

No. 92698-1

7/31/13
Finstad

NO. 35195-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL LOUIS RHEM, APPELLANT

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

No. 99-1-04722-4

FIFTH SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO SUPPLEMENTAL BRIEF.

1. Does *In Re Personal Restraint of Finstad* reinforce that a petitioner seeking collateral relief must meet the heavy burden of showing either actual prejudice or a complete miscarriage of justice?

2. Has petitioner failed to meet this burden on his alleged closed courtroom claim when he has never attempted to demonstrate any prejudice and offers no authority that he is entitled to rely on "presumed prejudice" in a collateral attack?

B. STATEMENT OF THE CASE.

The statement of the case has been set forth in the previous briefings.

C. ARGUMENT.

1. THE RECENT DECISION IN *FINSTAD* REINFORCES THAT A PETITIONER SEEKING COLLATERAL RELIEF MUST ESTABLISH THAT HE WAS ACTUALLY PREJUDICED BY CONSTITUTIONAL ERROR BEFORE HE IS ENTITLED TO RELIEF.

In *In re Personal Restraint of Finstad*, ___ Wn.2d ___, 301 P.3d 450 (2013), the Washington Supreme Court reinforced its long standing rule that a petitioner seeking collateral relief must meet the common law requirement of showing either: 1) that he was actually and substantially

prejudiced by constitutional error; or, 2) that a nonconstitutional error resulted in a complete miscarriage of justice. *See Finstad*, 301 P.3d at 452, 453, citing *In re Personal Restraint of Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007), and *In re Cook*, 114 Wn.2d 802, 810-12, 792 P.2d 506 (1990). Finstad filed an untimely petition under RCW 10.73.090, but could show a facial invalidity in his judgment to overcome the statutory time bar. The Court made it clear that the time bar in RCW 10.73.090 was a procedural bar, not a substantive bar, and that overcoming the procedural bar does not, by itself, entitle a petitioner to relief. *Id.* at 453. As Finstad failed to show the requisite prejudice required for relief, the court dismissed his petition.

Finstad does not change the law. The State has argued this point based on earlier cases in its initial response and reiterated it more than once. *See* State's Response to petition at p. 13-14; State's Second Supplemental brief at p. 12-19; State's Fourth Supplemental Brief at p. 6-8. Further, in the two cases where the Court *has* granted collateral relief in connection with a courtroom closure, the relief was given in the context of an ineffective assistance of *appellate* counsel claim and, in each case, the Court required the petitioner to show actual prejudice to obtain relief. *In re Personal Restraint of Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012) (plurality opinion finding the case was controlled by *Orange*); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). In *Orange*, the court 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.

Petitioner in the case now before the court did not raise an ineffective assistance of appellate counsel claim, thus he does not fall under the rule set forth in *Orange* and *Morris*. Petitioner has never presented any evidence or argument that he was actually prejudiced by the alleged courtroom closure. Petitioner simply relies on the "presumed prejudice" standard that is applicable to courtroom closure issues on direct review. As articulated in *Morris*, the Washington Supreme Court has not yet held that this presumption of prejudice is applicable to collateral attacks:

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. Moreover, petitioner has never presented this court with a single case holding a petitioner in a collateral attack is entitled to "presumed prejudice" on *any* issue, much less one dealing with a courtroom closure. The only authority presented to a court on this topic

was a citation to a treatise on federal habeas corpus practice and procedure. *See*, Petitioner's Supplemental Brief, filed December 20, 2012. Petitioner has argued that his case is controlled by *Orange*, when his failure to raise a claim of ineffective assistance of appellate counsel and his failure to make any showing of actual prejudice make it easily distinguishable. Thus, it is clear that petitioner is asking this Court to grant collateral relief without making a showing of any actual prejudice as required by *Cook* and its progeny, and without providing any Supreme Court authority that holds he is entitled to rely on the "presumed prejudice" standard applicable in direct appeals on closed courtroom issues. He is asking this Court to do what no Washington court has done before. Petitioner's arguments are contrary to the Supreme Court's jurisprudence on collateral attacks:

[M]ore is required before a court will order relief from a settled judgment. Relief by way of a collateral challenge to a conviction is extraordinary, and the petitioner must meet a high standard before this court will disturb an otherwise settled judgment.

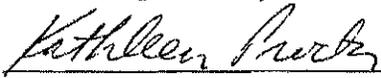
Finstad, 301 P.3d at 452, citing *In re Personal Restraint of Coats*, 173 Wn.2d 123, 132–33, 267 P.3d 324 (2011) (citing *Cook*, 114 Wn.2d at 810–12)(internal quotations omitted). Petitioner has failed to meet his burden and this claim should be dismissed.

D. CONCLUSION.

For the foregoing reasons this Court should dismiss the claim of improper courtroom closure in the petition.

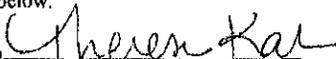
DATED: July 3, 2013

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Certificate of Service:

The undersigned certifies that on this day she delivered by e-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.

7.3.13 
Date Signature

PIERCE COUNTY PROSECUTOR

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