

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

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IN RE PERSONAL RESTRAINT PETITION OF:

**ROBIN T. SCHREIBER,**

PETITIONER.

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**SUPPLEMENTAL BRIEF IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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Jeffrey E. Ellis #17139  
*Attorney for Mr. Schreiber*

Law Office of Alsept & Ellis  
621 SW Morrison St., Ste 1025  
Portland, OR 97205  
206/218-7076 (ph)  
[JeffreyErwinEllis@gmail.com](mailto:JeffreyErwinEllis@gmail.com)

## A. INTRODUCTION

This supplemental brief, requested by the Court, addresses the application of four recent Washington Supreme Court decisions: *In re PRP of Morris*, \_\_\_ Wn.2d \_\_\_, 288 P.3d 1140 (2012); *State v. Wise*, \_\_\_ Wn.2d \_\_\_, 288 P.3d 1113 (2012); *State v. Paumier*, \_\_\_ Wn.2d \_\_\_, 288 P.3d 1126 (2012); and *State v. Sublett*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2012 WL 5870484 (2012).

*Paumier* and *Wise* are most on point, so Schreiber focuses primarily on those cases. *Sublett*, unlike this case, involved only a question from a deliberating juror—a portion of trial not traditionally open, according to the court. This case involves questioning potential jurors regarding their ability to serve as jurors—a portion of trial that is indisputably subject to the open and public trial guarantees.

This supplemental brief does not address the confidential questionnaire portion of Schreiber’s public trial claims. That issue is still pending in the Washington Supreme Court in *State v. Tarhan*, No. 85737-7 (“Whether sealing juror questionnaires following jury selection without conducting the analysis required by *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), constitutes structural error requiring reversal of a criminal conviction.”).

## **B. SUMMARY OF UNCONTESTED FACTS**

The following facts are uncontested. During jury selection, the judge decided to question two jurors privately about whether they observed Schreiber being escorted by jail officers to court. The questioning took place in the judge's chambers. The State acknowledges that the public was not in attendance for this part of trial. *See* Appendix C to State's Response.

Both jurors were questioned about whether they had seen Schreiber being escorted to court. One juror had. The other had not. The juror who had seen Schreiber saw him in handcuffs. That juror was also questioned about exposure to pre-trial publicity about the case. That juror was excused for cause. *Id.*

The trial court did not conduct a *Bone-Club* hearing before deciding to question the jurors privately. Defense counsel did not object to the private questioning. *Id.*

## **C. ARGUMENT**

### *Argument*

This case is squarely controlled by Washington Supreme Court precedent.

*The Trial Court Announced the Court Would Be Closed*

A trial court is required to *resist* closure. *State v. Bone–Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995). In this case, the judge *sua sponte* announced the closure of the courtroom.

A trial court is also required to consider alternatives to closure even when they are not offered by the parties. *Paumier*, slip opinion at ¶ 8. See also *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). In this case, the trial court never considered any alternative to closure.

If a court intends to close the courtroom it must consider all of the *Bone–Club* factors before closing a trial proceeding. *Paumier, supra* (“Failure to conduct the *Bone–Club* analysis is structural error warranting a new trial because voir dire is an inseparable part of trial.”). The trial court did not consider any of the required factors. Instead, the court simply announced that it would grant closure.

*Schreiber Did Not Waive His Right to an Open and Public Trial*

Schreiber did not waive his right to a public trial by arguably waiving his right to be present. *Morris* also involved the waiver of the right to be present for private questioning. *Morris* held that the waiver of the right to be present does not result in a waiver of the public trial right. “Waiver of the right to be present, however, should not be conflated with waiver of the right to a public trial.” “Moreover, a defendant must have knowledge of a right to waive it.” *Morris* at ¶ 17. Here, the trial

judge never asked Schreiber if he wished to waive his right to an open trial—just as he failed to engage in any of the steps required to close a courtroom.

In *Paumier*, *Wise* and *Morris*, the Washington Supreme Court reaffirmed that a defendant does not waive his right to a public trial by failing to object to a closure at trial. *Wise, supra* at ¶ 22 (“Wise did not object when the trial court moved part of the voir dire proceedings into chambers.”); *Paumier, supra* at ¶ 3 (“The prosecution, defense counsel, and Paumier were all present for the questioning and offered no objections.”); *Morris, supra* at ¶ 17 (finding that Morris waived his right to be present, but only after and perhaps because trial court declared intention to close courtroom). See also *State v. Marsh*, 126 Wash. 142, 145–47, 217 P. 705 (1923).

The State may nevertheless argue that Schreiber’s case is like the prior decision in *State v. Momah*, 167 Wash.2d 140, 152, 217 P.3d 321 (2009), because Schreiber’s counsel questioned jurors in chambers and because he asked several questions to a juror about pre-trial publicity. *Wise* made it clear, however, that *Momah* presented a unique set of facts:

*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. 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*, at ¶ 20.

This case is nothing like the “unique confluence” of facts in *Momah*. Schreiber’s trial counsel did not assist in designing the closure. Instead, he simply asked additional questions of a juror—who was already being questioned in a private setting.

Just as if not more importantly, the trial court did not conduct any portion of the required *Bone-Club* hearing. *Momah* found that the trial judge had essentially conducted a complete hearing. The recent trio of Washington Supreme Court decisions has made it clear that the judge’s failure to accurately apply all of the *Bone-Club* factors is a structural error that requires reversal.

Further, the *Wise* Court made it clear that the facts in *Momah* were unique: “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. Since *Wise* did not waive his right to a public trial by not objecting, and prejudice is presumed, a new trial is warranted.” *Id.*

This Court should reach the same result. This case is much more like *Wise*, *Paumier*, and *Morris*. The failure to conduct a “virtual” *Bone-Club* hearing makes it dissimilar to *Momah*.

*The Questioning was Part of Voir Dire*

The two potential jurors were questioned about their ability to serve. They were not already jurors. As a result, the jury selection cases control. This is not a case involving the possible “contamination” of jurors after trial had begun.

However, even if it was a case involving jurors who had been exposed to extraneous and prejudicial information after trial had commenced, the trial court was still required to conduct a *Bone-Club* hearing before it closed the courtroom. There is no reason why jurors could not be questioned individually in open court about their observations. Seeing Schreiber in handcuffs is not a fact that should be discussed in front of all potential jurors (who would then learn he was in custody). However, there is nothing about that information that requires questioning away and apart from the public.

The questioning of jurors about their ability to impartially serve and to aid the parties in the intelligent exercise of peremptory challenges is part of jury selection. That fact does not change simply because the questioning is about something that happened in the courthouse during the selection process. Jury selection remains jury selection regardless of topic.

### *Reversal is Required*

The State will almost certainly argue that the evaluation of prejudice from a courtroom closure in a PRP remains unresolved. It is certainly true that *Morris* was decided on narrow grounds and the Supreme Court did “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.” However, both *Paumier* and *Wise* explained how to evaluate the harm that flows from a structural error.

In a PRP, a petitioner must show “actual and substantial” prejudice. *In re Pers. Restraint of Woods*, 154 Wash.2d 400, 409, 114 P.3d 607 (2005). In a direct appeal involving an “unpreserved error,” the defendant must show a manifest or “actual” error affecting a constitutional right. In the case of a structural error, the necessary prejudice is always presumed.

In *Paumier*, the court held that a prejudice is always presumed with a structural error:

The next concerns we must address are whether Paumier had to contemporaneously object to the individual questioning to preserve the error and if he must show prejudice on appeal. Ordinarily, a party must contemporaneously object to preserve an error. RAP 2.5. However, RAP 2.5(a) allows an unobjected to error to be raised on appeal if it is a “manifest error affecting a constitutional right.” This court has previously interpreted “manifest error” as requiring a defendant to show actual prejudice. *State v. O'Hara*, 167 Wash.2d 91, 99, 217 P.3d 756 (2009). Here, that would mean Paumier must show actual prejudice because he failed to object to the closure during trial. But RAP 2.5(a) does not apply in its typical manner

here because the improper courtroom closure was structural error. As noted in *Wise*, “[n]othing in our rules or our precedent precludes different treatment of structural error as a special category of ‘manifest error affecting a constitutional right.’ ” *Wise*, — Wash.2d at — n. 11, — P.3d — (quoting RAP 2.5(a)(3)).

In fact, there is good reason to treat structural errors, like violation of a defendant's public trial right, differently. A structural error “affect[s] the framework within which the trial proceeds” and renders a criminal trial an improper “ ‘vehicle for determin[ing] guilt or innocence.’ ” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). The right to a public trial is a unique right that is important to both the defendant and the public. *Wise*, — Wash.2d at —, — P.3d —; *Momah*, 167 Wash.2d at 148, 217 P.3d 321. Moreover, assessing the effects of a violation of the public trial right is often difficult. *Wise*, — Wash.2d at —, — P.3d — (quoting *United States v. Marcus*, — U.S. —, 130 S.Ct. 2159, 2165, 176 L.Ed.2d 1012 (2010)). Requiring a showing of prejudice would effectively create a wrong without a remedy. Therefore, we do not require a defendant to prove prejudice when his right to a public trial has been violated.

*Paumier*, at ¶¶ 12-13. *Wise* added:

Structural error is a special category of constitutional error that “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Fulminante*, 499 U.S. at 310, 111 S.Ct. 1246. Where there is structural error “ ‘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.’ ” *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577–78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citation omitted)). Structural error, including deprivation of the public trial right, is not subject to harmless analysis. *Id.* at 309–10; *Easterling*, 157 Wash.2d at 181, 137 P.3d 825. A defendant “should not be required to prove specific prejudice in order to obtain relief.” *Waller*, 467 U.S. at 49, 104 S.Ct. 2210. Accordingly, 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. *Easterling*, 157 Wash.2d at 181, 137 P.3d 825; *Orange*, 152 Wash.2d at 814, 100 P.3d 291; *Bone–Club*, 128 Wash.2d at 261–62, 906 P.2d 325.

*Wise*, at ¶ 19.

The *Wise* Court added:

Because it is impossible to show whether the structural error of deprivation of the public trial right is prejudicial, we will not require *Wise* to show prejudice in his case. “We will not ask defendants to do what the Supreme Court has said is impossible.” *Owens v. United States*, 483 F.3d 48, 65 (1st Cir.2007).

*Id.* at ¶ 29.

This is consistent with the holdings of the United States Supreme Court. 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 (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 (2006) (deeming deprivation of counsel of choice a structural error); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (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 (1927) (holding that trial before a biased judge “necessarily involves a lack of due process”); *Sullivan v. Louisiana*, 508 U.S. 275, 280 (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* and *Tumey*, all of the above cited cases were collateral attacks.

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 (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.” *Arizona v. 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.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 make out a case of identifiable prejudice. *See Sustache-Rivera v. United States*, 221 F.3d 8, 17 (1st Cir.2000) (“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 post conviction petitioners to do what the courts have said is impossible.

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*, 5<sup>th</sup> Ed. (2001), p. 1519.

The presumption of prejudice does not disappear in a PRP. Likewise, there is no justification to require the “impossible” in a PRP, but

not in a direct appeal. Therefore, reversal is required whether the error is raised as an “unpreserved” manifest error on direct appeal or in a PRP.

C. CONCLUSION

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

DATED this 19<sup>th</sup> day of December, 2012.

Respectfully Submitted:

/s/Jeffrey Erwin Ellis  
Jeffrey Erwin Ellis #17139  
*Attorney for Mr. Schreiber*

Law Office of Alsept & Ellis  
621 SW Morrison St., Ste 1025  
Portland, OR 97205  
206/218-7076 (ph)  
[JeffreyErwinEllis@gmail.com](mailto:JeffreyErwinEllis@gmail.com)

## CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of this supplemental brief on opposing counsel by sending a copy via email to the Clark County Prosecutor's Appellate Division to the following email addresses:

Anne.Cruser@clark.wa.gov  
prosecutor@clark.wa.gov

December 19, 2012//Portland, OR  
Date and Place

/s/Jeffrey Ellis  
Jeffrey Ellis