

Court of Appeals No. 61980-2-1  
Snohomish County Superior Court No. 02-1-02368-6

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

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In re the Personal Restraint of:

JOHN A. WHITAKER.

Petitioner.

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PETITIONER'S REPLY ON SUPPLEMENTAL BRIEF REGARDING  
MOMAH AND STRODE

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**TABLE OF CONTENTS**

I. REPLY ARGUMENT .....1

    A. UNLIKE IN STATE V. MOMAH, THE COURTROOM  
        CLOSURES IN THIS CASE WERE NOT DONE OUT OF A  
        CONCERN FOR PREJUDICIAL PRETRIAL PUBLICITY .....1

    B. WHITAKER IS NOT REQUIRED TO PROVE SPECIFIC  
        PREJUDICE.....4

II. CONCLUSION .....9

## TABLE OF AUTHORITIES

### Cases

<u>Bell v. Cone</u> , 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)....	6
<u>Brecht v. Abrahamson</u> , 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 383 (1993).....	6
<u>Carson v. Fischer</u> , 421 F.3d 83 (2 <sup>nd</sup> Cir. 2005).....	8
<u>Cordova v. Baca</u> , 346 F.3d 924 (9th Cir. 2003).....	6
<u>In re Dalluge</u> , 152 Wn.2d 772, 100 P.3d 279 (2004).....	5
<u>In re Hagler</u> , 97 Wn.2d 818, 650 P.2d 1103 (1982).....	6, 8
<u>In re Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	5
<u>Judd v. Haley</u> , 250 F.3d 1308 (11 <sup>th</sup> Cir. 2001) .....	7
<u>Miller v. Dormire</u> , 310 F.3d 600 (8th Cir. 2002).....	7
<u>Owens v. United States</u> , 483 F.3d 48 (1 <sup>st</sup> Cir. 2007) .....	8
<u>Powell v. Galaza</u> , 328 F.3d 558 (9th Cir. 2003) .....	6
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995) .....	3
<u>State v. Jackmon</u> , 113 Wn.2d 772, 783 P.2d 580 (1989).....	5
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009) .....	passim
<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009) .....	3, 5, 9
<u>State v. Whitaker</u> , 133 Wn. App. 199, 135 P.3d 923 (2006).....	2
<u>Waller v. Georgia</u> , 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	7
<u>Walton v. Briley</u> , 361 F.3d 431 (7 <sup>th</sup> Cir. 2004).....	7

**Other Authorities**

Liebman and Hertz, Federal Habeas Corpus Practice and Procedure  
(4th Ed., 2001), § 31.3 ..... 6

**Constitutional Provisions**

U.S. Const. amend. VI (Right to Public Trial)..... 7, 8

## I. REPLY ARGUMENT

### A. UNLIKE IN STATE V. MOMAH, THE COURTROOM CLOSURES IN THIS CASE WERE NOT DONE OUT OF A CONCERN FOR PREJUDICIAL PRETRIAL PUBLICITY

The State maintains that the result in this case should be the same as that in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), because both involved significant concerns about prejudicial pretrial publicity. This argument fails because here, unlike in Momah, the trial court did *not* close the courtroom out of a concern that jurors would otherwise be contaminated by publicity. The possibility of prejudice to the defendant was more moderate in this case, and the trial court was able to handle that concern by questioning jurors individually in an *open* courtroom. See, e.g., 5/25/04 RP 13 (court explains to jurors that they will be interviewed individually over next three days). The judge closed the courtroom for the questioning of six jurors, however, simply because those jurors requested it. None of the requests had anything to do with exposure to pretrial publicity. See Personal Restraint Petition (PRP) at 8-10.

The State notes that the defense filed a motion to change venue in this case due to pretrial publicity. More specifically, the defense asked to renew a motion that had been filed in the case of co-defendant Anderson. CP 371-72. When it came time to discuss the motion, however, defense counsel conceded that neither Anderson nor co-defendant Jihad had difficulty picking fair jurors. I RP 120-21. Counsel made a perfunctory request “to change the venue, or in the alternative, if we run into problems

in the jury selection here, consider doing it at that time.” I RP 121. The Court responded that it was premature to address the issue before jury selection began. Id. After jury selection, the Court briefly noted that the motion to change venue was denied because the pretrial publicity did not cause problems with picking a jury. III RP 255. Defense counsel did not argue the point.

On direct appeal, this Court found that the pretrial publicity was not problematic for Whitaker. “The record reflects that Whitaker’s prospective jurors had little awareness of the publicity and the details of the crime.” State v. Whitaker, 133 Wn. App. 199, 135 P.3d 923 (2006). Although many jurors had heard something of the crime, “many knew little more than that a young woman had been missing and later found dead.” Id. (quoting trial court findings). “In general, the prospective jurors did not know John Whitaker’s name or how he related to the case.” Id. The crimes at issue, of course, involved numerous co-defendants, all with different roles. It was undisputed that Rachel Burkheimer was murdered and that her actual killer was John Anderson. Thus, any knowledge the jurors had from press coverage was generally nothing more than what the defense conceded in opening statement.

State v. Momah, *supra*, presented a different scenario. Dr. Momah, a gynecologist, was alleged to have sexually violated several of his patients. This sensational case received extensive pretrial publicity, with all of it focusing on the single defendant as the guilty party. Id. at paras. 2-4. Most of the closed questioning involved pretrial publicity, and

defense counsel exercised numerous challenges for cause. Id. at para. 5 and n.1. Further, unlike in this case, Momah's defense counsel actually argued for expansion of the closed hearings to include additional jurors. Id. at para. 3. The Supreme Court stressed several times in its opinion that counsel's argument for expansion of the closed hearing was an important factor in its decision. See, e.g., Momah at paras. 10, 28, 29, 31.

Other factors distinguish Momah from this case. Although the trial court in Momah failed to expressly discuss the five factors set out in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), it was clear from the record that the court was aware of the factors, that it "recognized the competing article I, section 22 interests in this case" and "in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury." Further, the closure was "narrowly tailored" to the impartial jury concerns. Id. at para. 31. Here, on the other hand, the trial court never recognized the competing concerns and made no attempt to tailor the closure to those concerns. Instead, the court permitted any juror who requested it to be interviewed privately. The jurors' reasons for requesting closed hearings were often weak, and little of the questioning during those hearings actually dealt with the matters for which the jurors sought privacy. See PRP at 8-10.

The State maintains that the concurrence in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), most accurately reflects the views of the Supreme Court. Those concurring Justices voted to affirm Momah's

conviction but to reverse Strobe's. They stressed two points: 1) that the trial court had no choice but to close jury selection in Momah's case due to the high potential for juror contamination; and 2) that defense counsel did not merely fail to object to closure, but rather affirmatively sought private questioning. See Whitaker's Supplemental Brief at 4-5. As discussed above, neither factor applies to Whitaker's case.

The State reiterates its argument that Whitaker's attorney invited the error by submitting a juror questionnaire that authorized a closed hearing. Whitaker has fully addressed that issue in the Reply on PRP at 1-4. In short, the record clearly shows that the questionnaire was ultimately the product of the trial court, working from the ones used at the co-defendant's trials, and considering input from the defense and prosecutor. The State indicated that it was satisfied with the final product. In any event, the questionnaire merely permitted jurors to *request* questioning in a closed setting, just as it permitted them to request such things as excusal for hardship. Nothing in the questionnaire suggested that the judge would *grant* any juror requests without following the appropriate legal standards.

**B. WHITAKER IS NOT REQUIRED TO PROVE SPECIFIC PREJUDICE**

The State maintains that Whitaker must prove specific prejudice from court closure. Other than the unique situation presented in Momah, however, the Washington Supreme Court has always found the error to be structural, that is, one that requires no showing of prejudice. It is difficult to imagine how a petitioner could ever prove that the closure of jury

selection specifically prejudiced him. Nobody can say how the presence of the public might have influenced jury selection. Certainly the jurors cannot answer that question, since jurors are not permitted to give testimony concerning their thought processes. State v. Jackmon, 113 Wn.2d 772, 778-79, 783 P.2d 580 (1989). That is why, as in State v. Strode, the error leads to automatic reversal.

Further, as the State concedes, the Supreme Court reached the same result in In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), where the claim was raised in a personal restraint petition. In Orange, as here, the petitioner maintained that his appellate counsel was ineffective in failing to raise the issue. The Supreme Court agreed. Because Orange would have been entitled to automatic reversal on direct appeal, appellate counsel could not have had a legitimate, strategic reason to omit the issue. The petitioner was prejudiced because, if not for appellate counsel's error, he would have won his appeal. The defendant was therefore entitled to a new trial based on ineffective assistance of counsel. Another way to characterize the analysis is that, when appellate counsel was ineffective in failing to raise an issue, the petitioner is entitled to the direct appeal standard on postconviction review. See In re Dalluge, 152 Wn.2d 772, 789, 100 P.3d 279 (2004).

The same result would apply even without a claim of ineffective assistance on appeal. The federal courts, like the Washington courts, generally require a post-conviction petitioner to prove actual prejudice rather than requiring the government to prove that the error was harmless.

Compare Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 383 (1993) (habeas petitioner must prove error had “substantial and injurious effect” on verdict), with In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982) (personal restraint petitioner must prove actual prejudice from error). The Brecht Court “did not, however, change, and in fact reaffirmed, its longstanding doctrine treating ‘structural’ error as not subject to harmless error analysis and accordingly as prejudicial – hence reversible – per se.” Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure* (4th Ed., 2001), § 31.3 at p. 1379, citing Brecht, 507 U.S. at 629-30, 638. “Thus, even in habeas corpus proceedings adjudicated under Brecht, ‘structural’ errors, as opposed to ‘errors of the trial type,’ are always considered ‘prejudicial’ and accordingly are reversible per se.” Id. at p. 1380.

Since Brecht, the federal courts have consistently found structural errors to be per se prejudicial, even on habeas review. See, e.g., Bell v. Cone, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (prejudice is presumed when petitioner was completely denied counsel, or the representation was so compromised as to be equivalent to denial of counsel); Cordova v. Baca, 346 F.3d 924, 930 (9th Cir. 2003) (because petitioner did not effectively waive his right to counsel in state-court trial, “[a]utomatic reversal of the conviction is the only lawful remedy”); Powell v. Galaza, 328 F.3d 558, 566-67 (9th Cir. 2003) (when trial court effectively directs a guilty verdict, the error is structural and requires no showing of prejudice; “[t]his principle applies on habeas review as well as

on direct review”); Miller v. Dormire, 310 F.3d 600, 603-04 (8th Cir. 2002) (invalid waiver of right to jury trial was presumptively prejudicial, structural error).

The federal courts have specifically applied this principle to violations of the Sixth Amendment right to a public trial, when raised on habeas review. In Judd v. Haley, 250 F.3d 1308 (11<sup>th</sup> Cir. 2001), the Court explained that “once a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way.” Id. at 1315. “The mere demonstration that his right to a public trial was violated entitles him to relief.” Id.

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 procedure outlined in Waller<sup>1</sup> prior to its decision to completely remove spectators from the courtroom. Judd has successfully demonstrated that the closure of the courtroom in his case was not conducted in conformity with the standards articulated in Waller; therefore, he is entitled to relief on his Sixth Amendment claim.

Id. at 1319.

Similarly, in Walton v. Briley, 361 F.3d 431 (7<sup>th</sup> Cir. 2004), the state-court trial judge held two sessions after the courthouse had closed for the day, inadvertently preventing the public from attending. “Because Walton need not show specific prejudice, these facts are sufficient to show a violation of Walton’s right to a public trial.” Id. at 433. In Owens v.

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<sup>1</sup> Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

United States, 483 F.3d 48 (1<sup>st</sup> Cir. 2007), the federal defendant lost his direct appeal and then filed a habeas petition. Id. at 56. The First Circuit explained that his claim regarding courtroom closure required no showing of prejudice even though it was raised on collateral review. Id. at 63. See also, Carson v. Fischer, 421 F.3d 83, 94-95 (2<sup>nd</sup> Cir. 2005) (“we have consistently held that prejudice is unnecessary in this context”).

The Washington courts have never suggested that a personal restraint petitioner could have a higher burden of proof than that of a federal habeas petitioner. In fact, the Washington case establishing the burden of proof in a personal restraint petition expressly adopted the federal habeas standard. In re Hagler, 97 Wn.2d at 824-26. The Hagler Court believed it important to stay in step with federal habeas law. Otherwise, “our state’s personal restraint procedure will come to be viewed as a necessary exhaustion of state remedies, rather than as a method by which serious constitutional claims may be heard.” Id. at 826.

Thus, whether raised on direct or collateral review, a violation of the right to a public trial is structural error and requires no showing of specific prejudice.

## II. CONCLUSION

Thus, the Court should reject the State's arguments and grant a new trial in view of Momah and Strode.

DATED this 8<sup>th</sup> day of January, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David B. Zuckerman". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

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David B. Zuckerman, WSBA #18221  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing pleading and accompanying exhibits on the following:

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