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NO. 71383-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

In re the Personal Restraint Petition Of:

HECTOR SALINAS,

Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder, Judge

PETITIONER'S OPENING BRIEF

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STATE OF WASHINGTON

## TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Trial Proceedings</u> .....	2
2. <u>Appeal</u> .....	5
C. <u>ARGUMENT</u> .....	6
SALINAS IS ENTITLED TO RELIEF BECAUSE APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE PUBLIC TRIAL VIOLATION.....	6
1. <u>The Violation Was Not Waived</u> .....	11
2. <u>The Violation Was Not Invited</u> .....	13
3. <u>Failure To Raise The Public Trial Violation Cannot     Be Deemed A Legitimate Tactic</u> .....	17
D. <u>CONCLUSION</u> .....	21

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Allied Daily Newspapers of Wash. v. Eikenberry</u> 121 Wn.2d 205, 848 P.2d 1258 (1993).....	8
<u>City of Bellevue v. Acrey</u> 103 Wn.2d 203, 691 P.2d 957 (1984).....	12
<u>In re Monschke</u> 160 Wn. App. 479, 251 P.3d 884 (2010).....	19
<u>In re Pers. Restraint of Lord</u> 123 Wn.2d 296, 868 P.2d 835, 870 P.2d 964 (1994).....	7
<u>In re Pers. Restraint of Morris</u> 176 Wn.2d 157, 288 P.3d 1140 (2012).....	1, 9, 10, 11, 12, 17, 18
<u>In re Pers. Restraint of Netherton</u> 177 Wn.2d 798, 306 P.3d 918 (2013).....	6
<u>In re Pers. Restraint of Rice</u> 118 Wn.2d 876, 828 P.2d 1086 (1992).....	19
<u>State v. Applegate</u> 163 Wn. App. 460, 259 P.3d 311 (2011) review granted in part, 176 Wn.2d 1032, 299 P.3d 19 (2013).....	12
<u>State v. Bone-Club</u> 128 Wn.2d 254, 906 P.2d 325 (1995).....	7, 8
<u>State v. Brightman</u> 155 Wn.2d 506, 122 P.3d 150 (2005).....	7
<u>State v. Copland</u> 176 Wn. App. 432, 309 P.3d 626 (2013).....	13, 14, 15, 16, 18
<u>State v. Easterling</u> 157 Wn.2d 167, 137 P.3d 825 (2006).....	7, 9

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Momah</u> 167 Wn.2d 140, 217 P.3d 321 (2009) <u>cert. denied</u> , 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010).....	13-16, 19
<u>State v. Osborne</u> 102 Wn.2d 87, 684 P.2d 683 (1984).....	17
<u>State v. Rolax</u> 104 Wn.2d 129, 702 P.2d 1185 (1985).....	6
<u>State v. Salinas</u> ___ Wn. App. ___, 2014 WL 3611336 (July 21, 2014).....	5
<u>State v. Salinas</u> 169 Wn. App. 210, 279 P.3d 917 (2012) <u>review denied</u> , 176 Wn.2d 1002, 297 P.3d 67 (2013)...	2, 6, 10, 11, 15, 18
<u>State v. Strode</u> 167 Wn.2d 222, 217 P.3d 310 (2009).....	9
<u>State v. Wise</u> 176 Wn.2d 1, 288 P.3d 1113 (2012).....	7, 8, 9, 10, 14, 20
 <b><u>FEDERAL CASES</u></b>	
<u>Evitts v. Lucey</u> 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).....	6
<u>Presley v. Georgia</u> 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).....	7
<u>Roe v. Flores-Ortega</u> 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).....	17
<u>Waller v. Georgia</u> 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	7

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
RAP 16.11 .....	19
U.S. Const. amend. VI .....	6, 7
Const. art. I, § 10.....	7
Const. art. I, § 22.....	6, 7

A. ASSIGNMENTS OF ERROR

1. Petitioner was denied his constitutional right to effective representation on appeal when his attorney failed to raise a meritorious argument that would have resulted in reversal of his convictions and life sentence.

2. The trial court violated petitioner's and the public's constitutional rights to an open and public trial.

Issues Pertaining to Assignments of Error

1. At petitioner's trial, the court employed private, in-chambers voir dire for several jurors without conducting a complete court closure analysis. Counsel on appeal failed to raise this meritorious issue. Does this violation of petitioner's right to the effective assistance of counsel on appeal warrant relief from his convictions and sentence under Morris<sup>1</sup>?

2. The State seeks to overturn the Supreme Court's decision in Morris. Should that attempt be rejected where it is binding precedent?

3. The State also attempts to rely on waiver and invited error to defeat petitioner's claim. Where neither the facts nor the law

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<sup>1</sup> In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012).

support these arguments, should they also be rejected?

B. STATEMENT OF THE CASE

1. Trial Proceedings

The Whatcom County Prosecutor's Office charged Hector Salinas with three counts of Rape in the First Degree and one count of Kidnapping in the First Degree, alleging he committed the crimes on June 30, 2008. See Response to Personal Restraint Petition, Appendix A, at 1.<sup>2</sup>

The Honorable Charles Snyder presided at Salinas' trial, and jury voir dire began March 9, 2010. RP<sup>3</sup> 1-3. All prospective jurors were provided a jury questionnaire, which gave them the option of identifying those questions deemed to be of a "sensitive nature" and about which they would like to speak "privately." Appendix E.

Judge Snyder also mentioned this option in his opening remarks to the panel:

In this case, I am going to offer an opportunity to those who have indicated that they wish to speak in private about some issues the chance to do that. That is the first thing we will undertake, and then we will go through the general process of picking a jury which will start this afternoon . . . .

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<sup>2</sup> All citations to appendices are to those attached to the State's Response to Salinas' personal restraint petition.

<sup>3</sup> "RP" refers to the verbatim report of proceedings for March 9, 2010.

RP 3.

Seven jurors indicated a desire to speak privately – jurors 3, 6, 21, 25, 27, 31, and 55. RP 12. Judge Snyder asked if anyone in the courtroom objected to interviews with these jurors in chambers, and no one spoke up. RP 13. He then asked the seven jurors to return at 1:30 that afternoon, asked a majority of the other prospective jurors to return at 2:30, and addressed hardships with additional prospective jurors before recessing for lunch. RP 13-23.

Upon the resumption of voir dire at 1:30, Judge Snyder again asked if anyone objected to private voir dire in chambers. Again, no one spoke up. RP 23. While the general public was excluded, there were at least 10 people present during each questioning session based on those identified on the record and/or those who spoke in chambers: the prospective juror, the judge, the court reporter, two prosecutors, a police detective, the defendant, two defense attorneys, and an interpreter. See RP 23, 26-27, 33, 35, 43, 57.

Juror 3 indicated he was once charged with theft, but the case ended with a dismissal, and his stepson had been convicted of a sex crime. RP 24-28. Juror 6's husband had pled guilty to child rape against their daughter. RP 28-35. Juror 25 indicated that, more than 40 years ago, she had a brief marriage to a man who sexually assaulted her. RP 36-40. Juror 27 had worked as a reserve sheriff's deputy and had views concerning violence toward women that made it impossible for him to be fair. RP 44-49. Juror 31 had a friend that was raped and murdered and also had professional experiences as a nurse treating police officers and battered women that left him colored against the defense. RP 41-43. Finally, juror 55 indicated his uncle had been a sexual predator and his cousin a victim, and he did not believe he could be fair.<sup>4</sup> RP 49-51. Judge Snyder excused jurors 27, 31, and 55 for cause. RP 44, 49, 51.

As directed, the entire remaining venire returned to open court at 2:30 and the rest of jury selection took place under public scrutiny. RP 53.

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<sup>4</sup> For reasons unexplained, juror 21 was never questioned in chambers despite being among the seven who requested private voir dire. Later, juror 21 discussed in open court a niece that had been molested. RP 97.

Ultimately, Salinas' jury convicted him as charged. Because the new convictions meant Salinas was a persistent offender, Judge Snyder imposed the mandatory sentence of life without the possibility of parole. Appendix A, at 1-2, 5.

## 2. Appeal

Attorney Susan Wilk represented Salinas on appeal. See State v. Salinas, 169 Wn. App. 210, 279 P.3d 917 (2012), review denied, 176 Wn.2d 1002, 297 P.3d 67 (2013). Salinas achieved little in this Court. His rape convictions and life sentence were affirmed. His case was remanded for an amended judgment reflecting dismissal of the kidnapping conviction, which merged with the rapes. And, although having no impact whatsoever on Salinas' life sentence, Judge Snyder was ordered to determine whether the three rape convictions involved the same criminal conduct.<sup>5</sup> Id. at 224-225, 227.

Wilk failed to challenge the in-chambers voir dire of the six prospective jurors, which, if successful, would have meant reversal of Salinas' convictions, reversal of his life sentence, and a new trial.

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<sup>5</sup> On remand, Judge Snyder found that two of the three rapes involved same criminal conduct. See State v. Salinas, \_\_\_ Wn. App. \_\_\_, 2014 WL 3611336 (July 21, 2014).

On December 26, 2013, Salinas filed a timely Personal Restraint Petition in which he argued Wilk was ineffective for failing to argue that the private, in-chambers voir dire violated his right to public trial. See Personal Restraint Petition. On April 18, 2014, the Whatcom County Prosecutor's Office filed its Response. On June 26, 2014, Salinas filed a Reply. Our office was then appointed to represent Salinas and prepare supplemental briefing.

C. ARGUMENT

SALINAS IS ENTITLED TO RELIEF BECAUSE APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE PUBLIC TRIAL VIOLATION.

Under the Washington Constitution, a person convicted of a crime has the right to appeal. Accompanying that right is the right to effective assistance of counsel on appeal. U.S. Const. amend. 6; Const. art. 1, § 22; Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); State v. Rolax, 104 Wn.2d 129, 135, 702 P.2d 1185 (1985).

“To prevail on a claim of ineffective assistance of appellate counsel, [a petitioner] must demonstrate the merit of any legal issue appellate counsel raised inadequately or failed to raise and also show [that he] was prejudiced.” In re Pers. Restraint of Netherton, 177 Wn.2d 798, 801, 306 P.3d 918 (2013) (citing In re

Pers. Restraint of Lord, 123 Wn.2d 296, 314, 868 P.2d 835, 870 P.2d 964 (1994)).

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012). Before a trial judge can close any part of voir dire, it must analyze and correctly apply the five factors identified in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). In re Pers. Restraint of Orange, 152 Wn.2d 795, 806-807, 809, 100 P.3d 291 (2004); see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

Under Bone-Club, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260; Wise, 176 Wn.2d at 12. The trial court must "resist a closure motion except under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259.

Judge Snyder did not conduct a complete closure analysis. He recognized there was a potential closure issue when asking if anyone present objected to his proposal. But he failed to consider whether a compelling interest demanded closure, did not consider whether in-chambers questioning was the least restrictive closure necessary, and did not weigh the competing interests. See Easterling, 157 Wn.2d at 179 (trial court erred in failing to identify compelling interest warranting closure and failing to make specific

findings showing it weighed competing interests).

A violation of the public trial right – including private questioning of potential jurors – is structural error, presumed prejudicial, and not subject to harmless error analysis. State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); Wise, 176 Wn.2d at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517-518.

In In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012), the Supreme Court addressed a petitioner's claim that appellate counsel was ineffective for failing to raise a public trial issue on direct appeal. Morris was charged with molestation and rape. In a questionnaire, jurors were offered the opportunity to speak in private and several exercised this option. Defense counsel offered no objection, and the jurors were questioned in chambers without analysis of the five Bone-Club factors. The remainder of voir dire took place in open court. Morris, 176 Wn.2d at 161-162.

Following his conviction, Morris appealed. His attorney raised several challenges, but failed to claim a violation of his public trial rights. Morris, 176 Wn.2d at 164. The Supreme Court granted Morris' PRP, finding that appellate counsel had been ineffective in this regard. Specifically, the Court found that appellate counsel's failure to raise the issue in light of well-established public trial jurisprudence (particularly In re Orange) fell below an objective standard of reasonableness and, therefore, counsel had performed deficiently. Id. at 167. Moreover, Morris was prejudiced because the result of his direct appeal would have been different had the issue been raised:

In *Wise* and *Paumier*, we clearly state that a trial court's in-chambers questioning of potential jurors is structural error. Had Morris's appellate counsel raised this issue on direct appeal, Morris would have received a new trial. See *Orange*, 152 Wash.2d at 814, 100 P.3d 291 (finding prejudice where appellate counsel failed to raise a courtroom closure issue what would have been presumptively prejudicial error on direct appeal). No clearer prejudice could be established.

Morris, 176 Wn.2d at 166.

Morris controls the outcome in Salinas' PRP. Here, as in Morris, "where appellate counsel fails to raise a public trial right claim, where prejudice would have been presumed on direct

review, a petitioner is entitled to relief on collateral review.”<sup>6</sup> Morris, 176 Wn.2d at 161.

The State properly recognizes that Morris controls. For that reason, it dedicates 11 pages of its Response To Personal Restraint Petition to arguments that Morris is wrongly decided and should be overturned. See Response, at 21-32. It dedicates 2 additional pages to an argument that Salinas should be required to show some additional “actual prejudice” from the public trial violations beyond what Morris requires. See Response, at 32-33. The State also properly recognizes this is the wrong forum for such arguments. See Response, at 9 n.6 (acknowledging only the Supreme Court can overrule one of its own decisions).

Alternatively, the State primarily argues that defense counsel waived Salinas’ ability to raise this issue, argues defense counsel invited the court’s error, and attempts to distinguish Morris by arguing Ms. Wilk may have had a tactical reason for failing to raise the issue. Each argument is addressed in turn.

1. The Violation Was Not Waived.

Relying largely on cases from foreign jurisdictions to

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<sup>6</sup> In Morris, four justices signed the lead opinion and Justice Chambers concurred in analysis and result, creating a majority decision. See Morris, 176

establish “the general rule throughout the country,” the State argues that because one of Salinas’ trial attorneys submitted proposed questionnaires offering jurors an opportunity to speak privately and because his attorneys did not object to the in-chambers discussions, trial counsel waived Salinas’ right to raise the public trial issue. See Response, at 14-15.

Waiver principles simply do not apply in this case. “It seems reasonable . . . that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.” Strode, 167 Wn.2d at 229 n.3 (citing City of Bellevue v. Acrey, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984)); see also Morris, 176 Wn.2d at 167 (“[A] defendant must have knowledge of a right to waive it.”). “To establish waiver in the public trial context, the record must show either that the defendant gave a personal statement expressly agreeing to the waiver or that the trial judge or defense counsel discussed the issue with the defendant prior to defense counsel’s waiver.” State v. Applegate, 163 Wn. App. 460, 470, 259 P.3d 311 (2011), review granted in part, 176 Wn.2d 1032, 299 P.3d 19 (2013). The record here shows neither. Thus, there was no waiver.

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Wn.2d at 173-174.

2. The Violation Was Not Invited.

Citing State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010), and Division Three's decision in State v. Copland, 176 Wn. App. 432, 309 P.3d 626 (2013), the State also argues the invited error doctrine bars review of Salinas' claim. Response, at 10-14. The State is mistaken.

In Momah, the Supreme Court, drawing on (but not adopting) the invited error doctrine, held that in-chambers voir dire did not amount to structural error under the particular and unusual circumstances of that case. Momah, 167 Wn.2d at 145, 153-154. Specifically, Momah had affirmatively and expressly advocated for closure, argued for expansion of that closure, and clearly benefitted from the closure. Id. at 155-156. It was apparent that Momah deliberately and thoughtfully pursued closure to safeguard his right to a fair and impartial jury in what was a highly publicized case. Id. at 145-146, 155. Moreover, it also was apparent the court, in consultation with trial counsel, had carefully considered Momah's rights before ordering the closure despite failing to articulate every Bone-Club factor on the record. Id. at 151-152, 156

Counsel's affirmative and aggressive pursuit of private voir dire, along with the court's careful consideration of Momah's rights, were atypical and distinctive features of Momah. Indeed, since Momah, the Supreme Court has made clear it is unlike any other case likely to come before the appellate courts. See Wise, 176 Wn.2d at 14-15 ("*Momah* presented a unique set of facts. . . . We emphasize that it is unlikely that we will ever again see a case like *Momah* where there is effective, but not express, compliance with *Bone-Club*. The rule remains that deprivation of the public trial right is structural error. . . ."; Paumier, 176 Wn.2d at 35 ("*Momah* relied on unique facts to conclude that no public trial right violation occurred when the jurors were individually questioned . . .").

Despite the Supreme Court's extremely narrow view of Momah, in the State's second cited case, Copland, Division Three concluded the circumstances in that case presented an even stronger case for invited error than even Momah. Copland, 176 Wn. App. at 442. In Copland, the defense affirmatively and expressly initiated the closure, asking the trial judge to close the courtroom to all members of the media during jury selection. It was the State that objected on public trial grounds and suggested a more narrow closure (individual private interviews) might be

appropriate if a proper record were made. When the defense motion was denied, the defense capitulated to a more limited closure, produced a list of jurors to question in chambers, and actively participated in the process of interviewing those jurors he had identified. Id. at 442-443.

Division Three found invited error under these circumstances and concluded an argument could be made Copland had knowingly, voluntarily, and intelligently waived his right to a public trial. Id. at 443 and n.4. Division Three also concluded that, although the trial judge did not explicitly name all five Bone-Club factors on the record, as in Momah, the trial court had “effectively considered those factors in making its decision.” Id. at 448-449. Therefore, even if the public trial issue had been raised on direct appeal, it likely would not have justified reversal. Id. at 449-450.

The circumstances in Salinas’ case are vastly different from Momah and Copland. In equating all three cases, the State again relies on the defense-proposed questionnaires offering an opportunity for private questioning. Response, at 13. The cover page of these questionnaires includes the following:

Some of these questions may call for information of a personal nature that you may not want to discuss in public. If you feel that your answer to any question may invade your right to privacy or might be embarrassing to you, you may so indicate on the form that you would prefer to discuss your answer in private. You will find instructions for this on the questionnaire.

Appendices B-D. Page 5 of each questionnaire then presents an opportunity to identify by question number which questions the juror would like to discuss privately. Id.

These questionnaires were never used and jurors never saw them. Judge Snyder used a different questionnaire form that offered the opportunity to discuss matters “privately.” See appendix E (quotations in original). And the record indicates that the mechanics of the “private” questioning originated with Judge Snyder. See RP 13 (court first identifies procedure involving chambers).

While neither defense counsel, nor anyone else, objected to Judge Snyder’s plan for in-chambers questioning, a failure to object is not a bar to review. The circumstances here do not remotely approach the circumstances in Momah and Copland, where defense counsel zealously advocated for a closure and it was apparent from the record the trial court had effectively complied

with all five Bone-Club requirements. Even assuming the invited error doctrine could apply to a public trial violation, Salinas' trial attorneys did not invite the error.

3. Failure To Raise The Public Trial Violation Cannot Be Deemed A Legitimate Tactic.

The State also seeks to avoid Morris by arguing that, unlike that case, Wilk's failure to raise the public trial issue may have been tactical:

[A]ppellate counsel could have reasonably, strategically, decided not to assert a violation of the right to public trial, believing that Salinas was precluded from raising the issue on appeal because he had invited and/or waived the alleged violation, and reasonably could have chosen instead to focus on the numerous other issues she did assert. . . .

Response, at 20.

Although legitimate strategy cannot form the basis for an ineffective assistance claim, the strategy must be just that – legitimate. Whether strategic or not, a tactic that would be considered incompetent by lawyers of ordinary training and skill in the particular area of the law may constitute deficient performance. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); see also Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (“The relevant question is not whether

counsel's choices were strategic, but whether they were reasonable.”).

In Morris and Orange, the Supreme Court rejected the notion that appellate counsel's failure to raise a public trial issue was the product of legitimate strategy or tactics. Morris, 176 Wn.2d at 167-168; Orange, 152 Wn.2d at 814. Moreover, in Salinas' case, it is worth remembering that he was found to be a persistent offender and sentenced to life in prison without any possibility of release. Failure on appeal meant spending the rest of his life in prison and dying there. It is not a reasonable tactic to overlook a meritorious issue that would result in automatic reversal of all convictions and a life sentence because the State might argue waiver or invited error. Such a decision is certainly unreasonable upon recognition that any waiver and invited error arguments lack merit.

The State's current waiver and invited error arguments could not possibly have driven Wilk's actions. By the time Division Three decided Copland in September 2013, the *decision* in Salinas' appeal was more than a year old. See Salinas, 169 Wn. App. at 210 (opinion filed July 2, 2012). Thus, the only decision during the relevant period of Wilk's representation that even suggests the

possibility of waiver or invited error was Momah, a case easily distinguished and one the Supreme Court has repeatedly recognized as unique.

The State also suggests that, if this Court is not convinced Wilk's failure to raise the issue was a legitimate tactic, it should remand for a reference hearing to determine whether it was. See Response, at 33-35. In support of such a hearing, the State suggests "there may have been some discussion [involving trial counsel and Judge Snyder] that was not recorded regarding the procedure to be utilized [for voir dire] and appellate counsel may have been aware of this." Response, at 34-35. In other words, appellate counsel may have had information, not currently part of the record, about a conversation at trial that made it apparent any error was invited.

A reference hearing may be appropriate in some cases to resolve "material issues of disputed fact." In re Monschke, 160 Wn. App. 479, 489, 251 P.3d 884 (2010) (quoting In re Pers. Restraint of Rice, 118 Wn.2d 876, 886-887, 828 P.2d 1086 (1992)); see also RAP 16.11(a)-(b) (authorizing reference hearings where necessary). In order to obtain such a hearing, however, the State must present *competent* evidence establishing the material disputed facts.

Monschke, 160 Wn. App. at 488-489.

The State's speculation in Salinas' case is not competent evidence and does not create a material dispute. Indeed, since the State's Response to Salinas' PRP includes an affidavit from one of the trial deputies, one can safely assume that if such evidence establishing invited error existed, it would have been mentioned in that affidavit. But there is no mention of any off-the-record discussions that could change the outcome in this case. See Appendix F. The State has not made the requisite showing for a reference hearing.

Finally, the State argues that, had Judge Snyder analyzed the Bone-Club factors on the record, all factors would have been met and seems to suggest remand could be appropriate to allow entry of all necessary findings. Response, at 32-33. Salinas strongly disagrees the record shows all factors would have been met. Ultimately, since there were at least 10 people present for each interview, little privacy was gained at the expense of public trial rights. Simply removing all other prospective jurors while examining each of the six jurors in the courtroom may have created much the same environment. In any event, post hoc determinations cannot cure the error. Wise, 176 Wn.2d at 12-13; Bone-Club, 128 Wn.2d at

261.

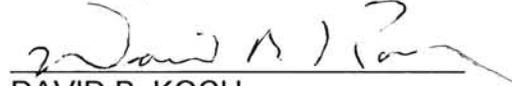
D. CONCLUSION

Salinas' is entitled to relief. His convictions and sentence must be vacated.

DATED this 29<sup>th</sup> day of August, 2015.

Respectfully submitted,

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