

6/24/13
Finstad

No. 92698-1

No. 35195-1

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

IN RE PERSONAL RESTRAINT PETITION OF:

MICHAEL L. RHEM,

PETITIONER.

**PETITIONER'S SUPPLEMENTAL MEMORANDUM
RE: *IN RE PRP OF FINSTAD***

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A. INTRODUCTION

This supplemental brief, requested by the Court, addresses the application of the Washington Supreme Court's recent decision *In re PRP of Finstad*, __ Wn.2d __, 301 P.3d 450 (2013).

Finstad is neither controlling, nor instructive because it involves the violation of a statute, which is never a structural constitutional error.

B. ARGUMENT

The first sentence in *Finstad* entirely distinguishes it from this case: "This case squarely asks whether petitioners collaterally challenging judgments and sentences based on a failure to follow statutory sentencing procedures must show that they were prejudiced by the claimed error." 301 P.3d at 451. See also 301 P.3d at 453 ("In this case, the trial court's failure to make the finding appears to us to be nonconstitutional error."). An error premised only on statutory authority is never a "structural" error, a designation reserved for constitutional errors that defy traditional harmlessness analysis.

Mr. Rhem claims a violation of his state and federal constitutional rights to an open and public trial. It is undisputed that an improper courtroom closure is a structural error. Frankly, it appears undisputed that the constitutional requirement was violated in the same manner as it was in numerous cases over the last decade resulting in reversal.

It makes perfect sense to require a specific showing of prejudice when addressing a statutory error, even more so when the error is a sentencing error—where prejudice either obviously exists or does not exist. It makes no sense and is completely inconsistent with the doctrine of structural errors to require a showing of specific prejudice.

Requiring a showing of specific prejudice in a case like this would require a hearing where jurors would be publically questioned about their private voir dire and where the judge would need to determine whether jurors' answers would have differed as a result. In addition, jurors would also need to be examined about whether their initial impressions of the case would have been different if family members or others had been allowed to show visible support for the defendant by sitting in the courtroom. In turn, trial counsel would need to be examined about whether they would have made different decisions in exercising peremptory and challenges for cause. Finally, the reference hearing court would somehow have to guess of whether there is reasonable likelihood that the trial would have turned out differently.

These questions are just as impossible to answer in a PRP as they would be on direct appeal. This is precisely the reason that reversal is always required.

C. CONCLUSION

This Court should reverse and remand for a new trial.

DATED this 21st day of June, 2013.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on June 21, 2013, I served a copy of this supplemental brief on opposing counsel by sending it attached to an email directed to the Pierce County Prosecutor's Appellate Division.

pcpatcecf@co.pierce.wa.us

June 21, 2013//Portland, OR
Date and Place

/s/Jeffrey E. Ellis
Jeffrey Ellis

Henley, Rosie

From: Jeffrey Ellis [jeffreywinellis@gmail.com]
Sent: Friday, June 21, 2013 4:26 PM
To: Coa2Filings
Cc: PCpatcecf@co.pierce.wa.us
Subject: Re: D2 351951--PRP Rhem--Supp Brief
Attachments: RhemSuppBriefFinstad.pdf

Attached is the supplemental brief requested by the court.

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