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In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions

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IN WASHINGTON STATE, OPEN COURTS JURISPRUDENCE CONSISTS MAINLY OF OPEN QUESTIONS

Anne L. Ellington* and Jeanine Blackett Lutzenhiser**

Abstract: Issues of public trial and the open administration of justice have been an intense focus of the Washington State Supreme Court in recent years. In its December issue, the *Washington Law Review* surveyed U.S. and Washington State public trial and public access jurisprudence, and made recommendations for clarifying the constitutional issues involved when a courtroom “closure” occurs. Just before that issue went to press, the Washington State Supreme Court decided four important public trial cases: *State v. Sublett*, *State v. Wise*, *State v. Paumier*, and *In re Morris*. The court issued fourteen separate opinions, clearly demonstrating deep divisions among the justices. This follow-up article examines the principal arguments of the new opinions, identifies what areas appear settled, and discusses the important questions that remain unresolved.

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INTRODUCTION

Patrick Morris was convicted of sex crimes against his daughter.¹ Michael Sublett went to prison for premeditated murder.² Both Eric

1. *In re Morris*, 176 Wash. 2d 157, 161, 288 P.3d 1140, 1142 (2012).

2. *State v. Sublett*, 176 Wash. 2d 58, 65, 292 P.3d 715, 718 (2012).

Wise and Rene Paumier were convicted of burglary.³ What do these defendants have in common? At some point during their trials, a procedure was conducted in chambers instead of the public courtroom, thereby implicating both the constitutional right of each defendant to a public trial and the constitutional right of the public to the open administration of justice. In each case, the procedures were routine, longstanding practices, and the defendants made no objection. Each challenged the practice for the first time on appeal.

On November 21, 2012, the Washington State Supreme Court announced its decisions in these four cases. Of the four defendants, only Sublett's conviction was affirmed. In the other three cases, the Court reversed for violation of the defendant's public trial right and ordered new trials.

The four decisions comprise fourteen separate opinions. Only two cases garnered a majority (both 5-4); in the others, a lead opinion was accompanied by either three separate concurrences or one concurrence and two separate dissents.

In its December issue (which went to press the week the four decisions were released), the *Washington Law Review* surveyed U.S. and Washington State public trial and public access jurisprudence (including three of these four cases at the intermediate appellate court level), and made recommendations for clarifying the constitutional and prudential issues involved.⁴ This article examines whether the new decisions have clarified the analytical approach, concludes they have not, and attempts to identify the areas in which the law is settled and the issues the Court has yet to resolve. Because these include the proper analytical framework for both trial and review, and involve issues that may arise in any criminal case, consensus as to the correct approach will greatly contribute to the interests of justice.

Part I summarizes the constitutional rights implicated by exclusion of the public from court proceedings. Part II recaps the course of Washington public trial and open access jurisprudence. Part III analyzes the different opinions in the four recent cases, and highlights the persistent (and so far intractable) disagreements among the justices. Part IV identifies the areas in which agreement is most urgently needed so that trial courts are able to safeguard the important constitutional interests at issue.

3. *State v. Wise*, 176 Wash. 2d 1, 6, 288 P.3d 1113, 1115 (2012); *State v. Paumier*, 176 Wash. 2d 29, 32, 288 P.3d 1126, 1128 (2012).

4. Jeanine Blackett Lutzenhiser, Comment, *An Open Courts Checklist: Clarifying Washington's Public Trial and Public Access Jurisprudence*, 87 WASH. L. REV. 1203 (2012).

I. THE U.S. AND WASHINGTON CONSTITUTIONS
GUARANTEE BOTH THE DEFENDANT'S RIGHT TO
PUBLIC TRIAL AND THE PUBLIC'S RIGHT TO OPEN
ACCESS

When a Washington State judge excludes members of the public from court proceedings, or seals records related to a case, the exclusion implicates state and federal constitutional rights of the public and, in criminal cases, of the defendants.

The Sixth Amendment of the U.S. Constitution and article I, section 22 of the Washington Constitution contain nearly identical provisions guaranteeing the right of an accused to a public trial.⁵ The First Amendment of the U.S. Constitution is generally understood to guarantee open access for the public and press to judicial proceedings.⁶ The freedoms enumerated in the First Amendment—of speech, the press, the right of assembly, and the right to petition the government—”share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”⁷ Article I, section 10 of the Washington Constitution also contains a separate guarantee of the open administration of justice: “Justice in all cases shall be administered openly, and without unnecessary delay.”⁸ This special emphasis on the presumption of open court proceedings renders the Washington Constitution at least arguably more stringent on this point, and the Washington State Supreme Court’s decisions have consistently emphasized the value of open administration of justice.⁹

5. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”); WASH. CONST. art. I, § 22 (“In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . .”).

6. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”). For a discussion of the open-access guarantees flowing from the First Amendment, see Lutzenhiser, *supra* note 4, at 1207–08.

7. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

8. WASH. CONST. art. I, § 10.

9. *See, e.g.*, *State v. Wise*, 176 Wash. 2d 1, 5, 288 P.3d 1113, 1115 (2012); *State v. Lormor*, 172 Wash. 2d 85, 90–91, 257 P.3d 624, 627–28 (2011); *In re Detention of D.F.F.*, 172 Wash. 2d 37, 39–40, 256 P.3d 357, 359–60 (2011); *State v. Strode*, 167 Wash. 2d 222, 229–30; 217 P.3d 310, 315–16 (2009); *State v. Momah*, 167 Wash. 2d 140, 147–48, 217 P.3d 321, 324–25 (2009); *State v. Easterling*, 157 Wash. 2d 167, 179, 137 P.3d 825, 830–31 (2006); *Rufer v. Abbott Labs.*, 154 Wash. 2d 530, 540, 114 P.3d 1182, 1186–87 (2005); *In re Orange*, 152 Wash. 2d 795, 804–05, 100 P.3d 291, 295–96 (2005); *Dreiling v. Jain*, 151 Wash. 2d 900, 903–04, 93 P.3d 861, 864 (2004); *State v. Bone-Club*, 128 Wash. 2d 254, 258, 906 P.2d 325, 327 (1995); *Allied Daily Newspapers of*

Under both constitutions, “the public’s right of access is not absolute, and may be limited to protect other interests.”¹⁰ In several important cases involving challenges brought by the media, the Washington State Supreme Court defined the *public’s* right to open proceedings under article I, section 10. In *Seattle Times Co. v. Ishikawa*¹¹ and *Allied Daily Newspapers v. Eikenberry*,¹² the Court announced the test to be used to balance the public’s right to access against other compelling interests.¹³

In more recent years, the Court has addressed numerous cases involving the *defendant’s* right to a public trial under article I, section 22. Actions challenged as unconstitutional closures (exclusion of the public) have ranged from the total clearing of the courtroom for all or part of pretrial proceedings or trial;¹⁴ the exclusion of particular members of the public;¹⁵ the private questioning of prospective jurors in the judge’s chambers;¹⁶ and even the bailiff’s release, for reasons of illness, of two members of the jury venire before voir dire even began.¹⁷

Issues at the core of these recent closure cases include the scope of the defendant’s public trial right (i.e., to what proceedings does the right attach) and the proper analysis for deciding when closure is justified (i.e. how to balance the defendant’s right to open trial, the public’s right to open proceedings, and other compelling interests arguably justifying closure—which may include the defendant’s right to a fair trial).¹⁸ On

Washington v. Eikenberry, 121 Wash. 2d 205, 209–10, 848 P.2d 1258, 1260–61 (1993); *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 36, 640 P.2d 716, 719 (1982); *Federated Publ’ns, Inc. v. Kurtz*, 94 Wash. 2d 51, 59–60, 615 P.2d 440, 444–45 (1980).

10. *Ishikawa*, 97 Wash. 2d at 36, 640 P.2d at 719.

11. 97 Wash. 2d 30, 640 P.2d 716.

12. 121 Wash. 2d 205, 848 P.2d 1258.

13. *See Eikenberry*, 121 Wash. 2d at 209–11, 848 P.2d at 1260–61; *Ishikawa*, 97 Wash. 2d at 37–39, 640 P.2d at 720–21. This test parallels the test for evaluating courtroom closures. *See infra* Part II.

14. *See, e.g., Easterling*, 157 Wash. 2d at 177, 137 P.3d at 830; *State v. Brightman*, 155 Wash. 2d 506, 509, 122 P.3d 150, 151 (2005); *Orange*, 152 Wash. 2d at 799, 100 P.3d at 293; *Bone-Club*, 128 Wash. 2d at 256, 906 P.2d at 326.

15. *State v. Lormor*, 172 Wash. 2d 85, 257 P.3d 624 (2011).

16. *See, e.g., State v. Wise*, 176 Wash. 2d 1, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wash. 2d 29, 288 P.3d 1126 (2012); *State v. Strode*, 167 Wash. 2d 222, 217 P.3d 310 (2009); *State v. Momah*, 167 Wash. 2d 140, 217 P.3d 321 (2009).

17. *State v. Wilson*, ___ Wash. App. ___, 298 P.3d 148, 150–51 (2013).

18. *See, e.g., Lormor*, 172 Wash. 2d at 90–91, 257 P.3d at 627–28; *In re Detention of D.F.F.*, 172 Wash. 2d 37, 39–40, 256 P.3d 357, 359–60 (2011); *Strode*, 167 Wash. 2d at 229–30, 217 P.3d at 315–16; *Momah*, 167 Wash. 2d at 147–48, 217 P.3d at 324–25; *Easterling*, 157 Wash. 2d at 179, 137 P.3d at 830–31; *Rufer v. Abbott Labs.*, 154 Wash. 2d 530, 540, 114 P.3d 1182, 1186–87 (2005); *Orange*, 152 Wash. 2d at 804–05, 100 P.3d at 295–96; *Dreiling v. Jain*, 151 Wash. 2d 900, 903–04, 93 P.3d 861, 864 (2004); *Bone-Club*, 128 Wash. 2d at 258, 906 P.2d at 327; *Eikenberry*,

these issues, the justices are deeply divided. The Court is also struggling to reach consensus on the test for appellate review, whether and when an error is structural, and what remedy should apply.

II. *IN STATE V. BONE-CLUB*, THE WASHINGTON STATE SUPREME COURT DEvised ITS OWN TEST TO EVALUATE A PROPOSED COURTROOM CLOSURE

The seminal Washington case governing issues of public trial under section 22 is *State v. Bone-Club*,¹⁹ which involved closure of a pretrial hearing to protect the identity of a witness who was an undercover detective. In *Bone-Club* the Washington State Supreme Court returned to the test used under article I, section 10 to protect the public's right to access (first set out in *Ishikawa* and reiterated in *Eikenberry*), and adopted it for purposes of protecting a defendant's right to a public trial under article I, section 22. The test has five parts, briefly summarized below:

1. The proponent of closure must identify the interests or rights justifying closure and make some showing of the need therefore; if the closure is not sought to protect the defendant's right to a fair trial, the proponent must show a serious and imminent threat to an important interest.
2. Those present must be given an opportunity to object.
3. The closure must be the least restrictive means available and effective to protect the interest.
4. The court must weigh the competing interests, consider alternative methods, and should articulate specific findings and conclusions.
5. The order must be no broader in its application or duration than necessary to serve its purpose.²⁰

The Court also held that the trial judge has the responsibility to protect a defendant's right to a public trial.²¹ Because the judge had not engaged in this "weighing of the competing interests"²² before closing the hearing, the Court was unable to determine whether closure was warranted: "We hold the trial court's failure to follow the five-step

121 Wash. 2d at 209–10, 848 P.2d at 1260–61; *Ishikawa*, 97 Wash. 2d at 36, 640 P.2d at 719; *Federated Publ'ns, Inc. v. Kurtz*, 94 Wash. 2d 51, 59–60, 615 P.2d 440, 444–45 (1980).

19. 128 Wash. 2d 254, 906 P.2d 325.

20. *Id.* at 258–59, 906 P.2d at 327–28; *see also Ishikawa*, 97 Wash. 2d at 37–39, 640 P.2d at 720–21.

21. *Bone-Club*, 128 Wash. 2d at 256, 906 P.2d at 326.

22. *Id.* at 256, 906 P.3d at 326.

closure test enunciated in this court's section 10 cases violated Defendant's right to a public trial under section 22."²³ The Court reversed and remanded for a new trial.²⁴

It soon became apparent that trial judges did not consider certain routine procedures (which ordinarily had no "proponent") to be closures and so did not engage in the *Bone-Club* analysis before (most commonly) protecting privacy of prospective jurors and encouraging candor in their responses by using sealed questionnaires and conducting parts of voir dire in a closed courtroom or in chambers.²⁵ About ten years after *Bone-Club*, the Court began addressing a series of such cases involving article I, section 22, and has vacated dozens of convictions in cases where the *Bone-Club* analysis was not applied.²⁶ (As a result, the issue has become so familiar that in courthouses in Washington, "Bone-Club" is now a verb.)

In the wake of these reversals, Washington judges and practitioners have been asking practical questions, the most urgent of which are: to what proceedings does the public trial right attach? And what exactly is a closure?

Certain basic things are clear. "[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public."²⁷ But the public trial right is implicated (and thus *Bone-Club* analysis is required) when a proceeding

23. *Id.* at 261, 906 P.3d at 329.

24. *Id.*

25. This may be a result of language in the cases. In *Ishikawa*, prefacing the announcement of the test, the Court stated: "Each time restrictions on access to criminal hearings or the records from hearings are sought, courts must follow these steps . . ." *Ishikawa*, 97 Wash. 2d at 37, 640 P.2d at 720. In *Bone-Club*, the Court held that the trial judge has a responsibility to protect Defendant's public trial right, and, citing *Ishikawa*, that "[t]he motion to close, not Defendant's objection, triggered the trial court's duty to perform the weighing procedure." *Bone-Club*, 128 Wash. 2d at 261, 906 P.2d at 329. Given that the test itself contemplates a proponent and opponent, trial judges may have believed that routine procedures not "sought" by any party were not the sort of procedures to which *Bone-Club* applied. See *Ishikawa*, 97 Wash. 2d at 39, 640 P.2d at 721.

26. See, e.g., *In re Morris*, 176 Wash. 2d 157, 288 P.3d 1140 (2012); *State v. Wise*, 176 Wash. 2d 1, 288 P.3d 1113 (2012); *State v. Strode*, 167 Wash. 2d 222, 217 P.3d 310 (2009); *State v. Easterling*, 157 Wash. 2d 167, 137 P.3d 825 (2006); *State v. Brightman*, 155 Wash. 2d 506, 122 P.3d 150 (2005); *In re Orange*, 152 Wash. 2d 795, 100 P.3d 291 (2005); *State v. Hummel*, 165 Wash. App. 749, 266 P.3d 269 (2012); *State v. Njonge*, 161 Wash. App. 568, 255 P.3d 753 (2011); *State v. Tinh Trinh Lam*, 161 Wash. App. 299, 254 P.3d 891 (2011); *State v. Leyerle*, 158 Wash. App. 474, 242 P.3d 921 (2010); *State v. Bowen*, 157 Wash. App. 821, 239 P.3d 1114 (2010); *State v. Waldon*, 148 Wash. App. 952, 202 P.3d 325 (2009); *State v. Sadler*, 147 Wash. App. 97, 193 P.3d 1108 (2008); *State v. Erickson*, 146 Wash. App. 200, 189 P.3d 245 (2008); *State v. Duckett*, 141 Wash. App. 797, 173 P.3d 948 (2007); *State v. Frawley*, 140 Wash. App. 713, 167 P.3d 593 (2007). For a discussion of some of these cases, see Lutzenhiser, *supra* note 4, at 1225–35.

27. *State v. Sublett*, 176 Wash. 2d 58, 71, 292 P.3d 715, 721 (2012).

normally conducted in open court, including jury voir dire, is purposely closed to the public.²⁸

Not yet clear are many of the larger questions, such as the proper test for determining exactly which proceedings implicate the defendant's public trial right;²⁹ whether the failure of a trial court to undertake a *Bone-Club* analysis is itself a constitutional error, regardless of whether the closure was justified;³⁰ whether a public trial error (either unjustified closure or failure to conduct the *Bone-Club* analysis) is always structural error and not subject to harmless error analysis (and therefore always requires a new trial);³¹ whether the Washington appellate rule for review of constitutional errors raised for the first time on appeal applies in these cases;³² and whether, in the absence of a *Bone-Club* analysis, a reviewing court will examine the record to determine the constitutionality of a closure.³³

III. THE FOUR RECENT DECISIONS REVEAL A DEEPENING DIVIDE

The four decisions announced November 21, 2012 involved two types of closure: the private questioning of jurors, and an in-chambers conference to consider a question from a deliberating jury. The Court reached a narrow majority in two cases but only a plurality in the other two, and the opinions are notable for sharp disagreements on key issues. We begin with *State v. Sublett*³⁴ (the only case in which the Court affirmed), because it announced a new test and because Chief Justice Madsen's concurrence is a wide-ranging discussion that supplements her dissents in the other cases.

A. *State v. Sublett: A Chambers Conference to Discuss a Question from the Deliberating Jury Does Not Implicate the Right to Public Trial*

In *Sublett*,³⁵ the issue was the consideration, in chambers, of a

28. *Wise*, 176 Wash. 2d at 11–13, 288 P.3d at 1118–19.

29. *See infra* Part III.A.

30. *See infra* Part III.B.

31. *Id.*

32. *See infra* Parts III.B and C.

33. *See infra* Parts III.A, B, and C.

34. 176 Wash. 2d 58, 292 P.3d 715 (plurality opinion).

35. The plurality opinion by Justice C. Johnson, was joined by Justices Chambers, Owens, and J. Johnson. Justice Stephens was joined in her concurrence by Justice Fairhurst, and Justice Pro

question from the jury about the court's instructions. The justices unanimously agreed to affirm Sublett's conviction. But the lead opinion garnered only a plurality, and the three separate concurrences demonstrate the disparate analytic paths the justices take, and the many areas in which consensus remains elusive.

1. A Plurality Inaugurates a New Test

During its deliberations in Michael Sublett's trial for murder, the jury submitted a question regarding the court's accomplice liability instruction.³⁶ The court and counsel met in chambers and discussed the question. No one objected to the procedure. Counsel agreed with the court's proposed answer, which was simply to tell the jury to reread the instructions.³⁷ That answer was duly given and placed in the record, although no record was made of the chambers conference.³⁸ The jury convicted Sublett on alternative charges of premeditated first-degree murder and felony murder, and the court sentenced him to life without the possibility of parole.³⁹

On direct appeal, Sublett argued that the discussion of the jury's question in chambers violated his right to public trial. The Washington State Court of Appeals disagreed and affirmed, holding that the public trial right does not extend to proceedings involving "purely ministerial or legal issues that do not require the resolution of disputed facts,"⁴⁰ and that because the jury's question involved a "purely legal" issue, consideration in chambers did not implicate the right.⁴¹

The Washington State Supreme Court also affirmed, but on different reasoning. Writing for a plurality, Justice Charles Johnson reiterated that despite the strong presumption that courts are to be open at all stages of trial, the public trial right is not absolute, and may be overcome to serve "an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values."⁴² The Court observed that "not every interaction between the court, counsel, and defendants will

Tempore Alexander. Justice Wiggins concurred in result only. Chief Justice Madsen wrote a separate concurrence.

36. *Sublett*, 176 Wash. 2d at 67, 292 P.3d at 719.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 67–68, 292 P.3d at 719.

41. *Id.* at 68, 292 P.3d at 719.

42. *Id.* at 71, 292 P.3d at 721 (citing *Waller v. Georgia*, 467 U.S. 39, 45 (1984)).

implicate the right to a public trial, or constitute a closure if closed to the public.”⁴³

But the Court rejected the legal/factual distinction made by the Court of Appeals,⁴⁴ reasoning that although the distinction “somewhat parallels” its desired approach, it was inadequate to protect a defendant’s public trial right because “[t]he resolution of legal issues is quite often accomplished during an adversarial proceeding, and disputed facts are sometimes resolved by stipulation following informal conferencing between counsel.”⁴⁵ In her concurrence, Justice Stephens explicitly rejected the legal/factual distinction, otherwise agreeing with the plurality on all issues.⁴⁶ A majority of the Court thus found the legal/factual distinction at least inadequate, standing alone, to protect defendants’ and the public’s right to an open trial.

Instead, the Court adopted the “experience and logic test,” which originated in a 1986 U.S. Supreme Court case, *Press-Enterprise Co. v. Superior Court (Press II)*.⁴⁷ The *Sublett* Court found this test desirable because it allows the trial court “to consider the actual proceeding at issue for what it is, without having to force every situation into predefined factors.”⁴⁸

The experience and logic test has two parts. The experience prong determines “whether the place and process have historically been open to the press and general public.”⁴⁹ The logic prong determines “whether public access plays a significant positive role in the functioning of the particular process in question.”⁵⁰ If the answer to both questions is yes, the right to public trial is implicated, and the court must analyze the proposed closure using the *Bone-Club* factors.⁵¹

Applying the test to the facts in *Sublett*, the Court held the right to a public trial did not attach to the chambers conference. Considering the experience prong, the Court analogized consideration of the jury’s

43. *Id.*

44. *Id.*

45. *Id.* at 72, 292 P.3d at 722.

46. *Id.* at 136, 292 P.3d at 753 (Stephens, J., concurring).

47. 478 U.S. 1, 13–14 (1986) (holding that a qualified First Amendment right of access attaches to preliminary hearings and that such a proceeding can therefore not be closed unless specific, on the record findings are made demonstrating that “closure is essential to preserve higher values and is narrowly tailored to serve that interest”) (internal quotation marks omitted).

48. *Sublett*, 176 Wash. 2d at 73, 292 P.3d at 722.

49. *Press II*, 478 U.S. at 8.

50. *Id.*

51. *Sublett*, 176 Wash. 2d at 73, 292 P.3d at 722.

question to a jury instruction conference, an informal proceeding often held in places other than an open courtroom, and concluded that the place and process have in fact not historically been open to the press and public. The Court also emphasized that the procedure for handling questions from a jury is controlled by a court rule, CrR6.15(f), which requires that jury questions be submitted in writing.⁵² The trial judge has discretion to manage a jury question in open court, but CrR 6.15(f)(1) does not require it.⁵³ Considering that the rule is apparently the only authority governing the process of handling questions from a deliberating jury, the Court concluded that consideration of a deliberating jury's question has historically *not* been open to the press and public. Regarding the "logic prong," the Court decided that "none of the values served by the public trial right is violated under the facts of this case."⁵⁴ Rights attaching to the trial itself—the right to appear, to cross-examine witnesses, to introduce or exclude evidence—do not attach to the process governing the court's handling of a question from the deliberating jury where the question concerns the court's instructions.⁵⁵ Thus there was no violation of Sublett's right to a public trial.

In her concurrence, Justice Stephens approved both the result and the adoption of the experience and logic test.⁵⁶ She wrote separately because the plurality had not completely rejected the distinction between "purely ministerial or legal" proceedings and those that "require the resolution of disputed facts."⁵⁷ She contended the distinction is faulty, misleading, and premised on labels rather than substance.⁵⁸ Justice Stephens also wrote separately to express sharp disagreement with the arguments of Chief Justice Madsen and Justice Wiggins, whose concurrences advocated application of Rule of Appellate Procedure (RAP) 2.5(a)(3) to determine whether a court will grant review. Justice Stephens took the position that such a requirement incorrectly equates failure to object with voluntary waiver: "We have repeatedly and conclusively rejected a

52. *Id.* at 76, 292 P.3d at 724. The rule next requires that "the court's response and any objections thereto shall be made a part of the record," and finally that "[t]he court shall respond . . . in open court or in writing . . . [a]ny additional instruction upon any point of law shall be given in writing." *Id.*

53. *Id.*

54. *Id.* at 77, 292 P.3d at 724.

55. *Id.*

56. *Id.* at 136, 292 P.3d at 753 (Stephens, J., concurring).

57. *Id.* at 136, 292 P.3d at 753 (quoting *State v. Sublett*, 156 Wash. App. 160, 181, 231 P.3d 231, 242 (2010)).

58. *See id.* at 136–42, 292 P.3d at 753–756.

contemporaneous objection rule in the context of the public trial right.”⁵⁹

2. *Concurring Chief Justice Madsen and Justice Wiggins Agree with Plurality’s Result, but Take Issue With Its Analysis*

In his concurrence, Justice Wiggins argued that the federal experience and logic test actually conflicts with article I, section 10 of the Washington Constitution,⁶⁰ because “[u]nder article I, section 10, *every part of the administration of justice is presumptively open*”⁶¹:

[T]he United States Supreme Court is much freer to limit courtroom openness than we are. With this in mind, I would reject the experience and logic test because it is contrary to the plain language of article I, section 10. We cannot say, on the one hand, that justice must be administered openly, but that on the other hand certain stages of a proceeding can be closed to the public because experience and logic tell us they can be closed. This is a contradiction. Either our courts are open, or they are not.⁶²

Justice Wiggins also described the test as similar to the “so-called ‘triviality’ or ‘de minimis’ approach, which is used in the federal courts but that we have declined to adopt.”⁶³ Justice Wiggins would distinguish the right to open trial from the remedy—the right to open administration of justice from “entitlement to a certain form of relief (namely, a new trial).”⁶⁴ He argued that for purposes of appellate review, closure cases are no different from other constitutional error cases and should be governed by the usual rule, which is RAP 2.5.⁶⁵ Under the rule, an appellant who did not object to an alleged error at trial may obtain review only by showing “manifest constitutional error”—that is, constitutional error that prejudices the outcome, error that has “practical and identifiable consequences in the trial of the case.”⁶⁶ Justice Wiggins

59. *Id.* at 143, 292 P.3d at 756–57 (citations omitted).

60. *Id.* at 145, 292 P.3d at 759 (Wiggins, J., concurring).

61. *Id.* at 147, 292 P.3d at 759.

62. *Id.* at 148–9, 292 P.3d at 759 (citations omitted). Justice Wiggins pointed to the problems identifying “experience” under the test, noting that research will be difficult and questioning the relevance of experience after adoption of the State Constitution in 1889. He concluded that “[i]t is simpler and more true to our constitution merely to say that all phases of judicial proceedings are presumptively open.” *Id.* at 147, 292 P.3d at 760.

63. *Id.*

64. *Id.* at 151, 292 P.3d at 761.

65. *Id.*

66. *Id.* (internal quotation marks omitted).

rejected Justice Stephens' argument that applying the rule amounts to treating silence as a waiver of the right, pointing out that the rule is by definition a rule for review of constitutional error not objected to below,⁶⁷ and review will be undertaken if prejudice occurred.⁶⁸ He declined to rely upon *State v. Marsh*,⁶⁹ the Washington case cited by his colleagues for the proposition that failure to object does not constitute a waiver, because it preceded the Rules of Appellate Procedure by fifty years: "*Marsh* [does not] justify disregarding our rules of appellate procedure."⁷⁰

In concurrence, Chief Justice Madsen voiced general arguments regarding the Court's jurisprudence in this area. She expressly intended her concurrence, together with her dissents in the three other cases decided the same day (*State v. Wise*,⁷¹ *State v. Paumier*,⁷² and *In re Morris*,⁷³ discussed below) to constitute "a single opinion touching on the multiple aspects of the public trial right and appellate review as they are presented by all four cases."⁷⁴ Her objective was to explain "why I believe the court's approach to reviewing public trial issues is exceptionally and unnecessarily strict."⁷⁵

As to the scope of the right to public trial, Chief Justice Madsen believes both the ministerial/factual analysis and the logic and experience test are useful tools for determining when the right attaches.⁷⁶ She observed that under both tests, history matters; if the history of the type of proceeding subject to closure provides no answer, the court must examine the values protected by the right and whether those values are served by requiring a particular part of the proceedings to be open.⁷⁷ The values are those identified in the U.S. Supreme Court case *Waller v.*

67. *Id.* at 154, 292 P.3d at 762.

68. *Id.* at 153, 292 P.2d at 762.

69. 126 Wash. 142, 217 P. 705 (1923).

70. *Sublett*, 176 Wash. 2d at 153, 292 P.3d at 761 (Wiggins, J., concurring).

71. 176 Wash. 2d 1, 288 P.3d 1113 (2012).

72. 176 Wash. 2d 29, 288 P.3d 1126 (2012).

73. 176 Wash. 2d 157, 288 P.3d 1140 (2012).

74. *Sublett*, 176 Wash. 2d at 90, 292 P.3d at 731 (Madsen, C.J., concurring).

75. *Id.*

76. *Id.* at 99, 292 P.3d at 735. But she pointed out that the experience and logic test has been used to determine the scope of the right to open access under the *First* Amendment; she found no case applying the test to determine the scope of a defendant's *Sixth* Amendment right, *id.* at 94, 292 P.3d at 733, and she noted the reminder from the United States Supreme Court in *Presley v. Georgia* that "the extent to which the First and Sixth amendment public trial rights are coextensive is an open question." *Id.* at 95, 292 P.3d at 733 (quoting *Presley v. Georgia*, 558 U.S. 209 (2010)).

77. *Id.* at 98–99, 292 P.3d at 735.

*Georgia*⁷⁸: ensuring a fair trial, reminding participants of their functions and their obligation to the accused, and encouraging witnesses to come forward and testify truthfully.⁷⁹ If the values are served by openness, then the right attaches and a *Bone-Club* inquiry is required. If those values are not served, “there is no constitutionally imperative reason for attaching the public trial right to the particular part of the proceedings.”⁸⁰

Chief Justice Madsen’s principal concern is the Court’s practice of ordering a new trial in “virtually every case where a closure occurred without” a *Bone-Club* analysis.⁸¹ “It is a mystery why, if the trial court does not engage in an on-the-record *Bone-Club* inquiry . . . this court believes it must foreclose all other possible ways in which the inquiry could be conducted.”⁸² She agreed with Justice Wiggins that review should be governed by the usual rule for constitutional error not raised below, RAP 2.5(a)(3), which requires a showing of prejudice resulting from the closure.⁸³ She criticized the plurality’s reliance on *Waller*, pointing out that there, the U.S. Supreme Court recognized that closure of the suppression hearing may have been partly justified, and ordered the trial court on remand to consider what portions, if any, of a new hearing could be closed.⁸⁴ She termed it a “poor result” that the majority has adopted a rule requiring a new trial without a showing of prejudice.⁸⁵ She also contended that the reviewing court should conduct its own examination of the record to determine whether error occurred, and if the record proves inadequate to the purpose, should consider remand for development of the record rather than automatically ordering a new trial. She pointed out that in *State v. Momah*,⁸⁶ the Court determined from the record that no violation occurred.⁸⁷

78. 467 U.S. 39 (1984).

79. *Sublett*, 176 Wash. 2d at 99, 292 P.3d at 735 (Madsen, C.J., concurring) (citing *Waller*, 467 U.S. at 46–47).

80. *Id.*

81. *Id.* at 90, 292 P.3d at 731.

82. *Id.* at 105, 292 P.3d at 738.

83. *See id.* at 123–28, 292 P.3d at 747–49.

84. *Id.* at 116–17, 292 P.3d at 743–44.

85. *Id.* at 115, 292 P.3d at 743.

86. 167 Wash. 2d 140, 217 P.3d 321 (2009).

87. *Sublett*, 176 Wash. 2d at 119–20, 292 P.3d at 745 (Madsen, C.J., concurring).

B. *State v. Paumier and State v. Wise: Failure to Conduct a Bone-Club Inquiry Is a Violation of the Right to Public Trial and Is Itself “Structural Error”*

In *Paumier* and *Wise*,⁸⁸ a narrow majority of the Court agreed that the failure to conduct a *Bone-Club* inquiry before ordering a closure is not only error that violates the right to public trial, but also is “structural error,” which requires automatic reversal and remand for a new trial. Vigorous dissents rejected this “rigid” rule in favor of application of the Rules of Appellate Procedure and a post trial inquiry that could satisfy the requirements of *Bone-Club* without the time and expense of a new trial.

1. *The Wise and Paumier Majorities Hold the Absence of the Bone-Club Test Constitutes “Structural Error”*

Wise and *Paumier* both involved private questioning of prospective jurors during voir dire.⁸⁹ In both cases, the Court held to its earlier view⁹⁰ that such private questioning, undertaken without weighing the competing constitutional interests through a *Bone-Club* inquiry, constituted a closure that violated the defendant’s right to public trial.⁹¹

In *Wise*, the Court drew a series of bright lines. First, the Court reiterated that private questioning of prospective jurors in chambers is a closure requiring consideration of the *Bone-Club* criteria.⁹² Second, closure without such consideration violates the defendant’s right to public trial.⁹³ Third, violation of the right to public trial is “structural error.”⁹⁴ And fourth, the Court went further, expressly holding that the failure to conduct a *Bone-Club* analysis is *itself* structural error which is

88. In both cases, Justice Owens was joined by Justices Chambers, Fairhurst, and Stephens, and Justice Pro Tem Alexander and Chief Justice Madsen wrote a dissenting opinion. In *Paumier*, Justice Wiggins dissented, joined by Justices C. Johnson and J. Johnson; in *Wise*, Justice J. Johnson dissented, joined by Justices C. Johnson and Wiggins.

89. In *Wise*, the subjects discussed during the private questioning included personal health matters, relationships with witnesses or law enforcement, and criminal history. *State v. Wise*, 176 Wash. 2d 1, 7, 288 P.3d 1113, 1116 (2012). In-chambers discussion in *Paumier* included personal health issues, criminal history, and familiarity with the defendant or the crime. *State v. Paumier*, 176 Wash. 2d 29, 33, 288 P.3d 1126, 1128 (2012).

90. *State v. Strode*, 167 Wash. 2d 222, 223, 217 P.3d 310, 312 (2009).

91. *Wise*, 176 Wash. 2d at 6, 288 P.3d at 1115; *Paumier*, 176 Wash. 2d at 32, 288 P.3d at 1128.

92. *Wise*, 176 Wash. 2d at 11, 288 P.3d at 1118.

93. *Id.* at 13, 288 P.3d at 1119.

94. *Id.* at 13–14, 288 P.3d at 1119.

per se prejudicial and automatically requires a new trial.⁹⁵ The Court further held that failure to object at trial does not constitute a waiver of the right to public trial that would preclude raising the issue on appeal, because such a waiver requires an affirmative indication of the defendant's understanding of the right.⁹⁶

Structural error is a special category of constitutional error that, even where it does not appear to prejudice a particular defendant, "affect[s] the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself."⁹⁷ Where such error occurs, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."⁹⁸ Structural error is presumed prejudicial and is not subject to harmless error review.⁹⁹

In both *Wise* and *Paumier*, the dissent argued that the defendants actually *benefited* from the closures because prospective jurors may have been more candid about hardships and biases in private questioning.¹⁰⁰ In each case, however, the majority was unmoved by the apparent absence of prejudice, emphasizing that by its nature, a structural error has the potential to weaken the foundations of justice: "It is the framework of our system of justice that we must protect against erosion of the public trial right."¹⁰¹

Regarding remedy, the *Wise* Court noted that remand for a new public proceeding might be appropriate where the violation occurred in the context of an "easily separable" proceeding such as a suppression hearing.¹⁰² But the Court concluded it could not "reasonably order a 'redo' of voir dire to remedy the public trial violation that occurred here."¹⁰³ The Court vacated *Wise*'s conviction and remanded for a new

95. *Wise*, 176 Wash. 2d at 6, 288 P.3d at 1115. The Court also held this in *Paumier*, 176 Wash. 2d at 37, 288 P.3d at 1130.

96. *Wise*, 176 Wash. 2d at 15, 288 P.3d at 1120; *see also* *State v. Strode*, 167 Wash. 2d 222, 229 n.3, 217 P.3d 310, 315 n.3 (2009) (explaining that the right to public trial is protected in the same constitutional provision as the right to trial by jury, and so can likewise be waived only in a knowing, voluntary, and intelligent manner).

97. *Wise*, 176 Wash. 2d at 13–14, 288 P.3d at 1119 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

98. *Id.* at 14, 288 P.3d at 1119 (quoting *Fulminante*, 499 U.S. at 310).

99. *Id.*

100. *Wise*, 176 Wash. 2d at 25, 288 P.3d at 1125 (J. Johnson, J., dissenting); *Paumier*, 176 Wash. 2d at 52, 288 P.3d at 1137 (Wiggins, J., dissenting).

101. *Wise*, 176 Wash. 2d at 18, 288 P.3d at 1121.

102. *Id.* at 19, 288 P.3d at 1122.

103. *Id.*

trial “that is open to the public, except as the trial court may direct a closure upon full scrutiny and consideration of the public trial right under *Bone-Club*.”¹⁰⁴ The holding in *Paumier* was nearly identical.¹⁰⁵

2. *Dissenters Decry “Rigid Rules” and Reject Automatic Application of the Structural Error Doctrine*

Chief Justice Madsen dissented in *Wise* and *Paumier*. Justice James Johnson also dissented in *Wise* and was joined by Justices Wiggins and Charles Johnson. In *Paumier*, Justice Wiggins authored a dissent joined by Justices Charles Johnson and James Johnson.

Chief Justice Madsen’s dissent reiterated her rejection of the proposition that mere failure to engage in a *Bone-Club* inquiry is itself structural error.¹⁰⁶ She contended the transformation of the *Bone-Club* inquiry into an independent, substantive constitutional right is unwarranted and has far-reaching consequences.¹⁰⁷ In *Sublett*, she had argued that “the failure to engage in the inquiry should not turn a justifiable closure into a violation of the right to a public trial.”¹⁰⁸ She noted again in *Wise* that the closure may well have been constitutionally justified,¹⁰⁹ and accused the majority of adopting a “rigid doctrine”¹¹⁰ with “inflexible rules”¹¹¹ which result in a “costly and unnecessary response that is not constitutionally required.”¹¹²

Instead, Chief Justice Madsen argued that the reviewing court should examine the record to determine whether or not the closures at trial were justified.¹¹³ She observed that courts in other jurisdictions regularly engage in posttrial inquiries to determine whether a closure was justified,¹¹⁴ and that the United States Supreme Court itself did exactly

104. *Id.*

105. *Paumier*, 176 Wash. 2d at 37, 288 P.3d at 1130.

106. *Id.* at 39, 288 P.3d at 1131 (Madsen, C.J., dissenting).

107. *Id.* at 39–40, 288 P.3d at 1131–32; *Wise*, 176 Wash. 2d at 22, 288 P.3d at 1123 (Madsen, C.J., dissenting).

108. *State v. Sublett*, 176 Wash. 2d 58, 103, 292 P.3d 715, 737 (2012) (Madsen, C.J., concurring).

109. *Wise*, 176 Wash. 2d at 23, 288 P.2d at 1124 (Madsen, C.J., dissenting).

110. *Id.* at 20, 288 P.3d at 1123.

111. *Paumier*, 176 Wash. 2d at 38, 288 P.3d 1131 (Madsen, C.J., dissenting).

112. *Wise*, 176 Wash. 2d at 21, 288 P.3d at 1123 (Madsen, C.J., dissenting).

113. *Paumier*, 176 Wash. 2d at 40, 288 P.3d at 1132 (Madsen, C.J., dissenting).

114. *State v. Sublett*, 176 Wash. 2d 58, 105–06, 292 P.3d 715, 738 (2012) (Madsen, C.J., concurring) (discussing *Kendrick v. State* and *People v. Kline* among other cases). In *Kendrick v. State*, 670 N.E.2d 369 (Ind. Ct. App. 1996), the trial court had failed to enter specific findings concerning its order excluding certain persons from the courtroom during the testimony of a

that in *Waller*.¹¹⁵ She reminded her colleagues that in *Momah*, the Washington State Supreme Court itself examined the record on review and determined that closure of voir dire did not violate the right to public trial and therefore did not constitute structural error.¹¹⁶ She argued that the decisions in *Wise* and *Paumier* have “ignored *Momah*,”¹¹⁷ “distinguished [*Momah*] out of existence,”¹¹⁸ and even “turn[ed] precedent into pretense.”¹¹⁹

Under Chief Justice Madsen’s approach, if the record does not indicate whether the closure was justified, remand would be appropriate to clarify the reasons for closure under the *Bone-Club* factors.¹²⁰ If the review shows the closure was justified and did not violate the defendant’s public trial right, “then the matter is at an end.”¹²¹ If the inquiry reveals an unjustified, unconstitutional closure, “then, and only then, would it be necessary to decide whether the violation was structural error requiring reversal and a new trial.”¹²²

If it turns out that an unconstitutional closure did occur, Chief Justice Madsen and Justices James Johnson, Charles Johnson, and Wiggins all agree that Rule of Appellate Procedure 2.5(a)(3) should govern review. The *Paumier* majority’s discussion of RAP 2.5(a)(3) and its statement that the rule “does not apply in its typical manner here”¹²³ generated a strong response from Chief Justice Madsen in her *Sublett* concurrence; she charged the Court with sweeping aside “the entire scheme of

confidential informant in a felony drug dealing case. *Id.* at 370. The Indiana Court of Appeals initially remanded the case to the trial court in order to obtain those findings. *Id.* The Court of Appeals then applied the *Waller* test to those findings, and determined that the court had identified an overriding interest—the protection of a confidential informant—and that the closure (exclusion of two friends of the defendant, who had a history of violence) was “narrowly tailored to protect the witness with as little impact as possible on the defendant’s right to a public trial.” *Id.* at 371.

In *People v. Kline*, 494 N.W.2d 756 (Mich. Ct. App. 1992), the trial court failed to make findings on the record to support closure during the testimony of a young rape victim. *Id.* at 760. The Michigan Court of Appeals emphasized the importance (articulated in *Waller* and *Press-Enterprise J*) of specific findings in order to determine if a closure order was proper. *Id.* at 760–61. The court in *Kline* remanded to the trial court “with directions to supplement the record with the facts and reasoning” that supported its decision to clear the courtroom. *Id.*

115. *Paumier*, 176 Wash. 2d at 41, 288 P.3d at 1132 (Madsen, C.J., dissenting).

116. *Id.* at 42, 288 P.3d at 1133.

117. *Wise*, 176 Wash. 2d at 24, 288 P.3d at 1124 (Madsen, C.J., dissenting).

118. *Paumier*, 176 Wash. 2d at 40, 288 P.3d at 1131 (Madsen, C.J., dissenting).

119. *Wise*, 176 Wash. 2d at 24, 288 P.3d at 1124 (Madsen, C.J., dissenting).

120. *Paumier*, 176 Wash. 2d at 41, 288 P.3d at 1132 (Madsen, J., dissenting).

121. *Id.*

122. *Id.* at 42, 288 P.3d at 1132.

123. *Id.* at 36, 288 P.3d at 1130 (majority opinion).

appellate review under the rules With this breathtaking, and incorrect, conclusion, the majority completely dispenses with the rules for addressing constitutional error on review.”¹²⁴

Applying the rule to the facts of *Wise*, Justice James Johnson argued that “there is no indication that the individual questioning of potential jurors prejudiced *Wise*. If anything, *Wise* benefited from the information obtained from the potential jurors’ candid responses.”¹²⁵ He concluded: “the alleged error was not “manifest” and *Wise* cannot raise it for the first time on appeal.”¹²⁶ Justice Wiggins reached the same conclusion in *Paumier*.¹²⁷

Justice James Johnson in *Wise* and Justice Wiggins in *Paumier* both highlighted *Momah*, in which, as Justice Wiggins notes, the Court held that “not every public trial violation is structural error.”¹²⁸ Justice Wiggins pointed out that *Momah* “is consistent with United States Supreme Court precedent.”¹²⁹ Both Justices concluded that Washington precedent does not require the conclusion that a violation of the right to public trial is necessarily structural.¹³⁰ Justice Wiggins argued that the improper voir dire closure in *Paumier*, while a violation of the public trial right, did not constitute structural error because it:

[D]id not render the trial unfair, nor did it convert an otherwise sound trial into an unreliable vehicle for determination of guilt or innocence. An error like this fails to meet the high standard for structural error If anything, in-chambers voir dire protects the defendant’s right to a fair and unbiased trial.¹³¹

124. *State v. Sublett*, 176 Wash. 2d 58, 127, 288 P.3d 715, 749 (2012) (Madsen, C.J., concurring).

125. *State v. Wise*, 176 Wash. 2d 1, 25, 288 P.3d 1113, 1125 (J. Johnson, J., dissenting).

126. *Id.*

127. *Paumier*, 176 Wash. 2d at 54–56, 288 P.3d at 1139–40 (Wiggins, J., dissenting).

128. *Id.* at 47, 288 P.3d at 1135 (emphasis in original) (citing *State v. Momah*, 167 Wash. 2d 140, 150–51, 217 P.3d 321, 326–27 (2009)).

129. *Id.*

130. *Wise*, 176 Wash. 2d at 26, 288 P.3d at 1125 (J. Johnson, J., dissenting) (“Our precedent does not command this result.”); *Paumier*, 176 Wash. 2d at 49, 288 P.3d at 1136 (Wiggins, J., dissenting) (“[W]e have never held that partial in-chambers voir dire without a *Bone-Club* analysis is structural error.”).

131. *Paumier*, 176 Wash. 2d at 50–51, 288 P.3d at 1136 (Wiggins, J., dissenting) (emphasis in original).

C. *In re Morris: Public Trial Violation Claims Raised on Collateral Review Decided on Grounds of Ineffective Assistance of Appellate Counsel*

Collateral review is handled in Washington by way of a Personal Restraint Petition (PRP).¹³² In *In re Morris*,¹³³ the Court analogized to *In re Orange*.¹³⁴ In that earlier case, the Washington State Supreme Court granted Orange's PRP and remanded for a new trial, holding that his attorney's failure to raise a public trial issue on direct review constituted ineffective assistance of counsel. In *In re Morris*, a plurality followed *Orange*, holding that Morris' appellate counsel was similarly ineffective. The two dissenters emphasized factual differences in *Orange*, and procedural distinctions between direct appeal and collateral review.

1. *Plurality Holds that Morris, like Orange, Established Ineffective Assistance of Counsel*

On direct appeal, Patrick Morris challenged certain evidentiary rulings but did not claim any violation of his right to public trial.¹³⁵ His convictions were affirmed and the Washington State Supreme Court denied further review in 2007.¹³⁶ In 2008, Morris sought collateral relief in a PRP, contending the trial court violated his public trial right by privately questioning potential jurors in chambers, and his appellate counsel was ineffective for failing to raise the issue in his appeal.¹³⁷

Morris filed his appeal shortly after the Court decided *Orange*. Christopher Orange alleged for the first time in a PRP that an unconstitutional closure occurred when the trial court, citing space limitations, excluded all spectators from the courtroom during the whole of voir dire and refused to make exceptions for Orange's family or that of the victim.¹³⁸ Orange alleged in his PRP that his counsel on direct appeal was ineffective for failing to raise that issue. The Washington State Supreme Court agreed, holding that the exclusion was a closure

132. *See generally* WASH. R. APP. P. 16.3–16.15.

133. 176 Wash. 2d 157, 288 P.3d 1140 (2012). Writing for a plurality, Justice Owens was joined by Justices Fairhurst and Stephens and Justice Pro Tempore Alexander. Justice Chambers wrote a separate concurrence, and Chief Justice Madsen, wrote a separate dissent. Justice Wiggins also dissented, joined by Justices C. Johnson and J. Johnson.

134. 152 Wash. 2d 795, 100 P.3d 291 (2005).

135. *Morris*, 176 Wash. 2d at 164, 288 P.3d at 1143.

136. *Id.* at 164, 288 P.3d at 1144.

137. *Id.* at 164–65, 288 P.3d at 1144.

138. *Orange*, 152 Wash. 2d at 802–03, 100 P.3d at 294–95.

and was per se prejudicial, that appellate counsel was ineffective for failing to raise the issue,¹³⁹ and that the proper remedy was remand for a new trial.¹⁴⁰

The plurality in *Morris* applied the same analysis, concluding that *Orange* “clarified, without qualification, both that *Bone-Club* applied to jury selection and that closure of voir dire to the public without the requisite analysis was a presumptively prejudicial error on direct appeal.”¹⁴¹ *Morris*’ appellate counsel had therefore been ineffective for failing to raise the issue, and “[n]o clearer prejudice could be established.”¹⁴² As in *Orange*, the plurality in *Morris* remanded for a new trial.¹⁴³

2. *Dissenters Distinguish Orange, Dispute Ineffective Assistance Holding, and Emphasize the Distinction Between Direct and Collateral Review*

In separate dissents, Chief Justice Madsen and Justice Wiggins¹⁴⁴ argued strenuously that *Orange* is factually distinguishable and should not control the result in *Morris*.¹⁴⁵ Justice Wiggins noted that the public trial violation in *Orange* was “conspicuous in the record”¹⁴⁶ with an objection made by counsel at trial, whereas *Morris* and his attorney made no objection and by their conduct expressed approval of the in-chambers questioning of prospective jurors.¹⁴⁷ Chief Justice Madsen argued that *Morris*’ appellate counsel could reasonably have concluded from the trial record that “the closure was justified by juror privacy *plus* the defendant’s interest in a fair trial decided by unbiased jurors. Closure for the purpose of obtaining full answers to sensitive questioning served both of these purposes.”¹⁴⁸ Justice Wiggins also argued that, while hindsight might make the issue an obvious argument on appeal, it was common practice in courts in Washington and other jurisdictions to conduct limited in-chambers voir dire, and *Morris*’s appellate counsel

139. *Id.* at 800, 100 P.3d at 293.

140. *Id.*

141. *Morris*, 176 Wash. 2d at 167, 288 P.3d at 1145.

142. *Id.* at 166, 288 P.3d at 1144.

143. *Id.* at 168, 288 P.3d at 1145.

144. Justice Wiggins was joined by Justices Charles Johnson and James Johnson.

145. *Morris*, 176 Wash. 2d at 177–79, 288 P.3d at 1149–50 (Madsen, C.J., dissenting); *id.* at 184–85, 288 P.3d at 1153–54 (Wiggins, J., dissenting).

146. *Id.* at 185, 288 P.3d at 1153 (Wiggins, J., dissenting).

147. *Id.* at 185, 288 P.3d at 1153–54.

148. *Id.* at 177, 288 P.3d at 1150 (Madsen, C.J., dissenting) (emphasis in original).

was hardly “constitutionally deficient for failing to raise and develop what may have been a novel legal argument at the time.”¹⁴⁹ Both Justices argued that in contrast to *Orange*, no deficient performance was apparent on the appellate record in *Morris*.¹⁵⁰

Justice Wiggins also underscored the differences between direct appeal and collateral review: “Our PRP procedures reflect a crucial and enduring belief in the importance of finality, [and] [i]t is for this very reason that we require personal restraint petitioners to demonstrate prejudice as a prerequisite to relief.”¹⁵¹ *Morris* demonstrated no prejudice, and prejudice should not be presumed; “[t]o conclude otherwise ignores the differences between direct and collateral review.”¹⁵²

Finally, Justice Wiggins decried the harm resulting from automatic reversal: “It does not serve the interests of justice to reopen this long-decided case, requiring a young girl to relive old traumas, and granting a windfall new trial to a man convicted of sexually molesting his daughter.”¹⁵³

IV. WASHINGTON OPEN COURTS JURISPRUDENCE REMAINS UNSETTLED

These four decisions reflect the wide divisions on the Court and the consequent difficulty of gathering a majority. The analysis of many common issues is thus unsettled. Future cases will also be affected by the changing membership of the Court: the two newest justices have not yet participated in decisions on open courts questions.

A. *Some Questions Have Been Decided*

Certain things are clear. The article I, section 22 public trial right applies to proceedings usually conducted in open court, including voir dire.¹⁵⁴ If the right applies, a closure occurs when observers are excluded by clearing the courtroom or by moving proceedings into private

149. *Id.* at 186, 288 P.3d at 1154 (Wiggins, J., dissenting).

150. *Id.* at 178, 288 P.3d at 1150 (Madsen, C.J., dissenting); *id.* at 185–86, 288 P.3d at 1153–54 (Wiggins, J., dissenting).

151. *Id.* at 180, 288 P.3d at 1151 (Wiggins, J., dissenting).

152. *Id.* at 183, 288 P.3d at 1153.

153. *Id.* at 186, 288 P.3d at 1154.

154. *State v. Wise*, 176 Wash. 2d 1, 11, 288 P.3d 1113, 1118 (2012); *State v. Lormor*, 172 Wash. 2d 85, 92, 257 P.3d 624, 628 (2011).

places.¹⁵⁵ Complete exclusion of the public from proceedings in a courtroom is a closure.¹⁵⁶ Inadequate space for both the public and the jury venire does not justify a closure.¹⁵⁷ Wholesale exclusion of the defendant's family is a closure.¹⁵⁸

On the other hand, the public trial right does not prevent the court from exercising its discretion to control the courtroom environment; the exclusion of one person, even a family member, to reduce noise and possible distractions is not a violation of the right.¹⁵⁹ Questioning jurors one at a time in open court is not a closure even if the remaining venire is kept elsewhere.¹⁶⁰ When the judge meets with counsel in chambers to consider a question from a deliberating jury about the court's instructions, the public trial right is not violated.¹⁶¹ Nor does the right apply to jury instruction conferences.¹⁶²

B. Other Issues Remain Unresolved

Substantive areas that remain uncertain include the scope of the right, the role of the structural error doctrine, and the impact of the experience and logic test. These uncertainties are discussed in turn.

1. Scope of the Right: To Which Proceedings Does the Public Trial Right Attach?

To answer this question the *Sublett* Court adopted the U.S. Supreme Court's experience and logic test from *Press II*, which involved closure of preliminary hearings in California.¹⁶³ The "experience" prong inquires whether a proceeding has "historically been open to the press and general public."¹⁶⁴ *Press II* found the preliminary hearings to be similar in nature to probable cause hearings, which are like trials and have traditionally been open; this satisfied the experience prong.¹⁶⁵ The Washington State Supreme Court thus gave great weight to past

155. See *Lormor*, 172 Wash. 2d at 92–93, 257 P.3d at 628–29.

156. *Id.* at 92, 257 P.3d at 628.

157. *In re Orange*, 152 Wash. 2d 795, 809–10, 100 P.3d 291, 298 (2005).

158. See, e.g., *id.* at 800–01, 100 P.3d at 293–94.

159. *Lormor*, 172 Wash. 2d at 96–97, 257 P.3d at 630.

160. *State v. Vega*, 144 Wash. App. 914, 917, 184 P.3d 677, 679 (2008).

161. *State v. Sublett*, 176 Wash. 2d 58, 77–78, 292 P.3d at 724–25 (2012).

162. *Id.* at 75, 292 P.3d at 723.

163. *Press-Enter. Co. v. Superior Court (Press II)*, 478 U.S. 1, 4–5 (1986).

164. *Sublett*, 176 Wash. 2d at 73, 292 P.3d at 722.

165. *Press II*, 478 U.S. at 12–13.

practices in handling questions from a deliberating jury.

This presents a puzzle, however. Questioning potential jurors in chambers is also a practice of long-standing and wide use, but this history has played no part in the Court's analysis (and rejection) of the practice, before or after *Sublett*.¹⁶⁶ We therefore do not know how the Court will apply the history part of the experience prong.

Under the logic prong, the trial court must determine whether openness plays "a significant positive role in the functioning of the particular process in question."¹⁶⁷ The Court has not clarified what the hallmarks of significance might be, or what is meant by "functioning of the particular process." The experience and logic test thus appears to combine a number of somewhat elastic ideas that will need to be further developed.

The Court will also have to revisit whether the experience and logic test can or should be supplemented with other inquiries, because there does not yet appear to be a majority view on the subject. In *Sublett*, the plurality rejected the Court of Appeals' legal/factual test as inadequate, standing alone, because it failed to recognize that proceedings often involve a mixture of content, and the test encourages reliance on labels rather than substance. This is a fair criticism, but leaves unanswered how the substance of the proceeding affects the analysis.

2. *What Role Should the Structural Error Doctrine Play? (And What About Momah?)*

One of the most difficult questions is application of the structural error doctrine, which governs both reviewability and remedy. A structural error is presumed prejudicial, and requires automatic reversal. It is to be hoped that the Court will apply this doctrine more cautiously going forward, for several reasons.

First, the doctrine has federal roots and is only recently part of Washington case law.¹⁶⁸ Traditional federal analysis includes a strong presumption that constitutional errors are not structural,¹⁶⁹ and that structural errors are rare. As the U.S. Supreme Court explained in

166. See generally *State v. Paumier*, 176 Wash. 2d 29, 288 P.3d 1126 (2012); *State v. Wise*, 176 Wash. 2d 1, 288 P.3d 1113 (2012).

167. *Press II*, 478 U.S. at 8.

168. See *State v. Vreen*, 143 Wash. 2d 923, 930, 26 P.3d 236, 239 (2001); *In re Benn*, 134 Wash. 2d 868, 921, 952 P.2d 116, 143 (1998).

169. *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (internal quotation marks omitted); *Neder v. United States*, 527 U.S. 1, 8 (1999).

Arizona v. Fulminante,¹⁷⁰ a “structural” error is a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.”¹⁷¹ In *Neder v. United States*,¹⁷² the Supreme Court characterized structural errors as “infect[ing] the entire trial process,” and depriving defendants of “basic protections” such that “no criminal punishment may be regarded as fundamentally fair.”¹⁷³ If a constitutional error is structural, a conviction cannot stand, because such errors are presumptively and irrebuttably prejudicial.¹⁷⁴ In *Washington v. Recuenco*,¹⁷⁵ the U.S. Supreme Court described the “rare cases” in which an error will be structural, thus requiring automatic reversal: “In such cases, the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”¹⁷⁶ Structural error has been found in cases involving, for example, complete denial of counsel, coerced confession, racial discrimination in selection of a grand jury, denial of self-representation at trial, complete denial of public trial, and defective reasonable-doubt jury instructions.¹⁷⁷ But as the *Recuenco* Court emphasized, “most constitutional errors can be harmless.”¹⁷⁸

Under the U.S. Supreme Court’s analysis, “a constitutional error is either structural or it is not,”¹⁷⁹ and once an error has been determined to be non-structural the test is:

[W]hether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained An otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.¹⁸⁰

There is nothing in the federal cases to suggest that an open courts violation is always structural error, and the Washington State Supreme Court has not explained why a more strict application of the doctrine in section 22 cases is required by the state constitution.

170. 499 U.S. 279 (1991).

171. *Id.* at 310.

172. 527 U.S. 1.

173. *Id.* at 8–9 (internal quotation marks omitted).

174. *See id.*

175. 548 U.S. 212 (2006).

176. *Id.* at 218–19 (quoting *Neder*, 527 U.S. at 8).

177. *Id.* at 219 n.2 (collecting cases).

178. *Id.* at 218 (internal quotation marks omitted).

179. *Neder*, 527 U.S. at 14.

180. *Id.* at 15 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

Second, the Court has not been consistent in applying the structural error doctrine to the public trial right. In *Bone-Club*,¹⁸¹ *Easterling*,¹⁸² *In re Orange*,¹⁸³ *State v. Brightman*,¹⁸⁴ and *Strode*,¹⁸⁵ the trial court closed the courtroom (or conducted voir dire in chambers) for a portion of a criminal trial, each time without benefit of the required balancing of interests. The Court held that each closure rendered the trial fundamentally unfair, and was therefore structural error.¹⁸⁶

In *State v. Momah*, however, the trial court, without benefit of a *Bone-Club* inquiry, conducted closed-door questioning of prospective jurors to prevent tainting the jury pool in a notorious sex crime case.¹⁸⁷ Yet the Court held this error was not structural: “not all courtroom closure errors are fundamentally unfair and thus not all are structural errors.”¹⁸⁸ The *Momah* court listed several criteria for distinguishing between public trial errors that are structural and those that are not:

(1) [W]hether the trial court closed the courtroom based on interests other than the defendant’s or to safeguard the defendant’s right to a fair trial; (2) whether the closure impacted the fairness of the defendant’s proceedings; (3) whether the defendant was consulted or given the opportunity to object, and whether the defendant assented to or actively participated in the closure; and finally (4) whether the record suggests that the court considered the defendant’s right to a public trial when it closed the courtroom.¹⁸⁹

Momah appears unique. Not only did the Court hold the error not structural, but it did so by examining the record and deciding for itself that the closure did not affect the fairness of the trial (and so did not

181. 128 Wash. 2d 254, 906 P.2d 325 (1995) (closing courtroom for testimony of undercover officer).

182. 157 Wash. 2d 167, 137 P.3d 825 (2006) (closing courtroom for plea negotiation between prosecutors and codefendant).

183. 152 Wash. 2d 795, 100 P.3d 291 (2004) (closing courtroom to spectators during voir dire).

184. 155 Wash. 2d 506, 122 P.3d 150 (2005) (closing courtroom to spectators during voir dire).

185. 167 Wash. 2d 222, 217 P.3d 310 (2009) (closing courtroom to spectators during voir dire).

186. *See id.* at 231, 217 P.3d at 316 (citing *Bone-Club*, *Easterling*, and *Orange* for the proposition that “denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed”); *see also* *State v. Momah*, 167 Wash. 2d 140, 150–51, 217 P.3d 321, 326–27 (2009) (citing *Bone-Club*, *Easterling*, *Orange*, and *Brightman* as cases where the closure errors were held to be structural). For a detailed discussion of *Momah* and *Strode*, decided by the Court the same day, *see* Lutzenhiser, *supra* note 4, at 1229–32.

187. 167 Wash. 2d at 145–47, 217 P.3d at 323–25.

188. *Id.* at 150, 217 P.3d at 326.

189. *State v. Paumier*, 176 Wash. 2d 29, 47, 288 P.3d 1126, 1135 (2012) (Wiggins, J., dissenting) (citing *Momah*, 167 Wash. 2d at 151–52, 217 P.3d at 326–27).

constitute structural error).¹⁹⁰ In subsequent cases, however, the Court has undertaken no such examination of the record. Nor has it applied the criteria enumerated in *Momah*. But the Court has not overruled *Momah*.¹⁹¹

Third, the *Wise/Paumier* rule that failure to conduct a *Bone-Club* inquiry is itself structural error is a new development. It is one thing to apply the structural error doctrine to a constitutional error such as an unjustified closure. It is another thing to apply the structural error doctrine to a failure to determine on the record whether the closure is constitutionally justified. This rule elevates the *Bone-Club* analysis to an independent constitutional right and eliminates any review of the merits of the closure decision whenever the *Bone-Club* balancing is absent.

The court has not clearly explained why (for example) in-chambers questioning of selected prospective jurors, on sensitive subjects and at their request, falls into the class of constitutional errors that infect the entire trial, such as the complete denial of counsel, coerced confession, racial discrimination in selection of a grand jury, denial of self-representation at trial, or defective reasonable-doubt jury instructions. It is therefore even more difficult to see how the failure to articulate a proper balancing of interests similarly infects the entire trial process, or deprives defendants of “basic protections” such that “no criminal punishment may be regarded as fundamentally fair.”¹⁹²

Whether the new rule has significant practical effect will depend upon whether closures continue to occur without a *Bone-Club* analysis. And in future cases, that will depend, at least in part, upon whether the Court can clearly define the scope of the public trial right.

3. *What Is the Impact of the Experience and Logic Test?*

Under the experience prong of the test, historical practice matters. A survey of what Washington judges have done “at chambers” since

190. *Momah*, 167 Wash. 2d at 151–56, 217 P.3d at 326–29.

191. The leading opinions have instead distinguished *Momah* as factually unique. *See, e.g.*, *State v. Wise*, 176 Wash. 2d 1, 14–15, 288 P.3d 1113, 1119–20 (2012). This approach has been challenged, especially by Chief Justice Madsen. *See id.* at 24, 288 P.3d at 1124 (Madsen, C.J., dissenting); *State v. Sublett*, 176 Wash. 2d 58, 119–20, 292 P.3d 715, 745 (2012) (Madsen, C.J., concurring). With the exception of *Momah*, the Court has extended the structural error doctrine not only to all violations of the public trial right, but to all cases where no *Bone-Club* analysis was done, regardless of whether or not there was an actual violation of the right and whether or not actual prejudice resulted. *See supra* Part III.B. This has meant a costly train of retrials for courts, prosecutors, and defense attorneys. For witnesses and victims, reliving the crime at a new trial is a high cost indeed.

192. *Neder v. United States*, 527 U.S. 1, 8–9 (1999).

statehood (and thus the earliest days of sections 10 and 22) reveals that in-chambers conferences to discuss even legal matters have long been seen as constitutional and within the discretion of the trial judge.¹⁹³ Until *Sublett*, however, history did not appear to have a role in the analysis, particularly considering that chambers questioning of potential jurors is a practice of very long standing. The new experience and logic test calls for review of historical practices. Yet it seems unlikely that the *Sublett* Court's adoption of the test signals a shift in the voir dire cases. What then is the role of the history inquiry?

a. What Is the Breadth of the Sublett Rule?

The *Sublett* chambers conference involved a deliberating jury's question about its instructions on the law. The Court's analysis was specific to that situation. Does the *Sublett* rule permit chambers consideration of all questions from a deliberating jury, such as questions about evidence, or is it limited to questions about the court's instructions? What analytical path is to be used for a different sort of question? What if the court and counsel all have new trials underway and cannot be physically present where the jury is deliberating—can they resolve the issue on the telephone, which has been a frequent practice? By email? What about consideration of questions from the jury during trial? If jurors are permitted to submit proposed questions for witnesses, may counsel and the court confer in chambers to decide which questions should be asked?

It was important to the *Sublett* Court's analysis that a court rule directed the process and protected the record. The Court viewed the rule as serving to advance and protect the constitutional requirements of open courts. It will likely be a rare case in which a rule applies to protect section 22 interests. What is the importance of the rule in the analysis?

b. What About Chambers and Sidebar Conferences?

Chambers conferences have long been used to resolve procedural (and sometimes substantive) issues, because they are efficient and productive. The defendant is normally not present. Do such conferences implicate a defendant's public trial right (or the public's right to open

193. See generally *In re Ticeson*, 159 Wash. App. 374, 384–85, 246 P.3d 550, 555–56 (2011), *abrogated on other grounds by Sublett*, 176 Wash. 2d at 71–72, 292 P.3d at 721–22. *Ticeson* was a matter of a Sexually Violent Predator commitment trial, and thus was a civil, not criminal proceeding. However, the closure questions the court discussed were similar to those at issue in the criminal context. *Id.* at 379–80, 246 P.3d at 553.

access)? Does the answer depend upon the nature of the discussion? Does it depend upon whether trial is actually underway?

Similarly, common practice has been to address certain types of trial issues in a quiet sidebar conference without dismissing the jury.¹⁹⁴ For example, the judge may wish to address counsel about specific lines of questioning or scheduling. Or counsel may wish to advise the court that an issue is about to surface, or reveal that a party has an urgent need for a recess, or state the basis for an objection. These issues may often be efficiently and fairly handled at sidebar; if the sidebar proves inadequate a recess can be taken. The alternative is to excuse the jury every time the judge wishes to address, question, or admonish counsel, or hear a fuller explanation of an objection. But this disrupts jurors' concentration and leaves them frustrated by their own exclusion from the proceedings. (It also results in a significant loss of time, especially where jury rooms are not adjacent to courtrooms.) Is a sidebar closure? Does it matter what issue is discussed, or whether a record is made?

c. What Are the Limits of the Trial Judge's Discretion?

The Court will also have to decide where the line falls between the administration of a trial and the rights of the defendant and the public. Trial judges have the responsibility to protect the defendant's public trial right.¹⁹⁵ They also have the responsibility, and inherent and statutory¹⁹⁶ authority, to preserve and enforce order in the proceedings before them.¹⁹⁷ Scheduling and order of witnesses; statutory or administrative empanelment of jurors, including general qualifications and even

194. Trial judges have been increasingly reluctant to conduct such conferences in light of the unsettled state of the law. Interview by Jeanine Blackett Lutzenhiser with the Hon. Susan Craighead, King County Superior Court, in Seattle, Wash. (Dec. 1, 2011); Interview by Jeanine Blackett Lutzenhiser with the Hon. Anne Ellington, Washington State Court of Appeals, in Seattle, Wash. (Dec. 29, 2011).

195. *See, e.g., In re Orange*, 152 Wash. 2d 795, 805, 100 P.3d 291, 296 (2005).

196. The Washington Revised Code provides in pertinent part:

Every court of justice has power—(1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority. (3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein. (5) To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto. (6) To compel the attendance of persons to testify in an action, suit or proceeding therein, in the cases and manner provided by law. (7) To administer oaths in an action, suit or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties.

WASH. REV. CODE § 2.28.010(1)–(7) (2012).

197. *State v. Lormor*, 172 Wash. 2d 85, 93–94, 257 P.3d 624, 628–29 (2011).

hardship not specific to a defendant's case;¹⁹⁸ management of space and accommodation; whether to permit photographers in the courtroom;¹⁹⁹ what security procedures are necessary²⁰⁰—these are matters traditionally within the discretion of the trial judge. Do these decisions implicate the public trial right or the public's right to open access? Does discussion of these matters in chambers implicate those rights? The Court has not yet seen a case raising these issues, but its decisions thus far do not suggest clear lines of analysis.

C. *Where Do the Justices Stand On These Issues?*

In light of the plethora of opinions and the recent changes in membership of the Court, it is useful to examine the justices' position on the major issues.²⁰¹ (The Court's newest members, Justices González and McCloud, have not yet heard cases raising these issues.)

1. *Scope of the Public Trial Right*

To determine when the right to public trial attaches, Justices Charles Johnson, Owens and James Johnson would apply the experience and logic test, but would recognize that the Court of Appeals' legal/factual test "somewhat parallels the approach we use."²⁰² Chief Justice Madsen believes both tests are useful.²⁰³ Justices Stephens and Fairhurst would apply only the experience and logic test.²⁰⁴ Justice Wiggins rejects the experience and logic test as unconstitutional.²⁰⁵ Thus six of the justices will apply the experience and logic test, and four of those justices do not reject the legal/factual test.

198. *See* *State v. Irby*, 170 Wash. 2d 874, 887, 246 P.3d 796, 803 (2011) (Madsen, C.J., dissenting) (arguing that excusal of potential jurors for personal reasons such as general hardship is distinct from true voir dire when the potential jurors are introduced to the substantive legal and factual issues of a defendant's case). The U.S. Supreme Court has "expressly distinguished 'voir dire' from the 'administrative empanelment process.'" *Id.* at 888, 246 P.3d at 803 (citing *Gomez v. United States*, 490 U.S. 858, 874 (1989)). *See also* *Lutzenhiser*, *supra* note 4, at 1236–37.

199. *State v. Russell*, 141 Wash. App. 733, 741, 172 P.3d 361, 364–65 (2007) (trial court balanced interests of defendant's right to public trial with court's authority to control courtroom photography under GR 16).

200. *State v. O'Connor*, 155 Wash. App. 282, 293, 229 P.3d 880, 884 (2010).

201. *See* Table 1: Open Courts Cases 2009–2012: Voting Alignments and Opinions.

202. *State v. Sublett*, 176 Wash. 2d 58, 72–73, 292 P.3d 715, 722 (2012).

203. *Id.* at 98–99, 292 P.3d at 735 (Madsen, C.J., concurring).

204. *Id.* at 136, 292 P.3d at 753 (Stephens, J., concurring).

205. *Id.* at 145–50, 292 P.3d at 758–60 (Wiggins, J., concurring).

2. *Structural Error*

All the justices hold unjustified closure to be constitutional error. They are divided on the issue of structural error.²⁰⁶ Justices Owens, Fairhurst, and Stephens hold that an unjustified closure is always structural error and that failure to conduct a *Bone-Club* inquiry is itself structural error. Chief Justice Madsen and Justices Wiggins, Charles Johnson, and James Johnson do not agree.

3. *Review and the Rules of Appellate Procedure*

Chief Justice Madsen and Justices James Johnson, Charles Johnson, and Wiggins would apply RAP 2.5(a)(3) to determine reviewability on appeal where a closure issue was not raised at trial, and Chief Justice Madsen would undertake an examination of the record (or an enhanced record) to determine whether the closure was justified. Justices Owens, Fairhurst, and Stephens believe application of RAP 2.5 is improper because it amounts to treating silence as waiver, and also reject appellate examination of the record to determine whether the closure was justified.²⁰⁷ Justices Wiggins, Charles Johnson, and James Johnson do not comment on this issue.

CONCLUSION

In admirable understatement, Justice Chambers observed (in his brief concurrence in *Morris*) that “[t]his court’s jurisprudence regarding public trials under article I, sections 10 and 22 is still developing.”²⁰⁸ Chief Justice Madsen made similar observations, closing her *Sublett* concurrence with a series of questions addressed to the Court as a whole.²⁰⁹ Because every criminal case may present these issues, further

206. *See supra* Part III.B.

207. “We do not comb through the record or attempt to infer the trial court’s balancing of competing interests where it is not apparent in the record.” *State v. Wise*, 176 Wash. 2d 1, 12–13, 288 P.3d 1113, 1118 (2012).

208. *In re Morris*, 176 Wash. 2d 157, 173, 288 P.3d 1140, 1148 (2012) (Chambers, J., concurring).

209. *Sublett*, 176 Wash. 2d at 135, 292 P.3d at 753 (Madsen, C.J., concurring) (“[M]ust 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? . . . [I]t is possible to give all aspects of the public trial right and all aspects of our appellate rules effect. Will we do so?”).

guidance from the Supreme Court is sorely needed so as to avoid the dire consequences of retrials. For the sake of courts, victims, defendants, and public confidence, it is to be hoped the views of the justices will find harmony in the next round.

TABLE 1: OPEN COURTS CASES 2009–2012: VOTING ALIGNMENTS AND OPINIONS

Case	Holding	Majority/ Plurality	Concur. 1	Concur. 2	Concur. 3	Dissent 1	Dissent 2
Morris (2012) (closed voir dire)	Reversed	Owens Fairhurst Stephens Alexander, JPT	Chambers			Madsen	Wiggins C. Johnson J. Johnson
Paumier (2012) (closed voir dire)	Reversed	Owens Chambers Fairhurst Stephens Alexander, JPT				Madsen	Wiggins C. Johnson J. Johnson
Wise (2012) (closed voir dire)	Reversed	Owens Chambers Fairhurst Stephens Alexander, JPT				Madsen	J. Johnson C. Johnson Wiggins
Sublett (2012) (chambers conf. for jury Q)	Affirmed	C. Johnson Chambers Owens J. Johnson	Stephens Fairhurst Alexander, JPT	Wiggins (result)	Madsen		

TABLE 1 *continued*

Case	Holding	Majority/ Plurality	Concur. 1	Concur. 2	Concur. 3	Dissent 1	Dissent 2
Lormor (2011) (exclusion of distracting family member)	Affirmed	C. Johnson Alexander Madsen J. Johnson Chambers Owens Fairhurst Stephens Wiggins					
Momah (2009) (closed voir dire)	Affirmed	C. Johnson Madsen Owens Fairhurst J. Johnson Penoyar, JPT	Penoyar, JPT			Alexander Sanders Chambers	
Strode (2009) (closed voir dire)	Reversed	Alexander Sanders Chambers Owens	Fairhurst Madsen			C. Johnson Penoyar, JPT J. Johnson	