

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY CS
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT
PETITION OF:
MICHAEL LOUIS RHEM,
Petitioner.

NO. 35195-1
Reply Brief of
Petitioner
(Evidentiary Hearing
Requested)

I. IDENTITY

Michael Rhem, pro se petitioner, comes now responding to States' Reply Brief.

II. ISSUES

A. Standing

Rhem is properly before this court in the form of Restraint Petition. This is a first petition in this matter. And it is timely.

The petitioner's claims specifically cites violations of direct State and Federal Articles and Amendments to the Constitution resulting in manifest prejudice.

B. Closure of the Courtroom

The States' response seems to disregard the intent and purpose of the public trial doctrine as a whole. The public has an interest in not creating a "starchamber" type of proceeding when it comes to a courtroom.

The following cases cited in the States' response stipulate their agreement that a trial should be open to the public, and jury voir dire counts as the same. State v. Boneclub, 128 Wn.2d 254, 257, 906 P.2d 325(1995); Gannet Co. v. DePasquele, 443 U.S. 368, 379, 99 S.Ct. 2898, 61 L.Ed.2d 608, (1998).

The violation of ones' right to a public trial is structural error. Waller v. Georgia, 467 U.S. at 48. Once he shows error, he need not show that it prejudiced him in any way. Judd v. Haley, 250 F.3d 1308, 1314-15 (11th cir. 2001).

The State attempts to distinguish petitioners case from that of this States' Supreme Court decision in Brightman and Orange, (see States' response) by stating that those cases were "full closures" and Rhems did not qualify because the judge proclaimed that he would alternate family members in as jurors were excused. The problem with this is that we have no time line to determine how long the proceedings went on absent any public being allowed in. The State would like this Court to except that an orderly system occurred in which during voir dire the public was switched back in as soon as room became available.

The problem with the States' time line is that RP 391 is an excerpt from the transcript from a point during trial, (after a jury had fully been seated) and the judge is still holding his post at the door stopping people from entering. He states that "people will only be admitted during break." What the record does not reflect, is at what point the first person was actually let

into the court room? Obviously the "during break" rule shows that no switching in was being practiced as jurors were excused. Proving that for some period of time a full closure was in force.

The State does bring up the case of Morales v. United States, 294 F.Supp.2d 174, 177-179 (2003). This appears to be a District Court decision out of Connecticut. It is not a mandatory controlling case and should not be treated as such. In any event, the judge in Morales made a specific time period that the Court would be closed, "on Friday". This is unlike the judge in Rhems' case, who makes no specific time, and appears to possibly go into the actual trial itself. Morales also contains language that the Court did not bar any specific person, contrary to Rhems' Court, who seemed to be focused on excluding the family.

In ending, petitioner would assert that the time line that stare decisis is attempting to establish concerning how long a judge can mandate a courtroom be empty of the public without it being "officially" considered closed is contrary to judicial equity and the constitutional provision itself. If a judge mentions a particular class(Rhems' family) can not enter the court room, and then reinforces it later by saying that even as the seats become empty the family can not enter until some (unknown) break, then for reason of the public's right to protect the sanctity of a trial, the proceeding was closed.

C. Confrontation

The prupose and intent of the entire lineage of cases cited

by the State and Petitioner (both for and against) is to protect the defendant at trial from being easily recognized as the entity being redacted from the document or testimony in question. It seems that most of the cases tend to be ancillary decisions of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and stray from it by making a case by case analysis of the redacted language in each situations particular circumstances. State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991); Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); State v. Vannoy, 25 Wn.App. 464, 610 P.2d 380 (1980); Gray v. Maryland, 523 U.S. 185, 118 S.Ct 1151, 140 L.Ed.2d 294; U.S. v. Logan, 210 F.3d 820 (8th cir 2000).

If such analysis of Rhems situation is made, it is obvious that the redacted statement is on it's face accusatory and pointed. In Marsh the state claims that Bruton was modified to allow redacted statements if (1) the statement was not incriminating on it's face and (2) became incriminating only when linked with evidence later. Petitioner believes that this two prong test strengthens his position, in that even without a scintilla of evidence presented at trial, the two defendants sitting at the defense table was enough to fill in the gaps redacted from the officers testimony. Hence, obviously incriminating on it's face.

Basically, it was nonsensical to believe that the person being referred to by the testifier, was not the individual sitting next to the person he was talking about at the defense table.

No curative instruction was given.

D. Double Jeopardy

The doctrine of collateral estoppel is the relative point to this ground. The many references to a prior trial basically provided a second proceeding in which to convict petitioner with the same evidence from the acquitted acts.

At the beginning of the second trial a debate occurred concerning the possible ruling of what "term" would be used to describe the first trial. The judge eventually made a vague and ambiguous statement on the record saying that "previous testimony" was the term that should be used (petitioner says ambiguous because the judge also states that he knew that the witnesses would undoubtedly use the term "prior trial" at certain points in the spur of the moment. 1-10-03 RP 46).

As the judge assumed, the witnesses consistently referred to the first trial. RP 500, 519, 586-90, 618, 620, 633-37. Even more disturbing was the defense counsel who originally argued the limine motion violating it himself and on more than one occasion using the term "previous trial". The most disturbing violations came from the prosecutor whose words carry a heavy weight because a juror would not believe that such a person of authority would lie or mislead them. One example of the prosecutors words; "Some of these same casings were used in different trial, involving the same witnesses and the same codefendants, but different charges, that didn't involve these incidents, but involved evidence to

prove that they were present at both, you know, that they possessed the guns in a similar way that I am trying to do." (RP II, 104; RP VI, 624. emphasis added)

It is true that some Courts have ruled an acquittal is not a showing of innocence but simply a jury not finding enough to meet the standard of "guilt beyond a reasonable doubt". However, other Courts including this Circuit, have ruled differently. U.S. v. James, 109 F.3d 597, 601 (9th cir. 1997)(collateral estoppel required that acquittal on three prior bank Robbery counts precluded their subsequent use as overt acts of related conspiracy charge).

Rhems case is unique because of the chronology of events. The acquitted charges being liberally used to supposedly show a chain of reprisal and retaliatory events leading up to the current conviction.

Besides the problem of using acquitted acts and evidentiary facts at the second trial, this also allowed the inference of a conviction (which was not the case). Otherwise, not only was the previously acquitted acts submitted, but they came with an inference that it had actually been a finding of prior guilt. The prosecutors constant referring to the first trial, combined with affirming language, could only lead a rational juror to believe that Rhem had already been convicted of the prior events in question.

The above creates an interesting question to ponder. Would it not have been more fair to not even have a limine motion, but

if allowing the mention of a first trial, to let the acquittal be known?

The end result of the current conviction was a jury that heard a prosecutor speaking in certain terms concerning guns and prior shooting events, combined with the idea of a trial already being held on the same. And in the unique situation of Rhem's case a reasonable juror would without a doubt convict if he believed that a prior jury had already made a guilt finding on the underlying chain of events.

This error was both manifest and harmful.

III. CONCLUSION

For the foregoing reasons, and those contained in original petition, Rhem's conviction should be reversed. Rhem would also request that this Court consider sua ponte the ineffective appellate argument that the State broaches in their response. Or allow additional briefing.

FEB. 1. 2007


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MICHAEL KHEM)

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**AFFIDAVIT OF SERVICE
BY MAILING**

I, MICHAEL KHEM, being first sworn upon oath, do hereby certify that I
have served the following documents:

REPLD BRIEF OF PETITION

Upon: KATHLEEN PROCTOR
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By placing same in the United States mail at:

**WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362**

On this 1ST day of FEBRUARY, 2007.

Michael Khem #723868
Name & Number

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.