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Supreme Court No. _____
(Court of Appeals No. 71383-3-I)

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

In re PERSONAL RESTRAINT PETITION

of

HECTOR SERANO SALINAS, Respondent.

STATE'S MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

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A. IDENTITY OF PETITIONER

Petitioner, State of Washington, Respondent below, asks this Court to review the decision of the Court of Appeals, Division One, referred to in section B.

B. COURT OF APPEALS DECISION

The State of Washington petitions this Court for review of the Court of Appeals opinion in In the Matter of the Personal Restraint of Hector Serano Salinas, #71383-3-1 (unpublished) which was filed June 15, 2015. A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a reference hearing should be ordered to address the material issue of disputed fact as to whether defense invited the violation of the right to public trial where petitioner asserts he did not and the State asserts defense did, where defense proposed a juror questionnaire three times that called for private voir dire, to occur not in open court, where the prosecutor did not request private voir dire and did not propose such a questionnaire, where the questionnaire given permitted jurors to request to speak in private regarding sensitive matters, where defense did not object at the time the judge inquired if anyone in the courtroom objected to private voir dire, and where defense actively participated in and expanded the scope of private voir dire.
2. Whether a reference hearing should be ordered to address the material issue of disputed fact as to whether appellate counsel, who failed to raise the right to public trial issue on appeal, provided ineffective assistance of counsel where the decision not to raise the issue may have been made for strategic reasons and where the petitioner did not allege ineffective assistance of defense counsel at

trial regarding the private voir dire that the State asserts occurred at his request.

3. Whether petitioner is entitled to a new trial based on a violation of his right to public trial where the petitioner invited the very error he alleges by proposing the questionnaire that called for private juror voir dire not in "open court" and actively participating in and expanding private voir dire.

D. STATEMENT OF THE CASE

Hector Salinas was charged and found guilty of three counts of Rape in the First Degree and one count of Kidnapping in the First Degree and was sentenced to life without possibility of release after having been found to be a persistent offender.

The rape occurred in Bellingham near Maritime Heritage Park on the night of June 20, 2008. The victim, DP, was homeless and living on the streets. She awoke to find a man sitting close to her. The man reached over and kissed her. He spoke Spanish. When DP stood up, the man grabbed her and hit her in the face. He had a knife in his hand. He raped her. Then he dragged her to a different area of the park where the assault continued.

Afterwards, DP flagged down a police car and told the officer she had been raped by a man with a knife. It was about 2:00 a.m. DP's face was bleeding and she could barely talk. She described her assailant as a Hispanic man wearing a stocking cap and having a mustache with possible chin hair. A canine officer arrived with his dog and began to track.

State v. Salinas, 169 Wn. App. 210, 214-15, 279 P.3d 917 (2012), *rev.*

den., 176 Wn.2d 1002 (2013). The canine track led to Hector Salinas, and subsequent DNA testing showed that some of the blood on Salinas's

clothing matched DP's, that the DNA profile on his underwear was consistent with a mixture of DP's and Salinas's DNA, and that the DNA on the rape kit swabs matched Salinas's. Id. at 215.

Prior to trial, Salinas's defense counsel filed a proposed jury questionnaire that informed jurors:

Some of these questions may call for information of a personal nature that you may not want to discuss in public. If you feel that your answer to any question may invade your right to privacy or might be embarrassing to you, you may so indicate on the form that you would prefer to discuss your answer in private. You will find instructions on this on the questionnaire.

App. B at 2¹. Question 26 then asked whether the juror would prefer to discuss the answer to any of the questions “privately *rather than in open court,*” and asked them to identify the questions by number. App. B at 7 (emphasis added). A number of the questions asked about jurors' experience with sexual abuse or misconduct. App. B at 5-6. A couple months later prior to trial, defense counsel filed two more proposed jury questionnaires, one day apart from each other. App. C, D. They each provided the same advisement to the jurors as the previous one did and asked similar questions about sexual abuse or misconduct, and whether the

¹ Appendices referred to herein, aside from Appendix A, refer to the appendices attached to the State's initial response to the petition.

juror would prefer to discuss their answers in private *rather than in open court.*

The prosecutor did not request private voir dire and did not file a proposed questionnaire. App. F. The prosecutor objected to some the questions in the defense's proposed questionnaire. App. F. The court ultimately provided a juror questionnaire, although not the specific one proposed by defense counsel. The court's questionnaire advised:

... if your answer to any of the following questions is of such a "sensitive nature" that you would like to discuss it 'privately', please identify those questions by number here: _____

App. E.

During pre-trial motions the judge mentioned that seven of the jurors wanted to speak in private and suggested that the jurors who wanted to speak individually be addressed first and then the rest of voir dire could be done. 3/8/10 RP 151-52 COA No. 65527-2-I². At the end of the pre-trial motions the next day, given time constraints, defense counsel suggested that the court take a break, bring in the "jury" (sic), swear them in and release those who didn't request to speak in private for the time being. 3/9/10 RP 69-70. The court indicated it was inclined to do that, and when the prosecutor stated: "...when you're talking about taking them in

privately ...,” the judge stated: “I’m going to ask if there’s anybody in the courtroom who has an objection, otherwise we have to do it in open courtroom.” 3/9/10 RP 70.

Later that day, after inquiring about whether all the prospective jurors had filled out the questionnaire, the judge informed the venire:

As you can see by that, this is a case that might involve some matters which might be of a sensitive nature. In this case, I’m 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 which will start this afternoon...

3/9/10 RP 3. After reviewing some preliminary matters, the judge noted some jurors had requested to speak in private and inquired:

Is there anyone in this group or *anyone* in this courtroom at this time *who has any objection* whatsoever to the Court conducting a short interview with each of those jurors, potential jurors with counsel and the defendant *in my chambers* all on the record to determine what their concerns are and be able to have them answer those questions or tell them what their concerns are *in private*? Is there anyone here that has any objection to that?

3/9/10 RP 12-13 (emphasis added). The court then directed the jurors who wished to speak privately to return at 1:30 p.m. and the remainder to return at 2:30 p.m. 3/9/10 RP at 13, 23. After the recess, the court inquired again:

² All the references to the report of proceedings in this response refer to the report of

I would ask if anyone has an objection to us speaking to them *in private* with us and counsel and defendant and the court reporter? Then I will go into chambers. Counsel will come in. The attorneys will come with me. The court reporter will set up, and Ms. Ortner will bring you in one at a time.

Id. at 23.

Individual voir dire of the prospective jurors then occurred in chambers. 3/9/10 RP 23-54. During private voir dire defense counsel asked questions that were beyond the scope of the purpose of the individual voir dire. 3/9/10 RP 38-40. As a result of the individual voir dire, three of the jurors were excused for cause. 3/9/10 RP 51; App. G at 2-3.

Salinas appealed and filed an overlength brief asserting numerous, substantive issues, contesting the search and seizure of various articles of clothing and effects, contesting the dog track, defense counsel's failure to request an instruction regarding the dog track evidence, the victim's in-court identification of Salinas, and a number of sentencing issues related to double jeopardy and the same criminal conduct, and regarding the proof, and the manner of proof, related to the persistent offender finding. The record that was prepared for the appeal included a complete transcription of the jury voir dire. (See Record in No. 65527-2-I). The Court of Appeals

proceedings filed in No. 65527-2-I.

affirmed Salinas' convictions, but directed the sentencing court to address the same course of criminal conduct sentencing issue on remand and directed that the first degree kidnapping conviction be vacated on remand. Salinas, 169 Wn. App. at 224.

Subsequent to the remand hearing, Salinas filed another appeal. That opinion affirming the trial court's determination that only two of the three rapes were the same course of conduct was issued in July of 2014. Court of Appeals No. 70125-8-I. Salinas then filed his personal restraint petition.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review of the Court of Appeals decision granting Salinas's personal restraint petition based on a violation of his right to a public trial. The decision is in conflict with In re Copland, 176 Wn. App. 432, 309 P.3d 626 (2013), a decision in which the Washington Supreme Court recently denied review. RAP 13.5A; 13.4(b)(2).

The Court of Appeals granted the petition, finding that appellate counsel's failure to raise the violation of his right to public trial on appeal constituted ineffective assistance of counsel. In doing so, the Court of Appeals decision rejected the State's contention that defense counsel at trial had invited the error and denied the State's request, should the court

determine that the record was insufficient to establish invited error, for a reference hearing to determine whether the trial court permitted private voir dire at defense request, given that the State did not request private voir dire. The State sought a reference hearing because it appeared from the available record that there must have been an off the record discussion regarding defense's proposed questionnaire because the questionnaire utilized was not the one defense proposed and the prosecutor did not agree with some of the questions in it. The State had also sought a reference hearing to determine why appellate counsel failed to raise the issue on appeal where she was and/or should have been cognizant of the right to public trial jurisprudence and had the juror voir dire transcript at the time of the appeal and could have made the strategic decision not to raise the issue.

The Court of Appeals did not address the State's reference hearing request, ruling instead that appellate counsel should have been aware of the issue given the opinion in In re Orange³. The State did not assert that appellate counsel wasn't aware of the issue. It asserted that appellate counsel could have made a strategic decision not to assert the right to public trial violation given the state of the law at the time and the

³ In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004).

applicability of the invited error doctrine, and that such a decision was within the norms of competent representation. Salinas did not include an affidavit from his appellate counsel as to why she failed to raise the issue. The Court of Appeals erred in reversing Salinas's very serious convictions involving the rape of a homeless woman, without granting the request for a reference hearing where the available record created, at a minimum, a material issue of disputed fact as to why the trial court permitted private voir dire.

In addition, the Court of Appeals misapplied the doctrine of invited error. Although the trial court recognized the closure issue and inquired as to any objections, the Court of Appeals did not find invited error because the court did not fully weigh all the Bone-Club⁴ factors. Slip Opinion at 4. While the Supreme Court has not yet denied a right to public trial claim based on invited error, it has recognized the applicability of the doctrine to the constitutional error. In In re Copland, which did apply the invited error doctrine to a right to public trial violation regarding jury voir dire, the court did not require a weighing of the Bone-Club factors below before applying the doctrine. All that is required for the invited error doctrine to apply is that the party set up the error complained about on appeal. Salinas

⁴ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

did just that by proposing a juror questionnaire, three times, that called for private questioning of jurors, outside of court, on questions of a personal nature that jurors might find invasive or embarrassing. The State did not propose such a questionnaire and did not request private voir dire.

Defense counsel actively participated in and even expanded the scope of the private juror questioning. This Court should grant review because the Court of Appeals misapplied the doctrine of invited error when it granted Salinas's petition.

F. ARGUMENT

Salinas contended in his petition that the questioning of seven prospective jurors in chambers without weighing the Bone-Club factors on the record constituted a violation of his right to a public trial and that appellate counsel's failure to raise the issue on appeal was ineffective assistance of counsel warranting a new trial, pursuant to In re Morris⁵. The Court of Appeals agreed with Salinas and granted him a new trial based on ineffective assistance of appellate counsel. The State asserts, as it did below, that the invited error doctrine precludes consideration of Salinas's

⁵ In re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012).

petition.⁶ Whether the trial court granted the private voir dire due to defense request is critical to this issue. While the State asserted that the established record was sufficient for the court to find invited error, it is clear from the available record that this is, at a minimum, a material issue of disputed fact. The State asserted that defense invited the error by proposing the questionnaire that called for private voir dire, not in open court, and actively participating, and even expanding, that juror voir dire, while petitioner asserted he did not. Given this disputed issue, it would be unfair for petitioner's very serious convictions to be reversed without a reference hearing to determine whether the private voir dire occurred because of a request from defense.

- 1. This Court should grant review and grant the State's request for a reference hearing to resolve the material issue of disputed fact of whether the defense invited the right to public trial error.**

The Court of Appeals did not grant nor address the State's request for a reference hearing. Instead, it ruled that In re Orange should have put appellate counsel on notice that failure to assert an issue related to the right to public trial regarding jury selection was presumptively prejudicial

⁶ The State also asserted that In re Morris was wrongly decided, but does not raise that issue here.

on appeal. If indeed defense invited the error, petitioner is precluded from obtaining relief. The available record establishes that the issue of whether defense invited the error is, at a minimum, a material issue of disputed fact. The State requests this Court remand for a reference hearing pursuant to RAP 16.12.

There are two material issues in which the parties dispute the facts:

1) whether the trial court permitted private voir dire of individual jurors because trial counsel for Salinas requested it, as the State alleges, or whether the trial court utilized the private voir dire process on its own initiative, as Salinas alleges, and 2) whether appellate counsel's failure to raise the alleged violation of the right to public trial on appeal was strategic, as the State alleges, or due to ineffectiveness, as Salinas alleges.

It is a petitioner's burden to state the facts underlying the claim of unlawful restraint, and the evidence to support those facts, in the petition. In re Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). If the factual allegations are based on knowledge in the possession of others, the petitioner "may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence." *Id.* at 886. The State must meet the petitioner's allegations with its own competent evidence, and if the produced evidence establishes material issues of

disputed fact, “the superior court will be directed to hold a reference hearing in order to resolve the factual questions.” Id. at 886-87.

The State here answered Salinas’s allegations regarding his right to public trial violation with evidence that the defense counsel initiated and desired the private voir dire that occurred. That evidence shows that defense counsel filed a questionnaire, not once but three times, calling for private voir dire of jurors, voir dire that would not occur in open court, that the prosecutor did not request private voir dire and that the prosecutor did not agree with some of the questions in defense counsel’s proposed questionnaire. Two of the questionnaires were filed right before trial⁷ and before the court ever made its statements about the individual voir dire procedure. The fact that there was a disagreement regarding the questionnaire and that the questionnaire given was not the one defense filed with the court logically implies that there was an off-the record discussion regarding the questionnaire as no discussion of the questionnaire appears in the record provided. The contents of this discussion, or other testimony regarding how the court arrived at the questionnaire it provided and the procedure it employed, would resolve the material issue of disputed fact as to whether private voir dire occurred at

the behest of defense counsel. The record supports the inference that but for defense request for private voir dire of jurors, the court would not have conducted the individual voir dire of jurors in a closed setting.

Another disputed issue of material fact is whether appellate counsel strategically chose not to raise the issue of the right to public trial violation. Salinas did not include in his petition any affidavit from his appellate counsel asserting that she was unaware of the right to public trial issue and law⁸. Due to attorney client privilege, he was in the best position to provide such an affidavit. An attorney's representation is presumed effective. While the Court of Appeals is correct that appellate counsel should have been aware of the case of In re Orange, the State is not asserting that appellate counsel was unaware of the existing jurisprudence regarding the right to public trial. On the contrary, appellate counsel should have been aware of the Supreme Court opinions in Momah⁹ and Strode¹⁰, as well as Orange, at the time appellate counsel filed the opening brief in the direct appeal in June 2011. However, a number of the Court of

⁷ The three proposed questionnaires appear to be nearly identical, except for some of the names listed as potential witnesses. See Appendix B, C, D of State's Response

⁸ Appellate counsel on Salinas's first direct appeal was Susan Wilk. Susan Wilk was also assigned appellate counsel in State v. Tyler Hawker, COA No. 61479-7. A right to public trial issue was asserted on appeal in that case that resulted in reversal. The opening brief in Hawker was filed on November 19, 2008, and the State filed a petition for review on April 22, 2011, just a couple months before the opening brief in Salinas was filed, on June 29, 2011.

Appeals opinions that addressed right to public trial claims subsequent to those decisions essentially tried to determine whether the facts of the case were more like those in Momah or those in Strode. *See e.g., State v. Bowen*, 157 Wn. App. 821, 831, 239 P.3d 1114 (2010) (“We conclude that the circumstances in this case are more similar to those in Strode than those in Momah.”). The defense request for permission for the defendant’s family to be able to see voir dire and the harm, exclusion of those family members, that resulted from the closure were central to the Orange court’s finding of ineffective assistance of appellate counsel. Orange, 152 Wn.2d. at 808-09. The error in Orange was “conspicuous in the record,” and thus appellate counsel should have known to raise it on direct appeal. In re Morris, 176 Wn.2d at 185 (Wiggins, J., dissenting).

The reason appellate counsel failed to raise the right to public trial issue on appeal is a material issue of disputed fact. The evidence available thus far indicates that defense counsel sought private voir dire of jurors and the prosecutor did not. Given this, and given the state of the law regarding the right to public trial at the time the opening appellate brief was filed, appellate counsel could have strategically chosen not to raise the public trial issue. Salinas failed to object at trial and he proposed

⁹ State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

questionnaires that called for the private voir dire that he alleges violated his right to public trial. In all fairness, the State deserves an opportunity to develop the record surrounding the issue of whether defense invited the right to public trial error.

2. **This Court should grant review in order to address the State's argument that Salinas invited the right to public trial error he asserts by proposing a questionnaire that called for private voir dire, failing to object, and actively participating in and expanding the voir dire.**

The Court of Appeals rejected the State's contention that Salinas invited the error, distinguishing Momah and Copland on the grounds that the trial court in those cases had at least effectively considered the Bone-Club factors and found this case more comparable to Coggin¹¹. It is not necessary under the invited error doctrine for a court to effectively address the very issue defense invites. All that is necessary is for the defense to set up the very error it alleges on appeal. That is the case here, defense requested private voir dire, voir dire that would not occur in open court, and the State did not. Defense did not object when the court inquired if anyone in the courtroom objected to questioning the seven jurors in chambers, actively participated in and even expanded the scope of that

¹⁰ State v. Storde, 167 Wn.2d 222, 217 P.3d 310 (2009).

¹¹ In re Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014).

voir dire. The State contends that but for the defense proposed questionnaire, private voir dire would not have occurred in this case.

The invited error doctrine “prohibits a party from setting up an error ... and then complaining about it on appeal.” In re Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). This is a “strict rule.” State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). The doctrine requires some affirmative action on the part of the defendant. Thompson, 141 Wn.2d at 724. Generally, where the defendant takes knowing and voluntary actions to set up the error, the invited error doctrine applies; where the defendant’s actions are not voluntary, it does not. In re Thompson, 141 Wn.2d at 724. The doctrine applies even in the context of constitutional error, and in the context of violations of the right to public trial. Studd, 137 Wn.2d at 546, 548; Coggin, 182 Wn.2d 115 at 119. This rule recognizes that “[t]o hold otherwise would put a premium on defendants misleading trial courts.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Recently, this Court denied review of Copland, a case in which the court denied a personal restraint petition alleging a right to public trial violation in part because the defense had invited the error. Copland, *supra*. In that case, the court considered whether the petitioner invited the

alleged right to public trial violation by “affirmatively assent[ing] to the error, materially contribut[ing] to it, or benefit[ing] from it.” Copland, 176 Wn. App. at 442. In comparing its facts to the Momah case, the court in Copland found that the case presented a stronger invited error argument than that in Momah. Id. at 442-43. Defense counsel had asked the trial court to close the courtroom to the media in order to avoid contamination of the jury pool. After an objection by the state, the court denied defense counsel’s motion to close the courtroom during voir dire, but ultimately agreed to allow certain jurors to be questioned privately, which the prosecutor had suggested might be permissible. Id. at 443. Defense counsel then gave the court a list of jurors for private questioning and actively participated in that questioning. Id. On review the court concluded that it could dismiss the petition based on invited error or failure to demonstrate prejudice based on defense having sought a full closure, having participated in the temporary closure and having benefitted from the closure by discovering potential biases of jurors. Id.¹²

Here, defense counsel for Salinas sought private voir dire as evidenced by the questionnaires defense counsel proposed. The judge

¹² The court went on to consider whether the failure to analyze the Bone-Club factors on the record was a violation of the *public’s right* to open proceedings that the petitioner could assert. Id. at 443-450.

specifically inquired of the entire courtroom if anyone objected to in chambers questioning of those jurors who wished to speak privately on sensitive issues. Defense counsel did not object. Defense counsel participated in the in-chambers questioning and even expanded it beyond those issues identified by the jurors. As in Copland, Salinas invited the very error he now asserts.¹³

In order to successfully raise an ineffective assistance of appellate counsel claim, the defendant, in addition to showing prejudice, must demonstrate the merit of the legal issue that appellate counsel was allegedly ineffective in failing to raise. In re Netherton, 177 Wn.2d 798, 801, 306 P.3d 918 (2013). In order to demonstrate prejudice, the petitioner must show that the issue the petitioner claims should have been raised would have resulted in reversal of the conviction. See, In re D'Allesandro, 178 Wn. App. 457, 314 P.3d 744 (2013) review denied, 182 Wn.2d 1021, 345 P.3d 784 (2015)(in order to establish prejudice from appellate counsel's failure to assert a right to public trial issue in the petition for review from the direct appeal, the petitioner must demonstrate

¹³ Of note, petitioner has not alleged ineffective assistance of *trial* counsel. Sometimes when the doctrine of invited error precludes consideration of an asserted error on appeal, there is an accompanying claim of ineffectiveness of *trial* counsel for inviting that very error. A new trial may be granted on that basis. Salinas, however, does not assert that trial counsel was ineffective in requesting the private voir dire.

that the Supreme Court would have granted review and reversed the conviction).

Under an ineffective assistance of appellate counsel claim, Salinas must demonstrate that if the right to public trial violation he now asserts had been raised on direct appeal, it would have been successful. He cannot because it was invited error, and he would have been precluded from asserting it on direct appeal.

G. CONCLUSION

For the reasons set forth above, Petitioner, State of Washington, respectfully requests that this Court accept discretionary review, reverse the Court of Appeals decision, and remand for a reference hearing.

Respectfully submitted this 15th day of July, 2015.



HILARY A. THOMAS, WSBA No. 22007
Appellate Deputy Prosecutor
Whatcom County Prosecuting Attorney

CERTIFICATE

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and appellant's counsel, addressed as follows:

David Koch
Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122

TD Stank
LEGAL ASSISTANT

7/15/15
DATE

APPENDIX

A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
PERSONAL RESTRAINT OF:
HECTOR SERANO SALINAS,

Petitioner.

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No. 71383-3-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: JUN 15 2015

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 JUN 15 AM 8:30

PER CURIAM. In 2010, a jury convicted Hector Salinas of three counts of rape in the first degree. Salinas filed this personal restraint petition contending that appellate counsel was ineffective for failing to raise a public trial claim in his direct appeal. We agree and reverse his convictions.

The State charged Salinas with three counts of rape in the first degree and one count of kidnapping in the first degree. Prior to voir dire, defense counsel proposed a jury questionnaire containing the following language:

Some of these questions may call for information of a personal nature that you may not want to discuss in public. If you feel that your answer to any question may invade your right to privacy or might be embarrassing to you, you may so indicate on the form that you would prefer to discuss your answer in private.

As the State and defense counsel discussed jury selection, defense counsel suggested the trial court question any jurors who wished to speak privately in chambers prior to general voir dire. The prosecutor inquired regarding the trial court's general practice for individual voir dire. The trial court responded: "I'm

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going to ask if there's anybody in the courtroom who has an objection, otherwise we have to do it in open courtroom." Once the jury pool was present, the trial court stated:

Is there anyone in this group or anyone in this courtroom at this time who has any objection whatsoever to the Court conducting a short interview with each of those jurors, potential jurors with counsel and the defendant in my chambers all on the record to determine what their concerns are and be able to have them answer those questions or tell them what their concerns are in private? Is there anyone here that has any objection to that?

The record does not reflect that anyone responded. The trial court excused jurors who did not wish to speak privately and then stated:

We have the jurors here that are the ones that I think wish to speak in private. I would ask if anyone has an objection to us speaking to them in private with us and counsel and defendant and the court reporter? Then I will go into chambers. Counsel will come in. The attorneys will come with me. The court reporter will set up, and Ms. Ortner will bring you in one at a time, and we'll talk to you and find out what your concerns are, and we'll take it from there, and if you will all just be patient, we'll do it as quickly as we can.

The record reflects that six jurors were questioned in chambers. The trial court excused three of the privately questioned jurors for cause.

A jury convicted Salinas as charged. Salinas was sentenced to life in prison without parole as a persistent offender. Salinas appealed. Appellate counsel did not raise a public trial claim on direct appeal. In a published opinion, State v. Salinas, 169 Wn. App. 210, 279 P.3d 917 (2012), this court affirmed Salinas's convictions but remanded to vacate the kidnapping conviction and conduct a same criminal conduct analysis. Salinas now files this timely personal restraint petition.

No. 71383-3-I/3

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a criminal defendant the right to a public trial. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Additionally, article I, section 10 of the Washington Constitution guarantees the public's open access to judicial proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). To protect both rights, certain proceedings must be held in open court unless application of the five-factor test in State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) supports closure of the courtroom.¹

It is well established that the public trial right in voir dire proceedings extends to the questioning of individual prospective jurors. Wise, 176 Wn.2d at 16-19. The wrongful deprivation of the public trial right is a structural error presumed to be prejudicial on direct appeal. Wise, 176 Wn.2d at 14.

To establish ineffective assistance of appellate counsel, a petitioner must establish that (1) counsel's performance was deficient and (2) the deficient performance actually prejudiced the defendant. In re Pers. Restraint of Morris, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012). "[W]here appellate counsel fails to raise a public trial right claim, where prejudice would have been presumed on direct review, a petitioner is entitled to relief on collateral review." Morris, 176 Wn.2d at 161.

¹ The five factors are: (1) the proponent of closure must make a showing of compelling need, (2) any person present when the motion is made must be given an opportunity to object, (3) the means of 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 public and of the closure, and (5) the order must be no broader in application or duration than necessary. Bone-Club, 128 Wn.2d at 258-59.

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Here, neither party disputes that the trial court closed the courtroom when it privately questioned potential jurors during voir dire in chambers without first conducting a full Bone-Club analysis. Thus Salinas's constitutional right to a public trial was violated. Because this error would have been presumed prejudicial on direct appeal, appellate counsel was ineffective for failing to raise it.

Relying on State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) and In re Pers. Restraint of Copland, 176 Wn. App. 432, 309 P.3d 626 (2013), the State argues that Salinas is not entitled to a new trial despite the closure because he invited the violation by proposing the questionnaire and process for individual questioning. "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial." In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). But Momah and Copland are distinguishable. In both cases, the trial court fully and effectively considered the Bone-Club factors on the record, even if it did not identify them by name. Momah, 167 Wn.2d at 156; Copland, 176 Wn. App. at 446-450. Here, the trial court recognized the closure issue and asked parties and the public if they objected. However, the trial court did not consider whether a compelling interest demanded closure, did not consider whether questioning jurors in chambers was the least restrictive closure possible, and did not weigh the competing interests of Salinas and the public.

Instead, this case is more similar to Coggin. In Coggin:

[d]uring jury selection, defense counsel expressed a desire for individual juror questioning due to the publicity and sensitive nature of the case. The prosecutor drafted a juror questionnaire, and defense counsel approved the final version. The questionnaire advised the potential jurors that if they preferred to discuss their answers in private, the court would give them an opportunity to explain their answers in a "closed hearing."

Coggin, 182 Wn.2d at 117. The Washington Supreme Court held that these actions did not rise to the level of invited error. Coggin, 182 Wn.2d at 119.

In the alternative, the State claims Salinas's conduct amounted to a waiver of the public trial right. But waiver of a constitutional right must be knowing, voluntary, and intelligent. State v. Shearer, 181 Wn.2d 564, 571, 334 P.3d 1078 (2014). A court must "indulge every reasonable presumption against waiver of fundamental rights." State v. Frawley, 181 Wn.2d 452, 334 P.3d 1022 (2014). Here the record does not support a conclusion that Salinas waived his public trial right. Defense counsel assented to the private questioning of jurors, but there is no evidence that Salinas was ever advised of his right to a public trial or consented to the private questioning of the jurors.

Finally, the State claims Salinas has failed to show that appellate counsel was ineffective for failing to raise the public trial issue on direct appeal. The State argues that appellate counsel could have reasonably decided not to raise a public trial issue, believing that Salinas was precluded from asserting the issue on appeal. But at the time Salinas filed his direct appeal, the Washington Supreme Court had decided In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). Orange "clarified, without qualification, both that Bone-Club applied to jury selection and that closure of voir dire to the

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public without the requisite analysis was a presumptively prejudicial error on direct appeal." Morris, 176 Wn.2d at 167.

Salinas's personal restraint petition is granted. Salinas's judgment and sentence is reversed and the case is remanded to the superior court for a new trial.

For the court:

COX, J.

Salinas, J.
Leach, J.

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Please find attached State's Motion for Discretionary Review.

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