

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 10, 2013, 3:53 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

NO. 81225-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT OF RICHARD HARTMAN

PETITIONER'S SUPPLEMENTAL BRIEF

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

FILED
SUPREME COURT
STATE OF WASHINGTON
2013 SEP 13 P 3:39
BY RONALD R. CARPENTER
CLERK

ORIGINAL

TABLE OF CONTENTS

A. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED..... 1

B. STATEMENT OF THE CASE..... 2

C. ARGUMENT 6

Excluding members of the public from the courtroom during jury selection and questioning prospective jurors in chambers denied Mr. Hartman his right to a public trial and is a structural error requiring reversal of his conviction 6

1. There is no dispute that the court barred the public from jury selection in violation of Mr. Hartman’s right to open court proceedings 6

2. Just as in *Orange* and *Morris*, Mr. Hartman is entitled to relief in a personal restraint petition when his appellate attorney failed to object to the denial of a public trial 8

3. The prejudice inherent in a complete exclusion of the public from substantive parts of jury selection constitutes the harm required for relief in a collateral attack 12

a. A violation of the public trial right is structural error because it is necessarily harmful to an array of interests protected by open court proceedings 13

b. Even in federal court, the improper exclusion of the public from trial is a structural error that requires reversal when raised in a collateral attack..... 15

4. Mr. Hartman was actually and substantially prejudiced by excluding his family from the courtroom and conducting part of jury selection in private 21

D. CONCLUSION..... 25

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Dreiling v. Jain, 151 Wn.2d 900, 93 P.3d 861, 864 (2004) 14

In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982)..... 18, 19, 20

In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012)
..... 1, 8, 10, 12

In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004)...
..... 1, 8, 9, 10, 11, 12, 15, 23

In re Pers. Restraint of Sandoval, 171 Wn.2d 163, 249 P.3d 1015
(2011)..... 20

Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982)..... 8

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) ..6, 7, 8, 9, 11

State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005)..... 8

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) 7

State v. Gunwall, 106 Wn.2d 54, 720 P.3d 808 (1986) 18

State v. Harvey, 175 Wn.2d 919, 288 P.3d 1111 (2012)..... 10, 20

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) 21

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 11

State v. Maxfield, 125 Wn.2d 378, 886 P.2d 123 (1994)..... 9

State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012) 10

State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012)..... 18

<i>State v. Wade</i> , 138 Wn.2d 460, 979 P.2d 850 (1999).....	10
<i>State v. Wise</i> , 176 Wn.2d 1, 288 P.3d 1113 (2012)	13, 14, 20
<i>Tacoma News, Inc. v. Cayce</i> , 172 Wn.2d 58, 256 P.3d 1179 (2011) (. 14	

United States Supreme Court Decisions

<i>Brecht v. Abrahamson</i> , 507 U.S. 619, 113 S. Ct. 1710, 1717, 123 L. Ed. 2d 353 (1993).....	17, 18
<i>In re Oliver</i> , 333 U.S. 257, 68 S. Ct. 499, 504, 92 L. Ed. 682 (1948)..	13
<i>Presley v. Georgia</i> , 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).....	7, 13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	11
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).	15
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	13, 15, 16

Federal Court Decisions

<i>Judd v. Haley</i> , 250 F.3d 1308 (11 th Cir. 2001)	16
<i>Owens v. United States</i> , 483 F.3d 48 (1 st Cir. 2007)	16, 20
<i>Shaw v. Wilson</i> , 721 F.3d 908 (7 th Cir. 2013).....	9
<i>United States ex rel. Bennett v. Rundle</i> , 419 F.2d 59 (3 rd Cir. 1969) ...	15
<i>United States v. Gupta</i> , 699 F.3d 682 (2d Cir. 2012).....	14, 17

<i>United States v. Withers</i> , 638 F.3d 1055 (9th Cir. 2011)	16, 21
<i>Walton v. Briley</i> , 361 F.3d 431 (7 th Cir. 2004)	16

United States Constitution

Sixth Amendment	7, 9
-----------------------	------

Washington Constitution

Article I, §10	7, 13
Article I, § 22	7, 9, 13

Court Rules

RAP 9.2	10
RAP 9.9	10
RAP 9.10	10
RAP 16.11	23

Other Authorities

Liebman and Hertz, <i>Federal Habeas Corpus Practice and Procedure</i> (4th Ed. 2001)	17
--	----

A. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED.

1. The court refused to let Richard Hartman's mother, brother, and wife attend jury selection because there was insufficient space in the courtroom for any spectators. It also called ten potential jurors into chambers and privately discussed their ability to serve on the jury. Appellate counsel did not raise the violation of Mr. Hartman's right to a public trial in his direct appeal despite being aware of the public's exclusion. Is Mr. Hartman entitled to relief in his personal restraint petition where, just as in this Court's decisions in *Orange*¹ and *Morris*² Mr. Hartman received ineffective assistance of counsel on appeal?

2. The violation of the right to a public trial is a structural error that undermines the framework of the trial. Prejudice is presumed when raised on direct appeal or when based on ineffective assistance of appellate counsel. It is also treated as a structural error when raised in a habeas petition in federal court. In a personal restraint petition, is a complete closure of a substantive portion of trial a structural error for which prejudice is presumed? Alternatively, has Mr. Hartman

¹ *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004).

² *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012).

demonstrated actual and substantial prejudice by the court's exclusion of spectators, including his family, from jury selection when he would have benefitted from their presence due to his health problems?

B. STATEMENT OF THE CASE.

Jury selection in Richard Hartman's prosecution for burglary spanned two days, while the trial itself lasted just over one day. On the first day of jury selection, Mr. Hartman's mother, brother, and wife tried to enter the courtroom, but a bailiff told them only prospective jurors were permitted inside. PRP I at 14-16 (Declarations of Ethel Gunderson, Steven Ewald, and Sherri Hartman).³ At one point, Mr. Hartman left the courtroom to speak with his family because "his mother and brother had been instructed they couldn't come in during jury selection." 11/21/06RP 41.

At the start of jury selection, the court told the panel,

If there's anything about the questions that we ask that you're not comfortable saying in a group setting, just let us know and we'll take you back to chambers one at a time, . . . so that it's more comfortable for you.

³ Mr. Hartman filed his original personal restraint petition on February 18, 2008. He filed a second PRP on February 25, 2008, adding a sentencing issue. Only the first PRP is before the Court at present. It is referred to as "PRP I" for clarity.

In-CourtVoi rDire 8-9.⁴ Before calling any jurors into chambers, the judge asked each juror who had a scheduling conflict whether he or she would “prefer telling me that [time problem] here or going to chambers?” *Id.* at 9, 11, 13-16, 27, 29. No jurors asked for private questioning at this time. The judge also told all potential jurors, “if there is anything that is personal to you that you do not want to share in a group setting, let us know, and we will take that portion of our questions into chambers.” *Id.* at 27. The prosecutor made the same offer, saying “we’re more than happy” to go into chambers if “there is something that you aren’t comfortable talking about in this setting.” *Id.* at 32-33. No potential jurors asked in open court to talk privately.

The judge individually called ten potential jurors into chambers and privately questioned them. In-ChambersVoi rDire 1-27. The judge did not explain why she called these particular jurors into chambers, but seven of the ten had indicated they did not believe they could be fair. In-CourtVoi rDire 6-8, 24. No follow-up questions occurred in court. In chambers, each mentioned personal experiences unrelated to the

⁴ Jury selection is contained in two volumes of supplemental transcripts, divided into “In-Court” and “In-Chambers” voir dire as reflected on the cover pages of each volume.

charged incident that made them feel ill-suited to serve as a juror in a burglary case. In-Chambers Voir Dire 1, 3, 12-13, 15, 17-18, 22, 25-26. Additionally, the court called one person into chambers to ask about his eligibility for jury service due to a prior conviction, another described a health problem, and a third was brought into chambers because she was a records custodian for the sheriff's office and knew the deputies, although she did not know anything about this case. In-Chambers Voir Dire 6-11. The court excused nine potential jurors during the in-chambers proceedings. *Id.* at 2, 6, 10, 12, 14, 16, 21, 24, 27.

In his direct appeal, Mr. Hartman's attorney raised several issues, including whether the judge should have ordered a competency evaluation when, during jury selection, she noticed that Mr. Hartman did not appear "able to fully comprehend what's going on." 11/17/06RP 29; COA 35763-1-II, Opening Brief. Counsel on direct appeal did not assign error to the private questioning of jurors or request a transcript of jury voir dire.

In his Statement of Additional Grounds for Review (SAG), Mr. Hartman complained that his right to a public trial was violated by holding "in chambers juror voir dire" and excluding his family from

watching jury selection. SAG at 2.⁵ The Court of Appeals ruled the record was insufficient to demonstrate a courtroom closure without the transcript from jury selection. COA 35763-1-II, 144 Wn.App. 1044, *6 (2008) (unpublished), *rev. denied*, 165 Wn.2d 1028 (2009).⁶

While his direct appeal was pending, Mr. Hartman filed this PRP based on the public trial violation, which includes declarations showing his family was excluded from the courtroom. PRP I (filed 2/19/08). He complained that he received ineffective assistance of both trial and appellate counsel because they had not objected to the unwarranted closure of the courtroom during voir dire. PRP I at 2. The PRP was stayed while this Court considered other related cases and review was granted on June 5, 2013.

⁵ RAP 10.10 permits a defendant in a criminal case to file a pro se statement to “identify and discuss” matters not adequately addressed in counsel’s brief. The Court of Appeals may ask counsel to further brief claims identified in the Statement of Additional Grounds. RAP 10.10(f).

⁶ The unpublished Court of Appeals decision is available on Westlaw, by searching the citation 144 Wn.App. 1044.

C. ARGUMENT.

Excluding members of the public from the courtroom during jury selection and questioning prospective jurors in chambers denied Mr. Hartman his right to a public trial and is a structural error requiring reversal of his conviction

1. *There is no dispute that the court barred the public from jury selection in violation of Mr. Hartman's right to open court proceedings.*

The prosecution has appropriately conceded that Mr. Hartman's right to a public trial "was violated" by the closure of jury voir dire. State's Supplemental Memoranda at 1 (filed 3/18/13). Without any *Bone-Club* analysis, Mr. Hartman's family was barred from the courtroom during jury selection and, in addition, ten prospective jurors were questioned in the judge's chambers. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).⁷

⁷ The requirements are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.

During jury selection, “[t]he public has a right to be present whether or not any party has asserted the right.” *Presley v. Georgia*, 558 U.S. 209, 214, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); U.S. Const. amend. 6; Const. art. I, §§10, 22. It is the unmistakable obligation of the court “to take every reasonable measure to accommodate public attendance at criminal trials.” *Id.* at 215.

A trial court may not exclude the public from observing court proceedings “without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order.” *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006) (citing *Bone-Club*, 128 Wn.2d at 258-59). In Mr. Hartman’s case, no justification for closing the courtroom was discussed on the record, no alternatives were pursued, and no opportunity for objection was offered. The only reasons the court gave was the jurors’s comfort level or personal preference, which have never been considered compelling reasons for closing a courtroom. *Presley*, 558 U.S. at 215-16; *In-CourtVairDire* 8-9, 27.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

2. *Just as in Orange and Morris, Mr. Hartman is entitled to relief in a personal restraint petition when his appellate attorney failed to object to the denial of a public trial*

In *Orange*, this Court held it constitutes ineffective assistance of appellate counsel to neglect a public trial violation on appeal where a judge had excluded family members from jury selection absent the required on-the-record inquiry set forth in *Bone-Club. In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812-14, 100 P.3d 291 (2004); *see also State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005).

Several years after *Orange*, this Court again held that appellate counsel was ineffective for failing to raise a public trial violation on direct appeal, this time involving the court's in-chambers questioning of prospective jurors during voir dire. *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012). The *Morris* Court ruled that in light of *Orange* and this Court's multiple decisions strictly enforcing the right to a public trial during jury selection, it was unreasonable for an appellate lawyer to fail to object to the unjustified questioning of prospective jurors in the judge's chambers. *Id.* at 166-67.

Bone-Club, 128 Wn.2d at 258-59; *see also Seattle Times v. Ishikawa*, 97 Wn.2d 30, 37-38, 640 P.2d 716 (1982) (explaining each requirement in more detail).

An appellate attorney provides constitutionally ineffective assistance by failing to raise an issue with clear merit. U.S. Const. amend. 6; Const. art. I, § 22; *Shaw v. Wilson*, 721 F.3d 908, 916-17 (7th Cir. 2013); *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997).

Orange was decided in 2004, and Mr. Hartman's trial occurred in 2006. In disregard of *Orange*, the court excluded Mr. Hartman's family from jury selection. The apparent reason was the space limitation of a modular courtroom, but the court made no efforts to accommodate the public and space limitations are not compelling reasons to bar spectators without seeking alternatives. *Orange*, 152 Wn.2d at 809; PRP I at 12. The court did not tell Mr. Hartman or anyone present that he or she could object to being prohibited from entering the courtroom. None of the *Bone-Club* criteria were mentioned. Despite *Orange*, appellate counsel did not raise the issue.

In his Statement of Additional Grounds for Review, Mr. Hartman explained that the judge "held in chambers voir dire" and "his mother, wife, and younger brother" were excluded from the courtroom due to space constraints, all in violation of his right to a public trial right. SAG at 2. The transcript prepared for direct appeal shows that

Mr. Hartman's family told defense counsel that the bailiff had excluded them from the courtroom during jury selection. 11/21/06RP 41.

Mr. Hartman's appellate attorney did not order the transcript of jury voir dire even though Mr. Hartman would have been entitled to it upon request. *State v. Harvey*, 175 Wn.2d 919, 921-22, 288 P.3d 1111 (2012).⁸ In *Harvey*, this Court ruled that an indigent appellant is entitled to transcription of jury voir dire when he "contends that the trial court erred by closing the courtroom during jury selection," because "[w]ithout a transcript of voir dire, the reviewing court cannot properly consider this claim." *Id.* at 921. Mr. Hartman's attorney did not request the necessary record and the Court of Appeals refused to consider the issue without an adequate record. 144 Wn.App. 1044, *6.

By failing to raise the denial of a public trial right, or even order the jury selection transcripts, appellate counsel's performance was deficient. *Morris*, 176 Wn.2d at 166-67; *Orange*, 152 Wn.2d at 814. "[T]here is little question" that "a trial court's in-chambers questioning

⁸ "The party presenting an issue for review has the burden of providing an adequate record to establish such error, [*State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999)]; see RAP 9.2(b), and should seek to supplement the record when necessary, see RAP 9.9, 9.10." *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012).

of potential jurors is structural error.” *Morris*, 176 Wn.2d at 166. “Had [Mr. Hartman’s] appellate counsel raised this issue on direct appeal, [Mr. Hartman] would have received a new trial.” *Id.* “No clearer prejudice could be established.” *Id.*

Furthermore, “appellate counsel should have known to raise the public trial right issue” because *Orange* held, “without qualification” 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.” *Id.* at 167 (citing *Orange*, 152 Wn.2d at 807-08). “Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 690-01, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

A reasonably competent trial attorney would know that the court’s unwarranted exclusion of Mr. Hartman’s family from jury voir dire violated Mr. Hartman’s right to a public trial, as expressly explained in *Orange*. *See Kyлло*, 166 Wn.2d at 868 (counsel’s performance deficient where “with proper research” counsel should

have discovered “relevant case law” and raised appropriate objections). The same deficient performance applies to the in-chambers questioning of jurors. *See Morris*, 176 Wn.2d at 167. The clarity of the law and the similarity of the violation of Mr. Hartman’s public trial rights show that appellate counsel’s performance was deficient and prejudicial, just as in *Morris* and *Orange*. Mr. Hartman is entitled to reversal of his conviction based on the impermissible exclusion of the public from significant, substantive portions of jury selection. *Morris*, 176 Wn.2d at 167; *Orange*, 152 Wn.2d at 184.

3. *The prejudice inherent in a complete exclusion of the public from substantive parts of jury selection constitutes the harm required for relief in a collateral attack*

The prosecution has asked the Court to review whether an affirmative showing of “actual and substantial prejudice” is required to obtain relief in a PRP based on a violation of the right to a public trial. State’s Supplemental Memoranda at 4 (filed 3/18/2013). Mr. Hartman is entitled to relief not only because he received ineffective assistance of appellate counsel, as in *Morris* and *Orange*, but also because the closure of a substantive portion of jury selection constitutes a structural error for which prejudice is presumed. Moreover, Mr. Hartman was actually prejudiced by exclusion of his family from voir dire.

a. *A violation of the public trial right is structural error because it is necessarily harmful to an array of interests protected by open court proceedings.*

The violation of the right to a public trial is a structural defect because it is necessarily detrimental to the public and the trial process although its affect cannot be quantified in a particular case. “While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real.” *Waller v. Georgia*, 467 U.S. 39, 49 n.9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)); *see Presley*, 558 U.S. at 216; *Wise*, 176 Wn.2d at 17-18.

The right to a public trial is so rooted in our legal tradition that it “evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.” *In re Oliver*, 333 U.S. 257, 266, 68 S. Ct. 499, 504, 92 L. Ed. 682 (1948). Washington’s constitution explicitly commands open court proceedings more emphatically than the federal constitution. Const. art. I, §§ 10,⁹ 22.¹⁰ This Court has “repeatedly emphasized the ‘utmost public importance’ of open courts” and “repeatedly decried ‘[p]roceedings cloaked in secrecy.’” *Tacoma*

⁹ “Justice in all cases shall be administered openly, and without unnecessary delay.”

News, Inc. v. Cayce, 172 Wn.2d 58, 66, 256 P.3d 1179 (2011) (quoting *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861, 864 (2004)).

The public nature of a trial is predicated on the “general rule [] that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” *State v. Wise*, 176 Wn.2d 1, 17, 288 P.3d 1113 (2012). Rigorously enforcing the public trial right in all cases lets “people not actually attending trials . . . have confidence that standards of fairness are being observed.” *Press-Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 508, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629 (1984). Put another way, “the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.” *United States v. Gupta*, 699 F.3d 682, 689 (2d Cir. 2012).

While a public presence will more likely bring to light any errors that do occur, it is the openness of the proceeding itself, regardless of what actually transpires, that imparts “the appearance of fairness so essential to public confidence in the system” as a whole.

Id. (quoting *Press-Enter.*, 464 U.S. at 508).

¹⁰ “In criminal prosecutions the accused shall have the right to . . . have a

In the context of jury selection, a defendant's family members who are not permitted to attend are unable "to contribute their knowledge or insight to the jury selection." *Orange*, 152 Wn.2d at 812. The closure also affects prospective jurors who are unable to "see the interested individuals" who support the accused. *Id.*

If courts required proof of specific prejudice, this requirement "would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury." *Waller*, 367 U.S. at 49 n.9 (quoting *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3rd Cir. 1969)). The error is structural due to "the difficulty of assessing the effect of the error" on one hand, and the "irrelevance" of the case-specific impact of the error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

b. *Even in federal court, the improper exclusion of the public from trial is a structural error that requires reversal when raised in a collateral attack.*

In a collateral attack filed in federal court, violations of the Sixth Amendment right to a public trial "are structural errors, [and] they

speedy public trial by an impartial jury. . . ."

warrant habeas relief without a showing of specific prejudice.” *United States v. Withers*, 638 F.3d 1055, 1066 (9th Cir. 2011) (citing *Waller*, 467 U.S. at 49-50). Even on habeas review, “once a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way.” *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001)**Error! Bookmark not defined..**

As a violation of the right to a public trial is structural error, Judd need not show that he was prejudiced by the closing of the courtroom. All he must demonstrate is that the trial court did not comply with the procedure outlined in *Waller* prior to its decision to completely remove spectators from the courtroom. Judd has successfully demonstrated that the closure of the courtroom in his case was not conducted in conformity with the standards articulated in *Waller*; therefore, he is entitled to relief on his Sixth Amendment claim.

Id. at 1319; *see also Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004) (where error is exclusion of public from portion of trial, “Walton need not show specific prejudice”).

Similarly, in *Owens v. United States*, 483 F.3d 48, 56 (1st Cir. 2007), the federal defendant lost his direct appeal and then filed a habeas petition. The court rejected the notion that a habeas petitioner needs to prove that the failure to hold a public trial caused actual

prejudice. *Id.* at 63-64. Noting that the Supreme Court has said “it is impossible to determine whether a structural error is prejudicial,” the court reasoned, “[w]e will not ask defendants to do what the Supreme Court has said is impossible.” *Id.*

In other contexts, federal courts employ a strict standard requiring the petitioner to prove actual prejudice to obtain relief in a habeas petition. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S. Ct. 1710, 1717, 123 L. Ed. 2d 353 (1993). But a public trial violation is not in the class of constitutional errors assessed based on the strength of the trial evidence. *Id.* It is considered prejudicial any time the constitutional public trial right is violated and accordingly is reversible per se.¹¹ Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure* (4th Ed., 2001), § 31.3 at p. 1379, citing *Brecht*, 507 U.S. at 629-30, 638. Washington’s constitutional guarantee of open court proceedings is broader than the federal constitution. *See State v. Sublett*,

¹¹ Although a courtroom closure may be considered “trivial” or “de minimus” under the Sixth Amendment, the test for triviality is based on the duration of the courtroom closure, not the harmlessness of the error in light of the trial evidence. *Gupta*, 699 F.3d at 688-89. Furthermore, [w]hatever the outer boundaries of our “triviality standard” may be . . . a trial court’s intentional, unjustified closure of a courtroom during the entirety of *voir dire* cannot be deemed “trivial.”

176 Wn.2d 58, 145, 292 P.3d 715 (2012) (Wiggins, J., concurring).¹²

The state's strong commitment to the "open administration of justice" should be enforced more rigorously than federal courts.

c. *The structural error analysis applies to a complete closure of the courtroom raised in a PRP.*

When a constitutional trial error is raised on direct appeal, the State bears the burden of proving the error harmless beyond a reasonable doubt. *In re Hagler*, 97 Wn.2d 818, 826, 650 P.2d 1103 (1982). In a collateral attack, the burden shifts to the petitioner to show that more likely than not that the error actually and substantially prejudiced the outcome. *Id.*

However, *Hagler* involved a complaint about erroneous jury instructions, which is a "trial type" error, not a structural error. *Hagler*, 97 Wn.2d at 827; see *Brecht*, 507 U.S. at 629. An error in how the jury is instructed is "amenable to harmless-error analysis because it 'may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" *Brecht*, 507 U.S. at

Id. at 689.

629 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Structural errors are a separate class of constitutional error. *Fulminante*, 499 U.S. at 309-10. Structural errors “are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome.” *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Structural errors “defy harmless error review” and “infect the entire trial process.” *Id.* at 8.

The primary purpose for requiring a PRP petitioner to show actual and substantial prejudice is protecting society’s “interest in finality” after the completion of direct review. *Hagler*, 97 Wn.2d at 823-24. The *Hagler* Court imposed this burden of proving prejudice on the petitioner as a way to balance the interest in preserving the finality of judgments against the countervailing interest in rectifying fundamental errors that occur in a criminal case. *Id.* at 823.

The interest in preserving a final judgment carries no weight in the case at bar, because Mr. Hartman filed his PRP while his direct appeal was pending. His PRP does not re-open a settled conviction. Mr.

¹² The *Gunwall* analysis contained in the Supplemental Brief of Respondent Grisby, Supreme Court No. 86216-8, at 14-19; and Supplemental Brief at Petitioner Applegate, Supreme Court No. 80727-2, at 12-19, detail the

Hartman had no choice but to file a PRP during his direct appeal because the necessary record documenting the violations of his public trial right was not available for the direct appeal. *See In re Pers. Restraint of Sandoval*, 171 Wn.2d 163, 168-69, 249 P.3d 1015 (2011) (valid purpose of PRP is to address issues that could not be raised on direct review due to lack of necessary record). It may be impossible to show the courtroom was closed on direct appeal if what happened outside the courtroom was not placed on the record. *Harvey*, 175 Wn.2d at 921. The Court of Appeals decision demonstrates that Mr. Hartman could not adequately raise the public trial violation on appeal, when he did not have a transcript to prove the in-chambers voir dire and his declaration was not part of the record, thereby showing that his PRP is not a second effort at direct appeal. *See Hagler*, 97 Wn.2d at 823-24.

Furthermore, to impose a burden of proving case-specific prejudice for a violation of the right to a public trial in a PRP would set a standard for collateral relief that is harsher than imposed by federal courts. The United States Supreme Court has said “it is impossible to determine whether a structural error is prejudicial,” thus, to require

extent of the protections conferred under our state constitution. *State v. Gunwall*,

proof of actual prejudice in a PRP would be “ask[ing] to do what the Supreme Court has said is impossible.” *Owens*, 483 F.3d at 56. . . “[L]etting a deprivation of the public trial right go unchecked . . . would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings.” *Wise*, 176 Wn.2d at 17-18.

In a PRP, the prejudicial effect of excluding the defendant’s family and other members of the public from jury selection is properly presumed and when that right is violated, the remedy is reversal of the conviction. *See Withers*, 638 F.3d at 1065.

4. *Mr. Hartman was actually and substantially prejudiced by excluding his family from the courtroom and conducting part of jury selection in private*

Mr. Hartman’s is the rare case where he is capable of showing it is more likely than not that he was prejudiced by the court’s exclusion of the public from jury voir dire. Jury selection is a critical stage of proceedings during which an accused person is entitled “to give advice or suggestion or even to supersede his lawyers altogether.” *State v. Irby*, 170 Wn.2d 874, 883, 246 P.3d 796 (2011) (internal citations omitted).

106 Wn.2d 54, 61-62, 720 P.3d 808 (1986).

Mr. Hartman expected his family to attend jury selection for moral support and to observe proceedings because health problems limited his own ability to concentrate during jury selection. PRP I at 12. His family's aid was something he "desperately needed at that time." *Id.* During the in-chambers portion of jury selection, the judge noticed Mr. Hartman's eyes were drooping and "he doesn't look like he may be able to fully comprehend what's going on," PRP I at 13 (11/17/06RP 29). Mr. Hartman told the judge he felt "light-headed and sick." *Id.* He was "semi-coherent" due to liver distress; after his trial, he had two operations for internal bleeding. PRP I at 2, 12. Had his family been allowed to observe jury selection, they would have realized his "semi-coherent" state was similar to symptoms from a prior incident when he was internally bleeding. PRP I at 2-3.

Even more prejudicially, on the second day of jury selection the prosecutor made a bail request and asserted Mr. Hartman's condition was the result of using drugs. PRP I at 22; 11/21/06RP 33, 36. The court raised bail and ordered that Mr. Hartman be put into custody at lunchtime. 11/21/06RP 36-37. If his family had not been excluded from the courtroom, they could have corroborated his medical condition and

countered the State's allegation of drug use, potentially defeating the bail increase. PRP I at 12.

The exclusion of Mr. Hartman's family resulted in an additional form of prejudice. During jury selection, Mr. Hartman's attorney complained to the court that he did not "buy" Mr. Hartman's defense and did not want to call a witness Mr. Hartman sought. In-CourtVoi rDire 28-29; *see* 144 Wn.App. 1044, *3. Given the conflict between attorney and client during jury selection, and Mr. Hartman's "semi-coherent" state, Mr. Hartman had even more reason to need his family's assistance in observing potential jurors at a time when Mr. Hartman and his lawyer were at odds. PRP I at 2, 12.

Finally, the exclusion of Mr. Hartman's family prejudiced the panel's view of him. A bailiff told his mother, brother, and wife that the courtroom was too crowded and they could not enter to watch jury selection. PRP I at 14-16.¹³ "As a result of the unconstitutional

¹³ In 2010, two clerks signed declarations claiming no memory of excluding anyone from the courtroom four years earlier. Supplemental Brief of Respondent, Attachment A (filed 6/28/10). However, it was the bailiff who directed the family to stay outside. PRP I at 14-16. The bailiff and clerk are not the same person. *See* In-CourtVoi rDire, 7, 15, 16, 18, 25, 29, 68 (showing separate roles of bailiff and clerk).

courtroom closure in the present case, what the prospective jurors saw, as they entered and exited the courtroom during . . . voir dire, was not the participation of the defendant's family members in the jury selection process, but their conspicuous exclusion from it." *Orange*, 152 Wn.2d at 812. They saw an isolated, semi-coherent accused person without knowing of the extent of his support network.

In sum, the courtroom closures were unlawful. The court had no compelling reason for privately questioning prospective jurors and gave no explanation for calling the particular jurors into chambers for questioning. The charged offense of burglary did not require delving into particularly sensitive topics for which jurors would need privacy to ensure candor. Mr. Hartman did not encourage or seek out private questioning of jurors, as arose in *State v. Momah*, 167 Wn.2d 140, 151-52, 217 P.3d 321 (2009). Furthermore, spectators such as Mr. Hartman's family were present yet excluded from jury selection.

At trial, Mr. Hartman's family told defense counsel that a bailiff prohibited them from entering the courtroom. 11/21/06RP 41. Since the specific declarations of Mr. Hartman's family members are corroborated by the contemporaneous transcript, the clerks's lack of memory do not undermine the family's statements they were excluded. If necessary, a reference hearing is available to further clarify off-the-record conversations. RAP 16.11.

Mr. Hartman's health issues demonstrate his need for his family's aid during trial and prejudice followed his family's unjustifiable exclusion from the courtroom. The court increased his bail during jury selection based in part on incorrect allegations he was using drugs. The court's improper exclusion of the public from jury selection constitutes the structural error of denying Mr. Hartman and the public the constitutionally guarantee of open court proceedings, and it also more likely than not prejudiced Mr. Hartman, thus entitling him to relief.

D. CONCLUSION.

Mr. Hartman respectfully requests this Court hold that he was denied his right to a public trial and this error requires reversal.

DATED this 10th day of September 2013.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

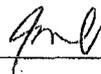
IN RE THE PERSONAL RESTRAINT PETITION OF)
)
)
RICHARD HARTMAN,) NO. 81225-0
)
)
PETITIONER.)
)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TIMOTHY HIGGS, DPA MICHAEL DORCY, PA MASON COUNTY PROSECUTOR'S OFFICE PO BOX 639 SHELTON, WA 98584-0639	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] JAMES WHISMAN, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] RICHARD HARTMAN 391 EAST RAINIER DR ALLYN, WA 98524	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF SEPTEMBER, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎ (206) 587-2711

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: timh@co.mason.wa.us; michael@co.mason.wa.us; PAOAppellateUnitMail@kingcounty.gov; Nancy Collins
Subject: RE: 812250-HARTMAN-SUPPLEMENTAL BRIEF

Received 9-10-2013

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Tuesday, September 10, 2013 3:52 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: timh@co.mason.wa.us; michael@co.mason.wa.us; PAOAppellateUnitMail@kingcounty.gov; Nancy Collins
Subject: FW: 812250-HARTMAN-SUPPLEMENTAL BRIEF

In re the PRP of Richard Hartman

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Petitioner

Nancy P. Collins- WSBA #28806
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: nancy@washapp.org

By

Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

CONFIDENTIALITY NOTICE: This email, including any attachments, may contain confidential, privileged and/or proprietary information which is solely for the use of the intended recipient(s). Any review, use, disclosure, or retention by others is strictly prohibited. If you are not an intended recipient, please contact the sender and delete this email, any attachments and all copies.