NO. 59960-7-I

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

In re the Personal Restraint Petition of

WILLIAM COGGIN,

Petitioner.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 APR -5 PM 4:00

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

The Honorable Steven J. Mura, Judge

SECOND SUPPLEMENTAL REPLY BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUES IN REPLY

On January 14, 2013 this Court ordered the respondent to address the impact of the Supreme Court's decision in In re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012) on this case. This Court ordered any reply be filed by April 15, 2013. The following issues are now presented in reply:

1. Does Morris preclude relief absent an explicit claim of ineffective assistance of appellate counsel?

2. May this Court now overrule Morris?

B. SUPPLEMENTAL ARGUMENTS IN REPLY

1. THE SUPREME COURT'S DECISION IN *MORRIS* EXPLICITLY UPHOLDS ITS PRIOR DECISION IN *ORANGE*, AND *ORANGE* REQUIRES REVERSAL IN THIS CASE.

In 2005, Coggin appealed his convictions and was represented by undersigned counsel. On Coggin's direct appeal, the present issue was not raised despite the fact that a courtroom closure was clearly prohibited by existing case law. Morris, 176 Wn.2d at 167 (lead opinion) and 174 (Chambers, J., concurring); see also August 7, 2006 unpublished opinion in case no. 56800-1-I (Supp. Brief of Petitioner at Appendix A). This Court affirmed Coggin's convictions except for second degree assault, which it ordered to be vacated. Id.

Having failed to raise the public trial issue on the appellant's direct appeal, and recognizing it should have been raised on direct appeal under then-existing case law, undersigned counsel soon filed this personal restraint petition on Coggin's behalf, on May 6, 2007, nearly six years ago. Supp. Brief of Petitioner.

The claims raised by undersigned counsel in that petition were guided by the holding of In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) for the proposition that Coggin was entitled to relief based on the trial court's error, as well as undersigned counsel's failure to raise the issue on direct appeal, notwithstanding any explicit ineffectiveness claim. Supp. Brief of Petitioner at 8 (citing Orange, 152 Wn.2d at 814).

In Orange, the claim of public trial violation was raised in a personal restraint petition. Orange was tried in 1995 for murder, attempted murder, and assault. Id. at 799. The trial court closed the courtroom during part of the jury selection process. Orange was convicted, and he appealed. Appellate counsel did not raise the closed jury selection issue. Id. at 814. Orange's convictions were affirmed on appeal. Id. at 803.

Orange filed a personal restraint petition in 2001, six years after his trial. Id. at 803. The Court of Appeals denied the petition, but the Supreme Court granted discretionary review and ordered a reference

hearing. Id. Findings from the reference hearing indicated the trial court closed the courtroom during voir dire. Id. at 808-10. The Supreme Court held trial court's failure to analyze the five Bone-Club factors before ordering the courtroom closed violated Orange's right to a public trial. Id. at 812.

Although no explicit ineffective assistance claim was made, the Orange Court also held the constitutional violation would have resulted in a new trial had the issue been raised in Orange's direct appeal. Id. at 814 (citing State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995)). The Supreme Court reasoned that because there was no legitimate tactical or strategic reason for appellate counsel's failure to raise the issue, Orange was denied his right to effective assistance of counsel on appeal and was entitled to a new trial, the same remedy he would have received had counsel raised the issue on appeal. Id.

Morris does not overrule Orange in any respect. Morris, 176 Wn.2d at 168 (lead opinion) and 173-74 (concurrence). This Court reminds bound by Orange, which requires reversal of Coggin's convictions. Orange, 152 Wn.2d at 814.

2. AS THE STATE ACKNOWLEDGES, THIS COURT MAY NOT OVERRULE THE SUPREME COURT.

As acknowledged by the State in its brief,[1] this Court is bound by rulings by the state Supreme Court. 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006). This applies to the decisions in both Morris and Orange. Thus, it is unnecessary to address this claim.

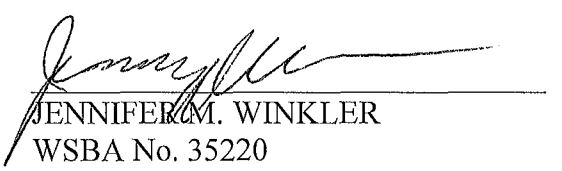
C. CONCLUSION

For the reasons stated above and the three previous briefs in support of Coggin's personal restraint petition, the petition should be granted.

DATED this 5TH day of April, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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[1] Third Supp. Brief of Resp't at 3 n. 7.

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	)	
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	)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF APRIL, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SECOND SUPPLEMENTAL REPLY BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF APRIL, 2013.

x Patrick Mayovsky