

8/5/10

No. 92698-1

No. 35195-1

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

IN RE PERSONAL RESTRAINT PETITION OF

**MICHAEL LOUIS RHEM,**

PETITIONER.

FILED  
COURT OF APPEALS  
10 AUG -5 AM 10:51  
STATE OF WASHINGTON  
BY [Signature]  
IDENTITY

**PETITIONER'S COURT ORDERED  
SUPPLEMENTAL REPLY**

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## I. INTRODUCTION

During Mr. Rhem's trial, the court closed the courtroom and asked the public, including his family members, to leave. In doing so, the court committed reversible error.

The Court stated:

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). As both defense counsel and Petitioner explained, the closure lasted for much of *voir dire*, forcing Rhem's family to stand outside and try to peer through a small window. *See* Declarations attached to Supplemental Brief. At no point did the trial court consider less restrictive alternatives to closure, such as moving to a bigger courtroom or allowing individuals to stand in the courtroom. *Id.*

This Court has requested that the parties address three recent decisions: *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (2009); *State v. Bowen*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 2817197 (2010); and *In re Pers. Restraint of Crace*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 2935799

(2010). Each of these cases fully supports reversal. However, it is important to note that this case is remarkably similar to *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004), which remains good law and requires reversal.

In order to deny Mr. Rhem relief, this Court would have to overrule each of these decisions, as well as ignore additional binding Washington and United States Supreme Court precedent.

## II. ARGUMENT

### *Introduction*

The trial court closed Mr. Rhem's courtroom when it excluded all members of the public, including family members, without conducting a *Bone-Club* hearing (or anything remotely resembling a *Bone-Club* hearing).

The state and federal constitutions guarantee the right to a public trial. While the public trial right is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. *Orange*, 152 Wn.2d at 804-05; *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The guaranty of open criminal proceedings extends to voir dire. *Orange*, 152 Wn.2d at 804, 100 P.3d 291.

### *The Constitutional Requirement of a Pre-Closure Hearing*

The recent Washington Supreme Court opinions in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), and *State v. Momah*, 167 Wn.2d 140,

217 P.3d 321 (2009), initially appeared to create uncertainty about whether a complete *Bone-Club* hearing was always required before a courtroom was closed.

However, if those two opinions created uncertainty about the constitutional requirement, that ambiguity no longer exists. As this Court noted in *Paumier*, three months after *Momah* and *Strode* the United States Supreme Court decided *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 721, \_\_\_ L.Ed.3d \_\_\_ (2010), a *per curiam* opinion holding that under the First and Sixth Amendments, voir dire of prospective jurors *must* be open to the public. 155 Wn. App. at 683.

This Court then summarizes the applicable constitutional requirement:

Noting that “[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials,” *Presley*, 130 S.Ct. at 725, the Court reiterated that “ ‘[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.’ ” *Presley*, 130 S.Ct. at 724 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 511, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*)). Moreover “trial courts are required to consider alternatives to closure even when they are not offered by the parties,” this is because “[t]he public has a right to be present whether or not any party has asserted the right.” *Presley*, 130 S.Ct. at 724-25.

Additionally, the trial court must make appropriate findings supporting its decision to close the proceedings.

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*. But in those cases,

the particular interest, and threat to that interest, must “be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”

*Presley*, 130 S.Ct. at 725 (quoting *Press-Enterprise I*, 464 U.S. at 510, 104 S.Ct. 819). The Court held that “even assuming, *arguendo*, that the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to consider all reasonable alternatives to closure.” *Presley*, 130 S.Ct. at 725. Thus, where the trial court fails to sua sponte consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant's conviction. *Presley*, 130 S.Ct. at 725.

Thus *Presley*, applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including voir dire.

*Paumier*, 155 Wn. App. at 684-85.<sup>1</sup>

This Court reversed in *Paumier*, noting: “Here, the trial court closed a portion of voir dire by interviewing certain jurors in chambers. By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier's and the public's right to an open proceeding.

*Presley* requires reversal of Paumier's burglary conviction, and we so hold.”

*Id.*

The facts of the instant case are indistinguishable. In the case at bar, the trial court closed the courtroom, shutting out the public and Rhem's family members, without first considering alternatives and/or making

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<sup>1</sup> *Paumier* notes that the question is not whether a case is factually more like *Strode* than it is like *Momah* because “*Presley* has eclipsed *Momah* and *Strode* and controls the outcome [closed courtroom] case[s].” 155 Wn. App. at 685.

appropriate findings. As in *Paumier*, this Court should reverse in this case.

*The Record Fails to Support the Conclusion that Rhem, Rather than the Court, Made a Deliberate Tactical Choice to Close the Court*

This Court's more recent decision in *Bowen, supra*, provides further support for reversal. *Bowen* holds that an objection is not required to obtain reversal where the trial court fails to conduct a pre-closure hearing and where the defendant has not made "deliberate, tactical choices precluding him from relief." *Slip Opinion*, p.4.

This Court reversed in *Bowen*, noting that "the trial court, not defense counsel, proposed individual in-chambers voir dire of jury pool members." *Id.* The Court further noted in *Bowen*, "the record does not indicate circumstances requiring individual questioning of jurors in chambers, as opposed to another public location." *Id.* Finally, in *Bowen* the record contained "no indication that either [the Court] or the parties considered [the defendant's] right to a public trial or explained that right to him." *Id.*

The instant case suffers from the same infirmities. As in *Bowen*, the trial court proposed closing the courtroom and clearly no one considered Mr. Rhem's right to a public trial or explained that right to him. As in *Bowen*, Mr. Rhem's conviction should be reversed.

*Structural Errors Always Require Reversal*

This Court held in *Bowen*: "Accordingly, we hold that this closure

constituted structural error.” *Id.*

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

To explain: 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 errors encompass 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 arising in habeas where the prejudice standard is similar to the standard in a PRP—and reverse without any discussion of prejudice.

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.

When a claim of ineffectiveness is raised in a PRP, the standard of review is the “reasonable probability” *Strickland* standard. *Crace*, (*Slip Opinion* at p. 14). In *Crace*, this Court declined to adopt a heightened prejudice standard for an ineffectiveness claim raised in a PRP, “confident that a ‘criminal defendant who obtains relief under *Strickland* does not receive a windfall; on the contrary, reversal of such a defendant's conviction is necessary to ensure a fair and just result.’” *Crace*, at 15, quoting *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Thus, reversal is required without any showing of specific prejudice.

However, even if that were not the case Rhem has shown specific prejudice: the exclusion of family members from the beginning of the trial.

As the Washington Supreme Court previously recognized in *Orange*, also a PRP case, “(a)s 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.” *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004).

In sum, both old and new law mandate reversal.

### III. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial.

DATED this 4<sup>th</sup> day of August, 2010.

/s/ Jeffrey E. Ellis  
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**CERTIFICATE OF SERVICE**

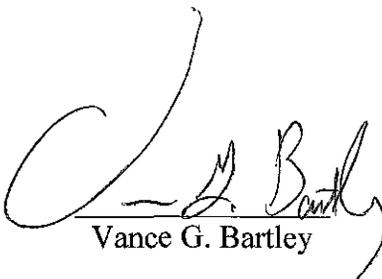
STATE OF WASHINGTON

BY 

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on August 4, 2010, I served the parties listed below with a copy of Petitioner's Court Ordered Supplemental Reply In Support of Personal Restraint Petition as follows:

Kathleen Proctor  
Pierce County Prosecutor  
930 Tacoma Ave S Rm 946  
Tacoma, WA 98402-2171

Aug 4, 2010 Sea, WA  
Date and Place

  
Vance G. Bartley