

FILED  
SUPREME COURT  
STATE OF WASHINGTON

11 APR 13 AM 10:38

BY RONALD R. CARPENTER

CLERK

No. 84929-3

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Apr 05, 2011, 3:54 pm  
BY RONALD R. CARPENTER  
CLERK

RECEIVED BY E-MAIL

THE SUPREME COURT OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF PATRICK L. MORRIS,

Petitioner.

*AMICUS CURIAE* BRIEF OF THE WASHINGTON ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS (WACDL)

Jeffrey Ellis, WSBA 17139  
Attorney for *Amicus*  
Law Office of Alsept & Ellis  
621 SW Morrison Street  
Suite 1025  
Portland, OR 97205-3813  
Cell: (206) 218-7076  
jeffreyerwinellis@gmail.com

Suzanne Lee Elliott, WSBA 12634  
Co-Chair *Amicus* Committee  
Washington Association of Criminal  
Defense Lawyers (WACDL)  
705 Second Avenue, Suite 1300  
Seattle, WA 98104  
(206) 623-0291  
suzanne-elliott@msn.com

ORIGINAL

**TABLE OF CONTENTS**

A. INTRODUCTION .....1

B. FACTS .....2

C. ARGUMENT .....2

    1. *Introduction*.....2

    2. *Ineffective Assistance of Appellate Counsel*.....3

    3. *The Right to a Public Trial*.....4

    4. *Structural vs. Trial Errors on Direct and Collateral Review* .....6

    5. *Public Trial Violations Do Not Require a Showing of Harm on Collateral Review*.....12

D. CONCLUSION .....15

## TABLE OF AUTHORITIES

### Cases

<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, <i>rehearing denied</i> , 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991).....	10, 11
<i>Brecht v. Abrahamson</i> , 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353, <i>rehearing denied</i> , 508 U.S. 968, 113 S.Ct. 2951, 124 L.Ed.2d 698 (1993).....	8, 9, 10
<i>Campbell v. Rice</i> , 408 F.3d 1166 (9th Cir.), <i>cert. denied</i> , 546 U.S. 1036, 126 S.Ct. 735, 163 L.Ed.2d 578 (2005).....	12
<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, <i>rehearing denied</i> , 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967).....	8
<i>Gannett Co., Inc. v. DePasquale</i> , 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).....	5
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	7
<i>Gómez v. United States</i> , 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923, <i>cert. granted and judgment vacated by Salazar v. U.S.</i> , 491 U.S. 902, 109 S.Ct. 3181, 105 L.Ed.2d 690 (1989).....	6
<i>In re Oliver</i> , 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948).....	4
<i>In re Pers. Restraint of Cook</i> , 114 Wn.2d 802, 792 P.2d 506 (1990).....	9
<i>In re Pers. Restraint of Lord</i> , 123 Wn.2d 296, 868 P.2d 835, <i>clarified</i> , 123 Wn.2d 737, 870 P.2d 964, <i>cert. denied</i> , 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).....	9
<i>In re Pers. Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004). 3, 5	
<i>Judd v. Haley</i> , 250 F.3d 1308 (11th Cir. 2001) .....	13, 14

<i>Kotteakos v. United States</i> , 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).....	8
<i>Matter of Hagler</i> , 97 Wn.2d 818, 650 P.2d 1103 (1982) .....	9
<i>McGurk v. Stenberg</i> , 163 F.3d 470 (8th Cir. 1998).....	11
<i>McKaskle v. Wiggins</i> , 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122, rehearing denied, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148 (1984).....	7
<i>Neder v. United States</i> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	10
<i>O’Neal v. McAninch</i> , 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).....	8
<i>Owens v United States</i> , 483 F.3d 48 (1st Cir. 2007).....	14
<i>Presley v. Georgia</i> , -- U.S. -- , 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) ....	6
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982) .....	6
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	2, 3, 5
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005) .....	3, 5
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006) .....	5, 6
<i>State v. Evans</i> , 96 Wn.2d 1, 633 P.2d 83 (1981) .....	8
<i>State v. Sheppard</i> , 182 Conn. 412, 438 A.2d 125 (1980) .....	12
<i>State v. Strode</i> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	3, 5, 6
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).....	7, 11
<i>Sustache-Rivera v. United States</i> , 221 F.3d 8 (1st Cir. 2000), cert. denied, 532 U.S. 924, 121 S.Ct. 1364, 149 L.Ed.2d 292 (2001) .....	11
<i>Tumey v. Ohio</i> , 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) .....	7

<i>United States ex rel. Bennett v. Rundle</i> , 419 F.2d 599 (1969).....	12
<i>United States v. Canady</i> , 126 F.3d 352 (2d Cir. 1997), <i>cert. denied</i> , 522 U.S. 1134, 118 S.Ct. 1092, 140 L.Ed.2d 148 (1998).....	5, 13
<i>United States v. González-Huerta</i> , 403 F.3d 727 (10th Cir.), <i>cert.</i> <i>denied</i> , 546 U.S. 967, 126 S.Ct. 495, 163 L.Ed.2d 375, <i>rehearing</i> <i>denied</i> , 546 U.S. 1072, 126 S.Ct. 795, 163 L.Ed.2d 648 (2005).....	11
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).....	7
<i>United States v. Thunder</i> , 438 F.3d 866 (8th Cir. 2006).....	5
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)6, 12, 14	
<i>Walton v. Briley</i> , 361 F.3d 431 (7th Cir. 2004) .....	5

#### **Other Authorities**

Hertz, Randy and Liebman, James, <i>Federal Habeas Corpus Practice</i> <i>and Procedure</i> , 5th Ed. (2001) .....	12
---	----

A. INTRODUCTION

This Court reviews two types of errors: trial and structural. The harmfulness of trial errors, constitutional or otherwise, must be quantitatively assessed by a reviewing court. In contrast, structural errors defy harmless error analysis. Structural errors are not reviewed for harm. Instead, they always mandate reversal whether raised on direct appeal or in a post-conviction proceeding.

Structural errors account for a small subset of all errors, and even most constitutional errors are trial errors, subject to harmless error review. Structural errors have two defining qualities. They permeate the entire conduct of the trial from beginning to end and affect its framework. The harm from structural errors is intangible, difficult to prove, or a matter of chance.

The improper closure of a courtroom is a structural error. As a result, reversal is required without a showing of prejudice whether reviewed on direct appeal or in a PRP. Nevertheless, the State now urges this Court to adopt a rule that would force a post-conviction petitioner to show particular, individualized prejudice whenever an open and public trial violation, or for that matter any structural error, is raised in a PRP. Structural errors do not become trial errors after the direct appeal is completed.

When a post-conviction court determines a trial court was improperly closed during jury selection, reversal is required without a showing of particular prejudice. To hold otherwise would be

fundamentally inconsistent with the nature of a structural error. In addition, it would effectively eliminate relief for every structural error either not raised or not cognizable on direct appeal. This leads to a perverse result. The worst errors, those that infect the entire trial, would almost never have a remedy.

B. FACTS

It appears that the following facts are undisputed.

After some initial general questions and comments to the jury panel assembled in this case, the trial court announced:

Well, Ladies and Gentlemen, we have some interviews to do of those people who indicated they wanted to talk privately. We have quite a few of those to do, actually; so what I'm going to do is ask a few of those to remain so we can start those before lunch. The rest of you report back at 2:00.

RP (voir dire) at 45-46. The court then recited the numbers of the eleven jurors who requested private questioning and told them when to report back to the court. The reporter indicates that the proceedings then continued "in chambers." App. A to PRP at 46. This continued for some time until proceedings resumed in the courtroom. App. A at 93.

C. ARGUMENT

1. *Introduction*

A portion of the jury selection in Mr. Morris's case was conducted in closed courtroom. The decision to close the courtroom was not preceded by a *Bone-Club*<sup>1</sup> hearing. If this issue had been raised on direct

---

<sup>1</sup> *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

appeal, reversal would have been required. *See e.g., State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004).

The fact that this issue is raised for the first time in a PRP should make no difference to the outcome. Reversal is required for violations of the right to an open and public trial during jury selection whether the issue is raised on direct appeal or collateral attack.

2. *Ineffective Assistance of Appellate Counsel*

However, this Court does not need to reach that issue in order to rule in Morris's favor. Instead, this Court can simply apply its earlier holding from *In re Orange*, 152 Wn.2d at 812, and conclude that Morris was denied the right to effective assistance of counsel on direct appeal.

It appears that all of the facts necessary to resolve this issue were in the direct appeal record. As a result, this Court can hold, as it did in *Orange*, that the remedy for appellate counsel's deficient failure to raise this issue on direct appeal is reversal and remand for a new trial. *Id.* at 815 ("Thus, had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in *Bone-Club*, remand for a new trial. Consequently, we agree with Orange that the failure of his appellate counsel to raise the issue on appeal was both deficient and prejudicial and therefore constituted ineffective assistance of counsel."). In this case, the failure to raise the issue on direct appeal constituted deficient performance. Mr.

Morris was prejudiced because it was well settled at the time of Morris' appeal that reversal was automatic.

Because the standard of review for a structural error raised for the first time in a PRP is an open question under state law, WACDL sets forth the reason why reversal is required for structural errors reviewed in a PRP.

3. *The Right to a Public Trial*

The principle that justice cannot survive behind walls of silence is reflected in the Anglo-American distrust for secret trials. *In re Oliver*, 333 U.S. 257, 268, 68 S.Ct. 499, 92 L.Ed. 682 (1948). In overturning the contempt conviction in *Oliver*, the Court identified three important functions that this right serves. First, it is a safeguard against government persecution:

Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

*Id.* at 270. Second, public trials discourage perjury:

In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

*Id.* at 270, n.24. This further preserves the integrity of the judicial system in the eyes of the public. Third, it protects citizens from irresponsible jurors.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and

not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions...

*Id.* at 270, n.25. See also *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 380, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (“Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.”). The public trial guarantee has been considered so important that courts have reversed convictions where the courtroom was closed for the announcement of the verdict, *United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997), *cert. denied*, 522 U.S. 1134, 118 S.Ct. 1092, 140 L.Ed.2d 148 (1998), where a trial inadvertently ran so late one night that the public was unable to attend, *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004), and where the trial was closed for the testimony of just one witness, *United States v. Thunder*, 438 F.3d 866, 868 (8th Cir. 2006).

This Court has likewise vigilantly protected the right to an open and public trial. *State v. Strode*, *supra* (right to an open trial applies to portion of jury selection conducted in chambers); *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, *supra* (closing courtroom during voir dire without first conducting full hearing violated defendant’s public trial rights); *In re Restraint of Orange*, *supra* (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); *Bone-Club*, 128 Wn.2d at 256 (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).

Jury selection is, of course, a crucial part of any criminal case. *See Gómez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923, *cert. granted and judgment vacated by Salazar v. U.S.*, 491 U.S. 902, 109 S.Ct. 3181, 105 L.Ed.2d 690 (1989) (“Jury selection is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice ... or predisposition about the defendant’s culpability....”).

It is well established that the violation of the right to an open and public trial is classified as a structural error. *Strode, supra*; (“This error cannot be considered harmless and, therefore, Strode’s convictions are reversed, and the case is remanded for a new trial”); *Easterling*, 157 Wn.2d at 181 (“denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis”); *Presley v. Georgia*, -- U.S. --, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (defendant’s Sixth Amendment right to a public trial denied when trial judge excluded public from the voir dire of perspective jurors); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (various gambling convictions of the defendants were reversed without harmless error review, where they were denied a public trial). Because of the “great, though intangible, societal loss that flows’ from closing courthouse doors,” the denial of a right to a public trial is considered a structural error for which prejudice is presumed. *Id.* at 50 n.9.

#### 4. *Structural vs. Trial Errors on Direct and Collateral Review*

In addition to the right to a public trial, the list of structural errors includes: the right to counsel; to counsel of choice; the right of self-representation; the right to an impartial judge; and the right to accurate reasonable-doubt jury instructions. *Gideon v. Wainwright*, 372 U.S. 335, 343-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (reversing a felony conviction of a defendant who lacked counsel without analyzing the prejudice that the deprivation caused); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (deeming deprivation of counsel of choice a structural error); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 79 L.Ed.2d 122, *rehearing denied*, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148 (1984) (finding harmless error analysis inapplicable to deprivation of the right to self-representation because exercising the right increases the chance of a guilty verdict); *Tumey v. Ohio*, 273 U.S. 510, 534, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (holding that trial before a biased judge “necessarily involves a lack of due process”); *Sullivan v. Louisiana*, 508 U.S. 275, 280, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (finding that, because of an inadequate reasonable-doubt instruction, no actual jury verdict had been rendered and the court could thus not apply harmless error analysis to determine whether the error affected the verdict). Aside from *Gonzalez-Lopez*, *Sullivan* and *Tumey*, all of the above cited cases were collateral attacks.

As the above-list of cases demonstrates, the automatic reversal rule for structural errors does not change when a case is on collateral review. To understand why, it is important to discuss the differences between trial and structural errors.

For decades, the United States Supreme Court applied the same rule for assessing the harmlessness of constitutional error in habeas corpus proceedings as they applied on direct appeal. Under that rule, constitutional violations required relief unless the government proved the error harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, *rehearing denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967). *See also State v. Evans*, 96 Wn.2d 1, 4, 633 P.2d 83 (1981).

In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353, *rehearing denied*, 508 U.S. 968, 113 S.Ct. 2951, 124 L.Ed.2d 698 (1993), the Supreme Court limited the *Chapman* harmless error standard to direct review of constitutional error and announced a different harmless error standard for collateral habeas corpus review. *Brecht* adopted the standard set forth in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), which is whether the error “had substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* at 776. The *Brecht* Court reasoned that the *Kotteakos* harmless error standard is better tailored to the nature and purpose of collateral review because application of a less onerous harmless error standard on collateral review promotes the considerations underlying habeas jurisprudence. In *O’Neal v. McAninch*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), the Court further refined the *Brecht* harmless error standard holding that where the issue is evenly balanced and the judge has doubts about whether the error had “substantial and

injurious effect” on the jury’s verdict, then the judge must treat the error as if it were not harmless and must rule for the petitioner.

This Court uses the *Brecht* standard of review when it evaluates the harm from certain constitutional errors in a personal restraint petitions. See *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). It is not uncommon for Washington courts to describe the harm standard as requiring proof that a petitioner was “actually and substantially” prejudiced by the error. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).

“Actual and substantial” is short-hand for switching the harm standard.

As this Court explained in *Matter of Hagler*, 97 Wn.2d 818, 826, 650 P.2d 1103 (1982):

On collateral review, we shift the burden to the petitioner to establish that the error was not harmless; in other words, to establish that the error was prejudicial. Whereas the State’s burden on direct appeal is beyond reasonable doubt, the petitioner’s burden on collateral review should be beyond the balance of probabilities. Thus, in order to prevail in a collateral attack, a petitioner must show that more likely than not he was prejudiced by the error.

This Court’s opinion in *Hagler*, clearly ties this Court’s standard of review in PRP’s to the federal standard used in habeas cases.

However, all of the above cases involve constitutional trial errors. Structural errors constitute a separate class of constitutional error. As a result, it is improper to import the words “actual and substantial” to structural error cases, if those words are understood to place a burden of

proving specific prejudice on a post-conviction petition. The very nature of structural errors makes this point clear.

In *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, *rehearing denied*, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991), the Supreme Court distinguished “trial errors” from “structural” errors in the context of constitutional rights violations stating that the former are subject to harmless error analysis, but the latter requires automatic reversal. A “trial error” occurs during a case’s presentation to the trier-of-fact and “may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission is harmless beyond a reasonable doubt.” *Fulminante*, 499 U.S. at 280. A structural defect, on the other hand, “affect[s] the framework within which the trial proceeds” and therefore defies harmless error analysis. *Id.* at 310.

Consequently, the *Brecht* distinction between harmless error standards applicable on direct or collateral review applies only to “trial errors” and is irrelevant to structural defects. Structural errors “are so intrinsically harmful as to require automatic reversal (*i.e.*, ‘affect substantial rights’) without regard to their effect on the outcome.” *See Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). As the *Neder* Court expressed: “Those cases, we have explained, contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such errors infect the entire trial process, and ‘necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of 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.” *Neder*, 527 U.S. at 8-9. Because structural errors, such as a failure to hold a public trial, “defy harmless-error review” and “infect the entire trial process” (*Neder*, 527 U.S. at 8) reviewing courts must “eschew[ ] the harmless-error test entirely.” *Fulminante*, 499 U.S. at 312. Unlike trial rights, structural rights are “‘basic protection[s]’ whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.” *Sullivan v. Louisiana*, 508 U.S. at 281. Structural errors have “consequences that are necessarily unquantifiable and indeterminate.” *Id.*; *United States v. González-Huerta*, 403 F.3d 727, 734 (10th Cir.), *cert. denied*, 546 U.S. 967, 126 S.Ct. 495, 163 L.Ed.2d 375, *rehearing denied*, 546 U.S. 1072, 126 S.Ct. 795, 163 L.Ed.2d 648 (2005) (“[I]f, as a categorical matter, a court is capable of finding that the error caused prejudice upon reviewing the record, then that class of errors is not structural.”).

If it is impossible to determine whether a structural error is prejudicial, *Sullivan*, 508 U.S. at 281, it necessarily follows that any defendant who claims structural error never needs to establish actual prejudice. *See Sustache-Rivera v. United States*, 221 F.3d 8, 17 (1st Cir. 2000), *cert. denied*, 532 U.S. 924, 121 S.Ct. 1364, 149 L.Ed.2d 292 (2001) (“If [an error] did constitute structural error, there would be per se prejudice, and harmless error analysis, in whatever form, would not apply”); *McGurk v. Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998) (holding that where counsel’s deficient performance resulted in structural error,

prejudice will be presumed). Otherwise, a post-conviction court requiring specific proof of prejudice would be asking defendants to do what the courts have said is impossible.

Thus, even in collateral review cases, structural errors are always considered “prejudicial” and accordingly are reversible per se. *See* Hertz, Randy and Liebman, James, *Federal Habeas Corpus Practice and Procedure*, 5th Ed. (2001), p. 1519.

5. *Public Trial Violations Do Not Require a Showing of Harm on Collateral Review*

The United States Supreme Court recently stated “violation of the public-trial guarantee is not subject to harmless review because ‘the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance.’” *González-López*, 548 U.S. 140, n. 4 (citing *Waller*, 467 U.S. at 49 n. 9). *See also United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (1969) (a requirement that prejudice be shown would in most cases deprive the defendant of the public-trial guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury); *State v. Sheppard*, 182 Conn. 412, 418, 438 A.2d 125 (1980) (“Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied.”).

As a result, the courts which have reviewed the merits of violations of the Sixth Amendment right to a public trial in a post-conviction proceeding have held that reversal is required without a showing of prejudice. *See e.g., Campbell v. Rice*, 408 F.3d 1166, 1171-1172 (9th Cir.), *cert. denied*, 546 U.S. 1036, 126 S.Ct. 735, 163 L.Ed.2d 578 (2005)

(noting that violation of the right to a public trial is one of those rare constitutional errors that requires automatic reversal because it amounts to a structural defect); *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001) (“The mere demonstration that his right to a public trial was violated entitles a petitioner to relief”); *United States v. Canady*, 126 F.3d at 364 (even though post-conviction petitioner had not raised public trial claim on direct appeal, he was entitled to relief because public trial claim is structural error).

If denial of a public trial did not result in automatic reversal it would be impossible to point to specific identifiable prejudice—either on direct appeal or on collateral review. This is true for all structural errors.

For example, requiring proof of prejudice would impose a burden on a defendant claiming that she was prejudiced by an improper reasonable doubt instruction that jurors would have voted differently. In addition, defendant would be forced to surmount this burden without proof of jurors’ actual thoughts, since those opinions inhere in the verdict. Requiring proof of prejudice from a defendant who was denied counsel of his choice would require him to show how his “chosen” attorney would have defended the case differently and that the differences in defense would have resulted in a different outcome, a requirement that would transform denial of counsel of choice to an ineffective assistance of counsel claim.

Requiring a criminal defendant, like Mr. Morris, who has been wrongfully denied his right to a public trial to show that he was prejudiced would require him to show the judge, prosecutor, witnesses, or jurors

acted or testified differently because no one was permitted to watch them. It would be unfair to impose this impossible burden on a post-conviction petitioner.

The opinion in *Owens v United States*, 483 F.3d 48 (1st Cir. 2007), a post-conviction case, demonstrates the impossibility of proving prejudice in the context of a closed courtroom violation. Owens' trial was closed to the public during jury selection. "As a result, it is possible that jurors might have been more forthcoming about biases and past experiences if they had faced the public. It is also possible that Owens and the Government might have picked a more impartial jury or asked different questions with local citizenry watching. All of these possibilities call into question the fundamental fairness of Owens' trial." *Owens*, 483 F.3d at 65.

However, requiring that Owens prove any of these types of prejudice by a preponderance of the evidence would place on him an impossible burden to satisfy. As such, on remand, "the court need not require Owens to prove that his counsel's failure to object to the trial closure was actually prejudicial." *Id.* Put simply: "We will not ask defendants to do what the Supreme Court has said is impossible." *Id.* See also *Judd v. Haley*, 250 F.3d at 1319 ("As a violation of the right to a public trial is structural error, Judd need not show that he was prejudiced by the closing of the courtroom. All he must demonstrate is that the trial court did not comply with the procedures outlined in *Waller* prior to its decision to completely remove spectators from the courtroom.").

This Court should not impose that impossible burden on Mr. Morris.

D. CONCLUSION

Structural errors are damning to the fairness of a trial, but in ways that are difficult to isolate and capture. As a result, structural errors warrant automatic reversal.

Structural errors continue to damn the fairness of a trial when the case is reviewed in a post-conviction setting. As a result, it is improper to require a post-conviction petitioner to prove specific, identifiable prejudice. Instead, reversal is automatically required.

In this case, a portion of Mr. Morris's trial was conducted in violation of his right to a public trial, a structural error where prejudice is presumed without any showing of specific harm. This Court should reverse and remand for a new trial.

DATED this 5<sup>th</sup> day of April, 2011.

Respectfully submitted,

s/Jeffrey Ellis

Jeffrey Ellis, WSBA 17139

Attorney for *Amicus* WACDL

Law Office of Alsept & Ellis

621 SW Morrison Street

Suite 1025

Portland, OR 97205-3813

Cell: (206) 218-7076

Email: jeffreyerwinellis@gmail.com

s/Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA 12634

Co-Chair *Amicus* Committee

WACDL

705 Second Avenue, Suite 1300

Seattle, WA 98104  
(206) 623-0291  
Email: [suzanne-elliott@msn.com](mailto:suzanne-elliott@msn.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Amicus Curiae Brief of WACDL on the following:

Skagit County Prosecutor's Office  
605 S. 3rd Street  
Mt. Vernon, Washington 98273

Mr. David B. Zuckerman  
Attorney for Patrick Morris  
705 Second Avenue, Suite 1300  
Seattle, WA 98104

Mr. Patrick Morris #871931  
MCC – Washington State Reformatory  
PO Box 777  
Monroe, WA 98272

DATED this 5<sup>th</sup> day of April, 2011.

s/Suzanne Lee Elliott  
Suzanne Lee Elliott, WSBA 12634  
Co-Chair *Amicus* Committee  
WACDL  
705 Second Avenue, Suite 1300  
Seattle, WA 98104  
(206) 623-0291  
Email: [suzanne-elliott@msn.com](mailto:suzanne-elliott@msn.com)

**OFFICE RECEPTIONIST, CLERK**

---

**To:** Christina Albouras  
**Subject:** RE: In re Patrick L. Morris, No. 84929-3

Received 4-5-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Christina Albouras [<mailto:calbouras@hotmail.com>]  
**Sent:** Tuesday, April 05, 2011 3:54 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Suzanne Lee Elliott; Jeffrey Ellis  
**Subject:** In re Patrick L. Morris, No. 84929-3

April 5, 2011

Dear Clerk:

Attached are the Motion for Permission to File Brief *Amicus Curiae* of the Washington Association of Criminal Defense Lawyers (WACDL) and *Amicus Curiae* Brief of WACDL in *In Re the Personal Restraint of Patrick L. Morris*, No. 84929-3, filed by attorney Suzanne Lee Elliott, WSBA 12634 at the address and phone number below. Thank you.

Sincerely,  
Christina Alburas  
Certified Paralegal  
Law Office of Suzanne Lee Elliott  
(206) 623-0291  
\* \* \* \*

Suite 1300 Hoge Building  
705 Second Avenue  
Seattle, WA 98104  
Fax (206) 623-2186

**CONFIDENTIALITY NOTICE**

*This email, including all attachments, is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521. It is therefore legally privileged and confidential and is intended only for the use of the individual(s) to whom it has been directed. If you are not the intended recipient, you are hereby notified that any review, retention, dissemination, distribution, or copying of this email is strictly prohibited. If you have received this email message in error, please immediately notify the sender via reply email or the telephone number above, and delete and/or destroy all copies of the original message and any attached files. Thank you.*