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SUPREME COURT  
STATE OF WASHINGTON  
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NO.81225-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE PERSONAL RESTRAINT PETITION

OF

RICHARD D. HARTMAN,

Petitioner

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STATE'S SUPPLEMENTAL MEMORANDA ADDRESSING RECENT  
DECISIONS OF THE COURT

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TIMOTHY J. HIGGS  
Deputy Prosecuting Attorney  
Mason County Prosecutor's Office  
521 N. Fourth Street  
P.O. Box 639  
Shelton, WA 98584  
Tel: (360) 427-9670 ext. 417  
FAX: (360) 427-7754

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PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

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A. INTRODUCTION

The court has asked for supplemental briefs to address *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (No. 84585-9, 2012); *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (No. 82802-4, 2012); *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 288 P.3d 1140 (No. 84929-3, 2012); and, *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (No. 84856-4, 2012).

In this supplemental response brief, the State asserts that each of the above cases affirms or reaffirms each defendant's constitutional right to an open and public trial, which was violated in this case, but the State asks the Court to deny Hartman's petition because he brings this claim on collateral review and has not demonstrated actual prejudice from this error.

B. ARGUMENT

*State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (No. 82802-4, 2012), holds that Washington Constitution art. I, § 22 guarantees to criminal defendants a right to a public trial. *Wise* at 9. *Wise* holds that violation of this right is structural error that is not subject to harmless error analysis and that the remedy for this error is a new trial. *Id.* at 13-14.

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In *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (No. 84585-9, 2012), the Court held that “with or without a contemporaneous objection” it is structural error requiring a new trial where a trial court closes voir dire without first conducting a *Bone-Club*<sup>1</sup> analysis on the record. *Paumier* at 37.

A violation of the right to an open trial is structural error for which prejudice is presumed, the defendant has no burden to show prejudice on review, and the remedy for this error is a new trial. *Paumier* at 37; *Wise* at 14. However, our Supreme Court has not decided “whether a public trial violation is also presumed prejudicial on collateral review.” *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 288 P.3d 1140 (No. 84929-3, 2012).

*Paumier* and *Wise* were direct appeals, but *Morris* was a timely filed personal restraint petition that followed an unsuccessful direct appeal. In his personal restraint petition Morris claimed that his appellate attorney was ineffective for not raising the public trial issue in the direct appeal. Morris clearly would have prevailed in his direct appeal had his appellate attorney raised the open-court violation on direct appeal. *Id.*

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<sup>1</sup> *State v. Bone-Club*, 128 Wn. 2d 254, 906 P.2d 325 (1995)

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Because Morris alleged on collateral review that his appellate counsel was ineffective for not raising the open trial issue on direct appeal, and because the case was decided on that issue, the *Morris* court specifically refrained from deciding whether the presumption of prejudice that flows from a public trial right violation on direct appeal would also be presumed prejudicial on collateral review. *Morris* at 166.

In the instant case, Hartman raised the open public trial issue in a statement of additional grounds in his direct appeal, but the appeals court rejected Hartman's contention because the record was insufficient to support the contention. *State v. Hartman*, No. 35763-1-II, May 28, 2008. On February 19, 2008, however, about three months before the decision in the direct appeal, Hartman filed the instant personal restraint petition, which alleges the same issue in regard to the open trial violation. In the personal restraint petition, additional facts were brought into the record and show that some jurors were examined in chambers in violation of Hartman's right to an open and public trial. Where an issue has been decided on direct appeal, but the decision was not a decision on the merits, petitioner is not barred from raising the same issue again in a personal restraint petition. *Matter of Taylor*, 105 Wn. 2d 683, 688, 717 P.2d 755 (1986).

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However, in the context of an open public trial right violation, this court has not ruled whether petitioner must show actual prejudice or whether prejudice will be presumed as it is on direct appeal. *Morris*, 176 Wn.2d at 166. Hartman's personal restraint petition is unique because whether appellate counsel was ineffective for failing to raise the open public trial issue is not the current question, and because, unlike *Morris*, the open trial issue was raised on direct appeal, albeit in a statement of additional grounds.

This Court's ruling in *Morris* is similar to this Court's ruling in *In re Orange*, 152 Wn. 2d 795, 814, 100 P.3d 291 (2004), where the Court found that appellate counsel in *Orange* was ineffective for failing to raise the open trial issue on direct appeal. *Id.* at 814. The basis of the Court's ruling was that an open trial error was presumed prejudicial if raised on direct appeal and that appellate counsel was, therefore, ineffective for not raising the issue on direct appeal because a new trial would have been certain had the issue been raised on direct appeal. *Id.* As in *Morris*, by deciding the issue based upon ineffective assistance of appellate counsel, the Court in *Orange* did not decide whether the denial of a open trial would be presumed on collateral review. *Id.*

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This Court has standing precedent holding that errors which are presumed prejudicial on direct appeal are not presumed prejudicial on collateral review and that when such errors are asserted in a personal restraint petition, the petitioner bears the burden of demonstrating actual prejudice. See, e.g., *In re Eastmond*, 173 Wn.2d 632, 641, 272 P.3d 188 (2012); *Matter of Mercer*, 108 Wn.2d 714, 741 P.2d 559 (1987); *Matter of Hagler*, 97 Wn. 2d 818, 825, 650 P.2d 1103 (1982). In the instant case, Hartman has not demonstrated any prejudice beyond that which would be presumed on direct appeal.

This Court's recent decisions in *Paumier*, *Wise*, *Morris*, and *Sublett* each reaffirm the long-standing, guaranteed right of an open and public trial for criminal defendants in Washington courts. These cases declared again what has been the law throughout our history as a state. See, e.g., Wash. Const. art I, § 22; *State v. Marsh*, 126 Wash. 142, 217 P. 705 (1923); and, *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005). But Hartman has not demonstrated that the public trial error that occurred in this case has led to any doubt or reason to doubt that the jury was correct when it found him guilty. The State, therefore, asks the Court to require Hartman to show actual prejudice on collateral review and, because he has not and cannot show actual prejudice, to dismiss his

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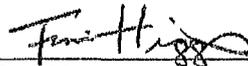
petition for a new trial. “Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *Matter of Mercer*, 108 Wn.2d 714, 720, 741 P.2d 559 (1987), quoting *Matter of Hagler*, 97 Wn. 2d 818, 824, 650 P.2d 1103 (1982).

C. CONCLUSION

The State concedes that error occurred when some jurors were examined in chambers during voir dire without first holding a *Bone-Club* hearing. However, Hartman has not shown actual prejudice resulting from this error. Because Hartman brings this claim in a personal restraint petition, the State asks the Court to hold that Hartman must demonstrate actual prejudice before obtaining a new trial and, because he has not demonstrated prejudice on collateral review, to dismiss this petition.

DATED: March 18, 2013.

MICHAEL DORCY  
Mason County  
Prosecuting Attorney



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Tim Higgs  
Deputy Prosecuting Attorney  
WSBA #25919

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**To:** Timothy Higgs  
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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.

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**From:** Timothy Higgs [<mailto:TimH@co.mason.wa.us>]  
**Sent:** Monday, March 18, 2013 12:36 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** 81225-0-- In re Pers. Restraint of Richard D. Hartman -- State's Supplemental Memoranda

Greetings,

Attached, please find a copy of the State's Supplemental Memoranda Addressing Recent Decisions of the Court to be filed in the matter of In re Personal Restraint Petition of Richard D. Hartman, No. 81225-0, and a copy of a declaration of service showing service by mail upon Mr. Hartman.

Sincerely,

Tim Higgs, DPA  
Mason County Prosecutor's Office  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417