

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

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IN RE PERSONAL RESTRAINT PETITION OF:

**JAMES ROWLEY,**

PETITIONER.

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

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

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 three recent Washington Supreme Court decisions: *In re PRP of Morris*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2012 WL 5870496 (2012); *State v. Wise*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2012 WL 5870496 (2012), and *State v. Paumier*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2012 WL 5870479 (2012). Those cases, along with previous binding precedent, mandate reversal of this case.

Conducting only part of a *Bone-Club* hearing does not suffice. Rowley did not waive his right to a public and open trial by failing to object. Because the trial transcript reveals that the trial judge closed the courtroom for a portion of jury selection without conducting a full closure hearing, the simplest way to decide this case is to follow *Morris* and find that appellate counsel was ineffective. Reversal is required.

## **B. ARGUMENT**

### *Argument*

This case is squarely controlled by recent Washington Supreme Court precedent.

Because Mr. Rowley anticipates that the State will argue that Rowley waived his right to an open and public trial and/or that the trial court conducted a sufficient pre-closure hearing, Rowley starts there.

*The Trial Court Announced That the Court Would Be Closed If Any Juror Felt Uncomfortable Answering Questions in Open Court*

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 *encouraged* closure of the courtroom.

Prior to the start of jury selection, the trial judge *sua sponte* announced: “My preference, as you all know, is to allow the jurors to come back individually into chambers.” (RP (5/29/08) 129. The next day, the judge told jurors that “occasionally a question may be asked that makes a juror uncomfortable insofar as responding out here in the open court.” RP (5/30/08) 2. The court continued: “In that situation, it may be available to you to say could we take this question up in the privacy of chambers.” *Id.* As a result, seventeen jurors were questioned privately about a range of topics, and eleven were excused. *Id.* at 3-39.

Because the trial court encouraged jurors to request closure based on any “discomfort,” it did not require a showing of a “compelling interest” necessary to close the courtroom. A juror may be uncomfortable answering a question in open court, but ordinary discomfort or a preference for privacy are hardly compelling reasons to close a courtroom.

A trial court is 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. For example, the trial judge never asked jurors if they'd still be willing to answer the question in open court despite their discomfort. Instead, the trial judge invited all jurors to request closure based on any unquestioned feelings of discomfort.

Given these failures, it makes no difference that the trial court inquired whether anyone objected 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 do so in this case. Instead, the court announced that it would grant closure and then inquired whether anyone resisted that preference. Reversing the presumption necessarily pitted anyone who objected against the court, which is why *Bone-Club* requires resistance, rather than encouragement of closure.

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

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 Rowley’s case is like the prior decision in *State v. Momah*, 167 Wash.2d 140, 152, 217 P.3d 321 (2009), because the trial judge mentioned the right to a public trial and solicited objections. *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*. Rowley’s trial counsel did not assist in designing the closure.<sup>1</sup> Instead, the trial judge announced that portions of voir dire would be closed upon any showing of discomfort. In addition, the trial judge did not weigh the

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<sup>1</sup> Rowley has also raised a claim of trial counsel’s ineffectiveness was not present in *Momah*.

requisite factors because the trial judge did not consider several of the required factors.

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.

*Ineffective Assistance of Appellate Counsel*

Rowley alternatively framed his "public trial" claim. Although he asserts that he should prevail based on each of those claims, the clearest path to reversal is to follow *Morris*.

To establish ineffective assistance of appellate counsel, a petitioner must establish that (1) counsel's performance was deficient and (2) the deficient performance actually prejudiced the defendant. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). In *Morris*, the Supreme Court reasoned had Morris's appellate counsel raised this issue on direct appeal, Morris would have received a new trial. "No clearer prejudice could be established." *Id.* at ¶ 16.

Having established prejudice, the remaining question is deficiency. "[P]erformance is deficient if it falls 'below an objective standard of reasonableness.'" *State v. Grier*, 171 Wash.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). This is a high threshold, and the petitioner "must overcome 'a strong presumption that counsel's performance was

reasonable.’ ” *Id.* (quoting *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009)). One method of overcoming this presumption is by proving that counsel's performance was neither a legitimate trial strategy nor a reasonable tactic. *Id.* at 33–34.

In *Morris* (and here), proving deficient performance necessarily requires proving that counsel should have known to raise the public trial right issue on appeal. “Morris's appellate counsel should have known to raise the public trial right issue even though we had yet to decide *Strode*. Morris filed his appeal in March 2005. *Orange* had been decided at that time and clarified, without qualification, both that *Bone–Club* applied to jury selection and that closure of voir dire to the public without the requisite analysis was a presumptively prejudicial error on direct appeal.” “Morris's appellate counsel had but to look at this court's public trial jurisprudence to recognize the significance of closing a courtroom without first conducting a *Bone–Club* analysis. This case is no different from the situation in *Orange* where the appellate counsel failed to raise the public trial right issue.” *Id.* at ¶ 19.

Mr. Rowley’s appeal was filed in July 2008. The opening brief was filed On December 15, 2008. The mandate was issued in November 2009. Plenty of caselaw made the closed courtroom meritorious at the time of the direct appeal. Appellate counsel was ineffective. If counsel had raised the claim, Rowley’s conviction would have been reversed.

C. CONCLUSION

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

DATED this 17<sup>th</sup> day of December, 2012.

Respectfully Submitted:

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

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

## CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on December 17, 2012, I served a copy of Mr. Rowley's supplemental brief on Mason County Prosecutor Tim Whitehead by sending the supplemental brief as an attachment to an email directed to:

timw@co.mason.wa.us

December 18, 2012//Portland, OR  
Date and Place

/s/Jeffrey Ellis  
Jeffrey Ellis  
Attorney at law