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No. 66055-1-I

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

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IN RE PERSONAL RESTRAINT PETITION OF:

**BRIAN CHAMPACO,**

PETITIONER.

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**SUPPLEMENT TO  
PERSONAL RESTRAINT PETITION**

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**A. INTRODUCTION**

Brian Champaco filed a timely PRP challenging his burglary and attempted rape convictions. In his first set of claims, Mr. Champaco argued that his constitutional rights to an open and public trial were twice violated: (1) when the trial court conducted a competency hearing based on documents which were under seal and unavailable to the public; and (2) when a confidential questionnaire was given to jurors which unavailable to the public and was apparently destroyed during or after trial.

Since filing his PRP, the Washington Supreme Court has decided several cases relevant to Champaco’s closed court claim. This supplemental pleading addresses the application of those recent decisions to this case.

**B. ARGUMENT**

**1. FAILURE TO CONDUCT A BONE-CLUB HEARING PRIOR TO CONDUCTING A COMPETENCY HEARING WITH SEALED DOCUMENTS MANDATES REVERSAL.**

The competency hearing in Mr. Champaco’s case was conducted in secret. The documents used to determine whether Champaco was able to proceed to trial and to assist in the selection of his jury were sealed. The decision to conduct the hearing in private with documents filed under seal was not preceded by a *Bone-Club* hearing. No one—not the trial court and not trial counsel—

discussed the implications of placing these documents under seal with Mr. Champaco. These actions violated Champaco's rights in several ways and mandate reversal.

2. A COMPETENCY HEARING IS PRESUMPTIVELY OPEN

Washington appellate courts have not previously ruled on whether a competency hearing is presumptively open and subject to the right to an open and public trial.

In *State v. Sublett*, 176 Wash.2d 58, 292 P.3d 715 (2012), the Washington Supreme Court adopted the federal constitutional test for determining whether a portion of trial is presumptively open or not. Recognizing that resolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceeding, in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–10 (1986) (*Press II*), the United States Supreme Court formulated and explained the experience and logic test to determine whether the core values of the public trial right are implicated.

The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” *Press II*, 478 U.S. at 8. The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.*

If the answer to both is yes, the public trial right attaches and the *Bone-Club* factors must be considered before the proceeding may be closed to the public. *Press II*, 478 U.S. at 7–8. The Washington Supreme Court specifically agreed “with this approach and adopt it in these circumstances.”

The Washington Supreme Court has also held that civil commitment hearings, a civil corollary to a criminal competency hearing, are presumptively open notwithstanding a statute closing those hearings to the public. *In re Detention of D.F.F.*, 172 Wash.2d 37, 256 P.3d 357 (2011). The Court held:

Since the open administration of justice assures the structural fairness of proceedings, a court's failure to consider whether a closure is necessary is a structural error. MPR 1.3 automatically closes the proceedings from the public without requiring or even permitting the trial court to make its constitutionally mandated determination whether those five requirements are met. Thus, the procedure set forth in MPR 1.3 violates article I, section 10.

Here, all four hallmarks exist. The first, third, and fourth are evident: (1) the trial court closed the courtroom based upon the mandate in MPR 1.3, without considering the interests involved; (3) the court sought no input from D.F.F. concerning the closure; and (4) there is nothing in the record to indicate the trial court considered D.F.F.'s right to the open administration of justice.

*Id.* at 42. The Court also noted the value in keeping the proceedings

open to the watchful eye of the public, to permit the public to scrutinize the proceedings. Such open access to the courts assures the structural fairness of the proceedings and affirms their legitimacy. It is fundamental to the operation and legitimacy of the courts and protection of all other rights and liberties. *Id.* As a result, the closure of D.F.F.'s proceedings satisfied all the *Momah* hallmarks for a structural error and reversal was required.

The Ninth Circuit Court of Appeals has applied the “experience and logic” test to pretrial competency hearings and held that those hearings were presumptively open, notwithstanding that the hearings involve sensitive information. *United States v. Guerrero*, 693 F.3d 990 (9<sup>th</sup> Cir. 2012).

The Court began by explaining whether there is a public right of access to criminal competency proceedings is a matter of first impression. *See United States v. Kaczynski*, 154 F.3d 930, 932 (9<sup>th</sup> Cir.1998) (declining to resolve media's First Amendment claim of access to defendant's court-ordered psychiatric competency report). As a result, the Ninth Circuit applied the “experience and logic” test.

The “experience” prong of the First Amendment access test considers “whether the place and process have historically been open to the press and general public.” *Press II* at 8. The experience requirement “does not look to the particular practice of any one

jurisdiction, but instead ‘to the experience in that *type* or *kind* of hearing throughout the United States.’ ” *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (quoting *Rivera–Puig v. Garcia–Rosario*, 983 F.2d 311, 323 (1st Cir.1992) (emphasis in original)).

The Ninth Circuit found only one (unpublished) federal court decision discussing whether there is a First Amendment right of access to a competency proceeding, *United States v. Curran*, 2006 WL 1159855 (D.Ariz. May 2, 2006) (unpublished). In *Curran*, the district court found that mental competency hearings have historically been open to the public absent specific facts supporting closure. *Id.* at \*2. The court relied primarily on four state court cases holding that mental competency proceedings should be open to the public. *See Miami Herald Pub. Co. v. Chappell*, 403 So.2d 1342 (Fla.Ct.App.1981) (holding that competency proceedings should be open); *Soc’y of Prof’l Journalists v. Bullock*, 743 P.2d 1166, 1178 (Utah 1987) (“pretrial competency proceedings in criminal cases may be closed only upon a showing that access raises a realistic likelihood of prejudice to the defendant’s right to a fair trial.”); *Cheyenne K. v. Superior Court*, 208 Cal.App.3d 331, 256 Cal.Rptr. 68, 71 (1989) (holding that the public may attend a competency hearing for a minor charged with murder unless the minor

establishes a reasonable likelihood of substantial prejudice to the right to receive a fair and impartial trial); *In re Times–World Corp.*, 25 Va.App. 405, 488 S.E.2d 677, 682 (1997) (holding that the First Amendment and Virginia Constitution grant the media a qualified right to attend competency proceedings); *but see People v. Atkins*, 444 Mich. 737, 514 N.W.2d 148 (1994) (finding no qualified right of access to criminal mental competency reports that have not been admitted into evidence).

On the other hand, the Ninth Circuit could not to identify any court's restriction of access to competency hearings. As a result, the *Guerrero* court did not clearly err in concluding that competency proceedings of a criminal defendant have historically been open to the public and press.

The “logic” element inquires “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press–Enterprise II*, 478 U.S. at 8. The value of ensuring public access to criminal proceedings is well settled. Public access to criminal trials and juror selection is “essential to the proper functioning of the criminal justice system.” *Id.* at 11–12. Additionally, the Supreme Court has held that there is a qualified First Amendment right of access to a preliminary hearing, as it is “often the final and most important step in the criminal proceeding.”

*Id.* at 12.

An adversarial competency hearing better resembles a criminal trial or a preliminary hearing than it does, for example, a grand jury proceeding or a chambers conference. In competency proceedings, a defendant has the right to be represented by counsel and the opportunity to testify, present evidence, subpoena witnesses, and to confront and cross-examine witnesses. Moreover, like preliminary hearings, competency hearings may determine the critical question of whether a criminal defendant will proceed to trial. A court's decision on whether a defendant is able to understand the nature of the proceedings against him and whether he is able to assist counsel in his defense is a critical part of the criminal process. Allowing public access to a competency hearing permits the public to view and read about the criminal justice process and ensure that the proceedings are conducted in an open, objective, and fair manner. Indeed, public confidence in the judicial system is especially significant where a defendant accused of a felony is not tried because he was found incompetent.

Accordingly, this Court should find that the experience and logic factors are both met. As a result, the trial court erred in closing the mental competency hearing without first conducting a *Bone-Club* hearing. Because the concerns that animate and underpin the

structural error doctrine are implicated, automatic reversal is required.

3. MR. CHAMPACO DID NOT WAIVE HIS RIGHT TO A PUBLIC TRIAL THROUGH THE USE OF QUESTIONNAIRES

There is a simple way to resolve the questionnaire issue. The right to a public trial was Mr. Champaco's right. *State v. Strode*, 167 Wash.2d 222, 229 n.3, 217 P.3d 310 (2009) (the "right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.").

Champaco was never asked if he wished to waive that right. Just like counsel cannot waive the right to a jury on his client's behalf, counsel's failure to inform Champaco of his right to a public trial constitutes reversible error where Champaco would not have waived the right, if asked.

Mr. Champaco was prejudiced by the loss of a constitutional right. As a result, this Court can reverse on this narrow ground alone.

4. THIS CASE IS DISTINGUISHED FROM *BESKURT*.

*State v. Beskurt*, 176 Wash.2d 441, 293 P.3d 1159 (2013), which held that in that case the use of a questionnaire did not violate the public trial right easily be distinguished. *Beskurt* involved a questionnaire which defense counsel possessed and was not restricted in its use. In other words,

counsel was not restricted in publically discussing the contents of the questionnaire in aiding his selection of the jury. In addition, oral voir dire made the contents of questionnaire entirely public. The Court stated:

At most, the questionnaires provided the attorneys and court with a framework for that questioning. In some instances, the court began by reiterating a prospective juror's questionnaire response and then asked that person to elaborate in open court. And in other instances, some jurors were not questioned at all from their written responses. Nothing suggests the questionnaires substituted actual oral voir dire. Rather, the answers provided during oral questioning prompted, if at all, the attorneys' for cause challenges, and the trial judge's decisions on those challenges all occurred in open court. The public had the opportunity to observe this dialogue. The sealing had absolutely no effect on this process. The order was entered after the fact and after voir dire occurred; it did not in any way turn an open proceeding into a closed one.

176 Wn.2d 447.

In this case, the questionnaire was never available for public inspection. See *Declaration of Trial Counsel; Champaco*. In addition, the questionnaire was long enough that it is reasonable to conclude that there were questions and answers that were not discussed in open court.

Lengthy questionnaires, like the one in this case, supplement oral voir dire. Questionnaires save time and allow the court and parties to ask more questions of prospective jurors. Lengthy jury questionnaires are designed to expedite oral voir dire. Colquitt, Joseph, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1 (2007).

The purpose of written questions is no different than oral questions: to gather information from the venire so that the court and the attorneys can

adequately address challenges for cause and peremptory strikes. *See, e.g., Stevens v. State*, 770 N.E.2d 739, 751 (Ind. 2002) (“Jury questionnaires are a useful tool employed by courts to facilitate and expedite sound jury selection.”); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 188 (Ohio 2002) (reasoning that “the purpose behind juror questionnaires is merely to expedite” voir dire, and therefore “questionnaires are part of the voir dire process.”).

Because questionnaires are merely a part of the overall voir dire process, the use of questionnaires does not implicate a separate and distinct proceeding. Based on this reasoning, courts in other jurisdictions have applied the presumption of openness to juror questionnaires. *See, e.g., Stephens Media, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 221 P.3d 1240 (Nev. 2009) (holding that use of questionnaires is merely a part of the overall voir dire process, subject to public access and the same qualified limitations as applied to oral voir dire); *Forum Communications Co. v. Paulson*, 752 N.W.2d 177, 185 (N.D. 2008) (concluding that a “written questionnaire serves as an alternative to oral disclosure of the same information in open court and is, therefore, synonymous with, and a part of, voir dire”). *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 188-89 (Ohio 2002) (holding that “[c]onsistent with our reasoning, we note that virtually every court having occasion to address this issue has concluded that such questionnaires are

part of voir dire and thus subject to a presumption of openness” and concluding “that the First Amendment guarantees a presumptive right of access to juror questionnaires . . . .”); *Bellas v. Superior Court*, 102 Cal. Rptr. 2d 380, 387-88 (Cal. Ct. App. 2000) (“[A]part from the question of public access, . . . defendant and defense counsel had a separate and independent right both to know the content of the questionnaires and to preserve them in their confidential files.”); *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994) (“True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source.”); *Copley Press, Inc. v. San Diego County Superior Court*, 228 Cal. App. 3d 775 (1991) (court shall provide public access to the questionnaire of an individual juror when the juror is called to the jury box for oral voir dire, but the public shall not have access to questionnaires of venire persons who are not called to the jury box since these questionnaires do not play any part in the voir dire); *In re Newsday, Inc. v. Goodman*, 159 A.D.2d 667, 669 (N.Y. App. Div. 1990) (noting “that the questionnaires completed by the petit jurors were an integral part of the voir dire proceeding” and observing that “the presumption of openness applies to all voir dire proceedings”).

Washington courts have not distinguished between public access to the courtroom and to documents in the court file. *Seattle Times Co. v.*

*Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982); *Dreiling v. Jain*, 151 Wash.2d 900, 908, 93 P.3d 861 (2004); *Tacoma News, Inc. v. Cayce*, 172 Wash.2d 58, 256 P.3d 1179 (2011) (excluding pretrial discovery documents that are never introduced in the case). In both cases, there is a presumption of openness which can be overcome in certain circumstances. In any case, a hearing must precede a closure or sealing order.

*Beskurt* did not hold otherwise. Instead, *Beskurt* simply held, based on the facts of that case, that the questionnaire was available to be viewed by the public at the time of trial and, in any event, it was possible to learn the contents of the questionnaire (questions and answers) by attending the open oral voir dire.

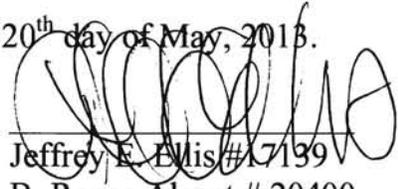
In this case, the questionnaire was never available for public inspection. Finally, the oral voir dire would have only revealed some—but hardly all—of what was contained in records which even current counsel cannot view.

There is a final distinction. *Beskurt* was a direct appeal. As a result, the court reviewed a limited record. This is a PRP. As a result, this Court can remand for a hearing to determine whether the questionnaire was made entirely public (like in *Beskurt*) or whether a portion of Champaco's jury selection remained private—like in the numerous cases where reversal was ordered.

**C. CONCLUSION**

Based on the above, this Court should reverse and remand for a new trial. In the alternative, this Court should remand for an evidentiary hearing.

DATED this 20<sup>th</sup> day of May, 2013.



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## CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of the attached *Supplemental Brief* on opposing counsel by emailing a copy to opposing counsel:

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May 20, 2013//Portland, OR  
Date and Place

/s/Jeffrey Ellis  
Jeffrey Ellis