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No. 92698-1

NO. 35195-1

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

MICHAEL RHEM

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

No. 99-1-04722-4

**RESPONDENT'S SIXTH SUPPLEMENTAL BRIEF
RE COGGIN AND SPEIGHT DECISIONS**

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A. ISSUES PERTAINING TO SUPPLEMENTAL BRIEF.

1. Should this court dismiss the petition as *Coggin* and *Speight* require a showing of actual and substantial prejudice and petitioner has shown none?

B. STATEMENT OF THE CASE.

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

Since the last supplemental briefs were filed, there has been a reference hearing in this case before the Honorable Ronald E. Culpepper in Pierce County Cause No. 13-2-14151-1. As directed by this court, the trial court forwarded a copy of its findings of fact to this court back in April of 2014. *See* Appendix A (“FOF”). Those findings indicate that the evidentiary hearing spanned five days and that nine witnesses testified. Appendix A, at p. 2. The transcripts from the reference hearing are not part of the record in this case. As petitioner has cited to these transcripts in his supplemental brief, the State is filing a separate motion to strike.

This court has directed a supplemental brief on the impact of two recent Supreme Court decisions decided on December 11, 2014: *In re Personal Restraint of Coggin*, ___ Wn.2d ___, ___ P.3d ___ (2014)(2014

WL 7003796) and *In re Personal Restraint of Speight*, ___ Wn.2d ___,
340 P.3d 207 (2014).

C. ARGUMENT.

1. THE LEAD OPINIONS IN *COGGIN* AND *SPEIGHT* IN CONJUNCTION WITH JUSTICE MADSEN'S CONCURRENCES HOLD THAT A PETITIONER MUST DEMONSTRATE ACTUAL AND SUBSTANTIAL PREJUDICE TO OBTAIN RELIEF IN A COLLATERAL ATTACK ALLEGING A VIOLATION OF HIS RIGHT TO A PUBLIC TRIAL.

Two recent decisions from a sharply divided Washington Supreme Court concern what a petitioner must show to obtain relief in a collateral attack when alleging there was a violation of his right to a public trial. *In re Personal Restraint of Coggin*, ___ Wn.2d ___, ___ P.3d ___ (2014)(2014 WL 7003796) and *In re Personal Restraint of Speight*, ___ Wn.2d ___, 340 P.3d 207 (2014). The lead opinion in each decision, signed by four justices, holds that a petitioner seeking collateral relief for a violation of a public trial right must show that he was actually and substantially prejudiced by the violation. *Coggin*, ___ Wn.2d ___, 2014 WL 7003796 at p. 2-5; *Speight*, 340 P.3d at 208-10. The four justices signing the dissenting opinions in each case would not have required any showing of prejudice instead finding that any public trial violation constitutes "structural error." *Coggin*, ___ Wn.2d ___, 2014 WL 7003796 at p. 7-12; *Speight*, 340 P.3d at 212. In each case Justice Madsen filed a

concurring opinion indicating that she would find that the petitioner had invited the error and therefore could not raise the violation as grounds for relief. *Coggin*, ___ Wn.2d ___, 2014 WL 7003796 at p. 5; *Speight*, 340 P.3d at 209. But recognizing the need for guidance she also included the following paragraphs in each of her concurring opinions:

Nevertheless, because guidance is needed I would agree with the majority that the error here, failure to engage in the analysis outlined in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), requires a petitioner in a personal restraint petition to prove prejudice unless he can demonstrate that the error in his case “ ‘infect[ed] the entire trial process’ ” and deprive the defendant of “ ‘basic protections,’ ” without which “ ‘no criminal punishment may be regarded as fundamentally fair.’ ” *Neder v. United States*, 527 U.S. 1, 8–9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Rose v. Clark*, 478 U.S. 570, 577, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)).

Coggin, ___ Wn.2d ___, 2014 WL 7003796 at p. 5; *Speight*, 340 P.3d at 209-10. In short, Justice Madsen’s statement indicates that between the two rationales presented in the leading and dissenting opinions, if the issue of invited error was not present, she agrees with the rational in the leading opinion rather than the dissent. This is an alternative holding in her concurrence and gives the needed fifth vote for the holding that a petitioner seeking relief by collateral attack for a violation of the public trial right must show actual and substantial prejudice. Petitioner cites to

Justice Madsen's concurring opinion but fails to address this language or its import.

After the reference hearing in this case, the court entered findings that "[n]o evidence was presented to support any finding of actual and substantial prejudice to the outcome of Rhem's trial." FOF at p. 13.

Under *Coggin* and *Speight*, the petition should be dismissed.

Petitioner argues in his supplemental brief that while *Coggin* and *Speight* raised claims solely under the state constitution, he relied upon the federal constitution as well. See Supplemental brief at p. 5. He supports this claim with a citation to page five of the petition. *Id.* Page five of the petition deals with petitioner's claim that there were violations of the court's order in limine; his public trial claims are not addressed until later in the petition. Looking at the section of the original petition claiming a violation of his public trial right, petitioner relied *solely* upon the state constitution. See Petition at p. 14-15. Petitioner also filed a timely amendment to his petition, but it raised claims solely pertaining to his sentence; it did not expand his claim as to the violation of the public trial right. See Amended petition (filed 9/7/06). Any public trial claims relying upon the federal constitution were not raised within the one year time frame under RCW 10.73.090 and are time barred. Petitioner's recent assertion that he relied upon the federal constitution in his petition is inaccurate.

D. CONCLUSION.

Petitioner has failed to show that he was actually and substantially prejudiced by any closure of the courtroom during voir dire as required by *Coggin* and *Speight*. For this reason, this court should dismiss the petition.

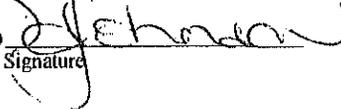
DATED: February 4, 2015.

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WSB # 14811

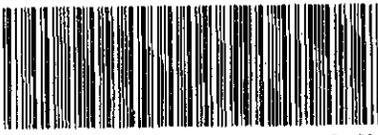
Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ ^{efile} 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.

2/4/15 
Date Signature

APPENDIX “A”

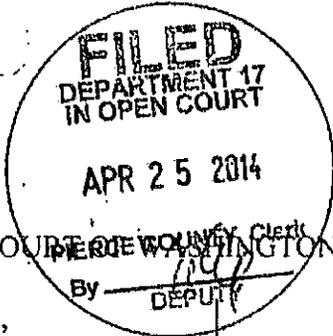
Findings of Fact and Conclusions of Law



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SUPERIOR COURT PIERCE COUNTY, WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff / Respondent,

vs.
MICHAEL LOUIS RHEM,
Defendant / Petitioner.

CAUSE NO. 13-2-14151-1 ✓
CAUSE NO. 99-1-04722-4
COA No. 35195-1

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AFTER REFERENCE HEARING

This case is before the court as a reference hearing. On October 16, 2003, the Court of Appeals, Division II, issued an order remanding this matter to the Pierce County Superior Court with direction that the Court consider six questions. The hearing was for the purpose of determining (1) Whether and to what extent the trial court closed the courtroom to the public during jury voir dire, (2) Whether the Petitioners family members were excluded (3) Whether Petitioner requested or objected to the closure, (4) Whether the trial court examined the Bone-Club factors before ordering the closure, (5) The duration of the closure, and (6) If there was a closure, whether this resulted in actual and substantial prejudice to the outcome of Rhem's trial, including findings about the nature and extent of the prejudice.

The state of Washington was represented by Pierce County Prosecuting Attorneys John Neeb and Kawyne Lund. Mr. Rhem was represented by Attorneys Mark Quigley and Renee Alsept.

1 An evidentiary hearing was held on March 25, 26 and 27th and April 7th and 17th, 2014,
2 with argument about findings on April 22, 2014. At the hearing nine witnesses testified.
3 Witnesses included Michael Rhem, Michael Stewart (Mr. Rhem's trial attorney), Lauretha Ruffin
4 (friend of Mr. Rhem and mother of his son), Lorenzo Parks and Charles Arceneaux (friends of Mr.
5 Rhem), Pierce County Superior Court Judge Thomas Felnagle (trial judge), Gregory Greer (Pierce
6 County Deputy Prosecutor at Mr. Rhem's trial), Geri Markham (Judicial Assistant to Judge
7 Felnagle at trial), Sheri Schelbert (Court Reporter for Judge Felnagle at trial). Prior to the hearing,
8 an order was entered allowing the attorneys access to juror information for the purpose of
9 contacting trial jurors. No jurors testified at the hearing.

10 The court had the opportunity to observe each witness, to hear arguments of counsel, and to
11 review all exhibits including transcripts of the voir dire proceedings of Mr. Rhem's trial before
12 Judge Felnagle. The court, deeming itself fully advised, now enters the following Findings of Fact
13 and Conclusions of Law regarding the questions of the appellate court.

14 FINDINGS OF FACT

15 I.

16 The trial was assigned to Judge Felnagle on January 9, 2003. That afternoon and during
17 the afternoon of January 10, 2003, the court heard a motion regarding severance, scheduling
18 issues, and motions in limine.
19

20 II.

21 Trial was called the morning of January 13, 2003. A motion to exclude minors was
22 argued and denied. (Mr. Rhem's three year old son was present with Ms. Ruffin and others in
23 the courtroom).
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III.

Following the motion to exclude minors, the court stated (at 10:23 a.m.) “ When we begin jury selection, it is just too crowded in here, ...so family members are going to have to wait outside until we can at least get some of the jurors out of here.... When we get the whole fifty up here we need to have the doors clear and the courtroom available only for jurors. But, after that, anybody is welcome”.

The trial judge made other observations that he was committed to an open court.

IV.

Judge Felnagle’s courtroom is one of the smaller Pierce County Superior Court courtrooms with a posted maximum occupancy of 63 persons. With fifty jurors, the judge and two staff members, three attorneys, two defendants (Mr. Rhem and Kimothy Wynne) and at least two correctional officers, the courtroom was near its maximum occupancy limit without members of the public present.

During voir dire, the courtroom was very crowded (the judge, at one point, asked if the jurors felt like “sardines”).

V.

The jury box was not used during general voir dire to seat either jurors or members of the public. Judge Felnagle testified that he had, on occasion, allowed members of the public to sit in the jury box during voir dire. He also testified that sitting members of public in the jury box could create a potential security issue.

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VI.

No attorney or defendant suggested using the jury box during voir dire and Judge Felnagle did not raise the issue.

VII.

A number of other courtrooms in the building had larger capacities than Judge Felnagle's courtroom, including some with the capacity of over one hundred persons. All Pierce County courtrooms are assigned either to an individual judge or to a particular pre-assigned docket.

VIII.

No attorney or defendant suggested the use of a larger courtroom and Judge Felnagle did not raise the issue. Mr. Rhem and his attorney wanted his family and friends to have the opportunity to observe jury selection.

IX.

No testimony was presented regarding availability of other courtrooms on January 13 or 14, 2003. It is not known if other courtrooms were available for use.

X.

Ms. Ruffin and Mr. Rhem's son were present in the courtroom on January 13, 2003. At some point after Judge Felnagle's 10:23 a.m. remarks, they exited the courtroom. At the noon recess, Mr. Ruffin and Mr. Rhem's son entered the courtroom to greet Mr. Rhem. This drew the attention of jurors 49 and 50 as they exited the courtroom.

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XI.

In the afternoon of January 13, 2003, jurors 49 and 50 were questioned individually about their observations of this interaction between Mr. Rhem and his son. There is a dispute about whether this questioning occurred in the courtroom or in Judge Felnagle's jury room.

XII.

Ms. Markham, judicial assistant, made a journal entry that the two jurors were questioned in the jury room, but had no independent recollection of the incident. Ms. Schelbert, court reporter, made no "parenthetical" that there was any move by any party to the jury room. She indicated that had a move been made a "parenthetical" would have so indicated. Judge Felnagle did not specifically recall the procedure used but indicated he had at times done individual questioning in his jury room. Mr. Rhem testified that individual questioning of jurors did occur in the jury room, and described generally the layout of the jury room. Judge Felnagle made a remark – "come on back" – consistent with inviting people in the courtroom to enter the jury room, but other interpretations of this remark are possible. Almost no other remark in the transcripts of the trial indicates that questioning occurred in the jury room. The court finds, after considering the entire record as a whole, that it cannot conclude that individual questioning occurred in the jury room.

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XIII.

At no time did Judge Felnagle explicitly order members of the public to leave the courtroom. Prior to the start of jury selection, he stated: "When we begin jury selection, it is just too crowded in here... so family members are going to have to wait outside until we at least get some of the jurors out of here... but after that, anybody is welcome."

XIV.

At no time did any attorney or defendant request that members of the general public be excluded from the courtroom. (The trial prosecutor did make a motion to exclude minors and a motion to exclude gang members. Both motions were denied)

XV.

At no time did Judge Felnagle do an analysis of the Bone-Club factors on the record

XVI.

No member of the public was asked to respond to or state an opinion about Judge Felnagle's statement that once jurors arrive, members of the public would have to wait outside the courtroom. No attorney or defendant requested that Judge Felnagle seek a response or reaction from any member of the public. Family and friends of Mr. Rhem (and most likely co-defendant Kimothy Wynne) were inside the courtroom and desired to be present.

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XVII.

At no time after his initial comment at 10:23 a.m. on January 13th, did Judge Felnagle address the issue of allowing members of the public to re-enter the courtroom. At no time did any attorney or defendant request that Judge Felnagle address this issue.

XVIII.

Judge Felnagle's main concern in his comments at 10:23 a.m. on January 13th, was to accommodate the large number of jurors to be seated in a small courtroom. An effect of his remarks, done without a Bone-Club analysis, was to exclude members of the public, including family members of Mr. Rhem, during the voir dire. He did not ask the attorneys or any defendant whether they objected to a closure of the courtroom to members of the public. The members of the public present were not asked whether they objected to any closure. No discussion about the time of, or conditions of, potential re-entry was made or requested, although Judge Felnagle did indicate they could "wait outside until we can get at least some of the jurors out of here". 11 potential jurors were excused before 3:01 p.m.

XIX.

Although Judge Felnagle did not explicitly order members of the public to leave the courtroom, the reasonable interpretation of his remarks was that members of the public would not be allowed in the courtroom once the jury arrived. The members of the public left the courtroom in compliance with Judge Felnagle's direction, not because they wished to leave.

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XX.

Members of the public, including Rhem's family or friends, were effectively excluded from the courtroom during the short general voir dire during the morning of January 13, 2003.

XXI.

Members of the public, including Rhem's family and friends, were effectively excluded from the courtroom during the afternoon of January 13, 2003. At some point during the afternoon, Mr. Rhem's son was held up the courtroom door window, indicating his presence with at least one other member of the public.

XXII.

Members of the public, including Rhem's family and friends, were not in the courtroom during the individual questioning of jurors numbers 49 and 50.

XXIII.

The afternoon session on January 13, 2003 began at approximately 1:40 p.m. Eleven jurors were released without objection before the afternoon break occurred at approximately 3:01 p.m. There was no request by any attorney or defendant to address re-entry by members of the public, and Judge Felngale did not raise the issue. There was no discussion of the possibility or practicality of rearranging the remaining 39 potential jurors to allow room for members of the public. Each excused juror left the courtroom immediately after being excused through the double door entry/exit and would have walked past anyone waiting in the foyer.

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XXIV.

With respect to a potential closure of the courtroom on the morning of January 14th, 2003, the evidence is somewhat in conflict. At the close of court January 13th, Judge Felnagle had stated, "...Let's advise family members and supporters on both sides that they're welcome to be here if they conduct themselves appropriately".... On January 14th no attorney or defendant raised the issue of allowing members of the public entry into the courtroom, and Judge Felnagle did not raise the issue. There was no discussion about seating members of the public in the jury box, nor any discussion about moving the 39 remaining potential jurors to accommodate members of the public. The court finds, by a preponderance of the evidence, that members of the public were not present in the courtroom during the morning session of the court.

XXV.

No evidence was presented indicating that the jurors sworn to decide the case had any knowledge of any court closure. (Jurors 49 and 50 were not reached.)

XXVI.

There is no evidence to suggest that after completion of voir dire, there was any closure of the courtroom explicit or perceived. Ms. Ruffin testified that she was present for opening statements.

XXVII.

There was no evidence presented that any closure of the courtroom had any effect on the verdicts reached by the jurors sworn to try the case.

1 From the above findings of fact, the court hereby enters the following conclusions of law:
2

3 CONCLUSIONS OF LAW

4 I.

5 On January 13, 2003, Judge Felnagle intended to do what he could to accommodate and
6 make comfortable a large number of jurors in a small courtroom. His intent and goal was to
7 comfortably seat the jurors to make the voir dire process go smoothly, not to restrict the rights of
8 any defendant or of any member of the public.
9

10 II.

11 His comments that spectators (members of the public) would have to step out of the
12 courtroom when jurors arrived, did have the effect of closing the courtroom to members of the
13 public. Members of the public left the courtroom in response to his statement at some point
14 before arrival of the 50 potential jurors.
15

16 III.

17 The effective closure of the courtroom to members of the public lasted through January
18 13th, and through and at least some, perhaps all the voir dire on January 14th. No closure of any
19 kind occurred after the jury was sworn to decide the case.
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IV.

No attorney and no defendant objected to any closure or perceived closure at any time, and no attorney or defendant asked to address the issue of allowing members of the public to be present in the courtroom at any time. At no time did Judge Felnagle raise any issue about entry by members of the public, aside from his comments at the end of the day on January 13th.

V.

There was no discussion of the Bone-Club factors by Judge Felnagle, and no attorney requested him to address them. There was implicit recognition by Judge Felnagle that any limitations on public access should be short in duration and limited in effect. At a number of points he reiterated his commitment to an open room.

VI.

There is no evidence that Mr. Rhem's trial rights or the outcome of the trial was effected in any way by the closure of the courtroom during the voir dire process.

The Court of Appeals directed this court to make findings and conclusions as to six issues:

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I.

Whether, and to what extent, the court closed the courtroom to the public during jury

voir dire:

The courtroom was effectively closed to the public at sometime the morning of January 13th, through most, perhaps all of the afternoon of January 14th, during the voir dire process.

II.

Whether petitioner's family members were excluded:

Members of petitioners' family and other members of the public were effectively excluded during voir dire.

III.

Whether petitioner requested or objected to the closure:

Petitioner did not request or object to the closure to members of the public at any time. No attorney requested or objected to closure.

IV.

Whether the trial court examined the Bone-Club factors before ordering the closure:

The trial court did not examine the Bone-Club factors, and was not requested to do so.

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V.

The duration of the closure:

The closure lasted for most, if not all, of the voir dire process.

VI.

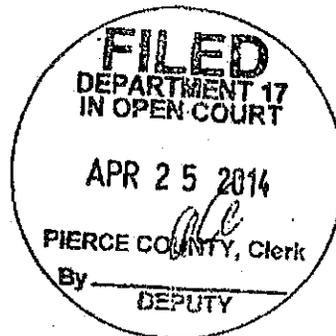
If there was a closure, and the trial court failed to consider the Bone-Club factors, whether this closure resulted in actual and substantial prejudice to the outcome of Rhem's trial, including findings about the nature and extent of this prejudice:

No evidence was presented to support any finding of actual and substantial prejudice to the outcome of Rhem's trial. There was no evidence presented at the reference hearing to indicate any effect that a closure had on the decisions of any members of the jury sworn to decide the case. There is no evidence of any closure of the courtroom during any other part of the trial, and balancing this prejudice against the trial court's need to accommodate and make comfortable the jurors leads to a conclusion that, on balance, such prejudice was not substantial.

These findings and conclusions of law were signed this 25th day of April, 2014.



JUDGE RONALD E. CULPEPPER



PIERCE COUNTY PROSECUTOR

February 04, 2015 - 2:31 PM

Transmittal Letter

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Brief: Supplemental Respondent's

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Affidavit

Letter

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Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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Comments:

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