Supreme Court No. 96690-7
Court of Appeals No. 34816-4-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CARLOS HERNANDEZ, II

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington is the respondent in this petition and plaintiff below.

B. ISSUES PRESENTED FOR REVIEW

1. Was there a courtroom closure sufficient to implicate Mr. Hernandez's public trial right?

2. If there was a closure sufficient to implicate Mr. Hernandez's public trial right, did Mr. Hernandez waive his remedy or invite error as to his remedy where he expressly declined a mistrial?

3. May the appellate court require Mr. Hernandez to waive his attorney client privilege sufficient to allow review?

4. Is the issue surrounding Mr. Crowley's representation moot where the appellate court can do nothing that would make a second trial different than the first?

C. STATEMENT OF THE CASE

As previously elaborated. The State does not take issue with Mr. Hernandez's summation, but does add the following facts.

Four members of the prosecutor's family wished to watch the trial. Trial RP 108. The bailiff turned them away during jury selection without the knowledge of the trial judge because the bailiff felt the courtroom was too crowded. Trial RP 109. The family members went down to the

prosecutor's office. A prosecutor came into the courtroom, interrupted the proceedings and informed the judge of what happened. Trial RP 105. The bailiff indicated no other persons had been turned away. Trial RP 113. The judge corrected the situation and asked for any motions from the defense. The defense attorney expressly declined to make a mistrial motion. Trial RP 113.

After the State received the appellant's brief in this case the State moved the trial court under its RAP 7.2 authority over the record to allow the State to have a copy of Mr. Crowley's declaration so that it could designate it in the record if need be. Mr. Hernandez resisted the State's motion and the trial court denied it. State's Supplemental Clerk's Papers.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. There was no courtroom closure significant enough to implicate Mr. Hernandez's public trial rights.

The Court of Appeals did not reach this issue, assuming without deciding that there was a public trial right violation. However, there was not.

"[A] closure 'occurs when the courtroom is completely and *purposefully* closed to spectators so that no one may enter and no one may leave.'" *State v. Stark*, 183 Wn. App. 893, 902, 334 P.3d 1196 (2014) (emphasis added), citing *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715

(2012) (plurality opinion). The focus is whether the trial court's request "completely and purposefully closed [the courtroom] to spectators so that no one may enter and no one may leave." *Id.* at 903. There was no trial court request for anyone to leave or be kept out in in this case.

The alleged courtroom closure was brief and inadvertent. The trial judge did not approve of the closure nor did he even know of its existence, and corrected it as soon as it was brought to his attention. In addition no one else besides the four members of the prosecutor's family was turned away, and then only for a short time. A trivial closure that was inadvertent does not violate the public trial right. *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008), citing *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005), and *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975). *Erickson* held that a trivial closure is one that is brief and inadvertent, and has no effect on the proceedings. That is the fact pattern here. The observers who were kept out were simply there to watch their family member, the prosecutor; there was no effect on the case.

The test for when a courtroom closure is de minimus is whether it affected the purposes of the public trial right. *State v. Schierman*, __ Wn.2d __, 415 P.3d 106, 126 (2018). As Mr. Hernandez points out, the purpose of the public trial right "is to remind the prosecutor and the judge (as well as the defense attorney, jurors and witnesses) of the responsibility

to the accused and the importance of their functions." Petition for Review at 6, citing *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). As far as any relevant participants knew the courtroom was open, and that any person could walk in at any time. Thus the purpose of reminding the participants of their responsibility was not frustrated by the bailiff's actions. The proceedings were being recorded as a normal practice, and only four people were excluded for the time it took to walk down a flight of stairs, complain and walk back up. The closure that occurred was de minimus, and thus did not affect Mr. Hernandez's public trial rights. Because Mr. Hernandez's public trial rights were not affected the court would not even need to reach the issue of waiver.

2. Mr. Hernandez either waived his right to a remedy or invited error when he expressly declined a mistrial.

After the inadvertent closure the trial judge asked Mr. Hernandez's attorney whether he had any motions to make. Mr. Morgan, the defense attorney, expressly stated he was not moving for a mistrial.

"There is great potential for abuse when a party does not object because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013), (quoting *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d

646 (2006)). "A conscious decision not to raise a constitutional issue at trial effectively serves as an affirmative waiver." *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994). Allowing this issue to go forward under these circumstances would provide a perverse incentive to both the prosecution and defendant. "The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). If a prosecutor recognizes an error made by the court that threatens a defendant's constitutional fair trial rights, it is incumbent upon the prosecutor to object and bring the issue to the court's attention. That is what a prosecutor did in this case when he was informed of a problem. If all a defendant has to do is assent to the court's error, then take his chances for a verdict, with a reversal already in the bag on appeal, a prosecutor would be much better off remaining silent and hoping no one, including appellate counsel, picks up on the error, and the defendant would be incentivized to assent to the error, and not raise the objection if he catches the problem. This perverse set of incentives, advocated by the appellant here, undermine the primacy of trial and the values of judicial economy, as well as the rights of defendants.

The Supreme Court recently addressed invited error in the public trial context in *In re Pers. Restraint of Salinas*, 189 Wn.2d 747, __ P.3d __

(2018). In *Salinas* defense counsel asked for the courtroom to be closed during voir dire. The trial judge did not sua sponte request the closure, nor did the State request the closure while the defendant silently stood by, instead the defense actively requested it in complete absence of support from the State. The Court ruled that this was invited error and the defendant could not complain about it. In this case Mr. Hernandez did not request the alleged closure, thus he did not invite that error, however in this case the inappropriate closure was recognized and brought to the court and counsel's attention, thus the real question becomes what remedy should the trial court have provided. Mr. Hernandez was invited to bring a motion by the court. Mr. Hernandez affirmatively declined a mistrial. Like *Salinas*, Mr. Hernandez's attorney did all of the talking. Defense counsel took affirmative and voluntary action to not seek a remedy. The State sat silent, doing nothing to oppose Mr. Hernandez's remedy. *See Salinas*, 189 Wn.2d at 758. If there was error in the remedy, Mr. Hernandez invited it, and cannot complain about it now.

Possible remedies for a closed courtroom that is recognized prior to verdict would be to restart the trial (a mistrial) or to redo the portion that was closed in open court. In this case, given where the court was in the process when the closure was recognized, that would have essentially amounted to the same thing, a restart of voir dire. This is not a case of

counsel missing an objection. This is a case where it is clear the defense knew of the remedy, and elected not to exercise it. This was reasonable, because all he really would have gained would be a restart of voir dire.

Assuming Mr. Hernandez's public trial rights were violated, the violation was cured as soon as the trial court became aware of the problem and opened up the court. Mr. Hernandez reasonably elected to not exercise his remedy for the past violation. He cannot seek it now.

Because under current case law the answer to these issues is clear, there was no significant courtroom closure, and if there was Mr. Hernandez waived/ invited error as to the remedy, there is no significant question of law worthy of Supreme Court review in this case and the petition for review should be denied.

3. A requirement that a defendant waive attorney client privilege sufficient to allow review of the issues raised is neither new nor novel.

Mr. Hernandez complains that the Court of Appeals' decision requires that he make public Mr. Crowley's reasons for withdrawal. However, the State never asked to make those documents public, instead it asked for a copy of them so the issue Mr. Hernandez raised could be adequately reviewed. Mr. Hernandez could have sought a protective order requiring the State to keep the documents confidential, but allowing the State to respond, and the documents would have been sealed in the

appellate court. GR 15(g). To what extent the documents would have had to been revealed for the court to issue an opinion is impossible to tell without reviewing the documents.

In any event attorney client privilege is a shield, not a sword to use to prevent the State from adequately responding to a claim or the court from adequately reviewing it. RPC 1.6(b)(5) specifically allows an attorney to break privilege to respond to allegations in any proceeding concerning the lawyer's representation of the client. *State v. Cloud*, 95 Wn. App. 606, 613, 976 P.2d 649 (1999), noted that an ineffective assistance of counsel claim waives the attorney client privilege sufficient to decide the issue. While the issue is not precisely an ineffective assistance of counsel claim in this instance, Mr. Hernandez offers no argument why his claim should be treated any different. In essence he is claiming his attorney acted unprofessionally in withdrawing. The Court needs an adequate record to review this claim, Mr. Hernandez has refused to provide one and prevented the State from doing so. The Court of Appeals' decision was consistent with the general principle that one who complains of an attorney's actions waives privilege sufficient to allow review of the issue. This is a well-established principle, and does not call for Supreme Court review.

The case law is clear that a defendant's presence is not required when there is no input he could have, such as a legal issue where the defendant cannot be told why his counsel is withdrawing. *State v. Berrysmith*, 87 Wn. App. 268, 274, 944 P.2d 397, 400 (1997); *State v. Rooks*, 130 Wn. App. 787, 795, 125 P.3d 192, 196 (2005). Because Mr. Hernandez refuses to allow the court to review the reason for withdrawal, he cannot distinguish *Berrysmith* and *Rooks* on their facts. Instead he simply argues that these cases should not be the law. But the principle that a defendant need not be present when his presence would not have any impact, such as for an issue of law, is well established and not an issue that calls out for Supreme Court review.

4. The issue regarding Mr. Crowley's withdrawal is moot.

"A case is moot if a court can no longer provide effective relief." *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (quoting *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). An appellate court provides effective relief of trial error by remanding for a trial free from the error that was complained about in the appeal. This is true even with structural error. For example, a trial conducted in a closed courtroom can be redone in an open courtroom. A critical proceeding without the defendant's presence can be redone with him present. Here the error complained about is that Mr. Hernandez did not get a chance to present his

side of the facts to a judge regarding Mr. Crowley's withdrawal. Presumably Mr. Hernandez believes that had he been able to present his side of the story the Court would not have allowed Mr. Crowley to withdraw, Mr. Crowley would have been his attorney and Mr. Crowley, through his brilliance, would have achieved a better result. Assuming this to be true, the remedy is to order a new trial, reverse Mr. Crowley's permission to withdraw from the case, and remand for a new trial with Mr. Crowley as defense counsel.

This the Court cannot do. Mr. Crowley resigned in lieu of discipline from the Washington State Bar.[1] He cannot represent anyone in Washington Courts. While the appellate court can remand for a new trial, it will be with a defense attorney other than Mr. Crowley. That is precisely what Mr. Hernandez got the first time around, a trial with an attorney other than Mr. Crowley. He was free to accept the public defender or hire counsel of his choice. In a new trial Mr. Hernandez would be free to accept the public defender or hire counsel of his choice. There is nothing the appellate court can say or do that will make the second trial different than the first, thus there is no effective remedy the appellate court can provide.

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[1] https://www.mywsba.org/LegalDirectory/LegalProfile.aspx?Usr_ID=000000019868 (last visited January 3, 2018) (See Also Opposition to Motion to State's Motion to Obtain Sealed Documents in State's Sup. Desig. of Clerk's Papers)

E. CONCLUSION

The Court of Appeals' decision followed well established legal principles. There is no significant issue of law that merits the Supreme Court's attention. The petition for review should be denied.

Dated this 24th day of January, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

That on this day I served a copy of the Response to Petition for Review in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Kate Benward
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Dated: January 24, 2019.

Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

January 24, 2019 - 10:23 AM

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