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COURT OF APPEALS  
DIVISION ONE

JAN 11 2010

**NO. 62109-2-1**

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**PATRICK L. MORRIS,**  
Appellant.

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FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON, FOR SKAGIT COUNTY

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**STATE'S SUPPLEMENTAL RESPONSE TO PERSONAL  
RESTRAINT PETITION**

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## **I. SUMMARY OF SUPPLEMENTAL RESPONSE TO PETITION**

Patrick Morris was convicted of two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. Morris filed the present personal restraint petition claiming in part that there was a violation of Morris's right to public trial by conducting a portion of *voire dire* in chambers.

The decisions in State v. Momah and State v. Strode, issued by the Supreme Court, highlight that reversal of conviction due to a closure on direct appeal is not automatic. Morris has not established in his collateral attack that the decision of his trial counsel was not tactical or strategic and he was actually and substantially prejudiced such that he is entitled to relief.<sup>1</sup>

## **II. ISSUES RELATING TO CLAIMED ERROR**

Since in Momah and Strode the Supreme Court determined that on direct appeal a trial court conducting a portion of *voire dire* in private might not amount to a closure which automatically results in a reversal, what impact do those decisions have on collateral attacks?

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<sup>1</sup> The State stands by the argument initially extended in the initial State's Response to Personal Restraint Petition.

Where the defendant participated in and benefitted from conducting a portion of *voire dire* in chambers, can the defendant establish that the decision of his trial counsel was not strategic or tactical decision such that he can establish the prejudice necessary to succeed in a collateral attack?

### III. STATEMENT OF THE CASE

The Court stayed this case until the Supreme Court ruled on State v. Momah, 167 Wn. 2d 440, 217 P.3d 321 (2009) and State v. Strode, 167 Wn. 2d 222, 217 P.3d 310 (2009). After those cases were decided the petitioner sought an order lifting the stay and granting supplemental briefing. This Court granted both motions and ordered the State to file a supplemental brief in response to the petitioner's supplemental brief.

The statement of the case has been adequately outlined in the State's initial response to this personal restraint petition. It is incorporated herein by reference. Additional references to the factual record are included herein as necessary.

### IV. ARGUMENT

Both constitutional and nonconstitutional errors may be raised in a collateral challenge. In re Pers.

Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). A petitioner has the burden of showing actual prejudice as to claimed constitutional error; for alleged nonconstitutional error, he must show a fundamental defect resulting in a complete miscarriage of justice. In re Pers. Restraint of Rice, 118 Wn.2d 876, 884, 828 P.2d 1086 (1992); In re Pers. Restraint of Cook, 114 Wash.2d 802, 813, 792 P.2d 506 (1990).

In re Pers. Restraint of Elmore, 162 Wn.2d 236, 251, 172 P.3d 335 (2007).

**1. Momah and Strode do not establish that Morris is entitled to relief in his collateral attack.**

In Momah the Court was asked to decide whether a defendant's constitutional right to a public trial under Article 1, §22 of the Washington State Constitution was violated when the trial court closed a portion of voir dire to safeguard the defendant's right to trial by an impartial jury. Momah, 167 Wn.2d at 145. Under the circumstances of the case the Court found closure was not a structural error and affirmed Momah's conviction. Id. at 145.

In Momah's case jurors were required to fill out a jury questionnaire pretrial. Based on the juror's responses the judge, prosecutor, and defense attorney created a list of jurors to be questioned individually. Defense counsel agreed to privately question those jurors in chambers. Jurors who stated a preference for private questioning were among that group of persons who were

privately questioned. Defense counsel participated in the private questioning. As a result of that questioning counsel exercised numerous challenges for cause. Id. at 145-6. The trial court did not conduct a Bone-Club analysis prior to in chambers questioning.

The Court considered the defendant's right to an open public trial in light of his potentially competing right to an impartial jury. "One right privileges openness, while the other may necessitate closure." Momah 167 Wn.2d at 152. To achieve the correct balance between those two rights the court considered those rights in light of the central aim of the criminal proceeding to try the accused fairly. To that end the defendant is entitled to make tactical decisions to advance what he perceives will result in a fair trial. Id. at 153. The Court presumed Momah did just that concluding that the decisions were "tactical choices to achieve what he perceived as the fairest result." Id. at 155.

The Court concluded that the closure in that case was not a structural error because it was done to protect Momah's right to a fair jury and did not prejudice him. Momah was given the opportunity to object to closure but did not do so. He never gave the court any indication that the procedure would violate his right to a public trial.

His counsel actively participated in the procedure, and took advantage of it causing several jurors to be removed from the panel.

Like counsel in Momah, the defense attorney here fully participated in questioning jurors during the jury selection hearings. Counsel used the information he gained in those hearings to challenge some of those jurors for cause. Defense used the process of questioning the few jurors in chambers about issues pertaining to their experiences related to sexual offenses to excuse six of the jurors for cause due to bias revealed. 6/8/04 RP 50, 54, 62, 68, 76 & 86.<sup>2</sup>

Morris also argues that Strode applies directly to his case and entitles him to a new trial. Strode was a plurality decision. "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. Zakel, 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 unlike Momah the record did not reflect

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<sup>2</sup> Morris claims that there was also a closure occurring in a brief hearing prior to jury selection on June 8, 2004, prior to a portion of the jury selection. Petitioner's Supplemental Response Regarding Momah and Stode, at page 7. However, the transcript of the hearing attached to his petition at Appendix A, specifically indicates "Proceedings held in open court jury panel not present." 6/8/04 RP at 2-3. The clerk's minutes conflict. Appendix B to petition at page 1. Regardless whether that was in court or not, there was argument, testimony, or other formal hearing. Purely procedural matters of the trial were addressed.

either the closing the courtroom was necessary to safeguard Strode's right to a fair trial or that there was a knowing and voluntary waiver of that right. Strode, 167 Wn.2d at 234. There was nothing in the record in Strode which suggested the defense was at all concerned that questioning jurors in a closed hearing was therefore necessary to ensure his right to a fair trial. The defense could have but did not object when the court directed the courtroom be closed for the jurors who were questioned in closed hearing during individual voir dire. Nothing in the record indicated that it was a tactical decision.

For those reasons this Court should find as the court in Momah that closure was not a structural error which requires the petitioner's conviction to be reversed and grant a new trial.

**2. The petitioner must show he was actually and substantially prejudiced when the court ordered a brief temporary courtroom closure during portions of individual voir dire.**

On collateral review a petitioner who asserts a constitutional error as grounds for relief must establish by a preponderance of the evidence that he was actually and substantially prejudiced by the claimed error. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). Although some errors which are per se

prejudicial on direct review may also be per se prejudicial on collateral review, the Court has declined to categorically equate the two situations. Id. at 329. Unless the claimed error is per se prejudicial the petitioner bears the burden to prove he was actually and substantially prejudiced. Id. at 329.

Morris fails to address this step in the process for obtaining relief. Morris argues that the violation of his right to public trial merits reversal without consideration of whether he was actually and substantially prejudiced. Morris cites to Momah and Strode without consideration of the applicability of those decisions to collateral review.

In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the Court considered whether appellate counsel was ineffective for failing to raise a claim that the petitioner's public trial right was violated when the trial court fully closed the courtroom during the entire voir dire proceeding to any one other than the jurors. Orange acknowledged the St. Pierre court had refused to accept the argument that all constitutional errors that are per se prejudicial on direct review are also presumed prejudicial for the purposes of a personal restraint petition. Id. at 804. The Court also recognized that had the defendant established his public trial right was violated on

direct review prejudice was presumed in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Id. at 814. Because the Court believed the defendant would have established a violation of his public trial right had his counsel raised the issue on direct appeal the Court found defense counsel was ineffective. Because the closure was a result of the trial court's motion on its own, the closure could not have been strategic or tactical and under those circumstances the appropriate remedy was to remand for a new trial. Id. at 814.

Momah and Strode alter this analysis. As explained above, even if a violation of the defendant's public trial right has been established, a new trial is not the presumptive remedy. If the defendant is not automatically entitled to a new trial, then he has not established that he has been "actually and substantially prejudiced" by appellate counsel's failure to raise the alleged error on direct appeal. In that case his petition should not be granted unless the petitioner meets his burden of proof.

Here the petitioner has not met his burden of proof. The eleven jurors who indicated they wished to provide information in private were spoken with in chambers. 6/8/04 RP 46-92. Due to the nature of the charges, the defense used the process to excuse jurors who revealed their concerns, most of which had to do with past

personal history of related events. Defense used the process to excuse six of the jurors for cause due to bias revealed. 6/8/04 RP 50, 54, 62, 68, 76 & 86.

The Court has identified the purpose of the public trial provision as benefitting both the defendant and the public. The defendant is benefitted because the public is permitted to see that he is fairly treated and the presence of interested spectators keep the defendant's triers aware of their responsibility and the importance of their function. Momah, 167 Wn.2d at 148, Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.E.d.2d 31 (1984). The public is benefitted by being able to judge the fairness of the proceeding itself. Those members of the public who are the defendant's families and friends are benefitted by being able to contribute their knowledge and insight to the defendant during jury selection. Orange, 152 Wn.2d at 812.

However, in the context of a personal restraint petition the petitioner is only able to assert his personal rights guaranteed by the Constitution have been violated as grounds for relief. RCW 7.36.130. Here prejudice the petitioner must establish in order to gain relief must relate to whether the public pressure on those trying the defendant to treat the defendant fairly and take seriously their

responsibility was impaired by the closure. Whether members of the public were prejudiced, either because they could not personally judge the fairness of the proceedings, or because they were not able to give input with regard to the limited amount of responses to questions during the brief closed hearings, is immaterial.

In Orange, reversal was based upon prejudice established upon a claim of ineffective assistance of counsel. The Orange court determined it could not have been strategic or tactical because the decision to close the courtroom was by the judge without input from the parties. This was determined after a reference hearing on this issue.

Consequently, we agree with Orange that the failure of his appellate counsel to raise the issue on appeal was both deficient and prejudicial and therefore constituted ineffective assistance of counsel. See State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))). The failure to raise the courtroom closure issue was not the product of “strategic” or “tactical” thinking, and it deprived Orange of the opportunity to have the constitutional error deemed per se prejudicial on direct appeal.

In re Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

Contrary to Orange, here there was a valid tactical reason to seek the questioning of individual jurors in a sex offense case in private. His trial counsel did so in order to get a more full disclosure from the jurors. His trial counsel used the process to excuse six of the jurors for cause due to bias revealed. 6/8/04 RP 50, 54, 62, 68, 76 & 86.

Morris has not alleged that there was not a valid tactical or strategic reason to pursue selection of jurors in private. In fact, the record supports that there was. Thus, he cannot establish that his trial or prior appellate counsel was ineffective for failure to raise the courtroom closure issue previously.

As was noted in the seminal case of Waller v. Georgia, “the remedy should fit the violation.” Waller v. Georgia, 467 U.S. 39, 50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Just as the windfall of a new trial would not have been in the public interest in that case, so too here. In a case involving a similar issue out of Massachusetts, the court there held:

In light of the defendant’s consent to the procedure, his presence throughout the voir dire, and the fact that the less public setting for the voir dire in all likelihood helped rather than harmed the defendant, we find no prejudice to the defendant from the setting in which this voir dire was conducted.

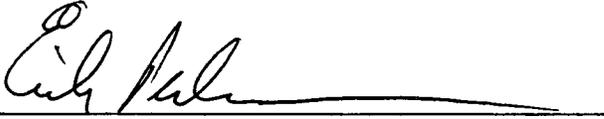
Commonwealth v. Horton, 434 Mass. 823, 753 N.E.2d 119, 128  
(2001).

**V. CONCLUSION**

For the foregoing reasons, Morris's personal restraint petition  
should be denied.

DATED this 17<sup>th</sup> day of January, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; []United States Postal Service; []ABC Legal  
Messenger Service, a true and correct copy of the document to which this  
declaration is attached, to: David B. Zuckerman, Attorney for Petitioner, addressed  
as 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104. I certify under  
penalty of perjury under the laws of the State of Washington that the foregoing is  
true and correct. Executed at Mount Vernon, Washington this 17<sup>th</sup> day of  
January 2010.

  
KAREN R. WALLACE, DECLARANT