed the panel until 1:30 pm. RP 128-144. After lunch, the court introduced the parties, then started the voir dire process. RP 145-150. The record next indicates² that -out of the presence of the venire – there was a discussion between the court and counsel about a couple of issues that potential jurors had raised in voir dire regarding the co-defendants’ family members. RP 150-157. The record indicates that at one point the petitioner’s child spoke to his father in the court room during a break and this was witnessed by a potential juror. RP 152. Apparently one juror indicated during the voir dire process that she found this disconcerting, and petitioner’s counsel recounted that he asked her if she would be as disconcerted if the family members in the courtroom were dressed in a suit and looked like the prosecutor. RP 153. Petitioner’s counsel concludes by stating that he anticipates that the prosecutor will ask the court to exclude

² Voir dire was not transcribed for the direct appeal.

family, but that he thought exclusion was the wrong remedy. RP 154. Following this, counsel for petitioner's co-defendant stated that, per the instructions of his client, he had asked his client's family members to not come back until the following afternoon. RP 154.

The prosecutor then renewed his motion to exclude children from the courtroom. RP 156. Petitioner's counsel responds that he doesn't think the proper showing has been made to "overcome the constitutional issue of public being allowed to be at trial." RP 156-57. The court made the following ruling on the renewed motion:

COURT: All right. Couple of observations. One is, I'm absolutely committed to an open courtroom. I think it is essential to the functioning of the judicial system, and again, I am not inclined to bar children from the courtroom.

RP 157. The court went on to articulate his view of the concerns being raised and how he viewed the concerns of Juror No. 50 regarding family members as being different from that of Juror 49, who felt that her security was compromised by some contact with them. RP 157-158. The court went on to state:

COURT: So I am going to be extra vigilant about this in the future. And if I get the sense that stuff is going on on purpose in my courtroom, people are going to jail. That's all there is to it. I won't tolerate it, not for a second. If there's ...purposeful contact to gain a strategic advantage or to disrupt the trial or to intimidate anybody or to make a display for the jury and it happens in court where my contempt powers reach, they are going to jail as quick as I can put them there.

RP 159. Just before recessing the case for the day the court repeated its ruling:

COURT: Okay. Again, I reiterate, let's advise the witnesses, let's advise family members and supporters on both sides that they're welcome to be here if they conduct themselves appropriately. The minute they're over the line, they're out, or worse.

RP 161. Nothing about this record indicates that the trial court closed the courtroom during voir dire. The trial judge was constantly committed to an open courtroom. Every ruling reiterates that family members, including children, are welcome in the courtroom as long as their conduct is appropriate. Neither defense counsel reacted to the challenged ruling as one that closed the courtroom, even though both voiced concerns about courtroom closure when the prosecutor made a motion to exclude children from the courtroom. The prosecutor renewed his motion to exclude children from the court room, which evidences that a child was present; the record indicates that petitioner's young son was in the room. It may be reasonably presumed that a young child was not there without an adult supervisor. The concerns that one potential juror had about security indicates that family members were in the courtroom. The court, by announcing that it is going to be vigilant about what was happening in the courtroom, supports the conclusion that family members were in the courtroom during the voir dire process. Petitioner has failed to meet his burden of showing that the courtroom was closed.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

D. CONCLUSION.

For the forgoing reasons, this Court should dismiss the claim that the trial court improperly closed the courtroom during voir dire.

DATED: December 17, 2009.

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[Signature]
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/17/09 [Signature]
Date Signature