No. 91905-4

No. 71383-3-I

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I.

IN RE THE PERSONAL RESTRAINT OF

HECTOR SALINAS,

Petitioner.

PETITIONER'S REPLY BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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HECTOR SALINAS, #726671, Pro se
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE.
WALLA WALLA WA. 99362

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III. ISSUES RAISED IN RELPY.

A. Mr.Salinas's Counsel Did Not Invite The Violation Of Salinas's Right To A Public Trial.

B. Mr.Salinas's Counsel Did Not Waive The Right To Public Trial Issue When He Failed To Object To Vior Dire In Chambers.

C. Mr.Salinas's Appellate Counsel's Conduct Of Failing To Raise The Public Trial Right Violation On Appeal Was Deficient.

D. Mr.Salinas Has Demonstrated Actual Prejudice Because Failure To Raise The Public Trial Issue On Appeal Is Presumed Prejudicial.

E. This Matter Should Not Be Remanded For A Evidentiary Hearing.

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IV. STATEMENT OF THE CASE.

Mr.Salinas has filed a Personal Restraint Petition (PRP) claim ineffective assistance of appeal counsel for failing to raise the Public Trial Right Violation on Direct Appeal.

The State has filed their Response to Mr.Salinas's PRP, and now Mr.Salinas files his Reply in oppoisition to the State's response.

Mr.Salinas request that the Court grant his PRP and remand this matter to the Superior Court for a new trial.

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V. ARGUMENT

A. MR.SALINAS'S COUNSEL DID NOT INVITE THE VIOLATION OF SALINAS'S RIGHT TO A PUBLIC TRIAL OR WAIVE SUCH RIGHTS.

1. Invited Error.

The State's argument is that Salinas's counsel invited error precludes Salinas from arguing that his rights to a public trial was violated. Response to Personal Restraint Petition (hereinafter "State's Response"), at 10-14. More specifically, their argument is that because Salinas's counsel advised the potential jurors that they could request that certain questions be asked in private, that Salinas's counsel requested closure of the court room. State's Response, at 4-5(citing Appendix's B-E), at 10-11, and at 13-14. This argument must fail.

Invited error requires a affirmative act. State's Response, at 11,(citing Thompson,141 Wn.2d at 724;See also In re Personal Restraint of Breedlove,138 Wn.2d 298,979 P.2d 417(1999)). In the cases cited by the State - Thompson, Studd, Breedlove, Momah, and Copland - defense counsel's in those cases requested the jury instractions, not jury questionairs, and requested closure of the courtroom.

In this case now before the court, merely telling juror's in proposed questionairs that they can request to answer some questions in private does not show that Salinas's counsel invited the error, because the decision to request not answering questions in this case would require an affirmative act on part of the potential juror, not Salinas's counsel. In other words,

it is the affirmative act of the potential juror in this case that got the ball roling, so to speak, which caused the invocation of closure of the court room, not Mr.Salinas's defense counsel.

As the State concedes, it was the trial court that specifically inquired if any-one objected to in chambers questioning of juror, not Salinas's counsel. State's Response, at 13-14. Thus, this court can infer that a juror, or juror's, requested to answer questions in private, that prompted the court to then ask if anyone objected, and not that Mr.Salinas counsel request closure of the court room. Mr.Salinas respectfully submits, the questionaires on their face, did not call for, or request, private vior dire by Salinas's trial counsel.

The State is correct to note that the court can consider affirmatively assenting to error, materially contributing to it, or benefiting from it, citing State v. Momah,167 Wn.2d at 154. State's Response, at 12. However, the Washington State Supreme Court analyzed State v. Momah in In re Copland,176 Wn.2d 432,442-443,309 P.3d 626,631-32(2013), and found that Copland's case for invited error was stronger than Momah's.

Unlike Momah and Copland, although the court in Momah like the court in this case took the initiative in proposing that juror's be questioned in chambers, Mr.Salinas's counsel did not ask the court to close the court room, which is unlike the case in Momah and Copland, and the court in Mr.Salinas's case did not address, even constructively like the Momah court, the Bone-Club factors. See Copland,176 Wn.2d at 448-49,309 P.3d at 634-35.

Mr.Salinas's case, it can only be asserted by the State that Salinas's counsel had the opportunity to object but didn't, and that Salinas's counsel participated in the vior dire in chambers. Nor does the State argue that Mr.Salinas benefited from vior dire in chambers. Thus, Mr.Salinas respectfully submits, the State's argument that Salinas's counsel invited the error of violating the right to public trial is not supported by either Momah or Copland, and Mr.Salinas requests that the court reject the State's invited error argument.

2. Waiver.

B. MR.SALINAS'S COUNSEL DID NOT WAIVE THE RIGHT TO PUBLIC TRIAL ISSUE WHEN HE FAILED TO OBJECT TO VIOR DIRE IN CHAMBERS.

The State concedes that failure to object, in-and-of-itself, does not effect a waiver of the right to public trial in the State of Washington. State's Response, at 14-15. The State argues that Salinas's counsel's failure to object, and having requested private vior dire, was sufficient to waive Salinas's right to public trial, even if it wasn't sufficient to constitute invited error. State's Response, at 15.

First, the record does not support that Salinas's counsel requested private vior dire, as argued above by Salinas. Second, the State concedes that failure to object, in-and-of-itself does not effect a waiver of the right to public trial. Third, the State has not submitted with it's response a copy of the record that shows that the trial court advised Salinas of his rights to a public trial and that Salinas knowingly an intelligently waived

such right. RAP 16.9. Nor does the State cite authority that counsel can waive such substantive constitutional right for the public or Salainas. The record that the State submits, see State's Response, at Exhibit G, does not show a knowing and intelligent waiver either.

More importantly, this case involves Mr.Salinas's claim that his Appellate Counsel was ineffective for not raising the public trial right violation issue on appeal. PRP Petition, at 2-7. Thus, Mr.Salinas respectfully submits, (as demonstrated by the next issue replied to by Mr.Salians, below), that the State cannot circumvent that underlying public trial violation by claiming waiver and by arguing that trial counsel waived the right to public trial by solely failing to object.

C. MR.SALINAS'S APPELLATE COUNSEL'S CONDUCT OF FAILING TO RAISE THE PUBLIC TRIAL RIGHT VIOLATION ON APPEAL WAS DEFICIENT.

First, and foremost, the Washington State Supreme Court held in Personal Restraint of Morris,176 Wn.2d 157,156-66,288 P.3d 1140,1144(2012), that failure to consider the Bone-Club factors before privately questioning potential jurors violates a defendant's right to public trial and warrants a new trial on direct review, and that the Court need not address whether a public trial violation is also presumed prejudicial on collateral review because the court can resolve such claim on the ineffective appellate counsel ground instead. Id., at 165-66,288 P.3d at 1144.

~~The Morris Court then said that there was little question that the second prong (the deficient performance actually prejudiced the defendant),~~

was met. Morris,176 Wn.2d at 166,288 P.3d at 1144. That had Morris's appellate counsel raised this issue (violation of public trial right), on direct appeal, Morris would have received a new trial. Id.,(citing Orange,152 Wn.2d., at 814,100 P.3d 291). The Morris Court held that, with regards to the first prong of a ineffective counsel claim, proving deficient performance necessarily requires proving that counsel should have known to raise the public trial issue on appeal. Morris,176 Wn.2d at 167,288 P.3d at 1145. The Morris Court then resolved the first prong on a objective review of the law. Id., at 167,288 P.3d at 1145.

Like Morris, Mr.Salinas's appellate counsel should have known to raise the public trial right issue. If appellate counsel in Morris should have known to raise the public trial right issue in 2005, Morris,at 167-68,288 P.3d at 1145, then certainly Mr.Salinas's appellate counsel should have known to raise it in 2012. Because the Washington State Supreme Court has already addressed this ineffective appellate counsel issue, this court need not re-decide the analytical framework of such claims as the State invites the court to do in their Response, at 15-21.

This is because it is undisputed that Salinas's appellate counsel did not raise the public trial right issue on appeal, the State concedes this, and Mr.Salinas has met his burden to show that under the law at the time appellate counsel filed the appeal, like in Morris, counsel needed only to look to the court's public trial jurisprudence to recognize the significance of closing a court room without first conducting a Bone-Club analysis.

Nor need the court decide whether or not Morris is incorrect, harmful or should be overturned. In, In re Personal Restraint of Orange,152 Wn.2d 759,814,100 P.3d 291(2004), the Washington State Supreme Court held that it had resolved the issue whether or not trial counsel was ineffective for failing to object to closure of the court room for vior dire.

The State argues here in this case, that the facts of Orange are "plainly distinguishable" of what occurred in Morris. State's Response, at 23-26. However, in clarifying their decision the Morris Court made clear that it was relying on the fact that Morris's case was "analytically indistinguishable" from Orange, not "factually indistinguishable," as the State asserts and relies. See Morris,176 Wn.2d at 160-61,288 P.3d at 1142. Thus, the State's reliance on the fact between Morris and Orange is flawed, and there argument should be rejected.

D. MR.SALINAS HAS DEMONSTRATED ACTUAL PREJUDICE BECAUSE FAILURE TO RAISE THE PUBLIC TRIAL ISSUE ON APPEAL IS PRESUMED PREJUDICIAL.

Here, in arguing for a "redo" of vior dire, the State argues that Mr.Salinas cannot demonstrate actual prejudice from the trial court's failure to analyze the Bone-Club factors at the time of the closure. State's Response, at 32-33. This argument should be rejected.

The State cites State v. Sublett,176 Wn.2d. 58,105-06,293 P.3d 715(2012), State v. Alverez,128 Wn.2d 1,19,904 P.2d 754(1995), and State v. Head,136 Wn.2d 619,622,964 P.2d 1187(1996), to support it's position. These

cases do not support the State's position. The State asks this court for a "redo" of vior dire. This is not permitted under State v. Paumier,176 Wn.2d at 29,35,288 P.3d 1126,1129(2012). Both the court's in Alvarez and Head had addressed the relevant Bone-Club factors, but did not enter either sufficient or proper finding of fact and conclusions of law. Alvarez,128 Wn.2d at 9-10,15,19,904 P.2d at 759,761,763;State v. Head,136 Wn.2d at 622,964 P.2d at 1189.

The State requests that this court remand for findings of fact and conclusions of law on the Bone-Club factors that the trial court has not addressed in this case, which distinguishes Salinas's case from Alvarze and Head. Mr.Salinas's prejudice stems from Appellate Counsel's failure to raise the public trial right issue on appeal, not on the trial court's failure to enter adequate or complete finding of fact and conclusions of law, on the Bone-Club factor's the trial court did not even consider.

Second, Justice Madsen's concurring opinion in State v. Sublett, was rejected in the opinion by the majority of the court in State v. Paumier,176 Wn.2d 29,288 P.3d 1126(2012), which was handed down the same day as Sublett. Justice Madsen's concurring opinion in Sublett, thus is not the opinion of the court. Therefore, Mr.Salinas respectfull submits, Justice Madsen's concurring opinion in Sublett is not controlling authority, and under State v. Paumier,176 Wn.2d at 35,288 P.3d at 1129, requires reversal. State v. Paumier,176 Wn.2d at 35,288 P.3d at 1129("[W]e cannot reasonably order a 'redo' of vior dire to remedy the public trial right violation that occurred here.")(citations ommited by Petitioner).

Thus, Mr.Salinas submits the end results of a Bone-Club claim it's self, or as a ineffective counsel claim results in the presumption of prejudice. State v. Wise,176 Wn.2d 1,13-14,288 P.3d 1113,1119(2012);State v. Paumier,176 Wn.2d at 35,288 P.3d at 1129;Morris,176 Wn.2d at 167-168,288 P.3d 1145.

E. THIS MATTER SHOULD NOT BE REMANDED FOR A EVIDENTIARY HEARING.

The State asks that this court remand this matter for a reference hearing. State's Response, at 33-35. The State supposes that appellate counsel may have not raised the public trial right violation because appellate counsel may have believed that Salinas's trial counsel invited the error. State's Response, at 34.

As demonstrated previously by Mr.Salinas, their is no evidence in the record to suggest that Salinas's trial counsel invited the public trial violation. So the record would not have lead appellate counsel to suppose such invited error for determining whether or not to raise the issue on direct appeal. Remand, to speculate as to appellate counsel's reason for not raising the public trial issue would not be well served in this case because the Washington State Supreme Court has determined that failure of appellate counsel to raise the public trial violation is per-se ineffective and prejudicial, as to change the out-come of the appeal. Morris,176 Wn.2d at 167-168,288 P.3d at 1144-1145.

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Mr.Salinas respectfully requests that the court decline to State's request for a reference hearing. Such request is out of desperation to do a baseless fishing trip, so-to-speak, in lieu of this court applying Morris and granting Mr.Salinas relief.

VI. Conclusion.

For the reasons stated in this Reply and in Mr.Salinas's PRP Petition, Mr.Salinas requests that the court grant his PRP and remand this matter for a new trial. Morris,176 Wn.2d 157,288 P.3d 1140(2012).

I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Signed this 23 day of JUNE ,2014.

Signed: Salinas Hector

Hector Salinas, #726671
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE.
WALLA WALLA, WA. 99362

Prepared By:

Rev. Galhen Melchizedek

Rev. Galhen Melchizedek #964471
Brother in Jesus Christ.

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