
No. 92698-1

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NO. 35195-1

IN RE: THE PERSONAL RESTRAINT PETITION OF:

MICHAEL RHEM, PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

Superior Court Case No. 99-1-04722-4

FOURTH SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Do the recent decisions by the Washington Supreme Court on the right to a public trial impact the issues raised in this collateral attack?

B. STATEMENT OF THE CASE.

Nearly six years ago, petitioner filed a timely personal restraint petition alleging that his convictions should be reversed because: 1) there were violations of the court's orders in limine, 2) the courtroom was closed to spectators during jury selection, and 3) the admission of the redacted statement of his codefendant in a joint trial violated *Bruton*. Within the time to file a timely personal restraint petition, petitioner successfully moved to amend his petition to include several challenges to the sentence imposed. Petitioner did not support his claim that the court room was closed to spectators during jury selection with any evidence other than a couple of citations to the record from his direct appeal.

The State responded that the claims regarding alleged violation of the orders in limine and *Bruton* violations should be dismissed as he had failed to establish any error. The State argued that petitioner had failed to show any substantive error in his 561 month sentence, but that there was a scrivener's error that should be corrected. As for the courtroom closure

issue, the State disputed that the courtroom was closed and argued that defendant had failed to provide *any* evidence to support his claim that every spectator was excluded from the courtroom for any period of time during jury selection. *See* State's initial response at p. 12-13. The State argued that the record was, at best, ambiguous about whether there had been an exclusion of all spectators and that portions of the trial record indicated that there had been contact between family members and potential jurors during the voir dire process - which was inconsistent with petitioner's claim. *See* State's initial response at p. 12. The State argued the claims should be dismissed for lack of evidence that the courtroom was closed. *See* State's initial response at p. 13. Additionally, the State argued that the claim should be dismissed as petitioner had failed to demonstrate that he was actually prejudiced by any constitutional error. The State pointed out that as petitioner had not raised a claim of ineffective assistance of appellate counsel, his case was distinguishable from *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004). *Id.*

Petitioner's reply to the state's response, filed in February Of 2007, did not include any additional evidence to support his claims.

Nearly a year later, in January 2008, counsel for petitioner filed a notice of appearance and asked the court to stay the case pending the Supreme Court's decision in *State v. Strode*, alleging that it contained a "nearly identical issue" and moved to file a supplemental brief. The Court

granted the stay and allowed supplemental briefing. Attached to petitioner's supplemental brief were two declarations that petitioner supplied to provide some evidence of a courtroom closure.

When the court lifted the stay imposed awaiting the decision in *Strode*, it ordered supplemental briefing. It later ordered additional supplemental briefing on the courtroom closure issue directing the parties to address two recent decisions, *State v. Paumier* and *State v. Bowen*, 157 Wn. App. 821, 239 P.3d 1114 (2010) issued by the Court of Appeals. The Court then, sua sponte, ordered another stay when the Supreme Court took review in *Paumier* and another case, *State v. Wise*. On November 27, 2012, the Court lifted the stay and order another supplemental brief on the impact of the Supreme Court's decisions in *Wise*, *Paumier*, *In re Personal Restraint of Morris*, and *State v. Sublett*.

C. ARGUMENT.

1. THE RECENT DECISIONS OF THE WASHINGTON SUPREME COURT ON COURTROOM CLOSURES HAVE LITTLE IMPACT ON THE ISSUES IN THIS CASE.

On November 21, 2012, the Washington Supreme Court issued four cases dealing with claims of courtroom closure: *State v. Sublett*, ___ Wn.2d ___, ___ P.3d ___ (2012) (2012 WL 5870484, a plurality opinion); *State v. Paumier*, ___ Wn.2d ___, 288 P.3d 1126 (2012); *State v. Wise*,

___ Wn.2d ___, 288 P.3d 1113 (2012); and, *In re Personal Restraint of Morris*, ___ Wn.2d ___, 288 P.3d 1140 (2012) (plurality opinion).

In *Sublett*, a case on direct review, the Court was faced with a question of whether a closed courtroom resulted when a judge dealt with a jury question in chambers in the presence of counsel. The Court reasoned that neither experience nor logic would support a conclusion that this conduct implicates the core values the public trial right serves. The Court found that a discussion as to the proper response to a jury question, where there is no objection or dispute as to the response, did not constitute a closure of the courtroom as long as the question and response were made part of the record. *Sublett*, ___ Wn.2d ___, 2012 WL 5870484 at p. 7.

As *Sublett* was a case on direct review and dealt with an alleged courtroom closure that is factually very different from the alleged closure that occurred in the instant case, this new decision has little impact on the issues now before the court in this collateral attack.

In *Wise*, a case on direct review, the court was faced with questions of whether, 1) Wise's right to a public trial was violated when the trial court conducted part of voir dire in chambers, rather than in the open courtroom, without engaging in a *Bone-Club* analysis; 2) Wise had preserved the issue for review when he did not object; 3) Wise needed to show any prejudice flowing from this error to obtain relief; and 4) assuming he was entitled to a remedy, should it be a new trial or a remand

to conduct a *Bone-Club* analysis. In *State v. Momah*, 167 Wn.2d 140, 151–52, 217 P.3d 321 (2009), and *State v. Strode*, 167 Wn.2d 222, 227, 232, 217 P.3d 310 (2009), the court had previously held that the public trial right in voir dire proceedings extends to the questioning of individual prospective jurors, so there was not much dispute in *Wise* as to whether a closure had occurred - the courtroom had been closed without the court conducting the required *Bone-Club* analysis. The opinion focused more on whether: 1) the failure to object to such a procedure constituted a waiver of the public trial right; 2) such error constituted structural error so that the defendant need show no further prejudice; and 3) the appropriate remedy for such an error was the grant of a new trial or whether a remand for a hearing on the *Bone-Club* factors. A plurality of the Supreme Court held that this closure constituted a structural error not subject to a harmless error analysis, and that the defendant was not required to prove specific prejudice in order to obtain relief. *Wise*, 288 P.3d at 1119-1121. The plurality also ruled that his failure to object to the in-chambers questioning did not constitute a waiver of his right to a public trial. *Id* at 1120. Because this violation of the public trial right occurred during jury selection, the court ruled that he was entitled to a new trial. *Id.* at 1122.

In *Paumier*, a case on direct review, the court was faced with essentially the same issues that were raised in *Wise*. Accordingly the Court held

Following the rule enunciated in *Wise*, we find that Paumier need not prove that violation of his public trial right prejudiced him. The trial court's failure to conduct a *Bone-Club* analysis was structural error that warrants reversal on appeal, with or without a contemporaneous objection.

Paumier, 288 P.3d at 1130.

As *Wise* and *Paumier* were cases on direct review and dealt with courtroom closures that were obvious and overt from reading the record on review, these new decisions have little impact on the instant case. This is made particularly clear when the court considers the opinion in *In re Personal Restraint of Morris*, the fourth decision issued on November 21, 2012, and the only one which involved a case on collateral review. Morris filed a timely personal restraint petition alleging his right to a public trial had been violated when the trial court conducted part of voir dire in chambers and that, further, his appellate counsel was ineffective for failing to raise the public trial right violation on direct review. *Morris*, 288 P.3d at 1142. The record on review in Morris's case showed that the trial court had questioned 14 prospective jurors in chambers without first conducting a *Bone-Club* analysis. *Id.* On direct appeal, Morris's appellate counsel raised evidentiary issues and a claim of ineffective assistance of trial, but did not raise a claim regarding the right to a public trial. *Id.* at p. 1143-44.

A plurality of the Supreme Court found that Morris's case was controlled by *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814,

100 P.3d 291 (2004), as he had demonstrated ineffective assistance of his appellate counsel for failing to raise the public trial right issue on direct review. Notably, the plurality did not decide whether the structural error/presumed prejudice holdings of *Wise* and *Paumier* would apply on collateral review:

We need not address whether a public trial violation is also presumed prejudicial on collateral review because we resolve Morris's claim on ineffective assistance of appellate counsel grounds instead.

Morris, 288 P.3d at 1143. In short, the recent decisions on public trial rights have established some new plurality holdings for claims raised on direct review, but have not added to the existing law when it comes to claims raised on collateral attack. The court reaffirmed its decision in *Orange* which granted collateral relief for ineffective assistance of appellate counsel for failing to raise a violation of a public trial right claim on direct appeal when the record on appellate review showed a clear violation of that right. The court found that Orange could show that he was prejudiced by the loss of the favorable standard of review on direct appeal where such public trial right violations are presumed prejudicial.

The decision in *Orange* has been discussed in the previous briefs. As noted in earlier briefing, petitioner in this case did not challenge the effectiveness of his appellate counsel for failing to raise the closed courtroom issue in his direct appeal. Thus, this case is distinguishable

from *Orange* and *Morris*, which granted relief on the ineffective assistance of appellate counsel issue – not for a violation of the right to a public trial. Thus, neither *Orange* nor *Morris* compels this court to grant relief. The Supreme Court has expressly left open whether a petitioner on collateral review can have the benefit of the presumed prejudice standard applicable to direct review. The State has previously argued in its briefing that the petitioner has failed to make any showing of prejudice and that under existing Washington law, he must do so to be entitled to collateral relief. As he has failed to demonstrate any prejudice the court should dismiss the claim.

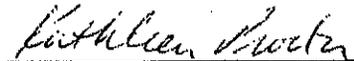
It is also important to note that -unlike the records in *Orange* and *Morris* where the closure was overt– it is not clear whether there was closure of the courtroom in this case by reading the trial transcripts. The record on review is ambiguous and the State has always disputed that a closure occurred. It does not matter how many decisions the Washington Supreme Court decides on public trial rights- it is unlikely that any case will resolve whether a closure occurred in the case before the court. That remains a contested factual issue.

D. CONCLUSION.

This Court should dismiss the petition or at the most, grant a reference hearing on whether there was a courtroom closure.

DATED: January 9, 2013.

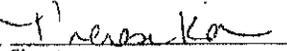
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.9.13 
Date Signature

PIERCE COUNTY PROSECUTOR

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