

No. 351951

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

IN RE PERSONAL RESTRAINT PETITION OF:

MICHAEL RHEM,

PETITIONER.

**PETITIONER'S SURREPLY
RE: COGGIN AND SPEIGHT**

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A. ARGUMENT

Introduction

The State asserts that a five person majority of the Washington Supreme Court have now concluded that a post-conviction petitioner must show a probability of a different verdict but for a violation of public trial right, citing *In re PRP of Coggin*, __ Wn.2d __, __ P.3d __, 2014 WL 7003796 (2014); and *In re PRP of Speight*, __ Wn.2d __, __ P.3d __, 2014 WL 7003794 (2014). The State makes this argument by counting Chief Justice Madsen’s concurring opinions as a vote for this position.

The State is incorrect.

Chief Justice Madsen’s Concurring Opinion

The State’s argument turns entirely on the following paragraph:

Nevertheless, because guidance is needed I would agree with the majority that the error here, failure to engage in the analysis outlined in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), requires a petitioner in a personal restraint petition to prove prejudice unless he can demonstrate that the error in his case " 'infect[ed] the entire trial process' " and deprive the defendant of " 'basic protections ,' " without which " 'no criminal punishment may be regarded as fundamentally fair.' " *Neder v. United States*, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Brecht v. Abrahamson* , 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Rose v. Clark*, 478 U.S. 570, 577, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)).

Coggin, _Wn .2d __, 2014 WL 7003796 at p. 5; *Speight*, 340 P.3d at 209-10 (Madsen, C.J., concurring in result only). According to the State.

Justice Madsen’s opinion “gives the needed fifth vote for the holding that a

petitioner seeking relief by collateral attack for a violation of the public trial right must show actual and substantial prejudice.” *Response*, p. 3.

In other words, the State argues that the excerpt cited-above sets forth the required *individualized* prejudice that must be proved in each case in order to merit reversal in a PRP. It does not. Instead, the excerpt cited by the State sets forth the harm that *always* follows in the case of any structural error. The full quotation from *Neder* cited in the Chief Justice’s concurring opinion proves this point:

The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Fulminante, supra*, at 310, 111 S.Ct. 1246. Such errors “infect the entire trial process,” *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and “necessarily render a trial fundamentally unfair,” *Rose*, 478 U.S., at 577, 106 S.Ct. 3101. Put another way, these errors deprive defendants of “basic protections” without which “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.” *Id.*, at 577–578, 106 S.Ct. 3101.

The Supreme Court has recognized that the right to a public trial is a structural error. See *Waller v. Georgia*, 467 U.S. 39, 49 (1984) (“[T]he defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee.”). A constitutional error is either structural or it is not. Whether an error is

structural depends on the category of error and not some “functional equivalence” or “proof of actual harm” test.

Federal courts sometimes apply what is termed a “triviality analysis” where a structural error has occurred, but where that error is so minor or insignificant that it does not implicate the interests underlying the structural error. However, no Washington court has ever found a “trivial” violation.

To the contrary, the Washington Supreme Court has expressly noted the harm that follows the exclusion of family members and friends from jury selection. *In re PRP of Orange*, 152 Wash.2d 795, 100 P.3d 291 (2004). The *Orange* court emphasized that, “[a]long with the general detriments associated with a closed trial, notably *the inability of the public to judge for itself and to reinforce by its presence the fairness of the process*, the present case demonstrates other kinds of harms: *the inability of the defendant's family to contribute their knowledge or insight to the jury selection and the inability of the venirepersons to see the interested individuals.*” *Id* at 812 (emphasis in original, citation omitted). “As a result of the unconstitutional courtroom closure in the present case, what the prospective jurors saw, as they entered and exited the courtroom during at least the first two days of voir dire, was not the participation of the defendant's family members in the jury selection process, but their conspicuous exclusion from it. The vigil of Orange's parents outside the closed courtroom doors may have been especially suggestive here, given

that prospective jurors were questioned in chambers on their knowledge of the Orange family's reputation in the community.” *Id.*

Mr. Rhem’s case is nearly a carbon copy of *Orange*.¹ Rhem was not required, but proved the same harm that found in that case. Reversal is required.²

B. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial.

DATED this 16th day of February, 2015.

Respectfully Submitted:

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¹ In his pro se *Reply*, Mr. Rhem asked this Court to fully apply *Orange* and consider “the ineffective assistance claim” that flows from *Orange*, and which was identified by the State in its response. *PRP Reply*, p. 7.

² The State argues that Mr. Rhem did not claim a federal constitutional violation in his pro se PRP. Nevertheless, the State’s original response repeatedly cites to and relies on the federal constitution. *Response*, p. 6. In any event, clarifying or adding additional authority that merits relief to an already identified claim does not constitute an amendment of the claim and is not subject to the time bar.

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of this supplemental reply brief on opposing counsel by sending a copy via email to the Pierce County Prosecutor's Appellate Division to the following email address:
PCpatcecf@co.pierce.wa.us

February 16, 2015//Portland, OR
Date and Place

/s/Jeffrey Ellis
Jeffrey Ellis

ALSEPT & ELLIS LAW OFFICE

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