

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

IN RE PERSONAL RESTRAINT PETITION OF:

ROBIN T. SCHREIBER,

PETITIONER.

**PETITIONER'S SUPPLEMENTAL BRIEF
RE: COGGIN AND SPEIGHT**

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A. INTRODUCTION

Nearly five years ago, Mr. Schreiber filed a PRP claiming, in part, that he was denied his state and federal constitutional rights to an open and public trial and that reversal was required. During the interim, this Court entered two year stay, scheduled the case for argument, and then entered another year-long stay. This Court's most recent stay awaited the Washington Supreme Court's decision in two cases: *In re PRP of Coggin*, __ Wn.2d __, __ P.3d __, 2014 WL 7003796 (2014); and *In re PRP of Speight*, __ Wn.2d __, __ P.3d __, 2014 WL 7003794 (2014), which promised to decide the post-conviction standard of review for a structural errors, namely closed court violations. Those cases have now been decided.

Neither case produced a majority decision. Instead, four justices wrote in favor of one position and four in favor of another. The concurring opinion by the Chief Justice did not reach the prejudice question. The only point of agreement producing a majority was that the petitions should be denied. Neither case has any precedential value here.

In addition, both *Coggin* and *Speight* were limited to state constitutional violations. Schreiber also claims a federal constitutional violation. There are numerous cases from federal courts which hold that a structural error mandates automatic reversal in a post-conviction setting. This Court should reverse.

B. ARGUMENT

1. Plurality Decisions Have Limited Precedential Value

A plurality opinion has limited precedential value and is not binding on the courts. *See In re Isadore*, 151 Wash.2d 294, 302, 88 P.3d 390 (2004); *State v. Gonzalez*, 77 Wash.App. 479, 486, 891 P.2d 743 (1995). In *Marks v. United States*, 430 U.S. 188 (1977), the Supreme Court of the United States explained how the holding of a case should be viewed where there is no majority supporting the rationale of any opinion: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks*, 430 U.S. at 193.

Both *Coggin* and *Speight* produced plurality decisions. The only holding that produced a majority was the conclusion that relief was not warranted.

In both cases, four justices signed Justice Johnson’s opinion. Four justices also signed the opinion authored by Justice Stephens. Chief Justice wrote an opinion that concurred with the result only reached by Justice Johnson’s decision. (*Coggin*: “However, I would instead hold that *Coggin* invited the courtroom closure during voir dire and accordingly is precluded from raising the issue on collateral review. Thus, we need not reach the

question of actual and substantial prejudice;” *Speight*: “I agree with the lead opinion's decision to deny Ronald Speight’s personal restraint petition, but for different reasons. First, I believe that this court must decide whether motions in limine implicate the public trial right, and I would decide this question in the negative. Second, I would hold that Mr. Speight invited the judge to conduct portions of voir dire in chambers. Thus, in contrast to the lead opinion and in line with my concurrence in *Coggin*, I believe we need not determine the prejudice showing required of personal restraint petitioners.”) (Madsen, CJ concurring in result only).

Consequently, neither case has any precedential application to this case.

2. The Federal Constitution Requires Automatic Reversal

In addition, both *Coggin* and *Speight* raised only a state constitutional claim. (*Coggin*: “In this case we must decide what standard on review is applicable in a personal restraint petition asserting a violation of the right to a public trial under article I, section 22 of the Washington State Constitution.” *Speight*: Petitioner Ronald Speight filed a timely personal restraint petition, claiming for the first time on collateral review that his right to a public trial under article I, section 22 of the Washington State Constitution, was violated when the trial court decided motions in limine and individually questioned potential jurors in chambers.”).

Although Schreiber’s closed courtroom claim is based on the state

constitution, he alternatively premised his claim on the federal constitution. *See* PRP, p. 5.

While this Court is certainly free to decide the harm standard under the federal constitution, the federal constitutional harm standard for structural errors reviewed in post-conviction is well defined.

The United States Supreme Court has held that some constitutional errors “necessarily render a trial fundamentally unfair” and “require reversal without regard to the evidence in the particular case.” *Rose v. Clark*, 478 U.S. 570, 577 (1986), citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (adjudication by biased judge). This limitation recognizes that some errors necessarily render a trial fundamentally unfair. Without these basic protections, a criminal trial cannot reliably serve [478 U.S. 570, 578] its function as a vehicle for determination of guilt or innocence, see *Powell v. Alabama*, 287 U.S. 45 (1932), and no criminal punishment may be regarded as fundamentally fair.

Errors that can never be deemed harmless are those which abort or deny the basic trial process. In contrast to trial errors, structural errors are defects that “affect[] the framework within which the trial proceeds” and are not subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such errors deny defendants “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.” *Rose*, 478 U.S at 577-78 (internal citation omitted). The Ninth Circuit has repeatedly granted relief in federal habeas cases where the trial was infected with a structural error without conducting actual prejudice analysis. *See, e.g., Conde v. Henry*, 198 F.3d 734, 741 (9th Cir. 1999) (finding reversible structural error where trial court precluded defense attorney from making closing argument on defense theory of the case); *United States v. Miguel*, 338 F.3d 995, 1001 (9th Cir. 2003) (finding reversible structural error where trial court precluded defense counsel from arguing defense theory of the case and instructed the jury that no evidence supported it).

In short, the applicable harm standard required under the federal constitution is settled. "The parties do not question the consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. *See, e.g., Douglas v. Wainwright*, 714 F.2d 1532, 1542 (11th Cir. 1983) (citing cases).

3. Sound Policy Reasons Require Automatic Reversal For Structural Errors Raised in a PRP

To hold otherwise with respect to structural errors, would require post-conviction petitioner’s to prove the impossible. Perhaps the most obvious “impossible to prove actual prejudice” claim is the right to self-

representation. Since 1975, the Supreme Court has recognized a Sixth Amendment right to represent oneself. Denial of this right is an error despite the fact that the vast majority of defendants would receive better representation, and a better chance at a favorable outcome, if they had had counsel. Nonetheless, the Supreme Court has noted that this right's "denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). In these cases, the harm is to the defendant's dignitary interest in representing himself; if it were judged by the usual harmless error standard, the defendant would lose in every case. Instead, courts presume prejudice to protect the right, despite the lack of what would usually be considered "harm."

Likewise, a post-conviction petitioner would never be able to show "harmful" error in a PRP involving denial of a jury trial; the use of an incorrect reasonable doubt instruction; the improper use of forced psychotropic medications; the denial of the right to be present at a critical stage; the failure to excuse a racially biased juror; and many other structural errors.

The same is true with respect to the right to a public trial. Though public trial errors are thought to have some potential effect on the outcome of the trial, in that abuses are less likely when the trial is in the public eye, the right also serves societal values of transparency and integrity in the

judicial process. Indeed, in the classic public trial case *Waller v. Georgia*, 467 U.S. 69, (1984), the Supreme Court noted that “[t]he harmless error rule is no way to gauge the . . . societal loss that flows' from closing courthouse doors.” In these cases, then, we may be able to measure some effect on the trial using a harmless error-type analysis, but we cannot measure the full effect of the error. How would a post-conviction petitioner even begin to show the loss of integrity of the judicial process?

By applying harmless error analysis in a post-conviction setting the failure of a trial judge to do what is required prior to closing a courtroom (hold a *Bone-Club* hearing) is rendered essentially unreviewable at any stage where the closure is not memorialized by a party. In other words, no record will exist in order to identify and raise the issue on direct appeal and prejudice will be impossible to prove in a PRP. The result is two directly contradictory rules telling judges if they refuse to do what is required under the constitution, but instead remain silent reversal will be unavailable.

Correctly applied, harmless error and structural error analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. This Court should reverse.

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C. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial. In the alternative, this Court should remand for an evidentiary hearing.

DATED this 2nd day of January, 2015.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of this supplemental reply brief on opposing counsel by sending a copy via email to the Clark County Prosecutor's Appellate Division to the following email address: Anne.cruser@Clark.wa.gov

January 2, 2015//Portland, OR
Date and Place

/s/Jeffrey Ellis
Jeffrey Ellis

ALSEPT & ELLIS LAW OFFICE

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