

No. 92698-1

No. 35195-1-II

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

MICHAEL LOUIS RHEM,

PETITIONER.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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A. ADDITIONAL STATEMENT OF FACTS

Mr. Rhem has attached two sworn statements regarding jury selection. One was written by Mr. Rhem; the other by his attorney (Michael Stewart). Both described the process of jury selection similarly.

Prior to the commencement of jury selection, all members of the public, including family of the defendants, were asked to leave when the jury was brought into court. The trial court indicated it was closing the courtroom to the public because it was too crowded. RP 75. However, even when the “full” panel of prospective jurors was present,” “there was room in the courtroom for spectators.” *See* Declaration of Stewart, p. 1. *See also* Declaration of Rhem, p. 1 (“(t)he people watching my trial could have stood against the side wall or sat in the jury box, which was empty as first.”). “In addition, the trial judge never discussed the possibility of moving to a bigger courtroom for jury selection.” *Stewart Declaration* at 1.

As jury selection progress and potential jurors were excused, “additional room became available in the court. However, members of the public were not permitted back in the courtroom until the jury was seated.” *Id. See also Rhem Declaration* at 1 (“...as jurors were excused, there was more and more room in the court. However, the spectators were required to stay outside until later.”).

B. ADDITIONAL ISSUES RELATED TO CLOSED COURTROOM CLAIM

1. Did the trial court's closure of the courtroom during portions of jury selection—without the court's first holding a "*Bone-Club* hearing" and where the only justification was that the courtroom was crowded—violate Mr. Rhem's right to an open and public trial as guaranteed by U.S. CONST. AMEND. VI and WASH. CONST., ART. 1, § 22?

2. Did trial counsel's failure to object to the closure of the courtroom waive the issue on appeal?

3. Is prejudice presumed and automatic reversal of the judgment required for violation of Rhem's right to an open and public trial?

4. At a minimum, is Rhem entitled to an evidentiary hearing on the issue of whether the courtroom was closed?

C. ADDITIONAL ARGUMENT

Violation of the Right to an Open and Public Trial

Introduction

Rhem claims that the trial court closed the courtroom during a significant portion of jury selection. Prior to closing the courtroom, the trial court did not conduct a *Bone-Club* hearing. Instead, the trial court

simply explained that it was too crowded to conduct jury selection in an open courtroom. In addition, to failing to consider less restrictive options, such as moving to a bigger courtroom, Rhem has submitted competent evidence that there was room for at least some of the public during all portions of jury selection. Nevertheless, the court was closed for the entirety of jury selection.

If the State presents competent evidence contesting these facts, then this Court should direct that an evidentiary hearing take place. Otherwise, this Court should grant Rhem's petition.

The Constitutional Rights to an Open and Public Trial

The right to a public trial is protected by both the federal and the Washington state constitutions. *See* U.S. CONST. AMEND. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."); WASH. CONST., ART. 1, § 22 ("In criminal prosecutions the accused shall have the right. . . to have a speedy public trial."); WASH. CONST., ART. 1, § 10 ("Justice in all cases shall be administered openly."). This right includes the right to open jury selection. *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2005), citing *Press-Enter Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

Washington Courts have scrupulously protected the accused's and the public's right to open public criminal proceedings. *State v. Easterling*,

157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents). “[P]rotection of this basic constitutional right clearly calls for a trial court to *resist* a closure motion *except under the most unusual circumstances.*” *Orange*, 152 Wn.2d at 805, *citing State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (emphasis in original).

The Hearing that Must Precede Any Contemplated Closure

For that reason, the Washington Supreme Court has developed a test which must be applied in every case where a closure is contemplated.

The *Bone-Club* requirements 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 the closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose;

Easterling, at 175, n.5; *Bone-Club*, at 258-259. As the test itself demonstrates, it must be conducted *before* closing the courtroom. For example, it is impossible to weigh the reasons given by a member of the press or public opposed to closure, if the trial court fails to expressly invite comment on the matter. After conducting a full hearing, the trial court must then make findings. The constitutional presumption of openness may be overcome only by "an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure

order was properly entered.” *Orange*, 152 Wn.2d at 806 (emphasis added) (quoting *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)). These requirements are necessary to protect both the accused’s right to a public trial *and* the public’s right to opening proceedings. *Easterling*, at 175.

The Right to an Open and Public Trial and the Requirement of a Hearing Apply to the Closure of a Portion of Jury Selection

The process of jury selection is included, not excepted, from this rule. *Brightman, supra; Orange, supra*. As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984), “(t)he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.”

This Court has specifically 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 Wn.2d at 515; *Orange*, 152 Wn.2d at 812. *See also State v. Frawley*, ___ Wn. App. ___, 167 P.3d 593, 596 (2007) (“We can find no material distinction between individual *voir dire* of jurors *in camera* and general *voir dire* of the jury panel. Jury selection is jury selection.”).

The Trial Court Closed the Courtroom Without Conducting a Bone-Club Hearing

Despite this solid body of law, the trial court justified its decision to close the courtroom (without first conducting a hearing) by indicating that it was closing the courtroom because of concerns about crowding. To the extent that the record was not previously clear that the courtroom was closed, the attached declarations establish that fact.

The reasoning given by the trial court in support of conducting jury selection in a closed courtroom is remarkably similar to the reasoning rejected by the Washington Supreme Court in *Orange*. 152 Wn.2d at 802 (Quoting the trial court: “The trouble with it is the limitations of space. Number one, it would be impossible for me to separate the family from the jurors. Number two, I probably wouldn't even have a place for the family to sit as we select the jury.”). The *Orange* court firmly rejected the “limitation of space” rationale for closure, finding that there was no compelling interest in calling enough jurors to preclude the presence of members of the public and that the order was broader than necessary. “Even if we were to view as a compelling interest the trial court's desire to keep the large jury pool intact, the trial court's ruling was not narrowly tailored to preserve that aim. A reasonably tailored order would have, at a minimum, allowed seating for the defendant's family, as well as members

of the press, and would have clearly and specifically provided that, as prospective jurors were excused from the crowded courtroom, additional spectators could be admitted to take the available seats or standing positions.” *Id.* at 811.

The only difference between this case and *Orange* is that in *Orange* the “trial court satisfied the hearing requirement by giving those present an opportunity to respond to his proposed courtroom closure.” *Id.* Here, the court ordered the closure without inviting comments (RP 75). Instead, the only discussion about the order to close came during jury selection when a juror noted that family members were standing outside the courtroom watching through the window in the door. *See* RP 151. However, this discussion was not focused on the decision to close the courtroom. Rather, the Court and prosecutor characterized the efforts of those unconstitutionally excluded individuals as “inappropriate” and “out of bounds.” RP 151, 155. While *Rhem* respects the trial court’s authority to control the behavior of individuals in its court, the actions of family members attempting to watch proceedings was the obvious by-product of the court’s unjustified order closing the courtroom. *See Rhem Declaration* at 1 (“As a result, a number of people had to wait outside the courtroom. Some of them tried to look through the little window in the door, which was closed, to see what was going on in the trial.”).

Moreover, the trial court did not “resist” closure, ordering it *sua sponte*. In short, the trial court failed to apply the law.

In *Orange*, the Supreme Court noted: “As a result of the unconstitutional courtroom closure in the present case, what the prospective jurors saw, as they entered and exited the courtroom during at least the first two days of *voir dire*, was not the participation of the defendant's family members in the jury selection process, but their conspicuous exclusion from it.” *Id.* at 812. Here, the consequence of exclusion was more detrimental to the criminal defendant on trial. As a result of the unconstitutional courtroom closure, what perspective jurors saw was family members attempting to hear and observe, but in a manner that at least one juror complained was inappropriate.

Defense Counsel's Failure to Object Does Not Waive the Issue

The State may argue that defense counsel's failure to object and subsequent participation in closed courtroom proceeding means that the issue has been waived. The Supreme Court has answered this question in the negative holding that is “the request to close itself, and not the party who made the request, that triggered the trial court's duty to apply the five-part *Bone-Club* requirements. The trial court's failure to apply that test constitutes reversible error.” *Easterling*, at 180.

Specifically, the *Easterling* Court held that this outcome was compelled by “our prior decisions relating to article 1, section 22 of our state constitution, which require trial courts to strictly adhere to the well-established guidelines for closing a courtroom, and . . . [by] public policy as made manifest by the federal and state constitutions which favors keeping criminal judicial proceedings open to the public unless there is a compelling interest warranting closure.” *Easterling*, at 177.

Because the trial court must act to protect the rights of both a defendant and the public to open proceedings, “the defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right.” *Brightman*, 155 Wn.2d at 517.

Reversal is Required

“Prejudice is necessarily presumed where a violation of the public trial right occurs.” *Easterling*, 157 Wn.2d at 181, 137 P.3d 825. “The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” *Id.* The remedy is reversal and a new trial. *Id.* at 174.

Because a portion of his trial was closed without first conducting a *Bone-Club* hearing, Rhem is entitled to a new trial. In the alternative, he is entitled to an evidentiary hearing.

E. CONCLUSION

Based on the above, this Court should reverse and remand this case to Pierce County Superior Court for a new trial or direct the conduct of an evidentiary hearing.

DATED this 8th day of April, 2008.



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2 **IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**
3 **DIVISION II**

4 *In re Personal Restraint Petition of*)

No. _____

5 MICHAEL RHEM,)

DECLARATION OF
MICHAEL STEWART

6)
7 Petitioner.)
8)
9)

10 I, Michael Stewart, declare:

11 1. I am the attorney who represented Mr. Rhem at his trial in this case, Pierce County
12 case number 99-1-04723-2.

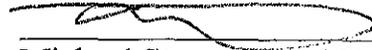
13 2. Prior to the start of jury selection the trial court indicated that all members of the
14 public were required to leave the courtroom when the initial group of jurors arrived for
15 questioning. The court stated on the record that members of the public were required to
16 leave because it would be too crowded in the courtroom for any spectators. As a result,
17 when the jurors arrived several people, who were friends and family of the defendants,
18 were ordered to sit outside the courtroom.
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23 3. However, even when the "full" panel of prospective was present there was room in
24 the courtroom for spectators. In addition, the trial judge never discussed the possibility of
25 moving to a bigger courtroom for jury selection.
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27 4. As jury selection progressed and potential jurors were excused, additional room
28 became available in the court. However, members of the public were not permitted back
29 in the courtroom until the jury was seated.
30

1 I declare under the penalty of perjury of the laws of the State of Washington that
2 the foregoing is true and correct.
3
4

5 3/25/08 Tacoma, WA
6 Date and Place


Michael Stewart # 23981
Attorney at Law

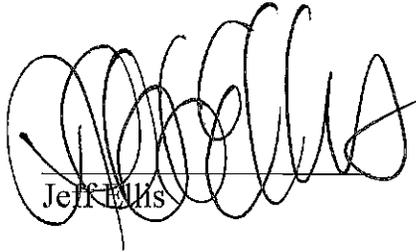
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CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on April 8, 2008, I served the party listed below with a copy of the attached *Motion for Permission to File Supplemental Brief and Petitioner's Supplemental Brief* by placing a copy in the mail, postage pre-paid, addressed to:

Kathleen Proctor
Deputy Prosecuting Attorney
Pierce County Prosecutor's Office
930 Tacoma Ave. S., Room 946
Tacoma, WA 98402-2171

4/8/08 Seattle, WA
Date and Place



Jeff Ellis

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