No. 59995-0-I

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

In the Personal Restraint Petition of

ROLAND SPEIGHT, Petitioner.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY
#05-1-05003-6

SECOND SUPPLEMENTAL RESPONSE
TO PERSONAL RESTRAINT PETITION

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INTRODUCTION

Defendant Roland Speight's Personal Restraint Petition asserts that he could request a limited court closure at trial, and then challenge that closure on review. In State v. Momah, 167 Wn.2d 140, 156, 217 P.3d 321 (2009), the Washington Supreme Court held that a defendant could not reverse a tactical choice to accept limited jury voir dire in chambers.

> Momah affirmatively accepted the closure, argued for expansion of it, actively participated in it, and sought benefit from it.

Momah, 167 Wn.2d at 156. Here, because San Juan Superior Court Judge Alan Hancock granted defendant's request – without express consideration of the Bone-Club factors – closing the courtroom was not structural error requiring automatic reversal.

Three years after Momah, the Supreme Court limited the scope of the opinion, but did not overrule it.

> We emphasize that it is unlikely that we will ever again see a case like Momah where there is effective, but not express, compliance with Bone–Club. The rule remains that deprivation of the public trial right is structural error.

State v. Wise, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012). The Court in Wise concluded that "a violation of the public trial right is per se

prejudicial, even where the defendant failed to object at trial." Wise, 176 Wn.2d at 18.

Defendant Roland Speight requested voir dire in chambers and provided the jury questionnaire to accomplish it. This case involved charges of rape; a fair trial before an impartial jury *required* interviewing some potential jurors in private. As in Momah, "defense counsel made a deliberate choice to pursue in-chambers voir dire to avoid 'contamination' of the jury pool..." Momah, 167 Wn.2d at 155.

Does Momah remain good law and exclude his conviction from automatic reversal? The State of Washington respectfully requests this Court to dismiss defendant's Petition for three reasons: (1) the trial court effectively complied with Bone-Club when it granted defendant's request for private interviews with potential jurors; (2) defendant waived his challenge to closing the courtroom; and (3) defendant did not suffer prejudice from the trial court granting his request.

I. ISSUE PRESENTED IN THIS SECOND SUPPLEMENTAL RESPONSE.

The Court of Appeals requested supplemental briefing on the effect of four recent Supreme Court opinions: In re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012), State v. Wise, 176 Wn.2d 1, 288

P.3d 1113 (2012), State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), and State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). The issue presented is whether these cases overruled Momah and require automatic reversal on collateral review, regardless of the circumstances.

These four cases are not the last words on the subject. The Washington Supreme Court has accepted review of nine Bone-Club cases for its next term:

- State v. Koss, No. 85306-1 (in-chambers conference on jury instructions);
- State v. Njonge, No. 86072-6 (closed courtroom to consider dismissing prospective jurors for hardship);
- State v. Slert, No. 87844-7 (in-chambers conference on dismissal of prospective jurors);
- State v. Smith, No. 85809-8 (sidebar conference on evidentiary matters);
- State v. Shearer, No. 86216-8, State v. Grisby, No. 87259-7 ("de minimus courtroom closure);
- State v. Frawley, No. 80727-2, State v. Applegate, No. 86513-2 (waiver during jury selection of right to public trial);
- In re Det. of Morgan, No. 86234-6 (in-chambers conference on involuntary medication).

This area of law continues to evolve.

II. STATEMENT OF FACTS

This Second Supplemental Response brief is the State's fourth submission to the Court. In its response to defendant's appeal, the State detailed the facts supporting defendant Speight's conviction for two counts of second degree rape. (6/14/06 Response Brief, No. 56760-8, at 4-12). On November 27, 2006, the Court of Appeals issued an unpublished decision, affirming defendant's conviction.

On May 4, 2007, defendant Speight filed his Personal Restraint Petition, alleging that Superior Court Judge Alan Hancock violated defendant's right to a public trial during voir dire. The State's Response to defendant's PRP described how defendant requested and participated in the in-chambers interviews. (10/23/07 Response at 5-6). The trial judge dismissed many of the jurors for cause. (2RP 14, 17, 35, 40, 43, 72; Appendix H to 5/4/07 Petitioner's Supplemental Brief). The in-chambers interviews were essential to guarantee defendant a fair trial.

The State's Response also documented how all five Bone-Club factors supported the in-chambers interviews. (10/23/07 Response at 8-16). Although the trial court did not formally weigh the factors on the record, Judge Hancock had compelling grounds

to grant defendant's request for the private interviews of potential jurors.

On December 31, 2007, this Court stayed defendant's PRP pending the Supreme Court's decision in State v. Strode, No. 80849-0. The Court lifted the stay on November 6, 2009, requesting a supplemental brief on the impact of the Supreme Court's opinions in State v. Momah, 81096-6, and State v. Strode.

The State filed its First Supplemental Response on April 26, 2010, explaining how defendant's PRP more closely resembled the facts in Momah. (4/26/10 First Supplemental Response at 2) ("because defendant actively participated in the interviews – and directly benefited from them – he cannot now claim that it deprived him of a fair, public trial").

On September 14, 2010, the Court issued a second stay, pending the Supreme Court's decision in In re Morris, No. 84929-3. On April 12, 2013, the Court lifted the stay and requested this Second Supplemental Response on the effect of the opinions in In re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012), State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), and State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

The State now renews its request to deny defendant's Personal Restraint Petition.

ARGUMENT

III. STANDARD OF REVIEW

> To obtain relief through a personal restraint petition, a petitioner claiming constitutional error must show that such an error was made and that it "worked to his actual and substantial prejudice." In re Pers. Restraint of Lile, 100 Wn.2d 224, 225, 668 P.2d 581 (1983). The petitioner bears the burden of establishing prejudice by a preponderance of the evidence, but that burden "may be waived where the error gives rise to a conclusive presumption of prejudice." In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). The St. Pierre court explicitly rejected, however, the suggestion made in prior dicta that constitutional errors that are per se prejudicial on direct appeal "will also be presumed prejudicial for the purposes of personal restraint petitions." Id.

In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

Although the Supreme Court in Morris had the opportunity to change this standard, it did not.

> We need not address whether a public trial violation is also presumed prejudicial on collateral review because we resolve Morris's claim on ineffective assistance of appellate counsel grounds instead.

In re Morris, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012).

IV. MOMAH REMAINS GOOD LAW AND DECIDES THIS CASE

The Supreme Court remains split on the consequences of a Bone-Club violation. On the one hand, five justices led by Justice Owens have held on direct review that closing the courtroom for voir dire is structural error, requiring a new trial. "Unless the trial court considers the Bone–Club factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial." State v. Wise, 176 Wn.2d 1, 14, 288 P.3d 1113 (2012); State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012) ("failure to conduct the Bone–Club analysis is structural error warranting a new trial because voir dire is an inseparable part of trial").

On the other hand Justices Madsen, Wiggins and both Justices Johnson have authored strong dissents to a rule of automatic reversal, and joined the majority in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). The concurring opinions in Sublett show a Court deeply divided over the foundation for, and scope of, remedies for a Bone-Club violation.

A majority of the Court did not overrule Momah, however. In Wise, the Court carefully distinguished Momah rather than simply reverse it.

> Momah was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in Momah effectively considered the Bone–Club factors. Id. at 151–52, 217 P.3d 321; Strode, 167 Wn.2d at 234, 217 P.3d 310 (Fairhurst, J., concurring). At bottom, Momah presented a unique confluence of facts: although the court erred in failing to comply with Bone–Club, the record made clear—without the need for a post hoc rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.

Wise, 176 Wn.2d at 14-15. The majority in Paumier took the same pains to distinguish Momah.

> Today's holding may seem in conflict with our previous decision in Momah, but it is not. As we made clear in Wise, Momah relied on unique facts to conclude that no public trial right violation occurred when the jurors were individually questioned. Id. at ——, 288 P.3d 1113. Specifically, the defendant in Momah "affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and [ ] though it was not explicit, the trial court ... effectively considered the Bone–Club factors." *Wise,* 176 Wash.2d at ——, 288 P.3d 1113. In stark contrast, these facts do not exist here. Paumier's mere presence in the courtroom does not qualify as active participation. Further, the trial court gave no indication it considered any of the Bone–Club factors. Thus, our holding is not in conflict with Momah.

State v. Paumier, 176 Wn.2d 29, 35-36, 288 P.3d 1126 (2012).

The unique facts in Momah also appear here.

A. Defendant Speight Affirmatively Assented To Closure

The State's First Supplemental Response documents defendant's request to close the courtroom and interview specific potential jurors in chambers. First, defense counsel provided the written juror questionnaire that offered private interviews. (5/23/05 Minute Entry at 2; Appendix A to 4/26/10 First Supplemental Response). Second, Judge Hancock agreed to close the courtroom after hearing argument from the State and defendant. (4/26/10 First Supplemental Response at 3-4). Neither counsel objected because a fair trial *required* interviewing certain jurors away from the full panel.

Third, the trial judge closed the courtroom to protect defendant's right to a fair trial. As the private interviews illustrated, many of the potential jurors had traumatic sexual assaults that mandated excusal for cause. It is highly unlikely that the jurors would have been forthcoming in public, and that the panel would not have been tainted by these emotional stories.

Defense counsel requested in-chambers interviews for good reason. Without them, her client would not have received a fair trial. Far from being ineffective, defense counsel would have been negligent if she did not request the private interviews.

B. The Court Effectively Considered Court Closure

Judge Hancock heard argument from counsel before granting defendant's request to hold in-chambers interviews. (5/23/05 Minute Entry at 2). Furthermore, as described in the State's November 23, 2007 Response, the Court had ample evidence under the Bone-Club factors to have limited voir dire in private. (10/23/07 Response at 8).

Unlike in Paumier, Wise, and Morris, the trial judge here did not sua sponte close the courtroom. Instead, Judge Hancock acted on defendant's request. This is identical to the facts in Momah.

> The trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

State v. Momah, 167 Wn.2d 140, 151-152, 217 P.3d 321 (2009).

Because the Supreme Court did not overrule Momah, the case provides compelling precedent for upholding defendant Speight's conviction.

V. DEFENDANT SPEIGHT WAIVED HIS CHALLENGE TO CLOSING VOIR DIRE

Defendant cannot request a closed courtroom at trial and then challenge closure on review. In State v. Wise the majority opinion stated:

> Wise cannot be said to have actively participated in effecting the courtroom closure during voir dire, as occurred in Momah. 167 Wn.2d at 146. This distinction is enough to render the invited error doctrine advanced by the dissent inapplicable.

Wise, 176 Wn.2d at 15 n.8. As noted above, the Supreme Court has accepted review of two cases that ask whether defendants can waive their right to public trial during jury selection. This case provides the strongest evidence of waiver and invited error. "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial." Momah, 167 Wn.2d at 153. By requesting closure, defendant Speight waived his public trial right during the sensitive portions of voir dire.

VI. DEFENDANT HAS NOT SUFFERED PREJUDICE

Finally, defendant cannot suffer prejudice from the trial court granting his request for in-chambers interviews. On collateral review, defendant must show actual and substantial prejudice from

a constitutional violation. That is not the same as showing error on appeal.

> The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence. Direct review is the principal avenue for challenging a conviction. "When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed.2d 1090 (1983).
>
> In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary remedy, a bulwark against convictions that violate fundamental fairness. Those few who are ultimately successful in obtaining habeas relief are persons whom society has grievously wronged and for whom belated liberation is little enough compensation.

Brecht v. Abrahamson, 507 U.S. 619, 633-634, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (citations omitted); In re St. Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992) ("we have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offender").

If a Bone-Club violation is per se prejudicial on collateral review, then defendant Speight would qualify for an automatic new trial. The Supreme Court in Morris – although squarely presented with the issue – refused to find per se prejudice. Morris, 176 Wn.2d at 166 ("we need not address whether a public trial violation is also presumed prejudicial on collateral review"). It is inconceivable that a defendant could request in-chambers interviews and then receive a new trial because the trial court granted the request.

CONCLUSION

The Supreme Court in Momah confirmed a primary tenet of criminal procedure:

> To ensure that a criminal defendant receives a fundamentally fair trial, we permit the accused to make tactical choices to advance his own interests and ensure what he perceives as the fairest result. In our adversarial system, these are basic rights of the accused. Accordingly, the choices a party makes at trial may impact their ability to seek relief from an alleged error or may affect the remedy they receive.

Momah, 167 Wn.2d at 153. Defendant Speight made appropriate, reasonable choices at trial. Washington law does not entitle him to a new trial because the trial judge granted his requests.

The State of Washington respectfully requests the Court to deny his Personal Restraint Petition.

DATED this 12th day of June, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Second Supplemental Brief** to:

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Re: In the Personal Restraint Petition of Roland Speight, No. 59995-0-I

To the Clerk:

Here for filing is one original and one copy of the Second Supplemental Response to Personal Restraint Petition with certificate of service.

Sincerely,

BURI FUNSTON MUMFORD, PLLC

Heidi Main
Legal Assistant to Philip J. Buri

Enclosures

cc: Randy Gaylord

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