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NO. 99926-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

ALEJANDRO PEÑA SALVADOR,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Peña Salvador, __ Wn. App. 2d __, 487 P.3d 923 (2021).

C. NEW ISSUE PRESENTED FOR REVIEW[1]

If this Court grants review in this case, the State seeks cross-review of the following issue, which the Court of Appeals decided adversely to the State, as an alternative ground on which to affirm Peña Salvador's convictions:

Is a defendant barred from appealing the denial of a for-cause challenge where he later accepted the jury without exhausting his peremptory challenges?

D. STATEMENT OF THE CASE

The defendant, Alejandro Peña Salvador, was convicted of one count of child molestation in the first degree against his girlfriend's minor daughter, J.O.; two counts of rape of a child in the

[1] Unusually, Peña Salvador included this issue in his petition for review on the grounds that "Division One panels have resolved the same issue differently," even though he prevailed on this issue in the Court of Appeals. Petition for Review at 15. Technically, Peña Salvador is not an aggrieved party on this threshold issue and therefore may not seek review of the Court of Appeals' holding. RAP 3.1. The State has drafted this Answer as if Peña Salvador's petition did not request review of this issue.

second degree against J.O.; and one count of child molestation in the third degree against J.O.'s sister, L.O.[2] CP 50-55. The relevant facts are set forth in the State's briefing before the Court of Appeals. Br. of Respondent at 2-14, 33.

The Court of Appeals rejected Peña Salvador's appeal on the merits, affirming the convictions in a unanimous published opinion. State v. Peña Salvador, __ Wn. App. 2d __, 487 P.3d 923 (2021).

E. ARGUMENT

Peña Salvador seeks review of the Court of Appeals' holdings that (1) the trial court properly exercised its discretion in denying Peña Salvador's for-cause challenge to Juror 44 and (2) the community custody condition requiring Peña Salvador to avoid areas where children's activities "regularly occur or are occurring" is sufficiently crime-related and not unconstitutionally vague. The reasoning and authority set out in the Court of Appeals' opinion and the Brief of Respondent below amply demonstrate that the criteria for acceptance of review set out in RAP 13.4(b) are not met on those issues.

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[2] The named minor victims are referred to by their initials in an attempt to protect their privacy.

Before reaching the merits of Peña Salvador's claim regarding the denial of his for-cause challenge to Juror 44, the Court of Appeals addressed the State's argument that Peña Salvador did not preserve his claim because he chose to let half his peremptory challenges go to waste rather than using one of them to remove the challenged juror. Peña Salvador, 487 P.3d at 928-31. The Court of Appeals acknowledged the logic and precedent from this Court supporting the State's position. Id. However, the court was troubled by more recent cases in which this Court and the United States Supreme Court have made broad pronouncements about a defendant's ability to appeal the denial of a for-cause challenge against a juror who goes on to be seated without articulating a distinction between the facts presented in those cases—in which the defendants exhausted their peremptory challenges—and cases where exhaustion had not occurred. Id. at 930-31. The Court of Appeals determined that it could "…not definitively conclude that Peña Salvador's challenge to Juror 44 is waived because he did not exhaust his peremptory challenges." Id. at 14.

If review is accepted, the State seeks cross-review of this holding. The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review. However, it is worth noting that the preservation issue does in fact meet the criteria for acceptance of review because (1) the Court of Appeals' decision on that issue conflicts with "well-settled case law" set out in State v. Clark, 143 Wn.2d 731, 762, 24 P.3d 1006 (2001), numerous preceding decisions of this Court cited in Clark, and the Court of Appeals' decisions in State v. Gebremariam, unpublished, No. 80235-6-I, 16 Wn. App. 2d 1009, 2021 WL 164707 (Jan. 19, 2021), and State v. Lewis, unpublished, No. 66977-0-I, 173 Wn. App. 1004, 2013 WL 312432 at *3 (2013), and (2) because it involves an issue of substantial public interest that should be determined by this Court. However, regardless of which party prevails, a ruling on the preservation issue alone would not change the outcome of Peña Salvador's appeal, and therefore review solely to address that question is likely not warranted. However, if this Court grants review on either of the substantive issues in Peña Salvador's petition, then in the interests of justice and full consideration of the issues the Court should also grant review of the preservation issue.

PEÑA SALVADOR WAIVED HIS FOR-CAUSE CHALLENGE OF JUROR 44 WHEN HE LATER ACCEPTED THE JURY WITHOUT EXHAUSTING HIS PEREMPTORY CHALLENGES.

Following the denial of Peña Salvador's for-cause challenge to Juror 44 and the completion of voir dire, Peña Salvador accepted the jury, with Juror 44 on it, despite having used only four of his eight peremptory challenges. CP 110; RP 639-40. This Court has repeatedly held that a defendant cannot obtain a new trial based on the allegedly erroneous denial of a challenge for cause if the defendant failed to exercise all available peremptory challenges. State v. Clark, 143 Wn.2d 731, 762, 24 P.3d 1006 (2001). In Clark, the defendant argued that the trial court erred by denying certain challenges for cause. Citing longstanding precedent, this Court rejected Clark's claim because he had not exercised all his peremptory challenges:

> At the threshold this issue is not properly raised because Clark accepted the jury as ultimately empaneled and did not exercise all of his peremptory challenges. Under well-settled case law, Clark can therefore show no prejudice based on the jury's composition. State v. Tharp, 42 Wn.2d 494, 500, 256 P.2d 482 (1953) (defendant must show the use of all his peremptory challenges or he can show no prejudice arising from the selection and retention of a particular juror and is barred from any claim of error in this regard); State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957) (no prejudicial error where defendant

> accepted the jury while having available peremptory challenges; nor did he challenge the panel); State v. Robinson, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969) (no prejudice may be shown where defendant failed to use all of his peremptory challenges); Gentry, 125 Wn.2d at 616, 888 P.2d 1105 (where defendant participated in selecting and ultimately accepted jury panel, his constitutional right to an impartial jury selected by him was not violated). We most recently reiterated this rule in State v. Elmore, 139 Wn.2d 250, 277, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000).

Clark, 143 Wn.2d at 762.

This rule is well-reasoned. It requires a defendant to assist the court in seating an unbiased jury by using a peremptory challenge to correct an erroneous for-cause ruling when a defendant has sufficient peremptories available. Without this rule, a defendant who believes the denial of his for-cause challenge was clearly erroneous is incentivized to sit on his hands, even when it would cost him nothing to remove the allegedly biased juror, and enjoy a “heads I win, tails you lose” situation: if he wins a favorable jury verdict, he can pocket his victory, and if he loses, he can get a new trial. Thompson v. Altheimer & Gray, 248 F.3d 621, 623 (7th Cir. 2001).

Moreover, as Juror 44 demonstrated in this case, sometimes a challenged juror’s comments during the remainder of voir dire

reveal that he would in fact likely be a more favorable juror for the defense than many other members of the venire. RP 553, 564, 576-77, 602. In that situation, a defendant's decision to let a peremptory challenge go unused rather than remove the previously-challenged juror can be presumed to reflect a defendant's revised opinion that the juror is in fact not biased after all, and is preferable to the juror who would replace him if he were removed. See State v. Rice, 120 Wn.2d 549, 558-59, 844 P.2d 416 (1993) ("[I]f a defendant does not exercise all peremptory challenges it is presumed that he or she was satisfied with the jury."). This creates an even more extreme "heads I win, tails you lose" situation where the defendant gets to keep a juror he now wants and yet, if the verdict goes against him, he can argue on appeal that the juror's presence on the jury requires reversal of the conviction.

Our courts routinely apply procedural barriers, such as the doctrine of invited error, to eliminate these kinds of perverse incentives and windfalls. E.g., In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (under invited error doctrine, appellate courts will not review a party's assertion of an error to which the party materially contributed at trial). A defendant

who approves a jury panel without exhausting his peremptory challenges has affirmatively communicated that he finds the jurors who will be empaneled satisfactory. Just as a defendant who affirmatively agrees to the wording of a jury instruction cannot later challenge the instruction even on constitutional grounds, State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005), a defendant who accepts a jury panel without exhausting his peremptory challenges should not be allowed to later complain that his constitutional rights were violated by the seating of a juror he affirmatively accepted.

This issue became muddled in the eyes of defendants like Peña Salvador, and of some lower courts, following this Court's decision in State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). In Fire, the issue was "whether, where a defendant exercises a peremptory challenge to remove a juror who should have been excused for cause *and the defendant subsequently exhausts all of his peremptory challenges*, the remedy is automatic reversal without a further showing of prejudice." Fire, 145 Wn.2d at 154 (emphasis added). This Court, finding article I, section 22 coextensive with the Sixth Amendment, applied the United States Supreme Court's decision in United States v. Martinez-Salazar, 528

U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), to hold that "if a defendant through the use of a peremptory challenge elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted." Fire, 145 Wn.2d at 165. This reversed prior Washington caselaw holding that, where a defendant used a peremptory challenge to cure the erroneous denial of a for-cause challenge and subsequently exhausted his peremptory challenges, the loss of the curative peremptory challenge constituted sufficient prejudice to warrant reversal. Id. at 159-60, 162.

A plurality of this Court noted in dictum that "[i]f a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge." 145 Wn.2d at 158; see Gebremariam, 2021 WL 164707 at *2 (observing that quoted language from Fire is dictum). However, this Court reiterated repeatedly throughout the opinion that it was

discussing situations in which the defendant exhausts all peremptory challenges. Fire, 145 Wn.2d at 153-65. Between the plurality, concurring, and dissenting opinions, Fire contains 56 references to the exhaustion of peremptory challenges. Id. at 153-65, 168-77.

As a natural result of their exclusive focus on defendants who exhaust their peremptory challenges, the plurality and concurring opinions in Fire never addressed what would happen if a defendant leaves a challenged juror on the jury but does not exhaust his peremptory challenges, nor did they discuss Clark or the other longstanding precedent holding that a defendant may not obtain reversal if he did not exercise all of his peremptory challenges. Id. at 153-65. However, the dissent did so several times, with no suggestion that the majority was in any way departing from that rule. E.g., id. at 169-70 (Sanders, J., dissenting) (citing a 1893 case holding that the use of a peremptory challenge to cure the denial of a for-cause challenge creates no prejudice if the defendant does not exhaust all his peremptory challenges, as support for the dissent's contention that relief should be granted where peremptories have been exhausted).

When the statements on which Peña Salvador relies are viewed in context, Fire cannot be read as overturning, *sub silentio*, more than a century of settled law. See State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) ("We will not overrule . . . binding precedent *sub silentio*."); see also Gebremariam, 2021 WL 164707 at *2 (holding that Fire does not overrule Clark because it does not address situations where a defendant failed to exhaust all peremptory challenges); Lewis, 2013 WL 312432 at *3 (2013) (same).

In reaching a contrary conclusion, the Court of Appeals' opinion in this case conflicts with Clark and its predecessors, as well as with Gebremariam and Lewis. The Court of Appeals distinguished Clark and its predecessors on the grounds that none of them involved the denial of a for-cause challenge against a juror who was eventually seated on the jury. Peña Salvador, 487 P.3d at 929. Curiously, the Court of Appeals highlighted Clark's failure to cite United States v. Martinez-Salazar,[3] State v. Parnell,[4] or State v. Stentz[5]—-cases in which the defendant *exhausted their*

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[3] 528 U.S. 304, 310, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000).

[4] 77 Wn.2d 503, 463 P.2d 134 (1969), abrogated by Fire, 145 Wn.2d 152.

[5] 30 Wash. 134, 70 P. 241 (1902), abrogated by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001).

peremptory challenges after using one to remove a juror they had unsuccessfully challenged for cause—as a reason to conclude that Clark "is not precisely on point here." Peña Salvador, 487 P.3d at 929.

The Court of Appeals noted that two published Court of Appeals opinions have applied Fire to permit reversal based on the erroneous denial of a for-cause challenge even when the defendant has not exhausted his peremptory challenges: State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), and State v. David, 118 Wn. App. 61, 74 P.3d 686 (2003), modified on remand on other grounds, 130 Wn. App. 232, 122 P.3d 764 (2005). Peña Salvador, 487 P.3d at 930. Gonzales quoted the dicta in Fire, and the similar dicta in Martinez-Salazar on which Fire relied,[6] as authority to reverse a conviction due to the erroneous denial of a for-cause

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[6] As in Fire, the Martinez-Salazar court's generalized statement that the seating of a juror who should have been dismissed for cause requires reversal was dictum, because Martinez-Salazar exhausted his peremptory challenges after using one to remove the juror he had unsuccessfully challenged for cause. Martinez-Salazar, 528 U.S. at 316-17; Thompson v. Altheimer & Gray, 248 F.3d 621, 623 (7th Cir. 2001) (noting Martinez-Salazar's statement about seating of a biased juror "is dictum"). Moreover, the authority Martinez-Salazar cited for that dictum was Ross v. Oklahoma's statement that "'Had [the biased juror] sat on the jury that ultimately sentenced petitioner to death, *and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause*, the sentence would have to be overturned.'" Martinez-Salazar, 528 U.S. at 316 (quoting Ross v. Oklahoma, 487 U.S. 81, 85, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988)) (alterations in original) (emphasis added).

challenge without considering what effect Gonzales' failure to exhaust his peremptory challenges should have. 111 Wn. App. 276, 282, 45 P.3d 205 (2002). David considered the failure to exhaust peremptory challenges but did not address Clark and its predecessors or the fact that Fire exhausted his peremptory challenges. 118 Wn. App. at 68. David simply held, erroneously and without analysis, that the Fire dicta constituted a rejection by this Court of any argument that a defendant who fails to use all of his peremptory challenges has waived his right to appeal the denial of a challenge for cause. David, 118 Wn. App. at 68.

The Court of Appeals in this case acknowledged that "whether or not defendants have exhausted their peremptory challenges constitutes a significant distinction that Gonzales and David failed to confront." Pena Salvador, 487 P.3d at 931. However, "[d]espite the compelling parallels to the invited error doctrine and the factual distinctions from Fire and Martinez-Salazar," the Court of Appeals was troubled by this Court's failure to differentiate in Fire "between cases in which a defendant has exhausted their peremptory challenges and those in which they have not for purposes of the waiver argument." Pena Salvador, 487 P.3d at 931. The court concluded that, "[r]eading together the

existing authority in Martinez-Salazar, Fire, Gonzales, and David, we cannot definitively conclude that Peña Salvador's challenge to Juror 44 is waived because he did not exhaust his peremptory challenges."[7] Pena Salvador, 487 P.3d at 931.

As discussed above, Fire in no way overruled Clark and the century of precedent on which it was based. Clark remains binding precedent, and the Court of Appeals' conflicting holding on that point should be reversed. Peña Salvador accepted the jury and gave up his remaining peremptory challenges rather than using one to correct the error of which he then complained. He was therefore not entitled to review of his claim that the seating of Juror 44 violated his constitutional rights. If this Court grants review in this case, it should affirm Peña Salvador's convictions on that basis, as well as on the bases upon which the Court of Appeals relied.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the

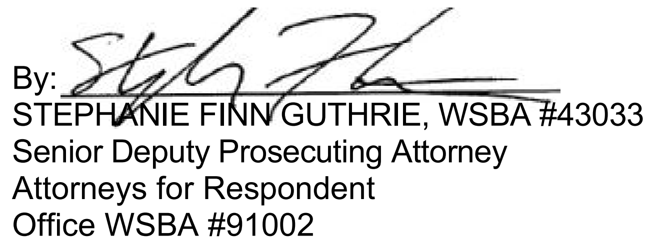
[7] This is not the only Court of Appeals opinion to evince a need for clarity on this issue. On more than one occasion, the Court of Appeals has declined to resolve the dispute about whether Fire overruled Clark and has disposed of the case on the grounds that, even if the defendant's objection to the denial of his for-cause challenge was preserved, his argument failed on the merits. E.g., State v. Southerland, unpublished, No. 76057-2-I, 4 Wn. App. 2d 1067, 2018 WL 3738765, at *1 n.1 (Aug. 6, 2018); State v. Burns, unpublished, No. 45195-6-II, 185 Wn. App. 1052, 2015 WL 563964, at *9 n.7 (Feb. 10, 2015).

State seeks cross-review of whether Peña Salvador waived his challenge to Juror 44 when he accepted the panel without exhausting his peremptory challenges.

DATED this 28th day of July, 2021.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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