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SUPREME COURT NO 91905-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint Petition Of:

HECTOR SALINAS,

Respondent

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

The Honorable Charles R. Snyder, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE STATEMENTS

1. Several prospective jurors were interviewed privately in the judge's chambers without a sufficient Bone-Club analysis. Defense counsel did not propose questioning in chambers and did not ask the judge to dispense with the required analysis. Rather, the mechanics of private voir dire originated with the judge, who – like other Whatcom County judges – had used this same approach before. Did the Court of Appeals properly find that the judge's error was not invited?

2. Did the Court of Appeals properly decline to order a reference hearing where the State has failed to meet its burden for such a hearing?

B. SUPPLEMENTAL ARGUMENT

There is no dispute that Salinas's constitutional right to a public trial was violated when Judge Snyder decided to handle the questioning of six potential jurors in chambers without first conducting the analysis required under State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). See State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012); State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012). Nor is there any dispute that, where appellate counsel mistakenly fails to raise this violation on direct appeal, a defendant

can prevail in a personal restraint petition based on a claim that appellate counsel was ineffective. See In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012); In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004).

But the State argues Salinas should be denied any remedy for violation of his constitutional rights because his trial attorney invited the trial judge's non-compliance with Bone-Club and, in a related argument, Salinas's appellate counsel was not ineffective because she properly rejected the issue based on her concern the error might be invited. Alternatively, the State asks for a hearing in which it hopes to discover evidence supporting these arguments.

There was no invited error and an evidentiary hearing would serve no purpose. This Court should affirm the Court of Appeals.

1. TRIAL COUNSEL DID NOT INVITE THE COURT'S FAILURE TO ENGAGE IN A SUFFICIENT BONE-CLUB ANALYSIS.

The invited error doctrine precludes review of trial court error made "at the defendant's invitation." State v. Studd, 137 Wn.2d 533, 546-547, 973 P.2d 1049 (1999) (quoting State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)). The doctrine prohibits a party from setting up an error and then complaining about that same error on review. State v. Wakefield, 130 Wn.2d 464, 475,

925 P.2d 183 (1996). To be invited, an error must be the result of affirmative, knowing, and voluntary actions. In re Pers. Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001). Relevant considerations may include whether the defendant affirmatively assented to the error, materially contributed to it, or benefitted from it. State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010). The State bears the burden to prove an error is truly invited as opposed to a consequence of the failure to object. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Salinas's trial attorneys did not invite Judge Snyder's non-compliance with Bone-Club. Where a courtroom closure is under consideration, it is *the trial judge's duty* to engage in a complete analysis of the five factors identified in Bone-Club prior to any closure. Bone-Club, 128 Wn.2d at 261. At no time did counsel for Salinas argue that Judge Snyder could or should dispense with this obligation before heading into chambers for private voir dire.

Given the nature of the charges, and probable questions during voir dire, defense counsel correctly predicted that some jurors might be uncomfortable discussing their own experiences with sexual abuse or sexual misconduct. Therefore, defense

counsel filed a proposed questionnaire addressing this concern.

See Appendix B.<sup>1</sup> The cover page includes 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. You will find instructions for this on the questionnaire.

Proposed question 26 asked, "Would you prefer to discuss the answer to any of these questions privately rather than in open court? If so, please identify the questions by number in the space provided below." Appendix B, at 5.

The proposed questionnaire included a list of all possible trial witnesses. Appendix B, at 5-7. Closer to trial, defense counsel updated the proposed questionnaire to accurately reflect the names of additional possible witnesses. See Appendix C, at 7. The following day, defense counsel updated the questionnaire again, this time with a modified prediction for the length of trial. Compare Appendix C, at 2 (estimating trial at one and a half weeks) with Appendix D, at 2 (estimating three weeks).

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<sup>1</sup> All citations to appendices are to those attached to the State's Response to Salinas's personal restraint petition.

Prosecutors reviewed the proposed questionnaire and opposed portions of it. Appendix F. Ultimately, this questionnaire was disregarded. It was not used, and jurors never saw it. Instead, Judge Snyder used a questionnaire that employs a different format, different language, and a different font. See Appendix E. On the subject of uncomfortable topics, the first page indicates:

*Please read each of these questions carefully and answer them as candidly and fully as possible – 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: \_\_\_\_\_*

During pretrial motions, after prospective jurors had been provided this questionnaire, Judge Snyder noted that seven jurors had indicated a desire to speak privately. He proposed voir dire begin at 11:00 a.m. the following morning – after completion of pretrial matters – that they speak with these seven jurors first, and complete the rest of voir dire in the afternoon. 1RP 150-152.<sup>2</sup>

The following morning, after completing pretrial motions, defense counsel suggested that, following a break, prospective jurors be brought up, sworn, and those that did not wish to talk in

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<sup>2</sup> This supplemental brief refers to the verbatim report of proceedings as follows: 1RP – March 8, 2010; 2RP – March 9, 2010 (74 pages); 3RP – March 9, 2010 – (150 pages).

private be temporarily released until after those conversations could take place. 2RP 69-70. Judge Snyder responded that he had the same thought. 2RP 70. The prosecutor then asked, "Your Honor, do you address the panel, when you're talking about taking them in privately –" .2RP 70. Judge Snyder replied, "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." 2RP 70.

Following the break, Judge Snyder made introductory remarks to the prospective jurors. After confirming that everyone had filled out the questionnaire, he said:

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 . . . .

3RP 3.

Judge Snyder identified by number those individuals desiring to speak privately. 3RP 12. He then asked if anyone objected to interviews with these jurors "in my chambers." 3RP 13. This was the first time anyone mentioned going in chambers, and no one

objected. 3RP 13. Judge Snyder then asked the jurors seeking this accommodation to return at 1:30 that afternoon, asked a majority of the other prospective jurors to return at 2:30, and addressed hardships with additional prospective jurors before recessing for lunch. 3RP 13-23.

Upon resumption of voir dire at 1:30, Judge Snyder again asked if anyone objected to private voir dire and described the process he had chosen to employ:

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. Ortnier 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 just be patient, we'll do it as quickly as we can.

3RP 23. Six individuals were interviewed in chambers. 3RP 23-51.

Three were dismissed for cause. 3RP 44, 49, 51.

This record reveals that, while the defense anticipated some prospective jurors would like to speak in a private setting, the actual mechanics of how this questioning would be accomplished, including the location of questioning, originated with Judge Snyder.

Neither the defense nor the prosecution suggested going into chambers, which is hardly surprising, since it would have been rather presumptuous of anyone but the judge himself to suggest use of his private chambers for this or any other purpose.<sup>3</sup> Nor did either counsel encourage Judge Snyder to dispense with a full Bone-Club analysis. Rather, the failure to engage in that analysis stemmed from Judge Snyder's erroneous belief at the time that the only necessary inquiry was whether anyone objected to private voir dire. See 2RP 70. And no one did.

Salinas's trial was not the first in which Judge Snyder had chosen to use his chambers for a portion of voir dire. In State v. Hummel, 165 Wn. App. 749, 266 P.3d 269 (2012), review denied, 176 Wn.2d 1023, 297 P.3d 708 (2013), the defendant – like Salinas – was prosecuted in Whatcom County before Judge Snyder. As in Salinas's case, defense counsel proposed a questionnaire, which indicated jurors should inform the court if a juror "would prefer to discuss your answer in private." Id. at 773.

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<sup>3</sup> Although the Court of Appeals properly found defense counsel did not invite the error in Salinas's case, that court indicated in its decision that, "*defense counsel* suggested the trial court question any jurors who wished to speak privately in chambers prior to general voir dire." Slip Op., at 1 (emphasis added). This is incorrect.

Judge Snyder adopted this questionnaire. Id. As in Salinas's case, Judge Snyder then announced that some jurors would be questioned in his chambers, asked if there were any objections and, hearing none, proceeded to question several jurors in that location without a full Bone-Club analysis. Id. at 773-774. Division One reversed Hummel's murder conviction for this violation of his right to public trial. Id. at 770-771, 774. Not only does Hummel reveal the proper outcome in Salinas's case, it also confirms that Salinas's attorneys were not the impetus for Judge Snyder's decision to invite jurors into his chambers without a full Bone-Club analysis. Judge Snyder had previously done the very same thing at Hummel's trial.<sup>4</sup>

Ultimately, Salinas's attorneys merely proposed a questionnaire in recognition that some potential jurors might prefer a measure of privacy to discuss certain topics and suggested those jurors be questioned initially, outside the presence of other potential jurors. The decision to question these jurors in chambers originated with Judge Snyder. And while neither defense counsel, nor anyone else, objected when Judge Snyder decided to conduct

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<sup>4</sup> ACORDS indicates Hummel was tried and convicted in 2009. Salinas was tried in 2010.

a portion of voir dire in chambers without the full Bone-Club analysis, a failure to object is not the same as an invited error.

The State relies on this Court's decision in State v. Momah in seeking to avoid a new trial for Salinas. But Momah is easily distinguished. In Momah, this Court, drawing on (but not adopting) the invited error doctrine, held that in-chambers voir dire did not amount to structural error under the particular and unusual circumstances of that case. Momah, 167 Wn.2d at 145, 153-154. Specifically, Momah had affirmatively and expressly advocated for closure, argued for expansion of that closure, and clearly benefitted from the closure. Id. at 155-156. It was apparent that Momah deliberately and thoughtfully pursued closure to safeguard his right to a fair and impartial jury in what was a highly publicized case. Id. at 145-146, 155. Moreover, it also was apparent the court, in consultation with trial counsel, had carefully considered Momah's rights before ordering the closure despite failing to articulate every Bone-Club factor on the record. Id. at 151-152, 156.

Counsel's affirmative and aggressive pursuit of private voir dire, along with the court's careful consideration of Momah's rights, were atypical and distinctive features of Momah. Indeed, since Momah, this Court has made clear it is unlike any other case likely

to come before the appellate courts. See Wise, 176 Wn.2d at 14-15 (“*Momah* presented a unique confluence of facts. . . . We emphasize that it is unlikely that we will ever again see a case like *Momah* where there is effective, but not express, compliance with *Bone-Club*. The rule remains that deprivation of the public trial right is structural error.”); Paumier, 176 Wn.2d at 35 (“*Momah* relied on unique facts to conclude that no public trial right violation occurred when the jurors were individually questioned.”).

Although the State frequently cites Momah to defeat a public trial violation, all three divisions of the Court of Appeals, and this Court, have rejected these efforts under circumstances similar to those here.

As just discussed, in Hummel, Judge Snyder used the same closure procedures he used at Salinas's trial, and Division One found Momah distinguishable. Hummel, 165 Wn. App. at 771-774.

Similarly, in In re D'Allesandro, 178 Wn. App. 457, 314 P.3d 744 (2013), review denied, 182 Wn.2d 1021, 345 P.3d 784 (2015), Division Two found Momah distinguishable. D'Allesandro's trial attorney had proposed and prepared a juror questionnaire offering private interviews. Id. at 460. Defense counsel also suggested to the trial judge that interviews of jurors indicating a desire for privacy

take place prior to general voir dire and outside the remaining pool of potential jurors. Id. at 461. The judge agreed and indicated the privacy he generally afforded such jurors meant “*outside of what’s open to the general public . . .*” Id. at 462 (emphasis in original). Counsel for both sides indicated this was “fine.” Id. Attached to the questionnaire was a cover sheet – submitted either by counsel or the court – explaining that private questioning would be conducted outside the presence of the public and other potential jurors. Id. at 460 & n.4.

The trial judge noted that his chambers was too small to conduct the questioning there. Instead, the judge proposed asking members of the public to leave the courtroom during the interviews and also suggested expanding the questioning to those indicating they knew something about the case. Id. 462-463. Neither the State nor the defense objected. Id. at 463. When it came time to question jurors, the court indicated that, although it normally used chambers for private questioning, there were too many individuals involved to do that this time. Id. at 463-464. The judge announced he was “turn[ing] this courtroom into the judge’s chambers” and then excluded the public without expressly addressing the five

Bone-Club factors. Id. at 464. Twenty seven prospective jurors were questioned privately, 14 of which were excused. Id. at 465.

Division Two found both deficient performance and prejudice from appellate counsel's failure to pursue the Bone-Club violation in D'Allesandro's direct appeal. Id. at 472- 475, 477. The court rejected any argument that, under Momah, defense counsel had invited the error. After noting Momah's "unique confluence of facts," the court pointed out that, although defense counsel requested some measure of private questioning in the questionnaire, it was the court that had excluded the public based on what appeared to be its common practice of conducting private voir dire in chambers. Id. at 475-476 (quoting Wise, 176 Wn.2d at 14-15). Moreover, "the trial court did not address the *Bone-Club* factors on the record, either explicitly, or implicitly as did the trial court in *Momah*." Id. at 476.

In State v. Fort, 190 Wn. App. 202, 211, 234-247, 360 P.3d 820 (2015), review denied, 185 Wn.2d 1011, 368 P.3d 171 (2016), Division Three found appellate counsel ineffective for failing to raise a public trial violation, reversed Fort's convictions for child rape, and ordered a new trial. At Fort's trial, the judge had employed a questionnaire and offered prospective jurors the

opportunity to discuss their responses in the privacy of chambers. Id. at 825-826. Defense counsel did not object, and several jurors were interviewed in that setting. Id. at 826. Division Three rejected the State's argument that Fort had invited the error. Although, as in Momah, Fort had benefited from the closure – which helped identify biased jurors – the record did not disclose defense advocacy for the use of chambers. “The record does not show that Fort designed or authored the jury questionnaire, but the record establishes that the trial court organized and executed the closure. Fort participated in the error, but he did not invite it.” Id. at 227.

Similarly, this Court rejected invited error in In re Coggin, 182 Wn.2d 115, 340 P.3d 810 (2014), where a dozen prospective jurors were questioned in chambers (and six dismissed) without the Whatcom County Superior Court judge engaging in the required Bone-Club analysis.<sup>5</sup> Coggin, 182 Wn.2d at 116-117.

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<sup>5</sup> Coggin is further evidence of the once common practice of Whatcom County trial judges choosing to handle portions of voir dire in chambers. See also State v. Frawley, 181 Wn.2d 452, 457-458, 334 P.3d 1022 (2014) (Whatcom County trial judge uses chambers for private voir dire in Applegate’s case).

Concerned about publicity and the sensitive nature of the case, Coggin's attorney had affirmatively expressed a desire for the individual voir dire and then approved a questionnaire, drafted by a prosecutor, informing potential jurors that "if they preferred to discuss their answers in private, the court would give them an opportunity to explain the answers in a 'closed hearing.'" Id. at 117 (quoting the questionnaire). As in Salinas's case, the Whatcom County Prosecutor's Office argued this was invited error that precluded relief. Id. at 119. This Court disagreed, holding the error was not invited where defense counsel had not drafted the questionnaire used at trial, had merely assented to use of that questionnaire, and where it was the trial judge who decided to handle questioning in chambers. Id. This was true even though Coggin may ultimately have benefitted from the private voir dire because it encouraged jurors to be more forthcoming regarding their experiences and abilities to decide the case fairly. Id. at 121-122. This Court noted that, even in Momah, it had rejected invited error as an impediment to review. Id. at 119.

It is difficult to fathom any material difference between Coggin and Salinas's case or between Salinas's case, Hummel, D'Allesandro, and Fort. In all of these cases, the defense

recognized the benefit of offering some measure of privacy to prospective jurors and participated to some degree in offering the opportunity for a more private setting, but in none of them was defense counsel the source of the trial judge's decision to question jurors in chambers without a full Bone-Club analysis. And it was that decision that resulted in a violation of public trial rights.

In addition to Momah, the State cites Division Three's decision in In re Pers. Restraint of Copland, 176 Wn. App. 432, 309 P.3d 626 (2013), review denied, 182 Wn.2d 1009, 343 P.3d 760 (2015). Copland, however, is also easily distinguished.

First, Copland did not argue that his appeals attorney was ineffective for failing to raise a public trial claim on appeal. Thus, his PRP claim was subject to a showing that he had suffered "actual and substantial prejudice" resulting from the violation, which he could not demonstrate. Copland, 176 Wn. App. at 439-441; accord Coggin, 182 Wn.2d at 119-122 (confirming applicability of this prejudice standard to PRPs not involving claims of ineffective appellate counsel). Thus, Copland's PRP was properly dismissed on this ground alone.

Second, as Division One recognized in Salinas's case, in Copland (as in Momah), "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. 446-450.” Slip op., at 4. Thus, unlike Salinas’s case, even if the public trial issue had been raised on direct appeal, it would not have justified reversal of Copland’s conviction. Copland, 176 Wn. App. at 449-450; see also D’Allesandro, 178 Wn. App. at 473 n.17 (Division Two also distinguishes Copland on this ground).

Third, although it was unnecessary for the Copland court to even address invited error, defense counsel’s conduct in Copland is quite different from counsel’s conduct at Salinas’s trial. In Copland, defense counsel expressly initiated the closure, affirmatively advocating for a total closure of the courtroom to all members of the media during jury selection. Copland, 176 Wn. App. at 442-444. It was the State that objected, pointing out that such a closure would potentially result in a public trial violation, and suggested a more narrow closure (individual private interviews) might be appropriate if a proper record were made. Id. at 443-444. When the defense motion for total media exclusion was denied, the defense capitulated to a more limited closure than it had requested, helping to produce an initial list of jurors it wanted questioned in

chambers, significantly expanding that list,<sup>6</sup> and then actively participating in the process of interviewing those jurors privately. Id. at 443-445.

Not only do the facts in Copland differ significantly from what occurred at Salinas' trial, ultimately Division Three *did not dismiss Copland's petition based on invited error*. See Copland, 176 Wn. App. at 443 (noting that it “may dismiss” based on invited error, but deciding instead whether there was a violation and what impact that violation had on Copland's conviction). Rather, Copland's petition was dismissed based on the trial court's “effective consideration” of the Bone-Club factors and Copland's inability to show prejudice. See id., at 449-450 (finding “the trial court

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<sup>6</sup> Counsel's advocacy for an expansion of private voir dire was noted as important in Copland and Momah. See Momah, 167 Wn.2d at 151; Copland, 176 Wn. App. at 448. In an attempt to make Salinas's case similar in this regard, Whatcom County argues that Salinas's attorneys expanded private voir dire. See State's Motion for Discretionary Review, at 10, 16-17, 19. This is incorrect. A review of the cited discussion reveals that a potential juror, who indicated on her questionnaire that she had been a crime victim, also indicated she was a certified riding instructor for “Animals as Natural Therapy.” 2RP 38, 40. Defense counsel asked her about her contact with victims of sexual abuse as part of the therapy she offered. 2RP 38-40. This was not an expansion of private voir dire; it was on point to the subjects at hand, which included whether prospective jurors or someone they knew had been a victim of sexual abuse. See appendix E (question 9).

attempted to employ *Bone-Club* criteria” and reasoning that “[e]ven if a violation had occurred, Mr. Copland does not show actual and substantial prejudice to justify relief in this petition.”).

Dicta in Copland, predicated on very different conduct by counsel, should not control the outcome here. Salinas’s defense attorneys did not invite the public trial violation.

## 2. A REFERENCE HEARING IS NOT WARRANTED

The State seeks a reference hearing to determine what additional, off-the-record discussions may have occurred regarding private voir dire because such a hearing might reveal evidence supporting its invited error claim. See Motion for Discretionary Review, at 11-14. The State also seeks a hearing to discover whether appellate counsel Wilk may have strategically chosen not to raise the issue on which Salinas has now prevailed in his PRP based on her fear it might trigger an invited error claim. See Motion for Discretionary Review, at 14-16.

A reference hearing may be appropriate in some cases to resolve “material disputed issues of fact.” In re Monschke, 160 Wn. App. 479, 489, 251 P.3d 884 (2010) (quoting In re Pers. Restraint of Rice, 118 Wn.2d 876, 886-887, 828 P.2d 1086 (1992)); see also RAP 16.11 and 16.12 (authorizing reference hearings

where necessary). To obtain such a hearing, however, the State must present competent evidence establishing the material disputed facts. Monschke, 160 Wn. App. at 488-489.

The Court of Appeals properly rejected the State's request for a reference hearing. Although the State argues there may be additional evidence demonstrating that defense counsel invited Judge Snyder's decision to conduct voir dire in chambers without a full Bone-Club analysis, such speculation is not competent evidence and does not create a material dispute. Indeed, since the State's Response to Salinas's PRP includes an affidavit from one of the trial deputies – and the focus of that affidavit is invited error – we can safely assume that if evidence establishing invited error existed outside the current record, it would have been mentioned in that affidavit. But there is no mention of any off-the-record discussions that could change the outcome in this case.<sup>7</sup> See Appendix F; see also Thomas, 150 Wn.2d at 844 (State's burden to show invited error).

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<sup>7</sup> That prosecutors asked Judge Snyder what he had in mind in terms of taking jurors “privately” also indicates that Judge Snyder, and not defense counsel off the record, was the source of the procedures used at Salinas's trial. See 2RP 70.

Nor is there reason for a reference hearing to determine whether Ms. Wilk failed to raise the public trial violation in Salinas's direct appeal for fear the State would respond with an invited error claim. The only decision during the relevant period of Wilk's representation that even suggested the possibility of invited error was Momah, a case easily distinguished and one this Court has repeatedly recognized as unique. Momah could not have reasonably driven Wilk's decision making.

Ultimately, there is nothing Ms. Wilk could say at a hearing that would justify her failure. There can be no reasonable tactic behind a decision not to raise a meritorious issue that would automatically reverse Salinas's life sentence and result in a new trial. In both Morris and Orange, this Court rejected the notion that appellate counsel's failure to raise a public trial violation was the product of legitimate strategy. Morris, 176 Wn.2d at 167-168; Orange, 152 Wn.2d at 814. Had Wilk raised the issue on appeal, it is certain Salinas would have prevailed based on a similar outcome under similar circumstances in Hummel and based on the outcome in this very PRP, which Division One unanimously decided in Salinas's favor.

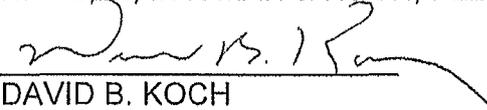
C. CONCLUSION

Defense counsel did not invite Judge Snyder's already established practice of conducting a portion of voir dire in chambers, without an adequate Bone-Club analysis, based solely on whether anyone objected. Division One properly denied the State's request for a reference hearing.

DATED this 10<sup>th</sup> day of June, 2016.

Respectfully submitted,

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