

NO. 40553-9-II

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

STATE OF WASHINGTON, Respondent

v.

ROBIN TAYLOR SCHREIBER, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 04-1-01663-1

CORRECTED SUPPLEMENTAL RESPONSE TO PERSONAL
RESTRAINT PETITION

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A. IDENTITY OF RESPONDENT AND AUTHORITY FOR RESTRAINT

The State of Washington is the Respondent in this matter. Mr. Schreiber (hereafter, “the defendant”) is restrained under the authority of the judgment and sentence entered by the Superior Court of Clark County on July 27, 2006, for Count One: Murder in the Second Degree, under cause number 04-1-01663-1. *See* Appendix A.

B. INTRODUCTION

Robin Schreiber murdered Sergeant Brad Crawford of the Clark County Sheriff’s Department while he was in the line of duty. Appendix B. Upset about a child support dispute with his ex-wife, Schreiber armed himself with a rifle and a shotgun, scaring his girlfriend enough that she called the police. Appendix B. Among the officers who responded was Sgt. Crawford. Appendix B. Schreiber repeatedly threatened the officers by pointing his rifle at them. Appendix B. He ultimately left his house and got into his truck. Appendix B. He drove over a barbed wire fence to escape his barricaded driveway and turned onto 114th Street, which runs in front of his house. Appendix B. 114th Street forms a 90 degree angle at the point where it becomes 124th Avenue. Appendix B. Sgt. Crawford was parked on the shoulder of that particular corner. As Schreiber approached 124th Avenue he accelerated to a speed of 30 to 40 mph and drove straight

into the driver's side of Sgt. Crawford's car. Appendix B. Sgt. Crawford died as a result of his horrific injuries.

Schreiber's murder trial began on May 31, 2006 and ended on June 28, 2006, spanning four weeks. There were 43 witnesses called to testify. On the second day of jury selection defense counsel and the trial court's judicial assistant learned that two jurors had used the incorrect bathroom during a recess and may have seen the defendant outside the courtroom in shackles. 321-25. When court reconvened it was clear that defense counsel was aware of what occurred prior to the trial court being made aware (indeed, he indicated he witnessed it.) RP Vol. II, p. 321-323, 324. Once the trial court understood what occurred, he told his judicial assistant to "have the [two jurors] go back there." RP Vol. II, p. 322. The prosecutor, for his part, had no idea what was going on and asked "So what are we doing, judge?" The court then informed the parties "We had a couple wanderers. Mr. Phelan¹, we're going to be talking to a couple jurors in my chambers." RP Vol. II, p. 323. Rather than object, Mr. Phelan began to tell the court that he had witnessed the incident out of the corner of his eye. RP Vol. II, p. 323. Mr. Schreiber then waived his right to be present during the chambers conference. Id. The trial court brought each of the two jurors into chambers one at a time for individual questioning that

¹ Mr. Phelan was Mr. Schreiber's retained defense counsel.

lasted for a period of 4 minutes.² The entire chambers conference was recorded and made part of the record. Report of Proceedings.

The first juror, Jeri Raimer, was asked by the trial court whether she was out in the hall area leaving the ladies rest room, to which she replied “yes,” and whether she had seen the defendant or any custody officer while out there, and she replied “no.” RP Vol. II, p. 325. She was asked no further questions. *Id.* The second juror, Patricia Rea, was asked by the trial court whether she was out in the hall recently rather than in the jury room, and she immediately became defensive. RP 325-26. She admitted that she had gone out to the bathroom³ but claimed that at least six other potential jurors did so as well (which wasn’t true), and said that she wouldn’t “narc” on them and that the judge could “forget it” if he asked her to. RP Vol. II, p. 327. When asked if she had seen the defendant she replied that she had, and when asked how he was attired she became sarcastic, saying he was wearing “these pretty bracelets on that were probably silver. I’ve seen that before.” RP Vol. II, p. 327. After one more question from the court about whether she had seen defendant’s

² Included in this time calculation is the time that Mr. Phelan spent arguing for the removal of potential juror Patricia Rea. The exact time period was 234 seconds, or 3.9 minutes. This time calculation excludes the ministerial dithering over who was supposed to be using which bathroom, which does not constitute a closure. See e.g., *Sublett*, *supra*. The source of this information is the declaration of Jennifer Casey, attached to the State’s original response to this petition

³ For context, the issue here was the jurors’ use of the wrong bathroom. They are provided a bathroom but left the jury room to use the public restroom, thereby giving rise to this issue. See RP Vol. II, p. 330.

handcuffs being removed (she hadn't), defense counsel expanded the closure and asked her a series of questions about whether she had been exposed to the pretrial coverage of the case and whether she learned any of the facts of the case as a result. RP Vol. II, p. 328-29. These questions were not the original purpose of the chambers conference. RP Vol. II, p. 323. She confirmed that she had seen news coverage of the case and learned from that coverage that the defendant "ran into a cop and--or a policeman, and he was killed, the policeman, and that there seemed to be something deliberate on the part of the perpetrator, your client." RP Vol. II, p. 329. Mr. Phelan asked no further questions and the juror was released back to the jury room. RP Vol. II, p. 329. Mr. Phelan then moved to have Ms. Rea excused from the jury and the State agreed. RP Vol. II, p. 329-30. The court agreed to excuse her. RP Vol. II, p. 330. At that point the voir dire portion of the chambers conference ended and the attorneys and court began discussing the ministerial matter of which bathroom everyone is supposed to use. RP Vol. II, p. 330-31. The entire chambers affair lasted about seven minutes. See Appendix D to the State's original response, the Declaration of Jennifer Casey.

Mr. Schreiber did not complain in his direct appeal that he had been denied his right to a public trial. He raises this issue for the first time in this collateral attack. This petition is timely. This Court has ordered

supplemental briefing solely on the public trial issue, in light of the Supreme Court's recent opinions in *State v. Wise*, 288 P.3d 1113 (November 21, 2012), *State v. Paumier*, 288 P.3d 1126 (November 21, 2012), *State v. Sublett*, 2012 Wash.Lexis 797 (November 21, 2012), and *In re PRP of Morris*, 288 P.3d 1140 (November 21, 2012).

C. SUMMARY OF ARGUMENT

*State v. Momah*⁴ remains good law and compels the conclusion in this case that there was not an unjustified court closure. This is so because defense counsel consented to the questioning of two potential jurors in chambers regarding the possibility that they saw the defendant in shackles, defense counsel expanded the closure, the closure was narrowly tailored (with the exception of the portion that defense counsel purposefully expanded) and lasted no longer than was necessary to determine what, if anything, the potential jurors had seen. The constitutional right at issue was the defendant's article 1, sec. 22 right to a fair trial, a compelling interest of both Schreiber and the State. Schreiber exclusively and substantially benefited from the closure, rooting out a biased juror and successfully challenging her for cause. The prosecution derived no benefit from this process. The closure lasted for 3.9 minutes in this four week

⁴ *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009).

trial. Applying the *Momah* factors, Schreiber's trial was not closed in violation of article 1, sec. 22 such that structural error occurred.

Second, the closure in this case was de minimis. The State incorporates the argument previously made in its initial response to this personal restraint petition, found specifically at pages 29 through 35 of the State's opening response.

Third, if this Court concludes that Schreiber's trial was closed in violation of his article 1, sec. 22 right to a public trial, or that *State v. Momah* does not retain precedential value, he is not entitled to relief in this personal restraint petition because he must demonstrate prejudice, which he cannot, and because *Morris*, supra, is strictly limited to cases in which the petitioner claims he was denied ineffective assistance of appellate counsel in his direct appeal, which Schreiber does not.

Fourth, if this Court concludes that *Morris* entitles Schreiber to relief and that he is relieved of his burden of demonstrating prejudice, *Morris* was wrongly decided, incorrect and harmful and should be overruled.⁵

⁵ Although this Court cannot overrule Supreme Court precedent, the State makes this argument to preserve it for further review if necessary.

D. ARGUMENT

I. THE BRIEF QUESTIONING OF TWO POTENTIAL JURORS IN CHAMBERS REGARDING WHETHER THEY HAD SEEN THE DEFENDANT IN SHACKLES DID NOT CONSTITUTE AN UNJUSTIFIED CLOSURE OF THE TRIAL UNDER *STATE V. MOMAH*.

In *State v. Momah*, supra, the Supreme Court held that limited, private questioning of numerous jurors in-chambers without the trial court having first conducted a hearing pursuant to *State v. Bone-Club*⁶ was a court closure, but was not an *unjustified* court closure – meaning, the closure error was not structural.⁷ This case is squarely controlled by *Momah*. In *Momah*, a highly-publicized rape case, defense counsel agreed to the private questioning of certain jurors who had indicated they could not be fair or who had requested individual questioning on their juror questionnaires, in order to preserve the defendant’s right to a fair and impartial jury. *Momah* at 146. Defense counsel also successfully sought to expand the closure by expanding the list of jurors who would be

⁶ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

⁷ The undersigned counsel has seen the holding in *Momah* characterized variously as the Court having held that the closure was not unjustified--meaning, there *was no* closure error, or, alternatively, that the closure was not unjustified--meaning, there *was* a closure error but the error was not structural. The majority opinion in *Wise* seemingly adopted the former characterization--that there was no closure error in *Momah*--when it said, in reference to the difference between *Momah* and *Wise/Paumier*: “The rule remains that deprivation of the public trial right is structural error.” *Wise* at 1120; and “no public trial right violation” occurred in *Momah. Paumier* at 1129. The State relies in this brief on the holding as characterized by the majority author of *Momah*, Justice Charles Johnson: “We hold that the closure in this case *was not a structural error* and affirm Charles Momah’s conviction.” *Momah* at 145 (emphasis added).

questioned privately. *Momah* at 146. On appeal, the defendant complained that his right to a public trial was violated by the trial court conducting portions of voir dire in chambers without first considering the factors enumerated in *Bone-Club*, supra, and *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210 (1984). The *Momah* Court began by discussing prior cases in which a public trial violation had resulted in fundamental unfairness such that the error was “structural” in nature, i.e., not readily susceptible to harmless error analysis. *Momah* 149-51 (discussing *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210 (1984) (full closure of suppression hearing), *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006) (closure of co-defendant’s motion to sever and plea of guilty), and *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) (exclusion of defendant’s family from voir dire over defendant’s objection)). If structural error is found to have occurred, reversal is automatic. Regarding these cases, the court concluded:

In the aforementioned cases, the closure errors were held to be structural in nature. Prejudice to the defendant in those cases was sufficiently clear and required the remedy of a new trial. In each case, the trial court closed the courtroom based on interests other than the defendant’s; the closures impacted the fairness of the defendant’s proceedings; the court closed the courtroom without seeking objection, input, or assent from the defendant; and in the majority of cases, the record lacked any hint that the trial court

considered the defendant's right to a public trial when it closed the courtroom.

Momah at 151.

In *Momah*, the Supreme Court held that a defendant should not be awarded a new trial when he participates in, expands and benefits from the limited private questioning of prospective jurors. *Momah* at 150-52.

Specifically, the Court held that where the defendant assents to the closure, had the opportunity to object to it but did not, actively participated in it (and, in both *Momah* and this case, **expanded** the closure), and benefited from it he should not get the windfall of a new trial. *Id.* As

Justice Wiggins explained in his dissenting opinion in *Paumier*, *supra*:

The criteria [in *Momah*] are (1) the interests on which closure was based, (2) whether the closure impacted the fairness of the proceedings, (3) whether the defendant objected or assented to the closure, and (4) whether the court considered the defendant's right to a public trial.

Paumier at 1137. It must be noted that the majority in *Momah* characterized the first factor--the interest on which the closure was based--as the most important of these characteristics: "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." *Momah* at 151-52.

Momah specifically held that an unjustified closure of a trial is not necessarily structural error:

If, on appeal, the court determines that the defendant's right to a fair public trial has been violated, it devises a remedy appropriate to that violation. *If* the error is structural in nature, it warrant automatic reversal of conviction and remand for a new trial. An error is structural when it "necessarily render[s] a criminal trial unfair or an unreliable vehicle for determining guilt or innocence.

Waller itself establishes that not all courtroom errors are fundamentally unfair and thus not all are structural errors; our cases applying *Waller* also support that proposition.

Momah at 149-50.

Is *Momah* still good law or has it been overruled? The State submits that *Momah* remains precedential. Justice Madsen in her respective dissents in *Wise* and *Paumier* and concurrence in *Sublett* argues that the majority opinions in *Wise* and *Paumier* have effectively overruled *Momah* (*Paumier* at 1132, Madsen, C.J., dissenting), turned "precedent into pretense," (*Wise* at 1124, Madsen, C.J., dissenting), and distinguished *Momah* "out of existence." (*Sublett*, supra, at slip opinion, p. 51, Madsen, C.J. concurring). In response, the majority in *Paumier* insisted that *Momah* remains precedential, stating: "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.”

Paumier at 1129.

The State argues that the facts in this case are similarly unique to those in *Momah* and that *Momah*, therefore, controls this case and compels a finding that the closure in this case, if erroneous, does not amount to structural error. Applying the *Momah* factors to this case, just as Justice Wiggins applied them to Paumier’s case in his dissent in *Paumier*, it is clear that the error here was not structural. As to the first factor, the interest on which the closure was based (this, again, is the most important of the four factors), the interest here was the defendant’s right to a fair trial under article 1, section 22. Here, as noted in the State’s original response, the trial court was faced with an irregularity that posed an emergent and serious threat to the defendant’s right to be tried by an impartial jury. First, the trial court was faced with the possibility that two potential jurors had seen the defendant shackled. It is well settled that this may impair his right to a fair trial by an impartial jury (see, e.g., *State v. Finch*, 137 Wn.2d 792, 848, 864-66, 975 P.2d 967 (1999) (viewing the defendant in shackles may give the appearance of future dangerousness in a capital case, and the trial court must balance certain interests before a prisoner may appear in shackles before a jury)). Second, because this incident would not have occurred but for two jurors disregarding their instruction to use the

bathroom provided in the jury room, the trial court was faced with the possibility that these two potential jurors had committed misconduct, or, at least, were unserious about their duty and prone to future misconduct. (It would not be difficult to imagine, for example, the surly Ms. Rea, having been seated on the jury, regaling her fellow jurors with her tale of having seen the presumably dangerous Mr. Schreiber in shackles). Safeguarding the defendant's right to a fair trial under article 1, section 22 is the most important function of the court in a criminal trial. See *Momah* at 153 ("In the present case, we must also balance the *article 1, section 22* rights at issue. To achieve the proper balance, we construe those rights in light of ***the central aim of a criminal proceeding: to try the accused fairly.***) (Emphasis added). Unlike cases where the trial judge simply conducts voir dire in chambers as a matter of routine, or questions individual jurors in chambers to safeguard their privacy or assure their comfort, or closes the courtroom to thwart the ability of the defendant's family to view the proceedings or the ability of the defendant to see his co-defendant strike a plea bargain, this closure was conducted solely to protect the defendant's right to a fair trial. The first *Momah* factor, therefore, compels the conclusion that the closure in this case was not structural error.

The second *Momah* factor, whether the closure impacted the fairness of the proceedings, is not even being questioned here. It didn't,

and Schreiber doesn't claim that it did (see Supplemental Brief of Petitioner, where at no time does he claim that he suffered actual prejudice. Rather, he claims he is not required to.) To the extent that it affected the fairness of the proceedings, it was only to make the proceedings *fairer* to Schreiber. To be clear, Schreiber was the exclusive beneficiary of this closure. Schreiber not only assented to this closure but actively participated in it. His was the only attorney to ask any questions of the two jurors – the State asked none (indeed, as noted above, the prosecutor was not even aware of this issue until he arrived in chambers and did not do anything to cause or expand this closure). Moreover, and most importantly, Schreiber *expanded the closure*, just as the attorneys did in *Momah*. Defense counsel knew about what happened out in the hallway before anyone else did, having witnessed it. He knew that the sole issue the trial court wanted to discuss was whether the two potential jurors had seen his client in shackles. And yet, he expanded the closure and began to voir dire Ms. Rea on her exposure to pretrial publicity (which, it should be noted, was the same thing defense counsel in *Momah* were concerned with. See *Momah* at 145-46). Here again, Schreiber benefited from the closure by learning that Ms. Rea had been exposed to pretrial publicity suggesting that he intentionally rammed Sgt. Crawford's car – the primary issue to be decided by the jury. As a result of this questioning Schreiber

successfully moved to have Ms. Rea removed from the jury for cause. Having Ms. Rea throw this information out during general voir dire would have tainted the entire panel against Mr. Schreiber. He also learned, through his own questioning of Ms. Rea, that she was incredibly hostile. That he now complains about a court closure that he assented to and expanded is incredible. The second *Momah* factor compels the conclusion that the closure in this case was not structural error.

The third *Momah* factor, whether the defendant objected to or assented to the closure, overwhelmingly weighs against finding structural error here. Retained counsel for Schreiber was Tom Phelan, a very experienced and distinguished attorney in Clark County. Mr. Phelan is very aware of the right to object in criminal trials and chose not to. A fair reading of the record just prior to the chambers conference is that Mr. Phelan and the trial court were of one mind on this matter and it was the prosecutor who was left in the dark. If it can possibly be argued that Tom Phelan is unaware of his right to lodge objections in criminal trials, he was certainly alerted to that right when the trial court asked if his client waived his right to be present in chambers, which additionally and implicitly asks counsel whether he *objects* to conducting the chambers conference without his client. Mr. Phelan had the opportunity to object to the brief, limited and private questioning of Ms. Raimer and Ms. Rea and

made a tactical decision not to do so. As though that were not enough, Mr. Phelan *expanded the closure*. Without seeking permission from the court Mr. Phelan began questioning Ms. Rea about her exposure to pretrial publicity, and thereby garnered information that allowed him to make a successful motion to have her removed for cause. The third *Momah* factor compels the conclusion that the closure in this case was not structural error.

The final *Momah* factor, whether the court considered the defendant's public right to a trial, may suggest structural error. The recording of the chambers conference to make it part of the record and available for transcription suggests that the court considered the public trial right.⁸ However, the court did not consider any alternatives to the closure (or if it did, it didn't articulate it on the record at the time.) Thus, three of the four *Momah* factors weigh heavily, if not inexorably, against finding structural error in this case. Taken as a whole, this Court should find that the closure in this case did not constitute structural error.

⁸ The undersigned counsel recalls the days where it was common practice to conduct individual voir dire in chambers or in back hallways, when jurors requested it, without any contemporaneous record being made. Around the middle of the last decade trial courts, in their growing awareness of the public trial issue, began taking steps to ensure that chambers conferences, hall conferences and side bars were recorded so that they would be part of the record.

II. THE CLOSURE IN THIS CASE WAS DE MINIMIS AND SHOULD NOT BE TREATED AS STRUCTURAL ERROR.

The State incorporates the argument previously made in its initial response to this personal restraint petition, found specifically at pages 29 through 35 of the State's opening response. The State supplements those arguments with the following. First, since the time of the original briefing in the personal restraint petition the Supreme Court has decided *State v. Lormor*, 172 Wn.2d 85, 257 P.3d 624 (2011). The Supreme Court affirmed the Court of Appeals, but on different grounds. See *State v. Lormor*, 154 Wn.App. 386, 224 P.3d 857 (2010). Regarding the de minimis closure exception recognized by numerous federal courts, the Supreme Court said:

[W]e reject, under these facts, the Court of Appeals' holding that embraced a trivial standard in regard to court closures and *reserve such a discussion for another day*.

Lormor at 87 (emphasis added). Thus, the Supreme Court left open the possibility that Washington would adopt a de minimis exception to the structural error rule for unjustified court closures. The State urges this Court to adopt the de minimis exception to the structural error rule for public trial violations and hold that the erroneous closure in this case was de minimis and does not constitute structural error.

In addition to the federal authorities cited by the State in its opening brief, there is strong state support for such an exception. Justice Wiggins, in his *Paumier* dissent observed that the Court's jurisprudence in this area reflects an impossible search for the perfect trial. *Paumier* at 1133 (Wiggins, J., dissenting). Justice Wiggins explains that in *Momah*, "we listed several criteria for determining when a public trial error is structural *and when it is not...*" *Paumier* at 1135 (Wiggins, J., dissenting). Justice Wiggins went on to explain that "it would be preposterous to conclude that any time a category of errors has been deemed structural, every single error within that category must also be structural. In making this argument, to wit: that not every public trial violation should be treated as structural, Justice Wiggins is essentially arguing for a de minimis exception to the structural error rule. Indeed, the lengthy quotation from *Gibbons v. Savage*, 555 F.3d 112, 119-20 (2d. Cir. 2009) included in his *Paumier* dissent points to his advocacy for a de minimis exception:

...[I]t does not necessarily follow...that every deprivation in a category considered to be "structural" constitutes a violation of the Constitution or requires reversal of the conviction , *no matter how brief the deprivation of how trivial the proceedings that occurred during the period of deprivation.*

Paumier at 1135 (Wiggins, J., dissenting), quoting *Gibbons v. Savage*, 555 F.3d at 119-20. The Second Circuit went on, in *Gibbons*, to describe a scenario where a lengthy trial occurs and there is a momentary closure that defense counsel does not object to and which does not render any portion of the trial unfair, and states that such a deprivation of the public trial right would be inconsequential and not structural error. *Id.*

Chief Justice Madsen also argues that “just because an error is structural in one context does not mean that every error of the same kind is structural,” noting that this was the approach the Court took in *Momah. Wise* at 1124 (Madsen, C.J., dissenting). In her *Sublett* concurrence, the Chief Justice further said “That violation of the same constitutional right can be structural error in one instance and not in another is not a remarkable idea.” *Sublett* at 100 (Madsen, C.J., concurring).

Support for the recognition of a de minimis public trial violation can be found *Orange* as well. Justice Madsen said in her concurrence in that case “Moreover, if the effect of even an unjustified closure is de minimis in fact, there is also no infringement of the defendant’s constitutional rights.” *Orange* at 824 (Madsen, J., concurring). Justice Madsen then went on to cite to the numerous federal authorities acknowledging that some unjustified courtroom closures are “too trivial” to warrant the windfall remedy of a new trial. Also in *Orange*, Justice

Ireland said “The reference hearing [in this case] showed the effect of the claimed closure was de minimis.” *Orange* at 829 (Ireland, J., dissenting). Although at first glance it might appear that the Supreme Court rejected the concept of the de minimis closure in *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) it did not do so. In that case, although the State urged the Court to find such an exception, the Court demurred, simply noting that the right to a public trial extends to voir dire and that the closure in *Brightman* was indistinguishable from the closures in *Bone-Club* and *Orange*, namely, the full exclusion of members of the public from an open courtroom for a public trial. *Brightman* at 517. The Court said: “Thus, *even though a trivial closure does not necessarily violate a defendant’s public trial right*, the closure here was analogous to the closures in *Bone-Club* and *Orange*.” *Id.* (emphasis added).

It is jarring to note the differences in approach to this issue from even a decade ago. Whereas our previous cases involved obvious prejudice to defendants and/or courtroom closures done over their objection – and several justices nevertheless suggesting that the de minimis nature of the closure might still warrant not granting the defendant a new trial – we have now come to the point that it is suggested that a defendant who (1) fails to object to a momentary closure, (2) participates in the closure, (3) expands the closure and (4) benefits from

the closure should now be heard to complain about such a closure for the first time on appeal or collateral attack, and should be awarded a new trial as a matter of policy alone, no matter how brief or trivial the closure actually was and without any consideration of whether he suffered prejudice. Should Washington choose not to recognize a de minimis closure exception, this will become the ultimate “lie in the weeds” litigation tactic. This is particularly so in a case such as the one at bar, where the prosecutor was fully sandbagged by what occurred. He was not told why the chambers conference was occurring until he arrived there. To the extent it can be claimed that anyone was not given an opportunity to object, it was the prosecutor, not the defense attorney who suffered in that regard. And given the state of our open courts jurisprudence at the time, it was not unusual that the prosecutor did not try to stop what was happening given that the closure was de minimis and narrowly tailored to address an imminent and unforeseen threat to the defendant’s right to a fair trial, and defense counsel’s obvious assent to the closure and his active participation in it.

Schreiber’s case is, for lack of a better term, the “poster child” for adoption of the de minimis court closure exception, or, if preferred, the “non-structural” court closure exception. Awarding Schreiber a new trial,

on these facts, would be unconscionable and the State respectfully asks this Court not to do so.

III. SCHREIBER IS NOT ENTITLED TO RELIEF UNDER ***IN RE PERSONAL RESTRAINT OF MORRIS*** BECAUSE HE IS NOT CLAIMING THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL STEMMING FROM HIS APPELLATE COUNSEL'S DECISION NOT TO RAISE THE ISSUE OF PUBLIC TRIAL VIOLATION ON DIRECT APPEAL.

In re Personal Restraint of Morris does not control this case and does not entitle Schreiber to relief. First, *Morris* is limited to collateral attack cases in which the error claimed is ineffective assistance of appellate counsel. Both the majority in *Morris* and Justices Wiggins and Madsen in their respective dissents in *Wise*⁹, *Paumier* and *Morris* and concurrences in *Sublett* acknowledge this strict limitation. In *Morris* the majority said:

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.

Morris at 1144. See also *State v. Paumier*, supra, (Madsen, J., dissenting) at 1131, n.5 and *State v. Sublett*, supra (Madsen, C.J., concurring), 2012 LEXIS 797 at 73 (“*Morris* lead opinion, slip op. at 8...(observing that on

⁹ Justice Wiggins did not file a dissenting opinion in *Wise*.

direct review 'failing to consider Bone-Club before privately questioning potential jurors violates a defendant's right to a public trial)...id. at 8-11...(holding same result ensues on collateral review when the issue arises through a claim of ineffective assistance of counsel)''), (emphasis added in bold, italics in original). And Justice Wiggins observed in his dissent in *Morris*:

The lead opinion would discard [the burden of demonstrating prejudice] entirely for public trial errors, ignoring the unique procedural situation of a PRP and treating the public trial right as a trump card annulling the principles of finality long enshrined in our PRP procedures. Indeed, the lead opinion's extension of *In re Personal Restraint Petition of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), to this case (and seemingly to *any* public trial violation) collapses the distinction between direct and collateral review for these cases by equating the two **as long as the defendant says the magic words: ineffective assistance of counsel.**

Morris at 1151 (Wiggins, J., dissenting).

While the State respectfully disagrees with the majority in *Morris* when it held that by saying the magic words, a petitioner should automatically be entitled to relief, the fact is that Schreiber has not said those magic words. Although he raised ineffective assistance of appellate counsel in several other contexts in his petition, he does not argue that his appellate counsel was ineffective for failing to raise the public trial issue on direct appeal. He is plainly not entitled to relief under *Morris*.

Cognizant of his decision not to claim that he was denied ineffective assistance of appellate counsel as to this issue, Schreiber argues in his supplemental brief to this Court that he is entitled to relief because any error that would be deemed structural on direct review would automatically be deemed prejudicial on collateral review.¹⁰ But the lead opinion in *Morris*, as noted above, specifically declined to make this holding.

It was only by claiming ineffective assistance of appellate counsel that the petitioners in *Morris* and *Orange* were able to make the required showing of prejudice. Those petitioners did not meet the prejudice prong merely by showing that their public trial rights were violated, but rather because had their appellate attorneys assigned error to the trial court's temporary closure of the trial by examining individual jurors in chambers during voir dire, they would have been granted relief on direct appeal. That is the nature of the error. Because Schreiber does not claim he was denied effective assistance of appellate counsel as to this issue, he cannot gain the benefit of this new "exception" to the prejudice rule that the Supreme Court appears to have carved out in *Morris*. He stands in the same position as any other personal restraint petitioner raising

¹⁰ In appellate parlance, Schreiber is walking through the "front door" and arguing the error on its face, rather than walking through the "back door" of ineffective assistance of counsel, as he must to obtain relief under *Morris*.

constitutional error: He must demonstrate actual and substantial prejudice. *In re personal restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Here, Schreiber has not claimed that he was prejudiced by the erroneous momentary closure of his four week trial. In fact, the record indisputably shows that he was the sole and substantial beneficiary of this closure. Because he is not entitled to relief under *Morris* and because he has not demonstrated that he was actually prejudiced by this error, this Court must deny him relief.

IV. ***IN RE MORRIS*** IS WRONGLY DECIDED,
INCORRECT AND HARMFUL.

If this Court were to decide that this case is not controlled by *Momah* and that *In re Morris* ostensibly entitles Schreiber to relief, then *In re Personal Restraint of Morris* is wrongly decided, incorrect and harmful.¹¹

Washington Supreme Court precedent should be overruled if it is shown to be incorrect and harmful. *State v. Nunez*, 174 Wn.2d 707, 713, 285 P.3d 21 (2012); *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2010). The Supreme Court, in *Barber*, stated:

The meaning of “incorrect” is not limited to any particular type of error. We have recognized, for example, that a decision may be considered incorrect based on inconsistency with this court's precedent; inconsistency

¹¹ The State reiterates that this argument is made for preservation purposes.

with our state constitution or statutes; or inconsistency with public policy considerations. A decision may also be incorrect if it relies on authority to support a proposition that the authority itself does not actually support.

Barber at 864 (internal citations omitted). A decision may be harmful “for a variety of reasons.” *Barber* at 865. A decision is harmful if it undermines an important public policy or a fundamental legal principal. *Nunez* at 716-19. A decision is harmful where it has a “detrimental impact on the public interest.” *Barber* at 865. The decision in *Morris* is incorrect and harmful under this test.

In *Morris* the trial court conducted private questioning of a number of jurors in chambers without first considering the *Bone-Club* factors. *Morris* at 1142. It appears from the Court’s opinion that the trial court conducted the questioning in chambers *sua sponte*, without a request from the parties. *Id.* Nevertheless, the defendant did not object to the private questioning, his attorney actively participated in the private questioning, and several challenges for cause were exercised as a result of that questioning. *Morris* at 1142-43.

Five members of the Washington Supreme Court (the lead opinion, signed by four justices, and a concurring opinion signed by Justice Chambers) held that the defendant was entitled to a new trial based on the theory that he had received ineffective assistance of appellate counsel,

because appellate counsel had not raised a public trial violation claim on direct appeal. *Morris* at 1144-45, 1149 (Chamber, J., concurring). In reaching this decision, the five justices concluded that appellate counsel's performance was deficient because Morris's case was indistinguishable from *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004), and that prejudice resulted because Morris would have been entitled to a new trial if the issue had been raised on direct appeal. *Id.* Both of these conclusions are deeply flawed.

First, *Orange* is plainly distinguishable from what occurred in *Morris*. In *Orange*, the trial court excluded members of the defendant's family from the courtroom during voir dire, and it was done over the defendant's objection and for a frivolous reason: because the courtroom lacked seating for everyone due to the trial court's insistence on having too many venire members in the courtroom at a time. *Orange* at 801-02. The trial court could have avoided the problem by simply dividing the potential jurors into groups, or not insisting on an excessively large venire. *Orange* at 810. The defendant in *Orange* specifically objected to excluding his family members from the courtroom and proffered alternatives to the trial court, which were rejected. *Orange* at 801-02. The *Orange* Court specifically found that the defendant had been *harmed* by the courtroom closure, due to the "inability of the defendant's family to

contribute their knowledge or insight to the jury selection and the inability of the venirepersons to see the interested individuals.” Orange at 812 (emphasis added by Court), quoting Watters v. State, 328 Md. 38, 48, 612 A.2d 1288 (1992). Accordingly, the error in Orange was “conspicuous in the record” and thus, appellate counsel was ineffective for failing to raise it on direct appeal. Morris at 1153 (Wiggins, J., dissenting).

In *Morris*, however, the defendant did not object to conducting individual voir dire in chambers, and was not harmed as a result of that procedure. To the contrary, the defendant waived his right to be present for individual voir dire, and he benefited from the closure because several jurors were removed for cause as a result of the private questioning. *Morris* at 1143. Moreover, *Morris* clearly assented to the closure when, rather than object, his counsel said (in regard to Morris waiving his right to be present for the chambers voir dire) “it would be more likely for jurors to be more forthcoming with what they are talking about if [Morris] were not in the room.” *Morris* at 1142. Although the Court’s opinion characterized this remark as solely pertaining to Morris’s presence in chambers, the reality of trial is not nearly so compartmentalized. It would not have been unreasonable for the trial court to have interpreted this remark as assent to the closure. *Morris* at 1144-45. Accordingly, the

alleged public trial violation in *Morris* was *not* “conspicuous in the record,” as it had been in *Orange*.

In light of these obvious and legally significant differences between the two cases, the court’s conclusion that *Orange* and *Morris* are indistinguishable and that Morris’s appellate counsel was ineffective for failing to raise the issue on direct appeal is simply incorrect. The defendant’s objection to the courtroom closure and the harm that resulted from that closure were central to the *Orange* Court’s finding of ineffective assistance of appellate counsel. But these key features are notably absent from *Morris*. In sum, *In re Morris* is incorrect because it is not supported by the authority upon which it relies.

For similar reasons, the court’s conclusion that Morris had established prejudice is also incorrect. With no analysis, other than citing to *Orange*, the Court stated that defendant Morris had suffered prejudice because he would have been entitled to a new trial if the issue had been raised on direct appeal. *Morris* at 1144. Again, however, because *Orange* is fundamentally different from *Morris* in legally significant ways – i.e., *Orange* objected while *Morris* did not, and *Orange* was harmed while *Morris* was not – the Court’s conclusion is again not supported by the precedent it cites. The Court’s decision is incorrect and harmful in this respect as well.

Morris is also incorrect because it conflicts with other Washington Supreme Court precedent. As noted by both dissents, a wealth of precedent had rigorously adhered to the well-settled principle that a personal restraint petitioner is required to show actual and substantial prejudice in order to obtain relief. *Morris* at 1149 (Madsen, C.J., dissenting), *Id.* at 1151-52 (Wiggins, J., dissenting). Other than the conclusory and incorrect statement that *Morris*'s case was the same as *Orange*'s case, the five-justice majority in *Morris* identified no prejudice whatsoever.

Moreover, as noted in both dissents, the majority's conclusory analysis in *Morris* also conflicts with *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992), wherein the Court specifically held that a *higher* standard for prejudice applies on collateral attack:

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 offenders. *Therefore, we decline to adopt any rule which would categorically equate per se prejudice on direct review.* Although some errors which result in per se prejudice on direct review will also be per se prejudicial on collateral attack, the interests of finality of litigation demand that a *higher standard* be satisfied in a collateral proceeding.

St. Pierre at 329 (internal citation omitted) (emphasis added); see also *Morris* at 1149 (Madsen, C.J., dissenting) and at 1151-52 (Wiggins, J., dissenting). But rather than apply this higher standard as required, the majority in *Morris* collapses the rules for direct appeal and the rules for collateral attack into a single standard under the rubric of ineffective assistance of appellate counsel. As such the decision is erroneous.

In sum, the decision in *Morris* is incorrect because it is not supported by the authority it relies upon, and because it conflicts with well-settled precedent.

Furthermore, the decision in *Morris* is harmful. It undermines public policy considerations and fundamental legal principles inherent in collateral review. It converts personal restraint petitions into renewed direct appeals. To say that *Morris* has a detrimental impact on the public interest is a tragic understatement. Because the practice of questioning individual jurors in chambers to protect the defendant's right to a fair trial (by, for example, fleshing out jurors who were subjected to prejudicial pre-trial publicity, or protecting juror's privacy so that they will be forthcoming in their answers, which in turn benefits the defendant) was commonplace, rightly or wrongly, up until just a few years ago, *Morris* may open the floodgates of collateral attack and result in the reversal of countless convictions. See *Sublett* at 79, n. 31 (Madsen, C.J., dissenting).

It is axiomatic that “[a] personal restraint petition is not to operate as a substitute for a direct appeal.” *In re St. Pierre* at 328. To the contrary, because collateral relief “undermines the principles of finality of litigation” and “degrades the prominence of the trial,” (*St. Pierre* at 329), collateral relief is reserved for cases in which fundamental fairness of the proceedings has truly been compromised.

The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence...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 collateral relief] are persons whom society has grievously wronged and for whom belated liberations is little enough compensation...Accordingly, it hardly bears repeating that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on final judgment.

Brecht v. Abrahamson, 507 U.S. 619, 633-34, 113 S.Ct. 1710 (1993).

Accordingly, it has long been the law in Washington that a personal restraint petitioner is entitled to relief only when the petitioner carries the burden of showing either constitutional error from which he has suffered actual and substantial prejudice, or non-constitutional error that constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. *In re personal restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

The Court's decision in *Morris* undermines these fundamental principles. Rather than safeguard the finality of litigation and the prominence of the trial, the *Morris* decision grants the windfall of a new trial not only under circumstances where no prejudice has been shown, but also where the defendant actually *benefited* from the error (as Mr. Schreiber indisputably did in this case). As Justice Wiggins stated in dissent:

The right to a public trial is not a magic wand granting new trials to all who would wield it. Openness is a crucially important value in our criminal justice system, but so is finality. It does not serve the interests of justice to reopen this long-decided case, requiring a young girl to relive old traumas, and granting a windfall new trial to a man convicted of sexually molesting his daughter. We require personal restraint petitioners to show actual and substantial prejudice because we value finality and seek to avoid outcomes of this nature. *Morris* should be required to meet that burden just like every other personal restraint petitioner.

Morris at 1154 (Wiggins, J., dissenting).

The majority in *Wise* and *Paumier* acknowledged that many, many thoroughly fair and untainted trials will now have to be redone at unquantifiable expense, with the hard work of the countless jurors who served on those trials cast aside, to right a policy wrong that may be

wholly unrelated to the fairness of the proceeding.¹² Indeed, should Schreiber receive a new trial as a result of this alleged error it will be nothing short of an outrage. He does not argue that this alleged error deprived him of a fair trial. The four minute private questioning of these two jurors in this four week trial was entirely and exclusively for Schreiber's benefit. It was done to ensure that he received a fair trial. A trial without jurors who had seen him in shackles; a trial without jurors who were flippant about their duty or prone to misconduct. Schreiber

¹² The *Wise* majority stated:

Deprivation of the public trial right may not appear to cause prejudice to any one defendant; in fact, it may not prejudice a single defendant at all.

...

We recognize that any one deprivation of the public trial right will not likely devastate our system of justice or even necessarily cause a particular trial to be unfair (though of this latter part we can never be sure). But letting a deprivation of the public trial right go unchecked affects "the framework within which the trial proceeds." To allow such deprivations would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings. It is the framework of our system of justice that we must protect against erosion of the public trial right.

...

Stability in the law and **policy reasons** demand that we maintain our rule: a violation of public trial right is per se prejudicial, even where the defendant failed to object at trial.

Wise at 1121 (internal citations omitted) (emphasis added).

From Justice Wiggins' dissent in *State v. Paumier*, supra:

In Rene Paumier's case, the claimed public trial error is entirely theoretical: that is, it is premised solely on notions of policy and judicial administration that have nothing to do with fairness of the underlying trial or whether Paumier committed the crime of which he is accused.

Paumier, 288 P.3d at 22, (Wiggins, J., dissenting).

expanded the closure he now complains of, questioning Ms. Rea about whether she had been exposed to pretrial publicity that might affect her impartiality. It was through this expansion of the closure that Schreiber learned that Ms. Rea had, indeed, been exposed to pretrial publicity that suggested that he had intentionally driven his car into Sgt. Crawford (the central issue to be decided by the jury in this case) and that she was a generally hostile juror. He successfully sought her removal from the panel as a result. Had Schreiber saved this question for the general voir dire Ms. Rea's answer would have prejudiced the entire panel. A second trial for Schreiber under these facts would be the type of result that erodes the public's confidence in the judiciary, the legal profession and the criminal justice system. When the public derisively speaks of criminal defendant's "walking free" on "technicalities," this is the type of case to which they are referring.¹³ These are the types of cases that spur citizens to anger, resulting in legislative policy initiatives such as "three strikes, you're out," which are not always sound in their crafting or execution. (See e.g. California's disastrous approach to "three strikes.") This is why the

¹³ This trial, for example, spanned 20 business days. A typical trial day begins at 9:00 a.m. and ends at 5:00 p.m., with a one-hour lunch break. Twenty trial days lasting roughly seven hours each would translate into approximately 8,400 minutes. A four minute court closure represents approximately .04% of a trial spanning that duration of time. This "court closure," it must be noted again, was substantially and exclusively to the defendant's benefit, was done solely to ensure he received a fair trial, and was expanded by him.

CLARK COUNTY PROSECUTOR

January 28, 2013 - 4:35 PM

Transmittal Letter

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