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No. 59921-6-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**ANTONIO RAMOS, Appellant.**

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**A. SUPPLEMENTAL BRIEF ISSUE**

The Court has requested the parties to address the application of State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) to this case.

**B. SUMMARY ANSWER**

The majority opinion in Momah clearly holds that unless a trial is rendered fundamentally unfair by a courtroom closure, automatic reversal is not required. A trial is not rendered fundamentally unfair where the courtroom closure occurred to protect the defendant's rights and the defendant wasn't actually prejudiced by the closure. Strode, on the other hand, is a plurality opinion with two justices concurring only in the result, in which the concurrence specifically rejects the portion of the plurality's opinion that permits a defendant to raise the public's right to open proceedings under Art. 1 §10. Assuming there was a de facto closure here, one which was not de minimis<sup>1</sup> and which may be raised for the first time on appeal<sup>2</sup>, Ramos was not prejudiced by the in chambers discussion with

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<sup>1</sup> The State still asserts, in accord with its response brief, that the in chambers questioning of one juror had only a de minimis effect on the proceedings and does not implicate the defendant's right to a public trial, particularly where, as here, neither party asked any questions of the juror and the juror was excused for cause because it would violate his religious beliefs. See State's response brief at 21-24.

<sup>2</sup> The State still also asserts that Ramos should be required to demonstrate a *manifest* error of constitutional magnitude before being able to raise a violation of his right to public

one juror regarding the juror's inability to serve due to his religious convictions that resulted in the juror being excused. Where, as in Momah, the defendant suffered no prejudice from this brief closure, no structural error occurred and reversal is not warranted.

### C. ARGUMENT

Under the clear majority opinion in Momah no structural error occurred under the facts of this case requiring reversal. In Momah the majority emphasized that the "central aim of any criminal proceeding must be to try the accused fairly," and that a defendant's right to public trial does not exist, and cannot be considered, in isolation from his other constitutional rights. Momah, 167 Wn.2d at 147-48. The public trial right is not absolute, but exists so that the public may see that the defendant is dealt with fairly and that his triers are kept keenly aware of their

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trial based on the extremely brief discussion with one juror in chambers during voir dire, particularly given the holding in Momah that not all errors regarding a defendant's right to public trial result in structural error necessitating reversal. Strode's plurality opinion relied on the right to public trial being an issue of "such constitutional magnitude" that it could be raised for the first time on appeal. Strode, 167 Wn.2d at 229. In Orange, however, relied upon by Strode for this proposition, the court assumed that the constitutional error would have been prejudicial per se and therefore it could be raised for the first time on appeal. See, In re Orange, 152 Wn.2d 795, 800, 100 P.3d 291 (2004). In State v. Collins, the court required that the record clearly show that the defendant was deprived of his right to public trial in order to raise the issue for the first time on appeal, holding that where there was no demonstration of actual prejudice and no objection made such that it appeared both sides acquiesced in the court's ruling, no violation of the public trial would be found on review. State v. Collins, 50 Wn.2d 740, 747-48, 314 P.2d 660 (1957).

responsibility and the importance of their function. *Id.* at 148. In that case the judge and the parties used jurors' responses to a questionnaire to determine which jurors should be questioned individually. Defense counsel not only agreed to question those jurors privately in chambers, but argued for expansion of the in-chambers questioning. *Id.* at 145-46. Defense counsel actively participated in the private questioning and counsel exercised a number of challenges for cause as a result of that questioning. *Id.* at 146-47. The trial court did not conduct a Bone-Club<sup>3</sup> analysis prior to in chambers questioning, although it did consider the defendant's public trial rights and balanced them against the defendant's right to a fair and impartial jury.

The court ultimately held that the trial court's closure did not constitute structural error and therefore automatic reversal was not appropriate. Under Momah whether a closure error constitutes structural error necessarily depends upon the nature of the violation: "If, on appeal, the court determines that the defendant's right to public trial has been violated, it devises a remedy appropriate to the violation." *Id.* at 149. If the error is structural, automatic reversal is warranted. *Id.* An error is only structural though if the error "necessarily render[s] a criminal trial

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<sup>3</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Id. (quoting Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

The court noted that in its prior cases of State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) and In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), new trials were required because the trials had been rendered fundamentally unfair by the closure. Id. at 150-51. In Easterling, the closure prevented the defendant from being present at a portion of his own trial, without the court ever having consulted with him. Id. at 150. In Orange, the trial was rendered fundamentally unfair because the closure excluded the defendant’s family and friends from being present during voir dire, despite the defendant’s repeated requests that they be present. Id. at 150-51. In those cases, where the prejudice was sufficiently clear, the errors were deemed to be structural. Id. at 151.

In distinguishing those prior cases where structural error was found, the Court noted that in Momah’s case, the defendant had “affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it and benefitted from it.” Id. at 151. The court presumed that the defendant made “tactical choices to achieve what he perceived as the fairest result.” Id. at 155. In

concluding that the closure in Momah was not structural error the court noted that the closure only occurred after the court consulted with the defense and prosecution and found that the record showed that the closure occurred to protect the defendant's right to an impartial jury and did not prejudice him. *Id.* at 155-56.

Strode, on the other hand, as a plurality opinion provides questionable guidance in addressing the issue under the circumstances of this case. "A plurality opinion has limited precedential value and is not binding on the courts." In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004). "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." State v. Zake, 61 Wn. App. 805, 808, 812 P.2d 512 (1991) *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992). The plurality in Strode found that the record did not reflect that either the closing of the courtroom was necessary to safeguard the defendant's right to a fair trial or that there was a knowing and voluntary waiver of that right. Strode, 167 Wn.2d at 234. In Strode, the plurality opinion would hold that a court must perform a Bone-Club analysis on the record prior to closing a courtroom in unexceptional circumstances, and that failure to do

so is structural error that can never be harmless. Strode, 167 Wn.2d at 223.

The concurring opinion took exception, however, to the plurality opinion's requiring an on-the-record colloquy before waiver could be found and permitting a defendant to raise the public's, and the media's, right to open proceedings in order to overturn his conviction. *Id.* at 235-36. It concurred in the result in Strode because it concluded that under the facts of the case the defendant's public trial rights had not been waived or safeguarded per Bone-Club, because the court had not weighed the defendant's right to public trial against the competing interests. *Id.* at 232, 235.

Ramos has asserted that he should be able to receive a new trial because the public's right to open proceedings under Article 1 §10 of the Washington Constitution was violated. However, only the plurality opinion in Strode would permit Ramos to assert someone else's right in order obtain a new trial. The concurrence in Strode specifically rejected the plurality's merging of the public's right to open proceedings under Article 1 §10 and the defendant's right to a public trial under Article 1 §22. *See, Strode*, 167 Wn.2d at 232, 236 (J. Fairhurst concurring). In Momah, the majority only addressed whether there was a violation of and

structural error regarding a violation of the defendant's right to public trial under Art. 1 §22. *See, Momah*, 167 Wn.2d at 147 . While the opinion does reference Art. 1 §10, it does so only in the context of the development of the Bone-Club factors test, which was borrowed from civil cases addressing allegations of Art. 1 §10 violations. *Id.* at 147-48.

Here, there was an extremely brief in chambers discussion with only one juror regarding his inability to serve due to his religious convictions. VDRP 40-46. Neither party questioned the juror. VDRP 41. After the juror stated that he was a Jehovah's Witness and could not sit in judgment of another person, the court excused him for cause. The juror had otherwise indicated his ability to sit impartially despite the fact that he apparently knew the prosecutor fairly well. VDRP 6-7.

Although there was no discussion regarding the defendant's right to a public trial here like there was in Momah, there is no showing of prejudice to the defendant as there was in Orange and Easterling. As such, no structural error occurred. As the court summarized in Momah:

... courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

217 P.3d at 155-56. A new trial would not be an appropriate remedy in this case because the closure here did not render Ramos's trial fundamentally unfair.

Furthermore, nothing in Strode or Momah precludes this Court from finding that the closure had a de minimis effect on the proceedings and therefore Ramos's right to a public trial was not implicated or violated. As the court in Brightman acknowledged, trivial closures, those brief in duration or inadvertent, do not necessarily infringe on a defendant's right to public trial. State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) ("... 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*"). Certainly a de minimis closure such as the one in this case, where there is no hint of actual prejudice to the defendant from the closure, does not warrant reversal of the conviction under Momah.

#### **D. CONCLUSION**

The purpose of the defendant's public trial right is to ensure that the defendant is treated fairly. Under Momah, not all closures, or in chambers questioning of jurors, results in structural error requiring reversal. Only those errors that render a trial "fundamentally unfair or an

unreliable vehicle for determining guilt or innocence” constitute structural errors. Only where the prejudice is “sufficiently clear,” should a new trial be ordered. Momah, 167 Wn.2d at 151. Absolutely no prejudice can be inferred or presumed from the exceptionally short in chambers discussion that occurred with just one juror, where neither side asked any questions and the juror was excused for cause. Reversal is not warranted in this case.

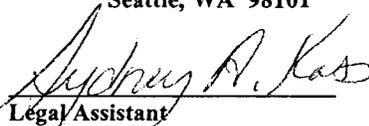
Respectfully submitted this 16<sup>th</sup> day of April, 2010.

  
HILARY A. THOMAS, WSBA #22007  
Appellate Deputy Prosecutor  
Attorney for Respondent

**CERTIFICATE**

I certify that on this date I placed in the mail with proper U.S. postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant’s counsel of record, Nancy Collins, addressed as follows:

Washington Appellate Project  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

  
Legal Assistant

04/16/2010  
Date

2010 MAY 11 AM 10:36

COA No. 59921-6-I

IN THE COURT OF APPEAL OF THE  
STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,	)	
Respondent,	)	
	)	DECLARATION OF SERVICE
vs.	)	
	)	
ANTONIO RAMOS,	)	
Appellant.	)	

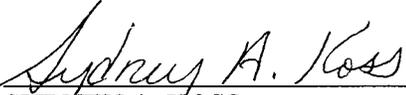
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I DECLARE THAT on April 16<sup>th</sup>, 2010 I placed in the U.S. mail with proper postage thereon, the original Supplemental Response Brief of Respondent, State of Washington, in the above-captioned matter, to this Court, and a true and correct copy of that document to appellant's counsel, addressed as follows:

Nancy P. Collins  
Washington Appellate Project  
1511 Third Avenue, Suite 701  
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Ms. Collins has confirmed receipt of Respondent's Supplemental Response via telephone.

DATED this 10<sup>th</sup> day of May, 2010.

  
SYDNEY A. KOSS  
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