1/8/15

No. 351951

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

IN RE PERSONAL RESTRAINT PETITION OF:

MICHAEL RHEM,

PETITIONER.

PETITIONER'S SUPPLEMENTAL BRIEF RE: COGGIN AND SPEIGHT

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A. INTRODUCTION

In July 2006, Mr. Rhem timely filed a PRP claiming, in part, that he was denied his state and federal constitutional rights to an open and public trial and that reversal was required. In the interim, this Court stayed this case several times; remanded the case for an evidentiary hearing seven years after the PRP was filed and over a decade after trial; and then stayed the case again. This Court's most recent stay awaited the Washington Supreme Court's decision in two cases: *In re PRP of Coggin*, __ Wn.2d __, __ P.3d__, 2014 WL 7003796 (2014); and *In re PRP of Speight,* __ Wn.2d __, __ P.3d __, 2014 WL 7003794 (2014), which promised to decide the post-conviction standard of review for a structural errors, namely closed court violations. Those cases have now been decided.

Neither case produced a majority decision. Instead, four justices wrote in favor of one position and four in favor of another. The concurring opinion by the Chief Justice did not reach the prejudice question. The only point of agreement producing a majority was that the petitions should be denied. Neither case has any precedential value here.

In addition, both *Coggin* and *Speight* were limited to state constitutional violations. Rhem also claims a federal constitutional violation. There are numerous cases from federal courts which hold that a structural error mandates automatic reversal in a post-conviction setting. This Court should reverse.

B. FACTS

The evidentiary hearing court's *Findings of Fact* establish that the courtroom was "effectively closed to the public at some time [during] the morning of January 13th, through most, perhaps all of the afternoon of January 14th, during the voir dire process." "Members of petitioners' [*sic*] family and other members of the public were effectively excluded during voir dire." Rhem did not request the closure. Members of Rhem's family had to wait in the hallway. The closure lasted for most, if not all of the voir dire process. The trial judge did not conduct any portion of the required Bone-Club hearing. The above facts are drawn from the summary findings that appear on pp. 12-13. Additional *Findings* support these essential facts.

In addition, although the evidentiary hearing judge did not make any relevant findings, the uncontradicted evidence at the hearing was that Mr. Rhem and his family felt that the family had been unfairly excluded during voir dire. *See e.g.,* RP 126 (to pick only one example).

C. ARGUMENT

1. The Courtroom Was Closed Without a Pre-Closure Hearing. Rhem Did Not Invite the Error.

Mr. Rhem was denied his state and federal constitutional rights to an open and public trial when the courtroom was closed to his family and to the public during most, and perhaps all, of voir dire. *In re Orange,* 152

Wn.2d 795, 100 P.3d 291 (2004). This Court correctly noted in *PRP of D'Allesandro,* 178 Wash.App. 457314 P.3d 744 (2013), that a:

> ...courtroom closure during voir dire was the type of closure that our Supreme Court has held establishes per se prejudice requiring automatic reversal on direct appeal. In *Wise* a five-justice majority of our Supreme Court held that (1) public trial violations during voir dire are per se prejudicial because this is the type of structural error wherein "it is *impossible* to show whether the structural error of deprivation of the public trial right is prejudicial"; and (2) the remedy for a voir dire violation must be a new trial because it is unreasonable to think that a " 'redo' " of voir dire would provide an adequate remedy. *Wise,* 176 Wash.2d at 19, 288 P.3d 1113 (emphasis added); *see also Easterling,* 157 Wash.2d at 181, 137 P.3d 825.

2. <u>Plurality Decisions Have Limited Precedential Value</u>

The Washington Supreme Court's recent decisions in *Coggin* and *Speight* do not require a different result. In fact, neither case has any applicable precedential value. A plurality opinion has limited precedential value and is not binding on the courts. *See In re Isadore,* 151 Wash.2d 294, 302, 88 P.3d 390 (2004); *State v. Gonzalez,* 77 Wash.App. 479, 486, 891 P.2d 743 (1995). In *Marks v. United States*, 430 U.S. 188 (1977), the Supreme Court of the United States explained how the holding of a case should be viewed where there is no majority supporting the rationale of any opinion: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those

Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193.

Both *Coggin* and *Speight* produced plurality decisions. The only holding that produced a majority was the conclusion that relief was not warranted.

In both cases, four justices signed Justice Johnson's opinion. Four justices also signed the opinion authored by Justice Stephens. Chief Justice wrote an opinion that concurred with the result only reached by Justice Johnson's decision. (*Coggin*: "However, I would instead hold that Coggin invited the courtroom closure during voir dire and accordingly is precluded from raising the issue on collateral review. Thus, we need not reach the question of actual and substantial prejudice;" *Speight*: "I agree with the lead opinion's decision to deny Ronald Speight's personal restraint petition, but for different reasons. First, I believe that this court must decide whether motions in limine implicate the public trial right, and I would decide this question in the negative. Second, I would hold that Mr. Speight invited the judge to conduct portions of voir dire in chambers. Thus, in contrast to the lead opinion and in line with my concurrence in *Coggin,* I believe we need not determine the prejudice showing required of personal restraint petitioners.") (Madsen, CJ concurring in result only).

Consequently, neither case has any precedential application to this case.

2. The Federal Constitution Requires Automatic Reversal

In addition, both *Coggin* and *Speight* raised only a state constitutional claim. (*Coggin*: "In this case we must decide what standard on review is applicable in a personal restraint petition asserting a violation of the right to a public trial under article I, section 22 of the Washington State Constitution." *Speight:* Petitioner Ronald Speight filed a timely personal restraint petition, claiming for the first time on collateral review that his right to a public trial under article I, section 22 of the Washington State Constitution, was violated when the trial court decided motions in limine and individually questioned potential jurors in chambers."). Although Rhem's closed courtroom claim is based on the state constitution, he alternatively premised his claim on the federal constitution. *See* PRP, p. 5.

While this Court is certainly free to decide the harm standard under the federal constitution, the federal constitutional harm standard for structural errors reviewed in post-conviction is well defined.

The United States Supreme Court has held that some constitutional errors "necessarily render a trial fundamentally unfair" and "require reversal without regard to the evidence in the particular case." *Rose v. Clark*, 478 U.S. 570, 577 (1986), citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (adjudication by biased judge). This limitation recognizes that

some errors necessarily render a trial fundamentally unfair. Without these basic protections, a criminal trial cannot reliably serve [478 U.S. 570, 578] its function as a vehicle for determination of guilt or innocence, see *Powell v. Alabama*, 287 U.S. 45 (1932), and no criminal punishment may be regarded as fundamentally fair.

Errors that can never be deemed harmless are those which abort or deny the basic trial process. In contrast to trial errors, structural errors are defects that "affect[] the framework within which the trial proceeds" and are not subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such errors deny defendants "basic protections," without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S at 577-78 (internal citation omitted). The Ninth Circuit has repeatedly granted relief in federal habeas cases where the trial was infected with a structural error without conducting actual prejudice analysis. *See, e.g.,Conde v. Henry*, 198 F.3d 734, 741 (9th Cir. 1999) (finding reversible structural error where trial court precluded defense attorney from making closing argument on defense theory of the case); *United States v. Miguel*, 338 F.3d 995, 1001 (9th Cir. 2003) (finding reversible structural error where trial court precluded defense counsel from arguing defense theory of the case and instructed the jury that no evidence supported it).

In short, the applicable harm standard required under the federal constitution is settled. "The parties do not question the consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. See. *e.g., Douglas v. Wainwright*, 714 F.2d 1532, 1542 (11th Cir. 1983) (citing cases).

3. Sound Policy Reasons Require Automatic Reversal For Structural Errors Raised in a PRP

To hold otherwise with respect to structural errors, would require post-conviction petitioner's to prove the impossible. Perhaps the most obvious "impossible to prove actual prejudice" claim is the right to self-representation. Since 1975, the Supreme Court has recognized a Sixth Amendment right to represent oneself. Denial of this right is an error despite the fact that the vast majority of defendants would receive better representation, and a better chance at a favorable outcome, if they had had counsel. Nonetheless, the Supreme Court has noted that this right's "denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins,* 465 U.S. 168, 177 (1984). In these cases, the harm is to the defendant's dignitary interest in representing himself; if it were judged by the usual harmless error standard, the defendant would lose in every case. Instead,

courts presume prejudice to protect the right, despite the lack of what would usually be considered "harm."

Likewise, a post-conviction petitioner would never be able to show "harmful" error in a PRP involving denial of a jury trial; the use of an incorrect reasonable doubt instruction; the improper use of forced psychotropic medications; the denial of the right to be present at a critical stage; the failure to excuse a racially biased juror; and many other structural errors.

The same is true with respect to the right to a public trial. Though public trial errors are thought to have some potential effect on the outcome of the trial, in that abuses are less likely when the trial is in the public eye, the right also serves societal values of transparency and integrity in the judicial process. Indeed, in the classic public trial case *Waller v. Georgia*, 467 U.S. 69, (1984), the Supreme Court noted that "'[t]he harmless error rule is no way to gauge the . . . societal loss that flows' from closing courthouse doors." In these cases, then, we may be able to measure some effect on the trial using a harmless error-type analysis, but we cannot measure the full effect of the error. How would a post-conviction petitioner even begin to show the loss of integrity of the judicial process?

To compound the problem, Washington courts prevent a defendant from inquiring of jurors about matters that inhere in the verdict. *Breckenridge v. Valley General Hosp.*, 150 Wash.2d 197, 75 P.3d 944

(2003) "(Thus, a juror's post-verdict statements regarding the way in which the jury reached its verdict cannot be used to support a motion for a new trial."). See also, *Wagner v. Shauers*, __ U.S.__ (Dec. 9, 2014) (same). Requiring a defendant to prove prejudice while simultaneously preventing him from doing so would represent the nadir of unfairness.

Finally, by applying harmless error analysis in a post-conviction setting the failure of a trial judge to do what is required prior to closing a courtroom (hold a *Bone-Club* hearing) is rendered essentially unreviewable at any stage where the closure is not memorialized by a party. In other words, no record will exist in order to identify and raise the issue on direct appeal and prejudice will be impossible to prove in a PRP. The result is two directly contradictory rules telling judges if they refuse to do what is required under the constitution, but instead remain silent reversal will be unavailable.

4. When a Constitutional Violation is First Cognizable in a PRP, a More Lenient Standard of Review Applies.

Neither *Coggin* nor *Speight* disturbed the rule that a more lenient standard of review applies when a claim of error is first cognizable in a PRP. Here, the fact that an evidentiary hearing was required in order to determine the whether there was a closure of the courtroom; the reasons for the closure; and the duration demonstrates that Rhem could not have raised the issue (at least not successfully) on direct appeal. A timely filed PRP

was Rhem's first opportunity to vindicate this constitutional violation. Where the petitioner has not had a prior opportunity for judicial review, Washington courts do not apply the heightened threshold requirements applicable to personal restraint petitions. Instead, the petitioner need show only that he is restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c). *In re Pers. Restraint of Dalluge,* 162 Wash.2d 814, 817, 177 P.3d 675 (2008) ("But when, as here, direct review is not available, we apply a more lenient standard. Dalluge can prevail if he can show he is under 'unlawful' (as meant by RAP 16.4(c)) 'restraint' (as meant in RAP 16.4(b))."). See also *In re Personal Restraint of Isadore,* 151 Wash.2d 294, 299, 88 P.3d 390 (2004); *In re Pers. Restraint of Cook,* 114 Wash.2d 802, 810, 792 P.2d 506 (1990).

Correctly applied, harmless error and structural error analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. This Court should reverse.

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D. CONCLUSION

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

DATED this 5th day of January, 2015.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of this supplemental reply brief on opposing counsel by sending a copy via email to the Pierce County Prosecutor's Appellate Division to the following email address: PCpatcecf@co.pierce.wa.us

January 5, 2015//Portland, OR
Date and Place

/s/Jeffrey Ellis
Jeffrey Ellis

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff / Respondent, vs. MICHAEL LOUIS RHEM, Defendant / Petitioner.	CAUSE NO. 13-2-14151-1 CAUSE NO. 99-1-04722-4 COA No. 35195-1 FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER REFERENCE HEARING

This case is before the court as a reference hearing. On October 16, 2003, the Court of Appeals, Division II, issued an order remanding this matter to the Pierce County Superior Court with direction that the Court consider six questions. The hearing was for the purpose of determining (1) Whether and to what extent the trial court closed the courtroom to the public during jury voir dire, (2) Whether the Petitioners family members were excluded (3) Whether Petitioner requested or objected to the closure, (4) Whether the trial court examined the Bone-Club factors before ordering the closure, (5) The duration of the closure, and (6) If there was a closure, whether this resulted in actual and substantial prejudice to the outcome of Rhem's trial, including findings about the nature and extent of the prejudice.

The state of Washington was represented by Pierce County Prosecuting Attorneys John Neeb and Kawyne Lund. Mr. Rhem was represented by Attorneys Mark Quigley and Renee Alsept.

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An evidentiary hearing was held on March 25, 26 and 27th and April 7th and 17th, 2014, with argument about findings on April 22, 2014. At the hearing nine witnesses testified. Witnesses included Michael Rhem, Michael Stewart (Mr. Rhem's trial attorney), Lauretha Ruffin (friend of Mr. Rhem and mother of his son), Lorenzo Parks and Charles Arceneaux (friends of Mr. Rhem), Pierce County Superior Court Judge Thomas Felnagle (trial judge), Gregory Greer (Pierce County Deputy Prosecutor at Mr. Rhem's trial), Geri Markham (Judicial Assistant to Judge Felnagle at trial), Sheri Schelbert (Court Reporter for Judge Felnagle at trial). Prior to the hearing, an order was entered allowing the attorneys access to juror information for the purpose of contacting trial jurors. No jurors testified at the hearing.

The court had the opportunity to observe each witness, to hear arguments of counsel, and to review all exhibits including transcripts of the voir dire proceedings of Mr. Rhem's trial before Judge Felnagle. The court, deeming itself fully advised, now enters the following Findings of Fact and Conclusions of Law regarding the questions of the appellate court.

FINDINGS OF FACT

I.

The trial was assigned to Judge Felnagle on January 9, 2003. That afternoon and during the afternoon of January 10, 2003, the court heard a motion regarding severance, scheduling issues, and motions in limine.

II.

Trial was called the morning of January 13, 2003. A motion to exclude minors was argued and denied. (Mr. Rhem's three year old son was present with Ms. Ruffin and others in the courtroom).

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III.

Following the motion to exclude minors, the court stated (at 10:23 a.m.) " When we begin jury selection, it is just too crowded in here, ...so family members are going to have to wait outside until we can at least get some of the jurors out of here.... When we get the whole fifty up here we need to have the doors clear and the courtroom available only for jurors. But, after that, anybody is welcome".

The trial judge made other observations that he was committed to an open court.

IV.

Judge Felnagle's courtroom is one of the smaller Pierce County Superior Court courtrooms with a posted maximum occupancy of 63 persons. With fifty jurors, the judge and two staff members, three attorneys, two defendants (Mr. Rhem and Kimothy Wynne) and at least two correctional officers, the courtroom was near its maximum occupancy limit without members of the public present.

During voir dire, the courtroom was very crowded (the judge, at one point, asked if the jurors felt like "sardines").

V.

The jury box was not used during general voir dire to seat either jurors or members of the public. Judge Felnagle testified that he had, on occasion, allowed members of the public to sit in the jury box during voir dire. He also testified that sitting members of public in the jury box could create a potential security issue.

VI.

No attorney or defendant suggested using the jury box during voir dire and Judge Felnagle did not raise the issue.

VII.

A number of other courtrooms in the building had larger capacities than Judge Felnagle's courtroom, including some with the capacity of over one hundred persons. All Pierce County courtrooms are assigned either to an individual judge or to a particular pre-assigned docket.

VIII.

No attorney or defendant suggested the use of a larger courtroom and Judge Felnagle did not raise the issue. Mr. Rhem and his attorney wanted his family and friends to have the opportunity to observe jury selection.

IX.

No testimony was presented regarding availability of other courtrooms on January 13 or 14, 2003. It is not known if other courtrooms were available for use.

X.

Ms. Ruffin and Mr. Rhem's son were present in the courtroom on January 13, 2003. At some point after Judge Felnagle's 10:23 a.m. remarks, they exited the courtroom. At the noon recess, Mr. Ruffin and Mr. Rhem's son entered the courtroom to greet Mr. Rhem. This drew the attention of jurors 49 and 50 as they exited the courtroom.

XI.

In the afternoon of January 13, 2003, jurors 49 and 50 were questioned individually about their observations of this interaction between Mr. Rhem and his son. There is a dispute about whether this questioning occurred in the courtroom or in Judge Felnagle's jury room.

XII.

Ms. Markham, judicial assistant, made a journal entry that the two jurors were questioned in the jury room, but had no independent recollection of the incident. Ms. Schelbert, court reporter, made no "parenthetical" that there was any move by any party to the jury room. She indicated that had a move been made a "parenthetical" would have so indicated. Judge Felnagle did not specifically recall the procedure used but indicated he had at times done individual questioning in his jury room. Mr. Rhem testified that individual questioning of jurors did occur in the jury room, and described generally the layout of the jury room. Judge Felnagle made a remark –" come on back" – consistent with inviting people in the courtroom to enter the jury room, but other interpretations of this remark are possible. Almost no other remark in the transcripts of the trial indicates that questioning occurred in the jury room. The court finds, after considering the entire record as a whole, that it cannot conclude that individual questioning occurred in the jury room.

XIII.

At no time did Judge Felnagle explicitly order members of the public to leave the courtroom. Prior to the start of jury selection, he stated: "When we begin jury selection, it is just too crowded in here… so family members are going to have to wait outside until we at least get some of the jurors out of here… but after that, anybody is welcome."

XIV.

At no time did any attorney or defendant request that members of the general public be excluded from the courtroom. (The trial prosecutor did make a motion to exclude minors and a motion to exclude gang members. Both motions were denied)

XV.

At no time did Judge Felnagle do an analysis of the Bone-Club factors on the record

XVI.

No member of the public was asked to respond to or state an opinion about Judge Felnagle's statement that once jurors arrive, members of the public would have to wait outside the courtroom. No attorney or defendant requested that Judge Felnagle seek a response or reaction from any member of the public. Family and friends of Mr. Rhem (and most likely co-defendant Kimothy Wynne) were inside the courtroom and desired to be present.

XVII.

At no time after his initial comment at 10:23 a.m. on January 13th, did Judge Felnagle address the issue of allowing members of the public to re-enter the courtroom. At no time did any attorney or defendant request that Judge Felnagle address this issue.

XVIII.

Judge Felnagle's main concern in his comments at 10:23 a.m. on January 13th, was to accommodate the large number of jurors to be seated in a small courtroom. An effect of his remarks, done without a Bone-Club analysis, was to exclude members of the public, including family members of Mr. Rhem, during the voir dire. He did not ask the attorneys or any defendant whether they objected to a closure of the courtroom to members of the public. The members of the public present were not asked whether they objected to any closure. No discussion about the time of, or conditions of, potential re-entry was made or requested, although Judge Felnagle did indicate they could "wait outside until we can get at least some of the jurors out of here". 11 potential jurors were excused before 3:01 p.m.

XIX.

Although Judge Felnagle did not explicitly order members of the public to leave the courtroom, the reasonable interpretation of his remarks was that members of the public would not be allowed in the courtroom once the jury arrived. The members of the public left the courtoom in compliance with Judge Felnagle's direction, not because they wished to leave.

XX.

Members of the public, including Rhem's family or friends, were effectively excluded from the courtroom during the short general voir dire during the morning of January 13, 2003.

XXI.

Members of the public, including Rhem's family and friends, were effectively excluded from the courtroom during the afternoon of January 13, 2003. At some point during the afternoon, Mr. Rhem's son was held up the courtroom door window, indicating his presence with at least one other member of the public.

XXII.

Members of the public, including Rhem's family and friends, were not in the courtroom during the individual questioning of jurors numbers 49 and 50.

XXIII.

The afternoon session on January 13, 2003 began at approximately 1:40 p.m. Eleven jurors were released without objection before the afternoon break occurred at approximately 3:01 p.m. There was no request by any attorney or defendant to address re-entry by members of the public, and Judge Felnagle did not raise the issue. There was no discussion of the possibility or practicality of rearranging the remaining 39 potential jurors to allow room for members of the public. Each excused juror left the courtroom immediately after being excused through the double door entry/exit and would have walked past anyone waiting in the foyer.

XXIV.

With respect to a potential closure of the courtroom on the morning of January 14th, 2003, the evidence is somewhat in conflict. At the close of court Januray 13th, Judge Felnagle had stated, "...Let's advise family members and supporters on both sides that they're welcome to be here if they conduct themselves appropriately".... On Januray 14th no attorney or defendant raised the issue of allowing members of the public entry into the courtroom, and Judge Felnagle did not raise the issue. There was no discussion about seating members of the public in the jury box, nor any discussion about moving the 39 remaining potential jurors to accommodate members of the public. The court finds, by a preponderance of the evidence , that members of the public were not present in the courtroom during the morning session of the court.

XXV.

No evidence was presented indicating that the jurors sworn to decide the case had any knowledge of any court closure. (Jurors 49 and 50 were not reached.)

XXVI.

There is no evidence to suggest that after completion of voir dire, there was any closure of the courtroom explicit or perceived. Ms. Ruffin testified that she was present for opening statements.

XXVII.

There was no evidence presented that any closure of the courtroom had any effect on the verdicts reached by the jurors sworn to try the case.

From the above findings of fact, the court hereby enters the following conclusions of law:

CONCLUSIONS OF LAW

I.

On January 13, 2003, Judge Felnagle intended to do what he could to accommodate and make comfortable a large number of jurors in a small courtroom. His intent and goal was to comfortably seat the jurors to make the voir dire process go smoothly, not to restrict the rights of any defendant or of any member of the public.

II.

His comments that spectators (members of the public) would have to step out of the courtroom when jurors arrived, did have the effect of closing the courtroom to members of the public. Members of the public left the courtroom in response to his statement at some point before arrival of the 50 potential jurors.

III.

The effective closure of the courtroom to members of the public lasted through January 13th, and through and at least some, perhaps all the voir dire on January 14th. No closure of any kind occurred after the jury was sworn to decide the case.

IV.

No attorney and no defendant objected to any closure or perceived closure at any time, and no attorney or defendant asked to address the issue of allowing members of the public to be present in the courtroom at any time. At no time did Judge Felnagle raise any issue about entry by members of the public, aside from his comments at the end of the day on January 13th.

V.

There was no discussion of the Bone-Club factors by Judge Felnagle, and no attorney requested him to address them. There was implicit recognition by Judge Felnagle that any limitations on public access should be short in duration and limited in effect. At a number of points he reiterated his commitment to an open room.

VI.

There is no evidence that Mr. Rhem's trial rights or the outcome of the trial was effected in any way by the closure of the courtroom during the voir dire process.

The Court of Appeals directed this court to make findings and conclusions as to six issues:

I.

Whether, and to what extent, the court closed the courtroom to the public during jury voir dire:

The courtroom was effectively closed to the public at sometime the morning of January 13th, through most, perhaps all of the afternoon of January 14th, during the voir dire process.

II.

Whether petitioner's family members were excluded:

Members of petitioners' family and other members of the public were effectively excluded during voir dire.

III.

Whether petitioner requested or objected to the closure:

Petitioner did not request or object to the closure to members of the public at any time. No attorney requested or objected to closure.

IV.

Whether the trial court examined the Bone-Club factors before ordering the closure:

The trial court did not examine the Bone-Club factors, and was not requested to do so.

V.

The duration of the closure:

The closure lasted for most, if not all, of the voir dire process.

VI.

If there was a closure, and the trial court failed to consider the Bone-Club factors, whether this closure resulted in actual and substantial prejudice to the outcome of Rhem's trial, including findings about the nature and extent of this prejudice:

No evidence was presented to support any finding of actual and substantial prejudice to the outcome of Rhem's trial. There was no evidence presented at the reference hearing to indicate any effect that a closure had on the decisions of any members of the jury sworn to decide the case. There is no evidence of any closure of the courtroom during any other part of the trial, and balancing this prejudice against the trial court's need to accommodate and make comfortable the jurors leads to a conclusion that, on balance, such prejudice was not substantial.

These findings and conclusions of law were signed this 25th day of April, 2014.

JUDGE RONALD E. CULPEPPER

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