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No. 68633-0-I

FILED  
COURT OF APPEALS  
DIVISION II

2013 MAY -8 PM 3:30

IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION I BY \_\_\_\_\_  
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT LEE FREEMAN

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF KING COUNTY

Cause No. 02-1-01727-1 KNT

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 MAY 10 PM 1:26

REPLY BRIEF OF APPELLANT

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ORIGINAL

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## TABLE OF AUTHORITIES

### Cases

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## I. STATEMENT OF THE CASE

The Appellant adopts the statement of the case as set forth in his opening brief, however, the following procedural history important to note:

Following Mr. Freeman's notice to this Court of his intent to appeal the trial court's denial of his 7.8 motion for new trial, Respondent moved to stay the proceedings pending the outcome of three Supreme Court cases (In re Pers. Restraint of 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)). See State's Motion to Stay Appeal Pending the Decisions in In re Morris, State v. Wise and State v. Paumier. Within that motion, Respondent was clear that Mr. Freeman was specifically appealing the trial court's denial of his 7.8 motion based on the two instances of courtroom closure during his trial and that outcome of those cases would likely be determinative in Mr. Freeman's case.

Mr. Freeman objected to the motion, however, this Court granted Respondent's motion and the matter was stayed. Now, because the outcome in each of those cases clearly favors Mr. Freeman, Respondent has changed the character of its response to this case and is attempting to raise issues it has previously waived.

## II. INTRODUCTION

Respondent's brief fails for several reasons. First, Respondent has not cross-appealed the decision of the trial court. Respondent now argues that the only issue this Court should consider is whether the trial court erred in not

transferring Mr. Freeman's CrR 7.8 motion to this Court for review as a personal restraint petition. Because Respondent waived this issue by failing to cross-appeal, this Court should only consider the record and whether the trial court erred in denying Mr. Freeman a new trial. Also, importantly, Respondent has failed to address any of the analysis set-forth within the decisions in Wise, Paumier, and In re Morris. The results in those cases were as follows:

In State v. Wise, 176, Wn.2d 1, 288 P.3d 1113 (2012), the Supreme Court held that a partial courtroom closure – where the trial court failed to consider the Bone-Club<sup>1</sup> factors on the record – was grounds for reversal as a violation of the public trial right.

In State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), the Supreme Court held that a partial courtroom closure – where the trial court failed to consider the Bone-Club factors on the record – was structural error regardless of whether the defendant (1) objected to the closure or (2) could show prejudice.

In In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012), our Supreme Court held that a partial courtroom closure without consideration of the Bone-Club factors on the record was structural error and that appellate counsel's failure to raise the issue on direct appeal constituted ineffective assistance of counsel.

Here, as noted above, Respondent requested that this Court stay this appeal pending the outcome of those three cases. However, now, because the outcome in those cases is apparently unfavorable to Respondent, the character of

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

Respondent's argument has changed and, rather than argue the merits of Mr. Freeman's appeal, Respondent is attempting to convince this Court to dismiss Mr. Freeman's appeal as "successive." Because this issue has not been raised it has been waived and, respectfully, this Court should only address the issues that have been properly appealed.

Second, the record is clear in this case that Mr. Freeman was twice denied his constitutional right to a public trial and should have been granted a new trial by the trial court. Where this did not occur, this Court must remand the case back to the trial court for a new trial.

### **III. ARGUMENT**

Respondent first contends that Mr. Freeman's motion to the trial court was time-barred and should have been transferred to this Court for consideration as a PRP. See Brief of Respondent at 7-8. Respondent further argues that, since the motion "should have" been converted in to a PRP, this Court should not consider it because it would be a "successive" collateral attack. See Brief of Respondent at 15. However, as noted above, the trial court did not convert Mr. Freeman's motion to a PRP. Instead, the trial court held a hearing – which Mr. Freeman attended – and then, after argument, denied the motion. The trial judge even anticipated that his decision might be appealed when he stated the following:

Judge: So anyway that clarifies that for me, let's go ahead and, and we've established I think hopefully on this record what my recollection is so if it does get appealed then, ah, that significant to the Court of Appeals ... they can at least deal with that and, um, and make a decision how they want to proceed.

RP at 18.

Respondent has not filed a cross-appeal alleging error on the part of the trial court in allowing the hearing, rather, Respondent is arguing that because the hearing should not have happened, this Court should not consider whether the *finding* of the trial court was erroneous. This line of argument is nonsensical and inconsistent with this Court's procedure. Mr. Freeman has appealed what he believes to be errors on the part of the trial court at a hearing which did occur. Respondent requested a stay in the proceedings arguing that the outcome of three Supreme Court cases were determinative of the issue at hand. Now, because the decisions in those three cases were all favorable to Mr. Freeman, Respondent has re-characterized the "determinative" issues, however, Respondent has not cross-appealed. The only issues before this Court are the ones raised by Mr. Freeman in this direct appeal – specifically, whether he should have been granted a new trial for the mistakes during his trial. As such, because this is a direct appeal, it cannot be considered a "successive" PRP as Respondent alleges.

Respondent further argues that "if this Court determines that Freeman's petition is not time-barred, a reference hearing is appropriate." See Brief of Respondent at 16. Respectfully, this argument fails.

First, the trial court already held a CrR 7.8 hearing. The trial court judge addressed his memory of the trial and discussed his common trial practices during the significant time period. The trial court declined to take testimony, clearly relying on the affidavits and the record. Respondent did not request further

evidence by way of testimony. To now require a reference hearing would serve no purpose. The record has been established.


Furthermore, a reference hearing is irrelevant where this Court simply reviews the record and confirms that no Bone-Club analysis occurred before the two instances of courtroom closure during Mr. Freeman's trial. As has been articulated previously, where this did not occur, in addition to Mr. Freeman's previous analysis, a new trial is required.

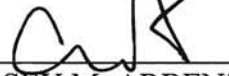
#### IV. CONCLUSION

The two instances of courtroom closure in Mr. Freeman's case without a record that the Bone-Club factors were considered amounted to structural error. As such, based on the files and authorities set forth by Mr. Freeman in his opening brief, as well as the holdings in In Re Morris, State v. Wise, and State v. Paumier, respectfully, this Court should reverse the trial court and grant Mr. Freeman a new trial.

DATED this 8 day of May, 2013.

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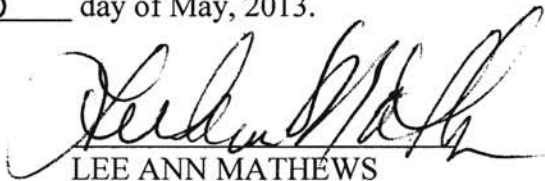
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 8<sup>th</sup> day of May, 2013.



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