No. 84585-9

MADSEN, C.J. (dissenting)—Several cases concerning the right to a public trial have come before the court, raising a number of questions about a defendant's right to a public trial, including when a violation of this right occurs and what remedies are available if the right is violated. *State v. Sublett*, No. 84856-4 (Wash. Nov. 21, 2012) (plurality opinion); *State v. Paumier*, No. 84585-9 (Wash. Nov. 21, 2012); *State v. Wise*, No. 82802-4 (Wash. Nov. 21, 2012); *In re Pers. Restraint of Morris*, No. 84929-3 (Wash. Nov. 21, 2012) (plurality opinion). In *Sublett*, I have written an extensive concurrence placing these multiple issues in context and explaining why I believe the court's jurisprudence in this area is erroneous in many respects.

Unfortunately, the court has adopted a series of such inflexible rules that Mr. Rene Paumier's conviction in the present case must be reversed—not on the ground that the closure of the proceedings for private, limited, in-chambers questioning of potential jurors was unjustified and a violation of the right to a public trial, but instead because the trial court did not inquire into whether the closure was justified.

I agree that a trial court errs when, before closing the courtroom, it fails to make an

on-the-record inquiry into whether closure is justified under article I, section 22 of the Washington State Constitution. *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). The "*Bone-Club*" inquiry must be made to determine whether the interest claimed to justify closure of the proceedings is a compelling interest that overrides the defendant's right to a public trial and whether the proposed closure is essential to preserve that interest, and the court must ensure that the closure is narrowly tailored. *Id.* at 258-59 (other requirements exist, including that anyone present must be given the opportunity to object to closure). A nearly identical inquiry is required under the Sixth Amendment to the United States Constitution before closing the proceedings in a criminal trial. *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

But contrary to the majorities here and in *Wise* and a majority of the court in *Morris*, I do not agree that the error in failing to conduct the on-the-record inquiry and enter written findings must be deemed structural error requiring reversal of the defendant's conviction and a new trial. It is highly likely that if the required inquiry and findings had been made, the result would be that closure was justified and not a violation of article I, section 22 or the Sixth Amendment. Thus, the error in these cases is the failure to conduct the inquiry, not an unjustifiable closure that necessarily violates the defendant's right to a public trial.

But in each of these three cases, the failure to conduct the inquiry, alone, is deemed to be the equivalent of an unconstitutional, impermissible, unjustifiable closure that constitutes structural error—the most egregious form of constitutional error, for

which no harmless error standard can be applied. Thus, the majorities in these cases equate the failure to conduct the inquiry—which is, without question, a serious error—with a violation of the right to a public trial, which is a far more serious error.[1]

The result is a rule that says in effect that the defendant has a *constitutional right to the inquiry* into whether his right to a public trial would be violated by closure, and if that inquiry is not conducted it is a constitutional violation of the very worst sort, i.e., structural error. And this is true regardless of whether the inquiry, if made, would show that the closure was perfectly constitutional.

It must be remembered when considering these cases that the majority in *Wise* has also virtually distinguished out of existence the one case where this court examined the record on review to determine whether a violation of the right to a public trial occurred and whether there was structural error requiring reversal, in circumstances where the trial court failed to engage in the *Bone*-Club inquiry prior to closing the proceeding for limited voir dire of potential jurors. *See Wise*, No. 82802-4, slip op. at 8 (in effect overruling *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010)). The court in *Momah* held that reversal was not required.

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[1] As I point out in my concurrence in *Sublett*, a majority of the court in each of these cases refuses to engage in a posttrial inquiry into whether closure is justified or to permit remand for this purpose. *See Paumier* majority, slip op. at 5 (the trial court's failure to engage in the *Bone-Club* inquiry is error and the wrongful deprivation of the right to a public trial is structural error requiring a new trial; "we are left with no other choice but to order a new trial"); *Wise* majority, slip op. at 9-13 (same; "[w]e do not comb through the record"); *Morris* lead opinion, slip op. at 8 (observing that on direct review "failing to consider *Bone-Club* before privately questioning potential jurors violates a defendant's right to a public trial and warrants a new trial"); *id*. at 8-11 (holding the same result ensues on collateral review when the issue arises through a claim of ineffective assistance of counsel); *Morris* concurrence (Chambers, J.).

I believe that posttrial examinations of the records in this case, *Wise*, and *Morris*, should be made. It is highly likely such review would show that the closures in these cases were not unconstitutional. Each of these cases involves the question whether limited, private, individual questioning of a few potential jurors on sensitive matters violates the right to a public trial, as I explain in my concurrence in *Sublett*. Importantly, the public nature of the proceedings is protected to a large degree by the fact that the proceedings were recorded, transcribed, and made part of the public record.

But because there was no *Bone-Club* or *Waller* inquiry before the private questioning of the venire members occurred, the defendants each obtain an entirely new trial, no matter the costs in delay, likely loss of evidence, costs in terms of time and effort of everyone involved (trial court, attorneys, victims, witnesses, etc.), and the added financial burden placed on the criminal justice system. They obtain this trial *not* because their *right to a public trial was violated*, but because in the absence of the appropriate inquiry *we do not know at this stage of the proceedings whether* their right to a public trial was *violated*. It makes no difference to the majorities whether posttrial appellate review or remand for fact findings or a hearing could show that the closures satisfied *Bone-Club*.

As I also show in my concurrence in *Sublett*, appellate courts in other jurisdictions routinely engage in posttrial inquiries into whether a closure was justified. In fact, in *Waller*, the United States Supreme Court itself examined the record of the consolidated cases before it to determine if the closure of the suppression hearing that occurred was

justified under the *Waller* factors. *Waller*, 467 U.S. at 48-49 ("[a]pplying these tests to the cases at bar"). In the *Sublett* concurrence, I also cite a number of cases where courts have found no public trial violations in connection with limited in-chambers questioning of potential jurors.

I would not assume that every closure in the absence of a *Bone-Club* inquiry is an unconstitutional violation of the defendant's right to a public trial. Rather than automatically granting new trials in these cases, this court should examine the records to determine whether the closures were justified. If the record does not resolve the question, then the cases should be remanded for factual determinations of whether the closure was justified under the *Bone-Club* factors. This remedy can resolve the question whether the closure actually constituted a closure of the trial in violation of the right to a public trial. If either on the appellate record or on remand (for entry of factual findings or a hearing followed by factual findings) a determination can be made through a posttrial *Bone-Club* inquiry that the closure did not violate the defendant's article I, section 22 right to a public trial, then the matter is at an end.

There is nothing in United States Supreme Court precedent that prevents this approach. Any constraints are of this court's own doing, and they can be traced to *Bone-Club*. But in *Bone-Club*, there is nothing that explains *why* there cannot be a posttrial inquiry into whether an unconstitutional closure in fact occurred.

Bearing in mind that the proponent has the burden of justifying closure, if, after a posttrial evaluation, it turns out that either a closure is found to be unjustified or if the

question cannot be resolved to show a constitutional closure, then the conclusion would have to be that the defendant's right to a public trial was violated. Then, and only then, would it be necessary to decide whether the violation was structural error requiring reversal and a new trial.

And if it turns out that an unconstitutional closure occurred, then, as Justice Wiggins correctly explains, the rules of appellate procedure should apply in public trial right cases just as they do in any appellate case involving a claimed constitutional violation. Moreover, as he also explains, just because structural error is found in a particular context involving a particular constitutional right, this does not necessarily mean that any and all violations of that particular constitutional right will be structural error in all contexts. As I point out in my concurrence in *Sublett*, many courts have held, as this court did in *Momah*, that public trial violations are not always structural error.

If the issue is properly reached, the court should conclude that, as in *Momah*, no structural error occurred here. Then, because Mr. Paumier failed to object to the closure, he should be required to satisfy the strict requirements to prevail when claimed constitutional error was not preserved. Under the rules of appellate procedure he is not entitled to any relief, as Justice Wiggins' dissent shows.

In summary, in this case, as in *Wise* and *Morris*, the trial court's error was the failure to engage in the *Bone-Club* inquiry on the record prior to closing the court for private, limited questioning of a few potential jurors on sensitive matters. The failure to make the *Bone-Club* inquiry on the record prior to closing the proceeding is a serious

error implicating the important right of the defendant to a public trial. However, this error is not itself a closure of the courtroom. The simple fact is that no determination has ever been made about whether the closure in this case, or in *Wise* or *Morris*, was justified, and so no determination has ever been made about the constitutionality of these closures.

As many appellate courts have either done themselves, or have directed lower courts to do, a posttrial inquiry into the propriety of the closure should be conducted. If this can be done on the appellate record, it should be done. If not, these cases should be remanded for entry of findings on the matter or a hearing followed by findings, whichever is appropriate in the circumstances.

But instead, the majorities in these cases have unfortunately perpetuated a theory of public trial cases that equates (a) the required inquiry into whether closure is justified to (b) an unjustified or unjustifiable closure, which is an unconstitutional closure. With this theory of public trial cases, the error in failing to conduct the *Bone-Club* inquiry automatically transforms any closure into an unconstitutional closure that is structural error, with the defendant automatically obtaining the windfall of reversal of his conviction and a new trial. I cannot agree with this approach.

As should be apparent, I believe the court should overrule our cases to the extent they require reversal of convictions and new trials solely because the trial court failed to engage in the *Bone-Club* inquiry before trial. I also believe that the court should overrule any case to the extent it concludes that the failure to engage in the *Bone-Club* inquiry,

alone, is structural error.

For the reasons stated here and in more detail in my concurrence in *Sublett*, I dissent.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: