No. 84856-4

MADSEN, C.J. (concurring)—I agree with the court's decision and concur in the result reached by the court.

The present case is one of several cases that have come before the court involving the right to a public trial, *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); and *In re Personal Restraint of Morris*, No. 84929-3 (Wash. Nov. 21, 2012) (plurality opinion). I have written opinions in each of the latter three cases, but take the opportunity here to write a single opinion touching on the multiple aspects of the public trial right and appellate review as they are presented by all four cases. My intent is to present as complete a picture of the court's decisions in this area as these cases suggest. In this way, I explain why I believe the court's approach to reviewing public trial issues is exceptionally and unnecessarily strict, better than I could do by only writing separate opinions addressing the individual issues in each case.

It is without doubt a critical function of the court to carry out the constitutional

requirement that criminal justice be rendered in public, to ensure that judges, prosecutors, and witnesses are ever mindful to carry out their respective responsibilities so that a fair and impartial proceeding results, and to encourage witnesses to come forward and testify truthfully. But recently this court has ordered a new trial in virtually every case where a closure occurred without an on-the-record inquiry into whether closure was justified, regardless of whether the claimed error was preserved and regardless of whether the particular error could possibly have had any effect on the defendant's receipt of a fair trial. When doing so, the court has dispensed with its own Rules of Appellate Procedure.

We often address deeply valued and closely held constitutional rights that must be protected to assure that a criminal defendant has a fair and just trial. However, there are procedural requirements that generally must be satisfied for appellate review of claimed constitutional errors, even with respect to the most fundamental rights we are privileged to enjoy, such as the right to remain silent, the right to confront witnesses, the right to compel attendance of witnesses, and the right to present a defense. For example, we generally insist that an objection is required to preserve claimed error, and if there is no objection then we apply a more stringent standard for review of a claimed violation of a constitutional right. The defendant must show that the asserted constitutional violation is manifest and had a negative impact on the outcome of the proceedings. But a majority of the court has decided that no such showing is ever required for a violation of the public trial right, notwithstanding the failure to object.

Additionally, when a violation of even an important constitutional right is claimed,

we will consider the record to determine whether the violation actually occurred. But in the context of the right to a public trial, if the trial court did not engage in an on-the-record inquiry into whether closure was justified, this court now assumes that the closure was not justified and declines to permit any further inquiry, even if the record would conclusively show that the closure was justified. Indeed, in one of the cases presently before the court, the majority significantly undermines the precedential force of a prior case where we did examine a record that showed effective but not express compliance with the required on-the-record inquiry.[1] Instead, in *Wise*, *Paumier*, and *Morris*, the majorities[2] reiterate the rule that the record will not be examined to determine if it shows that the closure was in fact justified.

In addition, the court declines to permit remands for entry of facts on the issue whether closure was justified or remand for a hearing on the issue. Thus, it is entirely possible that even a minimal closure, which an after-the-fact inquiry might show was fully justified, will require a new trial because no on-the-record inquiry was made at the time of the closure.

The court has effectively created a new constitutional right virtually independent of the public trial itself—the right to an on-the-record inquiry.

When compared to the decisions of the United States Supreme Court and many other federal and state courts, our state's law is remarkable for its severe and categorical

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[1] *Wise*, No. 82802-4, slip op. at 8 (virtually distinguishing *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) out of existence on the issue whether the existing record can be examined).
[2] The majority in *Morris* is comprised of the lead opinion and the concurrence by Justice Chambers.

approach. For example, in cases when no suitable inquiry occurred at the time of the closure, other courts often examine the record, remand for fact-finding, or remand for a hearing on the issue whether the closure was justified.

I begin by examining the concerns involved in determining whether the public trial right is implicated at all, the issue in *Sublett*. I then turn to the question whether, if the public trial right is implicated, there is in fact a closure of the courtroom; and if there is a closure, whether it implicates the public trial right. If a closure occurs that does implicate the public trial right, the next issue is whether the closure was justified because a justified closure does not violate the defendant's right to a public trial. This issue raises the question whether only a contemporaneous on-the-record inquiry into justification will be considered on appellate review, foreclosing review of the claimed error where an inquiry was not performed prior to closing the courtroom.

I next address the matter of reviewing claimed violations of the public trial right, including the issue whether an objection is required and what approach is appropriate if no objection to closure was made; whether a violation must invariably be considered structural error so that no showing of prejudice is required; and whether a violation must lead to reversal and a new trial or other proceeding. These issues arise in *Wise*, *Paumier*, and *Morris*.

I will explain how I believe the four cases before the court should be resolved. My intent is to show that in many respects this court has taken an unwarranted, hard-line approach to the matter of public trial violations, with the result that we reverse and

require new trials where there is no constitutional need to do so.

We can honor the constitutional right, give it full force and effect, ensure that it serves its purposes, and protect the defendant's rights without taking the restrictive position of that the majorities' decisions in *Wise*, *Paumier*, and *Morris* represent.

Whether a Closure Occurred

The first issue that often arises is whether the case in fact involves a closure implicating the constitutional right to a public trial. There are cases that involve a particular trial aspect or procedure and the question is whether this particular part of a trial is ever within the protection of the public trial right. *Sublett* is this type of case, and a majority of the court employs the "experience and logic" test for the purpose of determining whether the public trial right is implicated at all with respect to the particular procedure.

Experience and Logic Test

In *Sublett*, the court provides guidance for determining whether the right to a public trial attaches to a particular aspect of a criminal trial. The analysis will prove useful, especially given that in recent years we have seen a significant number of appellate cases in this state involving the public trial right.

The "experience and logic" test that the court uses in *Sublett* is found in First Amendment cases involving the right of the public and the press to access court proceedings. To this point, I have not discovered any case where this test has been used to decide whether the Sixth Amendment right to a public trial applies, although there are

a number of cases where the experience and logic test has been applied to determine that a particular criminal proceeding should be open to the public and the press under the First Amendment. *E.g.*, *United States v. Alcantara*, 396 F.3d 189, 198 (2d Cir. 2005) (plea colloquy and sentencing proceedings; interestingly, the court found the First Amendment right existed in response to the *defendants*' arguments, unlike the typical case where a member of the media argues applicability of the First Amendment right); *United States v. Wecht*, 537 F.3d 222, 235-39 (3d Cir. 2008) (presumptive right of access under the First Amendment includes jurors' names); *Applications of Nat'l Broad. Co.*, 828 F.2d 340 (6th Cir. 1987) (First Amendment right of access to preliminary proceedings concerning whether a judge must be disqualified for bias and to inquire into an attorney's possible conflict of interest); *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465-66 (9th Cir. 1990) (First Amendment right of access to plea agreements). After applying the experience and logic test, courts have also concluded that the First Amendment right of access does not apply to a particular type of criminal proceedings. *E.g.*, *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-18 (9th Cir. 1989) (no First Amendment right of access to issuance of pre-indictment search warrants).

There is a recognized close relationship between the First Amendment right of the public and press to access criminal proceedings and the defendant's Sixth Amendment right to a public trial. The United States Supreme Court in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), relied on First Amendment cases when it determined the Sixth Amendment right to a public trial applies to a pretrial suppression

hearing. The Court recently reminded us, though, that "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question." *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010). One cannot assume the same analysis will always apply to the two rights.

Disagreement about the Scope of the Right to a Public Trial

Despite its use in the First Amendment context, as mentioned other courts have not addressed whether the experience and logic test is an appropriate test to determine whether the Sixth Amendment right of the defendant applies. Rather, courts have approached the problem in other ways.

Some courts have declared that the right to a public trial applies to the entire trial. *E.g.*, *United States v. Sorrentino*, 175 F.2d 721, 722 (3d Cir. 1949); *Barrows v. United States*, 15 A.3d 673, 679 (D.C. 2011); *Sirratt v. State*, 240 Ark. 47, 54-55, 398 S.W.2d 63 (1966); *State v. Tapson*, 2001 MT 292, 307 Mont. 428, 435, 41 P.3d 305; *State v. Lawrence*, 167 N.W.2d 912, 915 (Iowa 1969); *State v. Pullen*, 266 A.2d 222, 228 (Me. 1970), *overruled on other grounds by State v. Brewer*, 505 A.2d 774 (Me. 1985); *Commonwealth v. Patry*, 48 Mass. App. Ct. 470, 474, 722 N.E.2d 979 (2000).

Other courts have disagreed. In *United States v. Ivester*, 316 F.3d 955, 958-59 (9th Cir. 2003), the court explained:

> Though some courts and treatises boldly declare that the Sixth Amendment right to a public trial applies to the entire trial, *United States v. Sorrentino*, 175 F.2d 721, 722 (3d Cir. 1949); Wayne R. LaFave, Herold H. Israel, Nancy J. King, 5 Crim. Proc. § 24.1(a) (2d ed.1999) (the Sixth Amendment right to a public trial "covers the entire trial, including the impaneling of the jury and the return of the verdict"), this position has been rejected by recent

> decisions which demonstrate that the right to a public trial does not extend to every moment of trial. *See, e.g.*, *United States v. Edwards*, 303 F.3d 606, 616 (5th Cir.2002) ("We must first determine whether *Waller* applies to" the court's decision to empanel an anonymous jury).
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> Thus, we must determine whether the proceedings in question implicate the Sixth Amendment.

(Some citations omitted.)

The *Ivester* court concluded that the right to a public trial was not implicated with respect to a discussion between the court and counsel about how to handle questioning of the jurors about possible fears for their safety. *Id*. at 959. Rather, the court determined that this discussion "was technical and administrative" and did not impact the Sixth Amendment right to a public trial. *Id*. The court in *Ivester* considered a second situation that occurred in the case, the judge's questioning of a juror in chambers with the parties and counsel present. The court observed that other courts had held that a judge's questioning of a juror in chambers without spectators or the defendant did not violate the constitutional rights of the defendant and it therefore followed that the Sixth Amendment public trial right was not violated when such questioning occurred with the parties and counsel present. *Id*.

Other decisions include *United States v. Olano*, 62 F.3d 1180, 1190-91 (9th Cir. 1995), where the court held that the district court judge's meeting with one juror in chambers about her impartiality given her daughter's new job did not deprive the defendant of his right to a public trial; *United States v. Norris*, 780 F.2d 1207, 1210 (5th Cir. 1986), where the court held that the right to a public trial does not extend to bench

conferences during trial "between counsel and the court on . . . technical legal issues and routine administrative problems" where "no fact finding function is implicated"; *United States v. Vazquez–Botet*, 532 F.3d 37, 51-52 (1st Cir. 2008), where the court concluded that the public trial right does not apply to a "'question-and-answer' offer of proof, the purpose of which was to create a record so [the appellate court] could determine the propriety of the [trial] court's relevancy ruling" (footnote omitted); *United States v. Brown*, 669 F.3d 10 (1st Cir.), *cert. denied*, 132 S. Ct. 2448 (2012), where the First Circuit concluded that none of the considerations underlying the right to a public trial were implicated and the Sixth Amendment public trial right did not extend to in-chambers questioning of a juror about remarks of a witness following his testimony, where the sole purpose was in connection with possible treatment of a contemptuous witness; and *People v. Olivero*, 289 A.D.2d 1082, 1082, 735 N.Y.S.2d 327 (2001), where the court held that the public trial right did not apply to the trial court's treatment of the courtroom as an annex to its chambers for the equivalent of an in-chambers conference regarding the scope of a codefendant's immunity. *Cf. People v. Virgil*, 51 Cal. 4th 1210, 1237-38, 253 P.3d 553, 126 Cal. Rptr. 3d 465 (2011) (not every sidebar conference rises to the level of a constitutional violation; brief bench conferences during jury selection about sensitive subjects when the courtroom itself was open to the public and the defendant was present did not deprive the defendant of his right to a public trial), *cert. denied*, 132 S. Ct. 1636 (2012).

Similarly, the federal district court for the Western District of Washington

determined that the defendant's right to a public trial was not violated when the court conducted an in-chambers conference with his trial counsel. *Nguyen v. Wingler*, 2010 WL 691411, at *8 (Jan. 5, 2010) (unpublished). The court commented that the United States Supreme Court has never held the right to a public trial extends to in-chambers conferences and other courts have recognized that the right does not extend so far. *Id*.; *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Brennan, J., concurring) ("when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle" and the court's opinion does not "intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings").

The Court of Appeals has applied a similar standard, as the lead opinion recognizes in the present case, lead opinion at 10-12, when it discusses cases where the Court of Appeals has determined that no violation of the public trial right occurs in connection with purely ministerial or legal issues that do not require disputed facts to be resolved. *See State v. Castro*, 159 Wn. App. 340, 246 P.3d 228 (2011) (pretrial hearing addressing whether to exclude witnesses and whether the State could impeach the defendant with prior criminal history); *State v. Koss*, 158 Wn. App. 8, 241 P.3d 415 (2010) (in-chambers discussion of language in jury instructions, followed by on-the-record open court proceeding for opportunity to object), *petition for review filed*, No. 85306-1 (Wash. Nov. 16, 2010); *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108

(2008) (stating principle); *State v. Rivera*, 108 Wn. App. 645, 32 P.3d 292 (2001) (public trial right not implicated when trial court addressed a juror's complaint about another juror's hygiene).

Sublett

I agree with the decision in *Sublett* that not every aspect of criminal proceedings is subject to the right to a public trial. Under the experience and logic test, history is one source of guidance as to whether a particular part of the proceedings is one to which the right to a public trial attaches. If precedent or other history, or both, are silent, then the second part of the analysis involves inquiry into whether the particular procedure, hearing, discussion, decision, or other aspect of the case is one to which the public trial right should apply. This demands an examination of the values served by the right to a public trial and whether they would be furthered if the right is applied with respect to the part of the proceedings in question. If these values would not be served by concluding that a particular aspect of a trial should be public, when this issue is one for which history provides no answer, then there is no constitutionally imperative reason for attaching the public trial right to the particular part of the proceedings. The ministerial/legal inquiry applied by the Washington State Court of Appeals and other courts also involves an inquiry into whether the values served by the public trial right would be served by holding that the right applies to the particular proceeding or procedure at issue.

These values are ensuring that the defendant has a fair trial, to remind the trial judge and prosecution of the importance of their functions and the obligation to the

accused to carry out their responsibilities, and to encourage witnesses to come forward and testify truthfully. *Waller*, 467 U.S. at 46-47. Because protecting and advancing these values are the core concerns of the right to a public trial, when they are not implicated it is unnecessary to require public proceedings in open court. These values are not quantifiable, but that does not mean they cannot be ascertained. Both the experience and logic test and the ministerial/legal analysis are useful tools that further the resolution of whether the public trial right attaches at all and both involve the crucial inquiry into the values underscoring the right.

I agree with the court's decision in *Sublett* that the right to a public trial is not implicated when, in chambers and with counsel present, the trial judge considers a question submitted by the jury during the course of its deliberations.[3]

Justified Closures

The next issue, if the right to a public trial is at stake, is whether there has been a violation of the right. In *Waller*, the United States Supreme Court explained that the public trial guarantee creates a presumption of openness that is not absolute and abridgement of the Sixth Amendment right to a public trial may be justified when a courtroom closure would advance an overriding compelling interest that is likely to be prejudiced if no closure occurs;[4] the closure is no broader than necessary to protect that

[3] The court in *State v. Swanson*, 112 Haw. 343, 354, 145 P.3d 886 (2006) similarly concluded that responses to jury communications are the functional equivalent of an instruction and the defendant's right to a public trial was not implicated when the jury sent the court a number of communications after business hours when the court was closed and locked (normal security caused the building to be closed).

[4] Many courts have held that when less than a total closure is at issue, a less stringent "substantial

overriding interest; the trial court considers reasonable alternatives to closure; and the court makes adequate findings to support the closure. *Waller*, 467 U.S. at 48. Recently, as indicated, the Court explained that the trial court must on its own initiative consider reasonable alternatives to closure. *Presley*, 130 S. Ct. at 723-24.

Our court has followed a nearly identical test, first described in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).[5] The proponent of closure must show a compelling interest that justifies closure and if this interest is a right other than one held by the accused, the proponent must show that the right is seriously and imminently threatened. Any person present when a closure motion is made must be provided the

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reason" test applies to determine whether a partial or narrow closure is justified. *Bucci v. United States*, 662 F.3d 18, 23 (1st Cir. 2011), *cert. denied*, 2012 WL 2807825 (U.S. Oct. 1, 2012); *United States v. DeLuca*, 137 F.3d 24, 32-35 (1st Cir. 1998); *United States v. Smith*, 426 F.3d 567, 571-74 (2d Cir. 2005); *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992); *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995); *Garcia v. Bertsch*, 470 F.3d 748, 752-53 (8th Cir. 2006); *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th Cir. 1989); *Nieto v. Sullivan*, 879 F.2d 743, 753 (10th Cir. 1989); *United States v. Brazel*, 102 F.3d 1120, 1155-56 (11th Cir. 1997); *Douglas v. Wainwright*, 739 F.2d 531, 533 (11th Cir. 1984); *United States v. Flanders*, 845 F. Supp. 2d 1298 (S.D. Fla. 2012); *Angiano v. Scribner*, 2008 WL 4375619, at *11-12 (C.D. Cal. 2008); *United States v. Weed*, 184 F. Supp. 2d 1166, 1176 (N.D. Okla. 2002); *Commonwealth v. Martin*, 39 Mass. App. Ct. 44, 49, 653 N.E.2d 603 (1995); *State v. Turrietta*, 2011-NMCA-080, 150 N.M. 195, ¶¶ 17-21, 258 P.3d 474, 479-80); *State v. Drummond*, 2006-Ohio-5084, 111 Ohio St. 3d 14, 22, 854 N.E.2d 1038, *abrogated on other grounds by State v. Bethel*, 2006-Ohio-4853, 110 Ohio St. 3d 416, ¶ 81, 854 N.E.2d 150; *State v. Sams*, 802 S.W.2d 635, 640 (Tenn. Crim. App. 1990). A "less stringent standard [is] justified because a partial closure does not implicate the same secrecy and fairness concerns that a total closure does." *Woods*, 977 F.2d at 76.

The Second Circuit has explained that in determining whether a closure is a narrow, "partial closure," a number of factors may be considered, including the closure's duration, whether the public can learn what occurred, for example, through a transcript of the proceedings, and whether all of the public was excluded or only selected members. *Carson v. Fischer*, 421 F.3d 83, 89-90 (2d Cir. 2005); *Bowden v. Keane*, 237 F.3d 125, 129-30 (2d Cir. 2001).

[5] We have consistently followed the Court's precedent under the Sixth Amendment when considering closures under both Sixth Amendment and article I, section 22 of the Washington State Constitution.

opportunity to object to closure. The method of closing the courtroom must be the least restrictive available that will still protect the threatened interest. (In accord with *Presley*, the consideration of reasonable alternatives must be made even if no party raises the issue.[6]) The court has to weigh the competing interests of the proponent and the public. And finally, the closure order must be no broader than necessary. *Bone-Club*, 128 Wn.2d at 258-59.

Thus, not all courtroom closures violate the right to a public trial.

In the Absence of an On-the-Record *Bone-Club* Inquiry, Posttrial *Bone-Club* Analysis May Be Appropriate

In *Wise*, *Paumier*, and *Morris*, a major issue is whether the failure to conduct an on-the-record *Bone-Club* inquiry mandates reversal and a new trial. The majorities in *Wise* and *Paumier* have taken the unfortunate position that if a trial court fails to make this inquiry at the time of closure, it cannot be done later. The court decides in *Morris*

[6] *Presley* does not dictate the result in the cases before the court, despite some of the arguments advanced in the briefing. In *Presley*, the defendant objected to the closure, which is not true in any of the cases before our court. Proper review of the claimed errors is not controlled by *Presley* and we can apply our rules of appellate procedure that normally govern review of claimed constitutional errors. Also, as explained above, *Presley* does not address the issue of whether a closure occurred in the first place. Accordingly, the court is free, for example, to consider whether the asserted closures were de minimis and so did not implicate the constitutional question, as many courts have done after the decision in *Presley*. The Court in *Presley* also declined to decide the defendant's claim that the trial court failed to identify any overriding interest that was likely to be prejudiced unless the proceeding was closed, although the Court did say that even if this was true the trial court must still consider any reasonable alternatives to closure.

The Court in *Presley* remanded the case for further proceedings not inconsistent with its opinion. *Presley*, 130 S. Ct. at 725. Because the Court did not order a new trial, *Presley* does not demand that a new trial occur if our court decides that a closure violated the right to a public trial. Whatever may be the appropriate remedy, aside from the necessity of further proceedings, it is not determined under *Presley*.

that "failing to consider *Bone-Club* before privately questioning potential jurors violates a defendant's right to a public trial and warrants a new trial on direct review." *Morris,* No. 84829-3, slip op. at 8; *see also Wise,* No. 82802-4, slip op. at 19 (the defendant's "public trial right was violated by the closure of part of voir dire proceedings without the requisite consideration of *Bone-Club*"); *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) ("in order to support full courtroom closure during jury selection, a trial court must engage in the *Bone-Club* analysis; failure to do so results in a violation of the defendant's public trial rights").

But a more accurate description of the *Bone-Club* requirement is that it is mandated "'to protect a defendant's right to [a] public trial.'" *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2004) (alteration in original) (quoting *Bone-Club*, 128 Wn.2d at 259). The *Bone-Club* inquiry is not, in and of itself, the constitutional right. In other words, when the *Bone-Club* inquiry is not made on the record, this does not tell us whether the closure *in fact* violated the defendant's public trial right, which we know is not absolute since closing a court may be justified and therefore the closure will not violate the public trial right. Indeed, an after-the-fact *Bone-Club* inquiry could well show that the closure was justified and that there were no reasonable alternatives to the closure. Because of this possibility, the failure to engage in the inquiry should not turn a justifiable closure into a violation of the right to a public trial.

When a posttrial *Bone-Club* inquiry can be made and would show that a closure

was justified, requiring new trials has no positive purpose but instead leads to delayed justice and additional costs, not all of which are quantifiable but which are nevertheless onerous. These can include the time and effort of the courts, the prosecuting agencies, and the defense attorneys, often public defenders, who must retry the cases; the burdens, including possible distress and anxiety, placed on another jury; the burdens placed on victims and other witnesses who must go through the process of another trial; the losses in relevant evidence that come with long-delayed presentation, when witnesses' memories are not as clear as at the time of the original trial; and the dollar costs of the new trials. These are not simply possible concerns for future cases, but are concrete concerns in *Wise*, *Paumier*, and *Morris* because these cases are remanded for unnecessary new trials without a showing that the constitutional right was violated in fact.[7]

In these three cases, the issue is whether individually questioning jurors on sensitive topics in a nonpublic setting violates the right to a public trial. In *Wise*, 10 prospective jurors were privately questioned in the judge's chambers, with the trial judge, the prosecution and defense counsel present. The questioning was recorded and transcribed. There were no objections to the procedure. In *Paumier*, the judge, the prosecution, defense counsel, and the defendant were all present for the questioning, and there were no objections. The in-chambers questioning was recorded and transcribed. In *Morris*, 14 potential jurors were questioned in chambers and 6 were excused for cause. The trial judge and counsel were present, with the defendant having waived the right to

[7] It is also likely that the decision in *Morris* will lead to a number of personal restraint petitions raising the same issue.

be present while the questioning in chambers occurred. Defense counsel explained that he had discussed with the defendant the fact it would be more likely for jurors to be forthcoming if he was not present. There was no objection to the procedure. The questioning was recorded and transcribed.

In each case a majority of the court concludes that the closure without the *Bone-Club* inquiry is a violation of the right to a public trial. The court refuses to engage in or otherwise permit any posttrial inquiry into whether the closure was justified. *See Wise*, No. 82802-4, slip op. at 9-13 ("[w]e do not comb through the record"; 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); *Paumier*, No. 84585-9, slip op. at 4-5 (same; "we are left with no other choice but to order a new trial"); *Morris*, No. 84929-3, 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); *id.* concurrence (Chambers, J.). The majorities in these cases do not permit an after-the-fact assessment of the closure to determine whether it was justified under *Bone-Club* and *Waller*. *See also Brightman*, 155 Wn.2d at 518; *Orange*, 152 Wn.2d at 810; *Bone-Club*, 128 Wn.2d at 261 (the determination of whether a compelling interest justifies closure is the affirmative duty of the trial court, not the appellate court).

But in *Waller*, after holding that any closure over the defendant's objections must

meet the tests applied in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984), and its predecessors, the Court *itself* "[a]ppl[ied] these tests to the cases at bar" and concluded that the closure of the entire suppression hearing was not justified. *Waller*, 467 U.S. at 47-48. The Court did not suggest in any way that reversal is automatically required if the trial court did not make the inquiry prior to the closure.

The majorities' refusals to permit an after-the-fact inquiry into the justifications for closure or to engage in these inquiries in *Wise*, *Paumier*, and *Morris* serve no useful purpose. In these cases, the individual questioning of a limited number of potential jurors occurred in the presence of the judge, counsel, and the defendant (in one case, the defendant affirmatively waived the right to be present), and was recorded and transcribed. When this court refuses to examine such a record—the recorded, public transcript of the proceedings, including the individual voir dire that occurred—to determine whether the closure would have been justifiable under an on-the-record *Bone-Club* inquiry had one taken place, it exalts the form of the public trial right above its substance. The values served by the right to a public trial are not quantifiable, but real; however, it is difficult to agree that any real harm to the defendants' rights to public trials occurred in the circumstances of these cases. The courts' decisions also render the work of the juries in these cases a nullity.

It is a mystery why, if the trial court does not engage in an on-the-record *Bone-Club* inquiry prior to closure, this court believes it must foreclose all other possible ways

in which the inquiry could be conducted. Many appellate courts conduct a review of the record to determine if the record shows that closure was warranted. Numerous appellate courts have remanded cases to the trial courts to make factual findings or hold hearings for the purpose of making the inquiry required under *Waller*, especially where the record is inadequate for review. On collateral review involving the public trial right, many courts have remanded the case for a reference hearing on whether closure was justified.

In *Kendrick v. State*, 670 N.E.2d 369 (Ind. App. 1996), before addressing the issues on appeal the Indiana Court of Appeals initially remanded the case to the trial court to enter findings regarding its order closing the courtroom during the testimony of a confidential informant and, after receiving the findings, the appellate court then addressed the issues whether the trial court erred in closing the courtroom and whether the defendant was denied effective assistance of counsel because of counsel's failure to object to the closure. In *People v. Kline*, 197 Mich. App. 165, 494 N.W.2d 756 (1992), the court found the trial court had failed to make findings on the record to support the closure during the testimony of a young rape victim. The court recognized that the government may have a sufficient interest in protecting young witnesses in cases of alleged sexual abuse. *Id*. at 171. The court concluded that the failure to state findings on the record, in and of itself, did not require a new trial and remanded to the trial court with directions to supplement the record with the facts and reasoning on which the partial closure was based. *Id*. at 172. In *United States v. Galloway*, 937 F.2d 542, 547 (10th Cir. 1991), *vacated on other grounds*, 56 F.3d 1239 (10th Cir. 1995), the court held that

the appropriate remedy for the trial court's failure to make findings supporting partial closure is remand to the trial court to specify the facts and reasoning on which the closure was based.

In *Nieblas v. Smith*, 204 F.3d 29, 32 (2d Cir. 1999), the Second Circuit Court of Appeals concluded on collateral review that it is "particularly appropriate for a habeas court to gather additional evidence—rather than granting the defendant the 'windfall' of a new trial—where the alleged constitutional violation does not affect the fairness of the outcome at trial, as in courtroom closure cases like" the one at hand. *See also e.g.*, *Smith v. Hollins*, 448 F.3d 533, 541 (2d Cir. 2006); *Hoi Man Yung v. Walker*, 341 F.3d 104, 112 (2d Cir. 2003); *Bowden v. Keane*, 237 F.3d 125, 132 (2d Cir. 2001) (based on evidence gleaned from the record, the trial court did not abuse its discretion in closing the courtroom during the testimony of an undercover officer); *Brown v. Kuhlmann*, 142 F.3d 529, 537-38 (2d Cir. 1998); *Woods v. Kuhlmann*, 977 F.2d 74, 77-78 (2d Cir. 1992) (information from various parts of the record sufficiently justified partial, temporary closure); *Bell v. Jarvis*, 236 F.3d 149, 172 (4th Cir. 2000); *United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995); *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994) (court found sufficient support in the record for partial temporary closure); *Tinsley v. United States*, 868 A.2d 867, 880 n.19 (D.C. 2005); *McIntosh v. United States*, 933 A.2d 370, 379 (D.C. 2007) (the "court need not ignore record facts that indicate the courtroom closure may have been justified by compelling reasons"); *State v. Biebinger*, 585 N.W.2d 384, 385 (Minn. 1998) (appropriate initial remedy is remand for an evidentiary hearing

on whether closure is justified, not retrial); *State v. Infante*, 796 N.W.2d 349, 355 (Minn. App. 2011); *State v. Weber*, 137 N.H. 193, 196-97, 624 A.2d 967 (1993) (where a state statute improperly placed the burden on the defendant to show that closure was not required during the testimony of young victims of alleged sexual assault, and so violated the right to a public trial, the court remanded for a determination whether closure was justified under *Waller* test).

Unfortunately, when a posttrial inquiry is foreclosed, the result is that the defendant has a free pass to a second trial, all at enormous and unnecessary cost to the State of Washington, the justice system, the juries, the parties, the victims, and the witnesses.

Finally, an after-the-fact assessment of justification would not impair the constitutional right. As the majority points out in *Wise*, when the trial court in the first instance engages in the *Bone-Club* analysis and determines that closure is warranted, appellate review is conducted under the abuse of discretion standard. *Wise*, No. 82802-4 slip op. at 8. Because even this highly deferential standard sufficiently protects the constitutional right at stake, it follows that a standard and scope of review permitting inquiry under the *Bone-Club* criteria after the fact would not be constitutionally deficient review. It is simply not necessary to assume that a violation of the constitutional right must be found if no contemporaneous inquiry is made.

The court's decisions that failure to conduct an on-the-record inquiry at the time of closure mandates a new trial is a harsh rule that is not required by any United States

Supreme Court case, and numerous courts routinely make or call for after-the-fact assessments of whether a closure was justified and accordingly not a violation of the right to a public trial. After-the-fact determinations of whether a closure was justified should be permitted, on the record, on remand, or in a reference or other evidentiary hearing, as appropriate, by a reviewing court, the trial court, or superior court. I would conclude in *Wise*, *Paumier*, and *Morris* that a new trial is not necessary in every case where a *Bone-Club* or *Waller*-type inquiry on the record was not made prior to closure.

Applying the *Bone-Club* Inquiry into the Closures for Limited Questioning of Potential Jurors on Sensitive Subjects

Wise, *Paumier*, and *Morris* and other recent cases have involved individual voir dire of jurors out of the public eye. In addition to the costs outlined above, refusing to consider whether the closures were justified in these cases does a disservice to the members of the public who come to the courts as potential jurors, engaged in their civic duties, without whom the promise of a jury of one's peers cannot be carried out. As the United States Supreme Court explained when it addressed public access to voir dire in criminal cases, very private matters often arise in the process of jury selection. Potential jurors should be able to air these histories and experiences and problems *in private*:

> The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain. . . .
>
> To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of

> embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.

Press-Enter., 464 U.S. at 511-12.

Potential jurors come into the court with all of their most private experiences and history, including, for example, personal histories of sexual abuse as children or of sexual assaults as an adult; histories of objectively irrational but very real phobias that may be personally humiliating and which may arise during court proceedings; histories of criminal convictions; or physical conditions that causes the individual embarrassment and which may do so during a trial. It is simply not believable that individuals who would be forthcoming about such sensitive topics aired in the relative privacy of the judge's chambers or a closed court would respond with the same forthrightness if questioned in public view or that of the rest of the jury venire.

It is therefore to the benefit of our jury system and the goal of an impartial jury to allow private questioning. It is also to the benefit of the court, which must decide whether a juror may be dismissed for reasons that make jury duty an undue burden. It is clearly for the benefit of the individual potential jurors who would much prefer to offer such sensitive information in a private setting. It is to the benefit of the defendant, because it helps insure an impartial jury and, to the extent possible, assists the defendant in making informed assessments of a potential juror's full and honest responses in aid of decisions on preemptory strikes and challenges for cause.

As many courts have held, this practice, in and of itself, does not violate a

defendant's constitutional rights. *See Olano*, 62 F.3d at 1190-91 (the district court's one-on-one meeting to determine a juror's impartiality did not violate the right of confrontation or due process); *Parker v. United States*, 404 F.2d 1193, 1197 (9th Cir. 1968) (the district court correctly individually interviewed jurors, with only the court reported present, about what they had seen, heard, or read recently about the defendant's prior but now withdrawn guilty plea); *Polizzi v. United States*, 550 F.2d 1133, 1137 (9th Cir. 1976) (same); *see also United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (per curiam) ("'[t]he mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right'"; "'[t]he defense has no constitutional right to be present at every interaction between a judge and a juror'" (first alteration in original) (quoting *Rushen v. Spain*, 464 U.S. 114, 125-26, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) (Stevens, J., concurring in judgment)).

It is unimaginable to me that, when the proceedings are recorded and transcribed, the practice of *limited* questioning of *some* potential jurors in private on sensitive subjects to ensure candid and complete responses is not justifiable under *Bone-Club*.

An after-the-fact-review of the record under *Bone-Club* shows in each case: The interests of the defendant in obtaining truthful and complete responses for purposes of making informed decisions during jury selection and in a fair and impartial jury and a fair trial, and the interests of the jurors in their privacy and avoiding embarrassing exposure, together and in total overrode the defendant's interest in having this limited portion of

voir dire held in open court. These overriding interests were appropriately protected by the limited in-chambers questioning. The public's right to be informed about the court's procedures and what took place was not impeded because there is a transcript of the proceedings in each case that may be reviewed to see that no improper or suspicious activity took place. Actual jury selection did not take place in chambers, but instead the process was continued in open court where the jury was finally selected. Accordingly, if there were any members of the public who were aware of any reasons why a particular person should not have served as a juror and who should have had the opportunity to air this belief in open court or advised the defendant of concerns, this opportunity existed. To the extent a member of the public might have commented on the questions and answers given in private at the time they were provided, this possibility does exist but alone is not significant enough to preclude closure. Moreover, the defendants had the opportunity to object but did not do so, and they either participated in the process or waived the right to be present in the belief that their absence would ensure more forthright answers from the potential jurors. The questioning was limited, with the greater portion of voir dire occurring in the open courtroom.

With respect to whether there were any alternatives to the limited in-chambers questioning, this factor necessarily assumes the existence of the overriding interest or interests that must be protected, and the issue is whether that interest can be protected short of closure. *See Presley*, 130 S. Ct. at 725 (assuming an overriding interest in closing voir dire, the trial court must consider all reasonable alternatives to closure). No

matter how the court setting is arranged to assure the questioning is sufficiently private to encourage candid answers, by definition the proceedings will be private and the public would not have access to the procedure until the record is transcribed. But at that time, the juror is not actually in the public eye and not exposed to the embarrassment of which the Court spoke in *Press-Enterprise*.

I believe that the *Bone-Club* factors show the closures were justified.

In addition, the values served by the public trial right are not impaired by limited, private questioning of jurors on sensitive topics, and for the most part these values are not even implicated. In each of the cases a limited number of potential jurors were questioned briefly in private on a limited range of sensitive topics prior to jury selection in open court. As to the first value underscoring the right to a public trial, the defendants' rights to a fair trial were not implicated because there is no suggestion that the procedure resulted in anything but the selection of a fair and impartial jury. Indeed, the defendants' rights to a fair trial were advanced, not impeded, through private questioning that encouraged prospective jurors to speak freely about sensitive, but important matters bearing on their ability to serve impartially. The defendant's knowledge of the jurors was increased, which aided in jury selection.

The fact that this questioning might have led to some jurors being dismissed for cause, or through exercise of preemptory strikes, did not implicate the right to a public trial. That a different jury might have been seated can always be claimed. But obtaining a different jury is not one of the goals of the public trial right. Moreover, a defendant

does not have the right to have any particular juror sit on his or her case. *City of Tukwila v. Garrett*, 165 Wn.2d 152, 161, 196 P.3d 681 (2008); *State v. Phillips*, 65 Wash. 324, 327, 118 P. 43 (1911).

As to the second value, there is nothing about this limited portion of voir dire that lessened the mindfulness of officers of the court of the importance of their respective roles in the defendant's trial. Because of the public record contemporaneously being prepared, the judges and prosecutors were reminded of the importance of their responsibilities, knowing their performance of these responsibilities would become part of the public record. This served to ensure the officers of the court appropriately carried out their duties.

As the United States Supreme Court said in *Press-Enterprise* about limited, private questioning of potential jurors and the public right of access to the courts: "When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests." *Press-Enterprise*, 464 U.S. at 512. The Court added that "[e]ven then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment." *Id*. In each of these cases, the proceedings were recorded and transcribed, as noted.

Finally, as to the third and fourth values served by the right to a public trial, the

private questioning occurred before the prosecution and defense presented their cases. Thus, the closures had no bearing on whether witnesses were encouraged to come forward and speak truthfully, and the third and fourth values were not implicated by the closures.

In summary, the *Bone-Club* inquiry discloses no basis in *Wise*, *Paumier*, or *Morris* for reversing the defendants' convictions and remanding for new trials. And the values served by the right to a public trial are not disserved by the individual questioning of individual potential jurors on sensitive subjects. The records in these cases show that the temporary closures for limited questioning of jurors on sensitive topics did not violate the defendants' rights to public trials because the closures were justified in each case.

However, *even if* one concludes that one or more of the records in these three cases is not adequate to conduct a *Bone-Club* inquiry, the appropriate course in *Wise*, and *Paumier* would then be remand for fact-finding on the issue, and in *Morris* a reference hearing should be ordered for the purpose of conducting a *Bone-Club* inquiry.[8] If in any

[8] The court should decline to follow the path in *Orange*, where the court ordered a reference hearing for the purpose of determining the effect of the trial court's ruling on the courtroom closure that occurred during the voir dire in the defendant's trial. *Orange*, 152 Wn.2d at 803. However, in examining the trial court's order entered during the trial to measure it against the required *Bone-Club* inquiry, the court disregarded the findings in the reference hearing, saying:

> [C]onsistent with our observation in *Bone–Club* that "determination of a compelling interest [is] the affirmative duty of the trial court, not the court of appeals," 128 Wn.2d at 261, we emphasize that it was the trial court's affirmative duty, not the duty of the superior court in a reference hearing more than eight years later, to identify the compelling interest justifying the encroachment on Orange's constitutional right to a public trial. The trial court did not fulfill that duty.

Orange, 152 Wn.2d at 810 (second alteration in original). Findings from a reference hearing should be given weight.

of these cases it proves impossible to conduct a posttrial inquiry that is sufficient to satisfy constitutional concerns, then new trials would be appropriate.

Violation of the Public Trial; Failure To Object and Structural Error

The next issues concern what is required to assure that claimed error consisting of a violation of the public trial right is preserved, and what showing must be made to obtain a remedy for a violation. Again, I will address *Wise*, *Paumier*, and *Morris*, but given the dissents in these cases that explain the majorities' failures to follow the appellate rules, my aim is more to show how the majorities' approach is far more strict than required under the United States Supreme Court's decisions and is also inconsistent with the decisions of courts in numerous other jurisdictions.

Review should proceed in accord with the Rules of Appellate Procedure. When constitutional error is claimed and no objection was made at trial, review should proceed under RAP 2.5(a)(3) for claimed manifest error affecting a constitutional right. This court went astray in *Bone-Club* when it reverted to *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923) for a rule that no objection is required for review of a claim that the right to a public trial was violated and review proceeds the same as if an objection had been made. *Marsh* greatly preceded the Rules of Appellate Procedure, and although it accurately stated the law of its time regarding claimed constitutional error in general, we should adhere to our present court rules that govern appellate review of claimed constitutional error.

This means that when a defendant fails to object to a courtroom closure on the ground that the closure violates the right to a public trial, to obtain review the defendant must demonstrate that the error is truly a constitutional error and establish actual prejudice. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). The latter requirement means the defendant must make a plausible showing that the error had practical, identifiable consequences. *Id*.

Here, these requirements have been bypassed by the majorities on the basis that a courtroom closure in the absence of an on-the-record *Bone-Club* inquiry is always structural error. The failure to object will never have any effect in a case where there has been a closure of any nature, extent, or duration, and no *Bone-Club* inquiry will ever have occurred. The claimed error will always be constitutional and it will always be manifest and it will always be reversible error, because it will always be structural. A defendant will always be able to surmount the requirements of RAP 2.5(a)(3) without ever satisfying them.

That this is a poor result cannot reasonably be doubted. As explained above, the closures in *Wise*, *Paumier*, and *Morris* during voir dire for brief, limited purposes were fully justified under the *Bone-Club* criteria. But under the decisions in these cases, error is deemed to be structural solely because of the failure to engage in the on-the-record *Bone-Club* inquiry. Period. This trivializes the importance of the right to a public trial, the need for fair and impartial juries, and it causes misuse of our justice system for unnecessary trials.

The majorities' reactive conclusion that structural error occurred that requires new trials is incorrect for at least two reasons. First, the absence of the *Bone-Club* inquiry in these cases should not lead to the automatic conclusion that the error is structural error. Structural error is error that is defies harmless error analysis and "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (alteration in original) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). The majorities' conclusions that structural error occurred is founded on numerous statements by the United States Supreme Court that structural error in the form of a violation of the right to a public trial occurred in *Waller*. *E.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

However, the dissent in *Paumier* is correct that the Court has never held that every public trial violation, no matter the nature, degree, or extent, is structural error. The Court has never addressed the issue, and has never even addressed structural error in any case that involved the right to a public trial.

Waller itself is, in some ways, a difficult case to place in the structural/nonstructural arena. The Court determined that the record conclusively showed that the complete closure of the suppression hearing in the case was not justified, i.e., the defendants'[9] constitutional rights to a public trial had *in fact* been violated. *See Waller*,

[9] I address below the one defendant in *Waller* who did not object during the state trial and the effect of that failure to object.

467 U.S. at 49 (the State had maintained that privacy interests had to be protected by closing the suppression hearing, and the only relevant evidence related to possible privacy interests consisted of tape recordings of intercepted telephone conversations; the Court determined that "[a]s it turned out, of course, the closure was far more extensive than necessary [because] [t]he tapes lasted only 2½ hours of the 7-day [suppression] hearing"). Thus, there was in fact a violation of the right to a public trial in *Waller*.

The Court remanded to the state courts to determine what portions, if any, of a new suppression hearing could be closed. *Id.* at 50. This alone makes the case quite different—essentially the Court allowed the state court a chance to engage in an inquiry into a possible justified closure of the new suppression hearing (which, from the Court's decision, would most likely involve closure of only a part of the new suppression hearing). The Court also said that a new trial would be necessary only if a new, public hearing resulted in suppression of material evidence not suppressed at the original trial. *Id.* The Court said that "[i]f, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest." *Id.* Thus, there was no automatic reversal of the convictions in *Waller* and no mandate that a new trial is necessary, as one might expect from structural error. Rather, remedy is to be appropriate to the error. *Id.*

But the present cases are not like the situation in *Waller* involving a total closure of a significant part of the criminal proceedings (the entire suppression hearing lasting over seven days) where the record affirmatively showed that the total closure was not

justified by the reason proffered by the State. Here, unless the court permits a posttrial *Bone-Club* inquiry to determine whether the limited private questioning was justified under the *Bone-Club* criteria, all that can be said is that there (a) *may have been* a public trial violation, i.e., it is possible that there was a real violation where the proceedings were unjustifiably closed—and (b) there *was* actual error in failing to make the *Bone-Club* inquiry on the record, but this does not mean that the closures were not actually justified or justifiable.

Given the kind of error that occurred in these three cases, the structural error analysis does not fit. The error that actually occurred was the failure in each case to engage in the proper inquiry into whether closure was justified and this error could be remediated through an after-the-fact *Bone-Club* inquiry in each case. Because of the possibility of a positive determination[1] that no constitutional public trial error actually occurred, the error of failing to conduct the inquiry is not an error that "*necessarily* render[s] a criminal trial fundamentally unfair," *Neder*, 527 U.S. at 9, because correcting the error by a posttrial inquiry can eliminate any question of a violation of the constitutional right to a public trial. It is also not an error that would "*necessarily* render[]" the trial "an unreliable vehicle for determining guilt or innocence" for the same reason.

If it turns out that the inquiry cannot be made, for whatever reason, or that the inquiry establishes that closure was not justified, then, I believe, the cases enter the realm

[1] By "positive" I mean that factually the constitutional violation that is claimed did not in fact exist and this can be positively established.

of constitutional error that must be further addressed.[11]

Presley, the most recent United States Supreme Court decision on the right to a public trial, was decided after *Fulminante* and other cases that referred to *Waller* as involving structural error. It was also decided after *Recuenco*, *Neder*, and *Fulminante*, cases discussing the structural error doctrine in detail. In *Presley*, the entire voir dire was closed.

The Court held only that the trial court erred when it failed to sua sponte consider alternatives to total closure of voir dire, and did not address the issue whether the closure was justified although it was asked to. The Court commented only that there was some merit to the argument because the "generic" risk of jurors overhearing prejudicial comments, without any more specificity, is inherent whenever the public is present and consequently this "broad concern[]" stated by the trial court would permit closing voir dire "almost as a matter of course." *Presley*, 130 S. Ct. at 725.

The Court remanded to the state court for further proceedings consistent with its opinion and did not discuss structural error or order a new trial as one might expect if the decisions in *Wise*, *Paumier*, and *Morris* were correct in describing a mandatory structural error analysis under the federal constitution. Rather, the Court remanded for additional

[11] Even if the closure is ultimately found to be structural error, this does not mean that appellate rules cannot be applied. The United States Supreme Court has explained that the federal plain error rule of Federal Rule of Criminal Procedure 52 applies even in the context of structural error. In response to a petitioner's argument that the error of which she complained was structural and so outside Rule 52(b), the Court said that "*the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure*." *Johnson v. United States*, 520 U.S. 461, 466, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (emphasis added).

proceedings consistent with its opinion. *Id*. The Court's remand instructions are open to the possibility that a posttrial consideration of alternatives could still be made to see whether the closure was actually justified (although, given the Court's comments, it appears there may have been no justification that would suffice given the record).

Thus, *Presley* also does not direct that error is structural where it consists of the failure to engage in a *Waller*-type or a *Bone-Club* inquiry.

The second reason why I do not agree with the determinations in *Wise*, *Paumier*, and *Morris* that structural error occurred that requires new trials is because this assumes that if a violation of a constitutional right in one context is structural, then that category of constitutional error will always be structural.

Our decision in *Momah* is to the contrary. There, we described previous cases as involving structural error because "[p]rejudice to the defendant in those cases was sufficiently clear and required the remedy of a new trial." *State v. Momah*, 167 Wn.2d 140, 151, 217 P.3d 321 (2009). However, in *Momah* no structural error occurred because the record showed the closure was justified. *Id*. at 156.

But in a peculiar reversal of the normal rules for adhering to precedent rather than minority opinions, the majority in *Wise* relies on the plurality opinion in *Strode* for the premise that failure to conduct the *Bone-Club* inquiry is always structural error. *Wise*, No. 82802-4, slip op. at 13 (citing *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009) (Alexander, C.J., plurality)). The majority in *Wise* ultimately ignores the holding in *Momah*, going to great lengths to try to distinguish *Momah* by describing it three times

as factually unique. *Id.* at 12-13. Every public trial case is factually unique and the distinction is unconvincing.

That violation of the same constitutional right can be structural error in one instance and not in another is not a remarkable idea. The example provided in the *Paumier* dissent is illustrative and shows the improvident results that can ensue from a rule that if one violation of the right to a public trial is structural, then all are. *Paumier*, No. 84585-9, slip op. at 5-6 (Wiggins, J., dissenting) (quoting *Gibbons v. Savage*, 555 F.3d 112, 119-20 (2d Cir. 2009)). In *Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir. 1996), the court also addressed this question. In the following quoted passage, the court explains how the United States Supreme Court's complete analysis in *Fulminante* and the Court's cases show that the same constitutional violation may be structural in one context and subject to harmless error analysis in another:

> We do not understand *Fulminante*'s list of examples of violations that have been held exempt from harmless error review to mean that any violation of the same constitutional right is a "structural defect," regardless whether the error is significant or trivial. Nor does the fact that the Supreme Court has applied harmless error analysis to one level of violation of a particular right necessarily mean that even the most egregious violations of that right would also require demonstrated prejudice. Unless the Supreme Court has held otherwise, errors of a quality that undermines the structural integrity and fairness of the proceeding might be deemed structural, notwithstanding that less significant violations of the same constitutional right have been subjected to harmless error analysis. To determine whether an error is properly categorized as structural, we must look not only at the right violated, but also at the particular nature, context, and significance of the violation.
>
> The examples cited by the Supreme Court in *Fulminante* support this understanding. *Fulminante* distinguishes between errors of sufficient magnitude or significance that they call into question the validity of the proceeding and are therefore deemed structural, and trivial violations of the

> same rights which are not. Thus, *Fulminante* lists the "total deprivation of the right to counsel" as a structural error, 499 U.S. at 309, 111 S.Ct. at 1265 (citing *Gideon* [*v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)]), but at the same time notes that a less significant denial of the right to counsel (at a preliminary hearing) has been held to be subject to harmless error review. 499 U.S. at 307, 111 S.Ct. at 1263 (citing *Coleman v. Alabama*, 399 U.S. 1, 10-11, 90 S.Ct. 1999, 2003-04, 26 L.Ed.2d 387 (1970)). Similarly, *Fulminante* cited *Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983), as an example of a presence violation subject to harmless error review. 499 U.S. at 307, 111 S.Ct. at 1263. In *Rushen*, a defendant's absence from two conversations between the trial judge and a juror was held to be harmless error. 464 U.S at 120-21, 104 S.Ct. at 456-57. That very opinion, however, makes clear that in egregious circumstances a violation of the right of presence might be exempt from harmless error review. *See Rushen*, 464 U.S. at 117 n. 2, 104 S.Ct. at 455 n. 2 (explaining that "violations of the right to be present during all critical stages of the proceedings" are, "as with most [violations of] constitutional rights, . . . subject to harmless-error analysis, *unless the deprivation, by its very nature, cannot be harmless* ") (emphasis added) (internal citations omitted). We therefore do not read *Rushen* as supporting the proposition that unjustified exclusion of the defendant from the entire trial would be subject to harmless error review.

Yarborough, 101 F.3d at 897-98 (alterations in original) (footnote and citation omitted); *see also Brown*, 142 F.3d 529; *United States v. Harbin*, 250 F.3d 532, 544 (7th Cir. 2001).

In *United States v. Pearson*, 203 F.3d 1243, 1261 (10th Cir. 2000), the court also concluded that the occurrence of structural error in one context does not mean that in another context the same constitutional violation is necessarily structural. Like the Second Circuit, the court held that whether error is structural depends not only on whether the constitutional right is violated, but also on nature, context, and significance of the violation. *Id*. Then, carrying forward the *Yarborough* court's comments about

Rushen, the Tenth Circuit explained that while the defendant's absence when the judge engaged in two conversations with a juror was subjected to harmless error review in *Rushen*, an unjustified exclusion of the defendant from an entire trial would constitute structural error. *Id*. This can hardly be doubted, serving to show that just because the Court has identified harmless error in one context does not mean the error would not be structural in another.

The dissent in *Paumier* shows that no structural error occurred there. *Paumier*, No. 84585-9, slip op. at 4-9 (Wiggins, J., dissenting). The dissent examines the record and applies the same analysis used in *Momah*, establishing why the in-chambers voir dire in *Paumier* did not constitute structural error. *Paumier*, No. 84585-9, slip op. at 7 (Wiggins, J., dissenting). The factual record shows that the limited private voir dire did not render the trial unfair and it did not turn the trial into an unreliable vehicle for determining guilt or innocence. *See id.* at 7-9. The same is true in *Wise*, and *Morris*. Thus, even though a violation of the public trial right may be structural error in some contexts, it is not in these cases.

In summary, even if a violation of the right to a public trial is structural error in some cases, it is not in these cases. First, nothing in the United States Supreme Court's decisions on the public trial right or on structural error demands that error in failing to conduct an inquiry into whether closure is justified must invariably be deemed structural error. The same should be true under article I, section 22. In the present cases, it is entirely possible that a posttrial inquiry, on the record or by remand for fact-finding or a

hearing, will show that no violation of the right to a public trial occurred. In this event, no structural error would have occurred, and none should be assumed in the absence of the after-the-fact inquiry.

Second, even though the violation of the public trial right is structural error in some contexts, it is not in all contexts, as this court held in *Momah*. The majorities in *Wise*, *Paumier*, and *Morris* should adhere to the holding in *Momah* that not every public trial violation is structural error. Finally, even if the ultimate conclusion in each of these cases is that a violation of the constitutional right to a public trial occurred, the error was not structural. If nothing else, the proceedings from the in-chambers questioning were transcribed as part of the public record. With this, the constitutional values were protected, as the Court explained in *Press-Enterprise*, and there can be no question of untoward conduct occurring during the closure.

Applying the Rules of Appellate Procedure; Failure To Object

The next area I discuss involves the effect of the failure to contemporaneously object to closure and the impact this has on the right to appellate review. My purpose in exploring this matter is again to show how strict this court's analysis of claimed violations of the public trial right is.

As explained above, under our rules review of a claimed error of constitutional magnitude is not necessarily forfeited if the defendant fails to object. Many courts in other jurisdictions hold, however, that the failure to object to closure precludes review entirely. That this is constitutionally permissible in the context of the right to a public

trial is clear under decisions of the United States Supreme Court.

In the context of a due process right to a public proceeding that the Court said was akin to the Sixth Amendment right to a public trial, the Court held that the due process right was waived by the defendant's failure to request that the proceedings that were previously closed for grand jury proceedings be opened for the criminal contempt proceeding that followed. *Levine v. United States*, 362 U.S. 610, 618-19, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960). Then, in *Waller* itself, the Court made it clear that a state procedural bar to consideration of a claimed violation of the Sixth Amendment right to a public trial may apply in the absence of an objection. The Court explained that most of the defendants in the case objected to the closure but one did not (and in fact joined the prosecution in seeking closure).[12] The Court held that on remand the state courts could determine whether the nonobjecting defendant was procedurally barred from any relief. *Waller*, 467 U.S. at 42 n.2.

The fact that review of a claimed violation of the right to a public trial can be lost through the failure to object is not a remarkable premise. It is simply one of many rights

[12] The Court explained in a footnote:

> Counsel for petitioners Waller, Thompson, Eula Burke, and W. B. Burke lodged an objection to closing the hearing. *Counsel for petitioner Cole concurred in the prosecution's motion to close the suppression hearing*. App. 14a, 15a. Respondent argues that Cole is precluded from challenging the closure. The Georgia Supreme Court appears to have considered the objections of all the petitioners on their merits. 251 Ga. 124, 126–127, 303 S. E. 2d 437, 441 (1983). Cole's claims in this Court are identical to those of the others. Since the cases must be remanded, we remand Cole's case as well. *The state courts may determine on remand whether Cole is procedurally barred from seeking relief as a matter of state law.*

Waller, 467 U.S. at 42 n.2 (emphasis added).

that the Court has explicitly listed where appellate review can be forfeited through failure to object. In *Peretz v. United States*, 501 U.S. 923, 936-37, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991), the Court observed:

> The most basic rights of criminal defendants are similarly subject to waiver. See, *e.g.*, *United States* v. *Gagnon*, 470 U. S. 522, 528 (1985) (absence of objection constitutes waiver of right to be present at all stages of criminal trial); *Levine* v. *United States*, 362 U. S. 610, 619[, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989] (1960) (failure to object to closing of courtroom is waiver of right to public trial); *Segurola* v. *United States*, 275 U. S. 106, 111[, 48 S. Ct. 77, 79, 72 L. Ed. 186] (1927) (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States* v. *Figueroa*, 818 F. 2d 1020, 1025 (CA1 1987) (failure to object results in forfeiture of claim of unlawful post arrest delay); *United States* v. *Bascaro*, 742 F. 2d 1335, 1365 (CA11 1984) (absence of objection is waiver of double jeopardy defense), cert. denied *sub nom. Hobson* v. *United States*, 472 U. S. 1017 (1985); *United States* v. *Coleman*, 707 F. 2d 374, 376 (CA9) (failure to object constitutes waiver of Fifth Amendment claim), cert. denied, 464 U. S. 854 (1983). See generally *Yakus* v. *United States*, 321 U. S. 414, 444[, 64 S. Ct. 660, 677, 88 L. Ed. 834] (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right").

In addition to these rights, the Court has found that the failure to object can also forfeit the right (often the word "waive" is used) to review of a claimed violation of the right of confrontation, and States may establish procedural rules governing the matter. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). And review of claimed violations of the rights to remain silent and to an attorney can be barred in postconviction proceeding under procedural default rules. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 359, 126 S. Ct. 2669, 165 L. Ed 2d 557 (2006) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)).

In fact, the Court's holding in *Waller* specifically reflects the recognition that the failure to object can preclude state review of a claimed violation of the public trial right. The Court said, "[W]e hold that under the Sixth Amendment any closure of a suppression hearing *over the objections of the accused* must meet the tests set out in *Press–Enterprise* and its predecessors." 467 U.S. at 47 (emphasis added). In the Court's most recent case involving the public trial right, *Presley*, 130 S. Ct. 721, there was a contemporaneous objection. The Court has never indicated that appellate review is required in the absence of an objection. In accord with these decisions, numerous courts have held or recognized that the failure to contemporaneously object to a claimed violation of the right to a public trial can subject the claimed error to forfeiture rules on direct or collateral review.

Such cases include: *Bucci v. United States*, 662 F.3d 18, 29 (1st Cir. 2011), *cert. denied*, 2012 WL 2807825 (U.S. Oct. 1, 2012); *Downs v. Lape*, 657 F.3d 97 (2d Cir. 2011) (recognizing state procedural rule), *cert. denied*, 132 S. Ct. 2439 (2012); *United States ex rel. Bruno v. Herold*, 408 F.2d 125, 128-29 (2d Cir. 1969); *United States v. Bansal*, 663 F.3d 634, 661 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2700 (2012); *United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006) (and noting that claim was of structural error); *Tillman v. Bergh*, 2008 WL 6843654, at *15 (E.D. Mich. 2008) (unpublished); *Chase v. Berbary*, 404 F. Supp. 2d 457, 464 (W.D.N.Y. 2005); *Wright v. State*, 340 So. 2d 74, 79-80 (Ala. 1976) (accused may waive the right to a public trial expressly or by failing to object); *Fisher v. State*, 480 So. 2d 6, 7 (Ala. Crim. App. 1985) (same); *People v. Edwards*, 54 Cal. 3d 787, 812-13, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991); *People v.*

Lang, 49 Cal. 3d 991, 1028, 782 P.2d 627, 264 Cal. Rptr. 386 (1989); *People v. Bradford*, 14 Cal. 4th 1005, 1046-47, 929 P.2d 544, 60 Cal. Rptr. 2d 225 (1997); *Masingh v. State*, 68 So. 3d 383 (Fla. Dist. Ct. App. 2011); *Alvarez v. State*, 827 So. 2d 269, 273-76 (Fla. Dist. Ct. App. 2002); *Hunt v. State*, 268 Ga. App. 568, 571, 602 S.E.2d 312 (2004); *State v. Loyden*, 2004-1558, 899 So. 2d 166, 179 (La. App. 3 Cir. 4/6/05); *Robinson v. State*, 410 Md. 91, 976 A.2d 1072 (2009) (stating that the fact structural error is involved does not mandate appellate review); *Commonwealth v. Cohen*, 456 Mass. 94, 105-06, 921 N.E.2d 906 (2010) (court looks to whether defendant raised claim of violation of right to a public trial in a timely matter because, like other structural rights, can be waived); *Commonwealth v. Wells*, 360 Mass. 846, 274 N.E.2d 452 (1971); *People v. Vaughn*, 491 Mich. 642, 821 N.W.2d 288 (2012); *People v. Pollock*, 50 N.Y.2d 547, 550, 407 N.E.2d 472, 429 N.Y.S.2d 628 (1980); *People v. Marathon*, 97 A.D.2d 650, 469 N.Y.S.2d 178 (1983); *State v. Butterfield*, 784 P.2d 153, 155-57 (Utah 1989).

Thus, review of even so highly valued a right as the right to a public trial may be procedurally barred in other jurisdictions when the defendant fails to object to closure.

This court, however, has repeatedly held that an objection is not required to preserve this claimed error in our state courts. *E.g.*, *Brightman*, 155 Wn.2d at 514-15; *Orange*, 152 Wn.2d at 800; *Bone-Club*, 128 Wn.2d at 257. This conclusion is consistent with review of other claims of violations of constitutional rights under the rules. As explained above, under RAP 2.5(a), the court will address manifest error affecting a constitutional right for the first time on appeal. But the holdings in *Brightman*, *Orange*,

and *Bone-Club* are not based on RAP 2.5(a), but instead on *Marsh*.

Permitting review of unobjected-to claimed constitutional error is within the scope of our appellate rules, as the court acknowledged in *State v. Easterling*, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006). *Easterling* involved a claimed violation of the public trial right, and the court seemed in that case to be on track with its own rules, saying that "'[w]e have the discretion to review an issue raised for the first time on appeal when it involves a 'manifest error affecting a constitutional right.'" *Id*. (quoting RAP 2.5(a) and citing RAP 13.4). But rather than following the rule, the majority in *Paumier* says that "RAP 2.5(a) does not apply in its typical manner here." *Paumier*, No. 84585-9, slip op. at 7. This is the point at which the majority sweeps the entire scheme of appellate review under the rules aside with the conclusion that structural error occurs when no *Bone-Club* inquiry is made on the record at the time of closure. With this breathtaking, and incorrect, conclusion, the majority completely dispenses with the rules for addressing constitutional error on review.

When RAP 2.5(a) is actually followed, the defendants in *Wise* and *Paumier* lose their cases, even assuming the in-chambers partial voir dire violated the right to a public trial. This is because, as explained by the dissent in *Paumier* and Justice Wiggins' concurrence in *Sublett*, these defendants have not established practical and identifiable consequences to the trial of the case—they have not established they were actually prejudiced by the in-chambers limited, private question of some of the members of the venire. *Paumier*, No. 84585-9, slip op. at 14 (Wiggins, J., dissenting); *Sublett*, No.

84856-4, slip op. at 7-8 (Wiggins, J., concurring).

The Ineffective Assistance Claim in *Morris*

Morris is here on collateral review of claims that the petitioner's right to a public trial was violated by the limited questioning of some prospective jurors in chambers on sensitive subjects and that his appellate counsel was ineffective for failing to raise the violation on direct review. The majority concludes that the case is analytically indistinguishable from *Orange* and as in *Orange* reversal and a new trial are required.

Insofar as the bare claim of a violation of the right to a public trial is concerned, this case is no different from *Wise* and *Paumier*. The error is not necessarily a violation of the right to a public trial that must be equated to structural error because there has been no determination whether closure was justified. At most, error consists of the failure to conduct the *Bone-Club* inquiry and the appropriate course at this point is to carry out this inquiry if possible. I believe this can be done on the existing record, as explained, but alternatively a reference hearing should be ordered in this case for the purposes of determining whether the closure was justified.[13] There is simply no constitutionally-founded basis that forbids an after-the-fact inquiry into whether the in-chambers questioning was justified.

As to the ineffective assistance claim, the dissent by Justice Wiggins shows that

[13] But as explained above, unlike the court's approach in *Orange*, we should consider the resulting findings on whether closure was justified.

this case is factually unlike *Orange*. In *Orange*, there was an objection at trial to the closure but appellate counsel failed to raise the issue on appeal, with no conceivable strategic reason for failing to do so. The dissent explains that the alleged error in *Orange* was conspicuous in the record.

I add that in the present case there is an obvious basis for believing that closure was justified, and this also distinguishes this case from *Orange*. *Orange* should not compel the result in this case.

Moreover, when the claim is that counsel was ineffective at trial for failing to object to closure, other courts have remanded for evidentiary hearings on relevant matters. In the habeas proceeding in *Owens v. United States*, 483 F.3d 48, 61-66 (1st Cir 2007), the court was faced with claims that trial and appellate counsel were ineffective for failing to raise the issue of a violation of the petitioner's right to a public trial. The court remanded for an evidentiary hearing, in part to determine whether the trial was actually closed. *Id*. at 66.

In *Johnson v. Sherry*, 586 F.3d 439, 444-46 (6th Cir. 2009), also a federal habeas case, the court granted the prosecution's motion to close the courtroom on the ground that two witnesses had been killed and others were afraid to testify, and defense counsel acquiesced in closure despite the court's reluctance to close the courtroom. The petitioner argued that despite his counsel's failure to object, his public trial claim was not defaulted because his counsel was constitutionally ineffective in failing to object to closure. The court was skeptical about whether the closure was justified and uncertain

whether there might have been a strategic reason for failing to object, for example knowledge that the defendant's family members had a history of contact with witnesses or other facts than what the record showed. *Id*. at 446. The court remanded for an evidentiary hearing on the issue whether closure was justified, which would bear on whether counsel was ineffective for failing to object.

As in these cases, a reference hearing in Mr. Morris's case could address the question whether closure was justified.

As to the prejudice prong of the ineffectiveness analysis, courts have held that when the denial of a public trial is the foundation of a claim of ineffective assistance of counsel, actual prejudice to the outcome of the case must be shown, in the sense of having an impact on the outcome of the trial. In *Purvis v. Crosby*, 451 F.3d 734 (11th Cir. 2006), a habeas petitioner argued that his counsel was ineffective for failing to object to closure of the courtroom during testimony of the young victim. The court explained that assuming the partial closure in the case at hand was a structural defect for which no showing of prejudice was required on direct review, the same was not true for a claim raised on collateral review in the context of an ineffective assistance of counsel claim based on counsel's failure to object to closure. *Id*. at 740. The court found this conclusion to be necessary under *Strickland v. Washington*, 466 U.S. 668, 692-93, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), where the Court explained the limited circumstances in which prejudice must be assumed but directed that in other circumstances attorney errors "cannot be classified according to likelihood of causing prejudice." The three

circumstances identified by the Court are (1) "'[a]ctual or constructive denial of the assistance of counsel altogether,'" (2) "'various kinds of state interference with counsel's assistance,'" and (3) "where counsel is burdened by conflicting interests arising from multiple representation[s]." *Purvis*, 451 F.3d at 740-41 (quoting *Strickland*, 466 U.S. at 692).[14] The Eleventh Circuit concluded:

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[14] The Court in *Strickland* stated:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States* v. *Cronic*, 466 U. S. [648,] 659, and n. 25[, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)]. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. [466 U.S.] at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.
>
> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler* v. *Sullivan*, 446 U. S. [335,] 345–350[, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)], the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, *e.g.*, Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler*[, 446 U.S. at 350] (footnote omitted).
>
> Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what

> We cannot hold that attorney error in failing to object to the closure of the courtroom is so likely to result in prejudice that we will presume it . . . . We cannot dispense with the prejudice requirement for attorney error of this type without defying the Supreme Court's clear holding that except in three limited circumstances, which are not present here, a defendant must show that any error his counsel committed "actually had an adverse effect on the defense."

Purvis, 451 F.3d at 741 (quoting *Strickland*, 466 U.S. at 693); *accord Torres v. McNeil*, 2010 WL 5849880, at *19-21 (N.D. Fla. 2010) (where denial of a public trial is the basis for a claim of ineffective assistance of counsel, prejudice to the outcome, i.e., the determination of guilt, must be shown); *Tillman*, 2008 WL 6843654, at *14 n.5 (notwithstanding fact that a public trial claim is not subject to harmless error review, when a petitioner contends that counsel was ineffective for failing to object to closure of the courtroom prejudice must still be established); *see also Virgil v. Dretke*, 446 F.3d 598, 607 (5th Cir. 2006) (declining to hold in the context of a claim of ineffective assistance of counsel that structural error is sufficient alone for a presumption of prejudice).

Other courts have disagreed. The court in *Owens*, 483 F.3d at 64, concluded that a violation of the right to a public trial is structural error and it is impossible to determine whether structural error is prejudicial, therefore, assuming the failure to object was not a strategic decision, actual prejudice need not be shown. *Id.*; *accord Johnson*, 586 F.3d at

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> conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

Strickland, 466 U.S. at 692-93.

447.

As Justice Wiggins' dissent in *Morris* explains, this court has declined to hold that per se reversible error on direct appeal requires reversal on collateral review. *Morris*, No. 84929-3, slip op. at 3-4 (Wiggins, J., dissenting); *see In re Pers. Restraint of Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992). This strongly suggests that on collateral review this court should not presume prejudice from the nature of the error.

Moreover, while I recognize the difficulty of determining prejudice where denial of the right to a public trial is at issue, there are distinctions that can be drawn. Here, the record shows that only a limited part of voir dire was closed, that the proceedings during this time were recorded and transcribed, and that the balance of voir dire was conducted in open court where the jury was finally selected. Because of these circumstances, the values underlying the right to a public trial were not impaired by the limited closure that occurred, as I explain above. I believe that the facts in this case do not support a presumption of prejudice on collateral review.[15]

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[15] It is illuminating to compare application of a presumption of prejudice on collateral review in *Morris* when the only error consists of failing to conduct the on-the-record inquiry, to the review standard applied on direct review to many claims of violations of many important constitutional rights. Harmless error analysis applied in context of: (1) the right to remain silent: *State v. Burke*, 163 Wn.2d 204, 222-23, 181 P.3d 1 (2008); *State v. Easter*, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996); *State v. Sweet*, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999); (2) the right to confront witnesses: *State v. Koslowski*, 166 Wn.2d 409, 431-32, 209 P.3d 479 (2009); *State v. Mason*, 160 Wn.2d 910, 927, 162 P.3d 396 (2007); (3) the right to compel the attendance of witnesses: *State v. Maupin*, 128 Wn.2d 918, 928-30, 913 P.2d 808 (1996); (4) the right to be present at all critical stages of the trial: *State v. Irby*, 170 Wn.2d 874, 885-86, 246 P.3d 796 (2011); and (5) the right to present a defense: *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010).

Of course, I do not mean to imply that the right to a public trial, when the courtroom is closed without justification, is subject to a harmless error standard; it is not. But my comparison is to show the incongruity of applying on collateral review a presumption of prejudice in *Morris*,

In the end, the court cannot say definitively that the defendant was denied his right to a public trial. Rather, the most that can be said is that there was no determination on the record as to whether the limited closure was justified. I would, as explained above, engage in the *Bone-Club* analysis on the record in this case and conclude that no unjustified closure occurred. This aside, however, the court should not conclude that appellate counsel was ineffective without ordering a reference hearing to determine whether any unjustified closure occurred. The court's findings entered after such a hearing should be accorded deference.

Assuming that the Failure To Engage in the *Bone-Club* Inquiry Itself Is an Independent Violation of the Right to a Public Trial, What Is the Appropriate Remedy

Finally, I briefly turn to the issue of what remedy should be provided if the right to a public trial exists solely of an independent right to the *Bone-Club* inquiry itself without regard to whether a closure was in fact justified, when no on-the-record inquiry was made at the time of closure. As the court explained in *Momah*:

> In *Waller*, the trial court closed the courtroom for a suppression hearing over the objections of the defendant and, on review, the Supreme Court held that the defendant was entitled to a new suppression hearing, but not automatically a new trial. The Court reasoned that "the remedy should be appropriate to the violation" and if it were to automatically grant a new trial without requiring a new hearing, the result would be a "windfall for the defendant" and would thus "not [be] in the public interest." *Waller*, 467 U.S. at 50. The Court did *not* conclusively presume prejudice and grant automatic reversal of the defendant's conviction and a new trial. Rather, in *Waller*, the Court required a showing that the defendant's case was actually rendered unfair by the closure.

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when the only violation that can at this point be said to have occurred is the failure to conduct a *Bone-Club* inquiry.

Momah, 167 Wn.2d at 150 (alteration in original).

Accordingly, the remedy in these cases should be appropriate to the violation. The only violation that the majorities identify in these cases is the failure to conduct the on-the-record *Bone-Club* inquiry. Remedying this error requires only that such an inquiry occur. Accordingly, even viewing the need for a *Bone-Club* inquiry as an independent constitutional right, the appropriate course in these cases is still an after-the-fact *Bone-Club* inquiry, either on the record or through remand for fact-finding or a hearing. This course is analogous to the remedy in *Waller*, where the Court determined there was at least to some extent an unjustified closure, and then remanded for a new suppression hearing preceded by an inquiry into how much, if any, of the new hearing should be closed. The majorities' insistence that a new trial is required does not accord with *Momah* or *Waller*.

In summary, even assuming that the failure to conduct the *Bone-Club* inquiry is the constitutional violation in these cases, the appropriate remedy is a *Bone-Club* inquiry. Once this remedy is afforded in each case, the closure either will be found to be justified, which would completely resolve any public trial claim, or it will be found not justified or indeterminable. Only in the latter two instances is there a need to consider any further remedy.

Conclusion

I concur in the decision in *Sublett* that the right to a public trial is not implicated when, in chambers and with counsel present, the trial judge considers a question

submitted by the jury during the course of its deliberations.

I have written extensively on various issues regarding the right to a public trial as they have been raised in the four cases currently before the court involving claims of violations of the right to a public trial. In addition, I have written in each of these cases to summarize the important aspects of these cases and the important legal questions posed. We are at something of a crossroads in our jurisprudence respecting the right to a public trial. We are faced with a case where there is little to favor the conclusion that the right to a public trial has been violated, *Sublett*. How do we best explain why and when the right to a public trial is not implicated by matters or procedures occurring during a criminal trial?

The three voir dire cases before us are, with very little doubt, cases where the closures would be found justified, had the proper *Bone-Club* inquiry occurred prior to the limited in-chambers questioning of a few potential jurors on sensitive matters. In *Wise*, *Paumier* and *Morris*, must we adhere to the harsh rule we have set up that the mere failure to make the inquiry is a constitutional violation of the worst kind, mandating reversal of the defendants' convictions and reversals for new trials?

Will we continue to disregard our own Rules of Appellate Procedure, giving them effect only in word, and not substance, when the public trial right cases come before us? As explained in this opinion and in the dissenting opinions in *Wise*, *Paumier*, and *Morris*, it is possible to give all aspects of the public trial right and all aspects of our appellate rules effect. Will we do so?

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: