

original  
HECTOR SERANO SALINAS  
12/17/2013

original  
DRAFT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

	)	
	)	
	)	NO. <u>71383-3</u>
	)	
	)	PERSONAL RESTRAINT PETITION
<u>HECTOR SERANO SALINAS</u>	)	
	)	

A. STATUS OF PETITIONER

Petitioner Hector Serano Salinas, who is in custody serving a conviction for a crime, DOC #726671, Washington State Penitentiary, 1313 N. 13<sup>th</sup> Avenue, Walla Walla, WA 99362, applies for relief from confinement in this personal restraint petition.

Mr. Salinas was convicted of three counts of first degree rape and one count of first degree kidnapping and sentenced to life without the possibility of parole as a persistent offender. He was sentenced after a jury trial before the Honorable Charles E. Snyder in Whatcom County Superior Court.

Mr. Salinas's trial attorney was Starch Follis, Whatcom County Public Defender's Office, 215 Commercial Street, Bellingham, WA 98225-4409.

Mr. Salinas appealed his convictions and sentence. His appointed counsel on appeal was Susan Wilk of the Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. His convictions were affirmed in a published decision, *State v. Salinas*, 169 Wn. App. 210, 279 P.3d 917 (20012). Review of the decision of the Court of Appeals was denied by the

Washington Supreme Court on January 8, 2013. *State v. Salinas*, 176 Wn.2d 1002, 297 P.3d 67 (2013).

Since judgment and sentence was entered, Mr. Salinas has not asked a court for any form of relief other than his direct appeal, as set forth above.

**B. GROUNDS FOR RELIEF:**

**First Ground: MR. SALINAS WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BECAUSE HIS APPOINTED ATTORNEY FAILED TO RAISE A MERITORIOUS DENIAL OF THE RIGHT TO A PUBLIC TRIAL ISSUE.**

**1. Facts relevant to petition**

On March 9, 2010, the first day of voir dire and without any consideration of the factors relevant to the decision to close the courtroom, the trial judge announced to the prospective jurors:

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

....

RP(3/9/2010) 3.<sup>1</sup> After discussing some general matters, the court noted that seven jurors had indicated they wished to answer questions in private. RP(3/9/2010) 12. The court then asked if there was anyone in the courtroom at that time “who has any objection whatsoever” to questioning those jurors in chambers on the record with counsel and the defendant.

RP(3/9/2010) 12. Then, without further discussion or analysis, the Court excused the jurors to be questioned in private until 1:30 p.m., and rest of the jurors under 2:30 p.m. RP(3/9/2010) 12-13.

---

<sup>1</sup> Mr. Salinas is separately asking that the file from his direct appeal be transferred for consideration in this cause.

When the court reconvened in chambers, with only counsel, the Court, the case detective and Mr. Salinas present, the seven prospective jurors were interviewed one by one.

Juror 3 had been accused of a theft and received a deferred sentence, and had a stepson who had been convicted of a sex crime as a juvenile. RP(3/9/2010) 24-25. Juror 3 indicated that there was nothing about either of these experiences which would make it difficult for him to be fair to Mr. Salinas or affect how he viewed the evidence in the case. RP(3/9/2012) 25, 27-28.

Juror 6's husband had been convicted of three counts of child rape against her daughter, and she did not want to disclose this in open court because her husband did not otherwise have to disclose his convictions to the public. RP(3/9/2010) 29-30. Juror 6 assured the Court that, notwithstanding, she could reach a decision based only on the trial evidence. RP(3/9/2010) 32.

Juror 25 wished to be questioned in private because she had had a short marriage many years earlier which involved "a forcible situation," but indicated that her experience would not make her reluctant to serve as a juror. RP(3/9/1010) 38-40.

Juror 31, indicated she had "real reservations" because of her work with abuse victims at Alameda County Medical Center and the personal experiences of a friend four years earlier. RP(3/9/2010) 41-42, Based on her description of her potential bias, the Court excused Juror 31 without objection. RP(3/9/2010) 44.

Juror 27 indicated that he had been a reserve deputy sheriff and quit because he "couldn't handle" the "domestic violence and child abandonment" cases; his own father had been a strict disciplinarian and he had born the brunt of the discipline as the eldest child. RP(3/9/2010) 45-49. The Court excused Juror 27 for cause without objection. RP(3/9/2010) 49.

Juror 55 shared his belief that "there is no excuse for sexual predators or assault on children or women, period." RP(3/9/2010) 50. In his childhood, an uncle had approached him

and his sister, and he was unwilling to talk further about it. RP(3/9/2010) 50. The Court excused Juror 55 for cause, again without objection. RP(3/9/2010) 51. Of the jurors interviewed on the judge's closed chambers, one of these jurors sat on the jury; one was excused by the state and one by the defense during the exercise of their peremptory challenges.

Although this voir dire was conducted in chambers, outside the presence of the public, appellate counsel did not challenge this denial of the right to a public appeal.

## **2. Legal argument relevant to grounds for relief**

In *In re the Personal Restraint of Morris*, 176 Wn.2d 157, 167-168, 288 P.3d 1140 (2012), the Washington Supreme Court held that appellate counsel was ineffective for failing to raise a meritorious closed-courtroom case on direct appeal.

The Court, in *Morris*, began its analysis by citing, *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), and *State v. Paumier*, 176 Wn.2d 29, 285 P.2d 1126 (2012), as making clear that “failing to consider *Bone-Club*<sup>2</sup> [*State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995)] before privately questioning potential jurors violates a defendant's right to a public trial and warrants a new trial on direct review.” *Morris*, 176 Wn.2d at 165-166 (citing *Wise*, at 6, and

---

<sup>1</sup> The *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
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.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

*Bone-Club*, 128 Wn.2d at 258-59 (alteration in original) (quoting *Allied Daily Newspapers of Wash, Eikenberry*. 121 Wn.2d 205, 21-11, 848 P.2d 1258 (1993)).

*Paumier*, at 35). The *Morris* court further held that it need not address whether the denial of a public trial is to be presumed prejudicial on collateral review as well as on direct appeal because the collateral review cases can be resolved on ineffective assistance of counsel grounds. *Id.* at 166.

The Court, in *Morris*, then found that the prejudice prong of an ineffective counsel claim clearly had been met:

Here, there is little question that the second [prejudice] prong of this test is met. 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 [In re the Personal Restraint of Orange]*, 152 Wn.2d 795, 100 P.3d 291 (2004), 152 Wn.2d 814 (finding prejudice where appellate counsel failed to raise a courtroom closure issue that would have been presumptively prejudicial error on direct appeal). No clearer prejudice could be established.

*Morris*, at 166. The Court then found that after *Orange*, appellate counsel should have known that *Bone-Club* applied to jury selection and the closure of voir dire “without the requisite analysis” was a presumptively prejudicial error and constituted deficient performance. *Id.* at 168. Such failure to raise an issue which was structural error could not be considered “strategic” or “tactical” thinking: “Morris's appellate counsel had but to look at this court's public trial jurisprudence to recognize the significance of closing a courtroom without first conducting a *Bone-Club* analysis.” *Id.* As in *Bone-Club* and *Orange*, the Court reversed Mr. Morris's conviction and remanded for a retrial.

The same result should be required in Mr. Salinas's case. Here, as in *Morris*, the trial court closed the courtroom without conducting the full inquiry required by *State v. Bone-Club*. The court informed the jury at the outset of voir dire, without any analysis, that jurors who requested it would be interviewed in private. RP(3/9/2010) 3. Before going into chambers, the

---

court asked if anyone present had any objection to conducting voir dire there for some jurors. RP(3/9/2010). The court, however, did not consider any of the other *Bone-Club* factors: The court did not ask that a compelling interest be shown or a “serious and imminent threat” to that interest established before considering closure. The court did not consider less restrictive means of protecting the threatened interest that complete closure or any means of narrowly-tailoring the extent of closure, and did not weigh or balance the interest of the proponent of the closure against the interest of the public. *Bone-Club*, 128 Wn.2d at 258-259. In fact, no one asked for the closure of the courtroom, nor was there any discussion of what the closure was to accomplish beyond allowing seven jurors to answer questions in private. The importance of identifying the interest or purpose of the closure is apparent here where the actual in-chambers voir dire did not show any compelling need for closure of the courtroom. Juror 3 had a deferred prosecution theft case, a matter of public record; Jurors 27 and 31 had reservations about their ability to be fair because of past experience with working with victims of abuse. RP(3/9/2010) 24-25, 44-49. Jurors 25 and 27 had past experiences, in marriage and being approached by an uncle with some unspecified improper sexual motive, but neither were asked to discuss or reveal any details of their experiences and neither disclosed any details. RP(3/9/2010) 38-40, 50. Only one juror even articulated a wish for privacy because she did not want to have to publically disclose that her husband had been convicted of a sex offenses against her daughter; again, presumably a matter of public record and not necessarily an issue of compelling importance.

Certainly the court did not consider the less restrictive alternative of allowing the public to remain while individual questioning took place, while excusing the other jurors to the jury room. The court did not consider the alternative of questioning these jurors during the regular voir dire and waiting to see if any need for privacy arose.

The trial court failed to conduct the *Bone-Club* analysis. The perfunctory asking if anyone objected to the closure was insufficient. As the Court held in *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006):

[T]he trial court erred when it neither identified a compelling interest warranting the public's exclusion from the pretrial process nor made specific findings that showed it weighed the competing interest of Jackson as the proponent of closure against the public's interest in maintaining unhindered access to judicial proceedings.

“It was the request to close itself, and not the party who made the request, that triggered the trial court's duty to apply the five-part *Bone-Club* requirements. The trial court's failure to apply that test constitutes reversible error.” *Id.* at 180.

Appellate counsel should have raised the meritorious closed-courtroom issue and denied Mr. Salinas the effective assistance of counsel on appeal. As in *Orange* and *Morris*, this ineffectiveness should require reversal of his conviction and a remand for retrial.

**Second Ground: THE FAILURE TO CONDUCT THE *BONE-CLUB* ANALYSIS BEFORE CONDUCTING VOIR DIRE IN CHAMBERS REQUIRES REVERSAL OF MR. SALINAS'S CONVICTION.**

**1. Facts relevant to second ground**

As noted above, the closed-courtroom issue was not raised by counsel on direct appeal. It is raised for the first time in this collateral proceeding.

**2. Legal argument in support of second ground for relief**

In *Morris, supra*, the court did not find it necessary to reach the question of whether the denial of a public trial is to be presumed prejudicial on collateral review as well as on direct appeal. *Id.* at 166.

This case, as well, can be decided on ineffective assistance of counsel grounds. Further, the trial court's failure to fully consider the *Bone-Club* factors before moving voir dire in chambers meets the standard for granting relief in a Personal Restraint Petition (PRP).

"Prejudice is necessarily presumed where a violation of the public trial right occurs." *Easterling*, 157 Wn.2d at 181. "The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." *Id.* The remedy is reversal and a new trial. *Id.* at 174.

When a claim of constitutional error is raised in a PRP, the petitioner ordinarily must show by a preponderance of the evidence that the alleged error caused actual prejudice. *Orange*, 152 Wn.2d at 804. This burden is waived, however, if the error gives rise to a conclusive presumption of prejudice. *Id.* (quoting *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 328, 828 P.2d 492 (1992)). See also *In re Richardson*, 100 Wn.2d 669, 679, 675 P.2d 209 (1983); *McGurk v. Stenberg*, 163 F.3d 470 (8<sup>th</sup> Cir. 1998) (habeas case involving a structural error does not require petitioner to prove prejudice).

Such structural error requires reversal whether considered on direct appeal or on collateral review. As the United States Supreme Court explained:

In *Arizona v. Fulminante*, 499 U.S. 279, 11 S. Ct. 1246, 113 L. Ed.2d 302 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.* at 304-308, 111 S. Ct. 1246 (internal quotation marks omitted). These include "most constitutional errors." *Id.* at 306, 111 S. Ct. 1246. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affect[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.* at 309-310, 119 S.Ct. 1827, 144 L. Ed.2d 35 (1999).

*United States v. Gonzales-Lopez*, 548 U. S. 149, 148-149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). Denial of the public trial right is structural error and prejudice is necessarily presumed.

*Paumier*, at 35; *Wise*, at 11-13, 15. For this reason, Mr. Salinas should be entitled to reversal of his conviction on collateral review.

**C. CONCLUSION**

This petition is the best way for Mr. Salinas to get the relief, and no other avenues of relief are available.

**D. STATEMENT OF FINANCES:**

If you cannot afford to pay the \$250 filing fee or cannot afford to pay an attorney to help you, fill out this form. If you have enough money for these, do not fill this part of the form. If currently in confinement you will need to attach a copy of your prison finance statement.

1. I do  do not \_\_\_\_\_ ask the court to file this without making me pay the \$250 filing fee because I am so poor and cannot pay the fee.
2. I have \$  \_\_\_\_\_ in my prison or institution account.
3. I do  do not \_\_\_\_\_ ask the court to appoint a lawyer for me because I am so poor and cannot afford to pay a layer.
4. I am  am not \_\_\_\_\_ employed. My salary or wages amount to \$ 18.00 a month. My employer is DOC, Washington State Penitentiary, 1313 N. 13<sup>th</sup> St, Walla Walla, WA 99362  
Name and address of employer
5. During the past 12 months I did \_\_\_\_\_ did not  get any money from a business, profession or other form of self-employment. (If I did, it was \_\_\_\_\_  
Type of self-employment  
And the total income I received was \$ \_\_\_\_\_.
6. During the past 12 months I:  
Did \_\_\_ Did Not  Receive any rent payments. If so, the total I received was \$ \_\_\_\_\_  
Did \_\_\_ Did Not  Receive any interest. If so, the total I received was \$ \_\_\_\_\_  
Did \_\_\_ Did Not  Receive any dividends. If so, the total I received was \$ \_\_\_\_\_  
Did \_\_\_ Did Not  Receive any other money. If so the total I received was \$ \_\_\_\_\_  
Do \_\_\_ Do Not  Have any cash except as said in question 2 of Statement of Finances. If so the total amount of cash I have is \$ \_\_\_\_\_.

Do \_\_\_ Do Not  Have any savings or checking accounts. If so, the total amount in all accounts is \$ \_\_\_\_\_

Do \_\_\_ Do Not  Own stocks, bonds or notes. If so, their total value is: \$ \_\_\_\_\_

**7. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what each item or property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.**

Items	Value
N/A	

**8. I am \_\_\_ am not  married. If I am married, my wife or husband's name and address is:**

---

---

**9. All of the persons who need me to support them are listed below:**

Name & Address	Relationship	Age
N/A		

**10. All the bills I owe are listed here:**

Name & Address of Creditor	Amount
N/A	

**D. REQUEST FOR RELIEF:**

I want this court to vacate my conviction and give me a new trial.

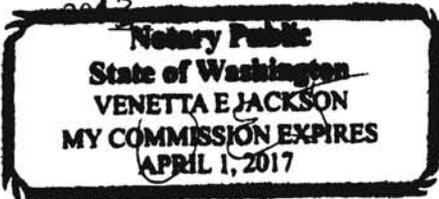
E. OATH OF PETITIONER

STATE OF WASHINGTON )  
 ) ss.  
 )  
COUNTY OF Walla Walla

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

HECTOR SOLLINKS  
(Signature Here)

SUBSCRIBED AND SWORN to before me this 17th day of December



Venetta E. Jackson  
Notary Public in and for the State of Washington  
Residing at Walla Walla

If a notary is not available, explain why none is available and indicate who can be contacted to help you find a Notary: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

DATED This \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
(Signature Here)

Final  
DRAFT

IN THE COURT OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Personal Restraint of

HECTOR SERANO SALINAS,

Petitioner.

Whatcom County, No. 08-1-00877-3

MOTION TO CONSIDER RECORD FROM  
DIRECT APPEAL

FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
2013 DEC 26 PM 1:28

---

**I. IDENTITY OF MOVING PARTY**

Petitioner Hector Salinas seeks the relief designated in Part II.

**II. STATEMENT OF RELIEF SOUGHT**

Petitioner requests that, in connection with its review of this petition, the Court bring forth and consider the record from his direct appeal, No. 65527-2-I, in Whatcom County Cause No 08-0877-3.

### III. FACTS RELEVANT TO MOTION

This motion is based on the accompanying personal restraint petition (PRP).

### IV. GROUNDS FOR RELIEF AND ARGUMENT

This is a personal restraint petition challenges Mr. Salinas's convictions based on ineffective assistance of appellate counsel claim for failure to raise a meritorious closed-courtroom issue. A complete review of the claim may require a review of portions of the verbatim report of proceedings and clerk's papers from the direct appeal. Reproduction of all of these records would be duplicative of records currently filed in this Court.

### V. GROUNDS FOR RELIEF AND ARGUMENT

While the Court could require the State to submit a new file for this case, see RAP 16.9, it should be more efficient for the Court to simply consider the direct appeal file when ruling on the PRP.

DATED this 12 day of 17, 2013

Respectfully submitted,

Hector Salinas

Attorney for Petitioner

Dec. 22, 2013

Court of Appeals (Div. I)  
Clerk of The Court  
One Union Square  
600 University St.  
Seattle, WA.  
98101-1176

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 DEC 26 PM 1:23

This is a letter to notify the court that I do not speak/write english and its hard for me. So I had to find someone to write for me.

This is my reason for taking this long.

Thank You.

Hector Salinas #720671  
Rainier - C - 310  
Washington State Penitentiary  
1313 N. 13th Ave.  
Walla Walla, WA.  
99362