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THE SUPREME COURT OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF:

MICHAEL L. RHEM,

PETITIONER.

SUPPLEMENTAL BRIEF

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A. INTRODUCTION

This case involves a violation of Mr. Rhem's constitutional right to a public trial. The constitutional violation is plain. The question posed is whether Rhem is entitled to relief. Rhem posits that the answer is "yes," for two reasons.

First, Mr. Rhem was denied effective assistance of appellate counsel. Rhem raised a public trial violation in his pro se PRP. He then requested the Court of Appeals to consider a claim of ineffective assistance of appellate counsel in his reply, which was filed within one year of the direct appeal mandate. Although his petition was pending in the lower court for a decade, that court did not decide the IAC of appellate counsel claim. Because the claim was timely, if inartfully raised, this Court should reach the issue and reverse.

Alternatively, this Court should hold that a defendant is "actually and substantially" prejudiced when family members are excluded from voir dire and can only observe proceedings by peering in a window to the courtroom door. The constitutional right to a public trial has long recognized the importance of a defendant's family presence at trial. Because the public was wrongfully excluded, the first impression of Rhem's jurors was not the participation of his family members in the jury selection process, but their "conspicuous exclusion from it." *In re PRP of Orange*, 152 Wash. 2d 795, 100 P.3d 291 (2004).

B. SUMMARY OF RELEVANT FACTS

Procedural History

Mr. Rhem was convicted in Pierce County Superior Court of several counts of first-degree assault and weapons violations. He was sentenced to 561 months in prison.

Rhem's convictions were reversed on appeal based on instructional error and erroneously admitted habit evidence. 112 Wash.App. 1034 (2002).

Rhem was convicted at his retrial. This time, his convictions were affirmed on appeal. 126 Wash.App. 1008 (2005). Appellate counsel did not assign error to the closure of the courtroom during jury selection. This Court denied review. 156 Wash.2d 1003 (2006). The mandate was issued on February 3, 2006.

Mr. Rhem filed a pro se PRP on July 21, 2006. In that petition, he claimed a violation of his right to a public trial. The State's first response was filed on December 8, 2006.

On February 1, 2007, still acting pro se, Rhem mailed his reply brief. That pleading requested the court to consider a claim of ineffective assistance of appellate counsel for failing to raise the public trial on appeal. *Reply*, p. 7.

For nearly a decade, the Court of Appeals entered and then lifted stays as this Court considered and decided several closed courtroom cases. The lower court also requested numerous additional briefs.

The Court of Appeals stayed Rhem's petition on January 16, 2008. Counsel appeared and a supplemental brief was filed on April 9, 2008. The stay was lifted on October 29, 2009. Petitioner filed supplemental pleadings on November 17 and December 22, 2009.

Another round of supplemental pleadings were filed in August 2010, just prior to oral argument September 3, 2010. The case was stayed again on September 17, 2010. That stay remained in place until November 27, 2012. After that stay was lifted, the court requested additional briefs, filed in December 2012 and January 2013.

On June 8, 2013, the Court of Appeals issued another order calling for additional briefs. Petitioner and Respondent filed this round of supplemental briefs on June 21 and July 3, 2013, respectively.

On September 25, 2013, the court again stayed Rhem's PRP. The stay was lifted on October 16, 2013. That same day, the court issued an order remanding for an evidentiary hearing. On April 28, 2015, the Pierce County Superior Court reference hearing judge's findings were received in the Court of Appeals.

Less than two months later on June 18, 2014, the Court of Appeals stayed the petition. That stay remained in place until December 30, 2104.

Another round of supplemental briefs was filed in January and February 2015.

The Court of Appeals issued its decision on December 22, 2015, eight years and ten months after Rhem asked the court to consider his IAC of appellate counsel claim. The court's opinion did not mention the issue.

Facts

Prior to jury selection, the trial court spontaneously announced that when jury selection started and the jury panel arrived, the courtroom would be too crowded so the courtroom would be "available only for jurors." RP 75. The trial court specifically stated that the defendant's "family members" would have to "wait outside" until some of the potential jurors were dismissed. *Id.* The trial court noted that the courtroom, which was "not one of the bigger courtrooms," was "packed." RP 128. During voir dire, two juror complained about noises or "disturbance[s]" coming from the hallway outside of the courtroom and jail personnel commented that the defendants' families were "waving hi and holding up the baby through the window." RP 150-58.

On October 16, 2013, the Court of Appeals directed the conduct of an evidentiary hearing regarding the scope of the closure and any prejudice. The evidentiary hearing court's *Findings of Fact* establish that the courtroom was "effectively closed to the public at some time [during] the morning of January 13th, through most, perhaps all of the afternoon of

January 14th during the voir dire process." "Members of petitioners' [sic] family and other members of the public were effectively excluded during voir dire." Rhem did not request the closure. Members of Rhem' s family had to wait in the hallway. The closure lasted for most, if not all of the voir dire process. The trial judge did not conduct any portion of the required *Bone-Club* hearing.

In addition, although the evidentiary hearing judge did not make any relevant findings, the uncontradicted evidence at the hearing was that Mr. Rhem and his family felt that the family had been unfairly excluded during voir dire. See *e.g.*, Ref. Hrg. RP 126.

C. ARGUMENT

Introduction

The two questions posed in this case are (1) whether this Court should consider Rhem's claim that his appellate counsel was ineffective in failing to assert a public trial violation on direct appeal, and if not, (2) whether Rhem demonstrated prejudice meriting relief on a stand-alone public trial claim. Rhem addresses the issues in that order.

1. <u>Appellate Counsel Was Ineffective.</u>

Rhem Properly and Timely Raised the Issue

In his pro se PRP, Rhem pointed to the trial record and asserted: "during voir dire, the trial court put several of Petitioner's family members out of the courtroom. (1/13/03-RP 75)." PRP, p. 4. He then alleged a

violation of his constitutional right to a public trial. *Id.* at 14-15. In a reply brief, which he mailed from prison on February 1, 2007, Rhem "would also request that this Court consider sua [s]ponte the ineffective appellate argument that the State broaches in their response." He also sought "additional briefing." *Reply*, p. 7. In the body of his argument, Rhem cited to this Court's *Orange* decision, a case decided on ineffective assistance of appellate counsel grounds.

In subsequent pleadings, Rhem renewed his request that the Court of Appeals decide the claim on IAC grounds, if he did not prevail on his stand-alone public trial claim. For example, in his supplemental reply addressing the impact of *Coggin* and *Speight* on the prejudice analysis, Rhem argued that his case was a "carbon copy" of *Orange*, and that the court could avoid the issue of substantial and actual prejudice by deciding the IAC of appellate counsel issue. *Supplemental Reply re: Coggin and Speight*, p. 4, n.1. Nevertheless, the Court of Appeals did not consider and decide the IAC of appellate claim. As a result, this Court is the first court to consider the claim.

There are several reasons why this Court should reach the issue and hold that Rhem was denied effective assistance of his appellate counsel.

a. <u>Rhem timely raised the issue</u>. Rhem filed his reply less than one year after the direct appeal mandate was issued. RAP 18.6 (brief is filed when mailed); GR 3.1.

This Court has previously allowed an amendment when it was made within the one-year statutory time limit. *In re Pers. Restraint of Bonds,* 165 Wash.2d 135, 140, 196 P.3d 672 (2008). See also *In re Haghighi*, 178 Wash. 2d 435, 446, 309 P.3d 459, 464 (2013). "Though the appellate rules do not expressly authorize or prohibit amendment to PRPs, we have accepted amendments to a PRP made within the statutory time limit." *Bonds,* 165 Wash.2d at 140. Washington appellate courts have previously held that even if a petitioner does not move to amend his PRP, a brief can serve as an amended PRP if it adds a claim not raised in the PRP. See *In re Pers. Restraint Petition of Davis,* 151 Wash.App. 331, 335 n. 6, 211 P.3d 1055 (2009). Likewise, Rhem's IAC claim arises from the same factual predicate alleged in his PRP and opening brief. This Court has previously held, albeit in the context of the relitigation bar, that a "new" issue is not created merely by supporting a previous ground for relief with different factual allegations or with different legal arguments. *In re Davis*, 152 Wash. 2d 647, 671, 101 P.3d 1, 15 (2004).

b. <u>Rhem was pro se.</u> This Court should liberally construe the statements in Rhem's reply to constitute an amendment to his PRP. *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389 (2008) ("Even in the formal litigation context, pro se litigants are held to a lesser pleading standard than other parties") (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (pro se pleadings are to be "liberally construed"). The United States Supreme

Court further approved the practice of federal courts to recharacterize a pro se petitioner's claim "in order to place it within a different legal category." *Castro v. United States*, 540 U.S. 375, 381 (2003).

This Court can and should do the same.

c. <u>This Court has the discretion to consider the argument.</u> It is not unprecedented for Washington appellate courts to consider issues raised for the first time in a reply brief. *State v. McNeal*, 142 Wash. App. 777, 785, 175 P.3d 1139, 1143 (2008) ("Because McNeal raised a new issue in his reply brief, we allowed the State to file a responsive brief to address this new issue.").

d. <u>The State was not prejudiced and Rhem did not gain an unfair advantage by raising the issue in his reply</u>. Over nine years passed before the Court of Appeals decided the case. The State had plenty of notice and opportunity to respond.

If the Public Trial Violation Had been Raised on Direct Appeal, There is a Reasonable Probability Rhem Would Have Prevailed.

This Court has previously and consistently held that the automatic reversal harm standard applies when appellate counsel deficiently fails to raise a meritorious public trial violation. *Orange, supra; In re PRP of Morris*, 176 Wash.2d 157, 288 P.3d 1140 (2012).

The trial record sufficiently reveals that the courtroom was closed for at least a portion of voir dire.

In *Orange*, the trial court expressly ruled that "no family members, no spectators will be permitted into this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic]." *Orange*, 152 Wn.2d at 807–08. This Court held that the court's ruling "effected, at a minimum, a *temporary*, full closure, the precise type of closure to which the *Bone–Club* court applied the five, well-settled guidelines." 152 Wn.2d at 808.

In *State v. Njonge*, 181 Wn.2d 546, 334 P.3d 1068 (2014), this Court considered a public trial claim where the trial court similarly contended with space constraints during jury selection. In that case, the trial court warned observers, "Tomorrow when we have the jury selection, there will not be room for all of you.... The chance of all of you being able to be here and observe are slim to none during the jury selection process." *Njonge*, 181 Wn.2d at 550. There was no express order relating to a closure, and the record did not show any observer being asked to leave the courtroom. 181 Wn.2d at 552. The record showed that after hardship excusals had reduced the number of prospective jurors in the courtroom, more visitors were accommodated. 181 Wn.2d at 551. This court held that the record did not establish that observers were excluded from the courtroom during hardship excusals. 181 Wn.2d at 561.

This case is more like *Orange* than *Njonge*. Here, the trial judge clearly excluded family members and spectators from a portion of trial.

Prior to the start of jury selection, the trial judge 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 when we get the whole 50 up here, we need to have the doors clear *and the courtroom available only for the jurors*. RP 75 (emphasis added).

The State acknowledged in its first response: “Thus, the plain language of the court ruling indicates that family members would have to give up their seats for the venire, but after the venire was seated, could come back in as space allowed.” *Response*, p. 11. That is enough to make out a constitutional violation. This Court has considered and expressly and consistently rejected a de minimis approach to a public trial violation. *State v. Frawley*, 181 Wash. 2d 452, 466, 334 P.3d 1022, 1029 (2014). While the reference hearing revealed that the closure was longer than the judge suggested, the constitutional violation was revealed in the transcript of proceedings.

If appellate counsel had raised this plain error on appeal, the appellate court would have reversed. This Court should conclude that Rhem was denied his Due Process right to effective assistance of appellate counsel.

2. Rhem Was Actually and Substantially Prejudiced.

Turning to Rhem's stand-alone public trial claim, this Court should hold that Rhem was actually and substantially prejudiced when his family members were improperly excluded from the courtroom.

The PRP Prejudice Standard

A defendant must meet a higher prejudice threshold in a PRP. This higher standard on collateral review is met where, "in light of the essential purpose of the constitutional right at issue, a violation of the right would necessarily prejudice the defendant." *In re PRP of Coggin*, 182 Wash. 2d 115, 120, 340 P.3d 810, 813 (2014). In *Coggin*, private questioning worked to benefit Coggin by protecting his right to a fair trial by an impartial jury. *Id.* at 121.

Here, the exclusion of Rhem's family members worked to disadvantage and prejudiced him. Here, the improper closure violated one of the essential purposes behind allowing the public and especially family members to attend voir dire.

The Right to Have a Defendant's Family Attend Trial

The United States Supreme Court has long recognized the right to a public trial entitles a criminal defendant "at the very least ... to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re Oliver*, 333 U.S. 257, 272 (1948). Numerous courts are in accord. *Rodriguez v. Miller*, 439 F.3d 68, 73 (2d Cir. 2006) ("Intrinsic to

the public trial right is an individual's right to have family members and friends present at his trial, a right this Court takes very seriously.”); *Guzman v. Scully*, 80 F.3d 772, 776 (2d Cir.1996) (“The exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly.”); *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994) (“special concern for assuring the attendance of family members of the accused”); *United States v. Agosto-Vega*, 617 F.3d 541, 548 (1st Cir. 2010) (“when considering the balance of factors supporting closure, courts should not minimize the importance of a criminal defendant's interest in the attendance and support of family and friends. To say the least, this support is ineffective in absentia.”).

This Court has previously acknowledged the how improperly excusing family members from jury selection undermines an essential purpose of the public trial right and described the resulting prejudice. This Court described the exclusion of family members from voir dire as prejudicing the ability of the defendant's family to contribute their knowledge or insight to the jury selection and the ability of the venirepersons to see the interested individuals. *Orange*, 152 Wash.2d at 812. “As a result of the unconstitutional courtroom closure in the present case, what the prospective jurors saw, as they entered and exited the courtroom during at least the first two days of voir dire, was not the

participation of the defendant's family members in the jury selection process, but their conspicuous exclusion from it." *Id.*

As a result of the exclusion order, Rhem was not introduced to his jury with his family in attendance. Instead, his family was forced to peer through the courtroom windows, which at least some jurors felt was improper. Even more than the "vigil of Orange's parents outside the closed courtroom doors," the vigil of Rhem's family was so suggestive that several members of the venire commented on it. Due to the trial court's improper closure of the courtroom, Rhem's family was viewed as disruptive and acting contrary to the law. It is not a stretch to suggest that the actions of Rhem's family negatively prejudiced the jury's view of Rhem when, in fact, it was the trial judge who was acting unlawfully.

The Prohibition Against Examining Jurors to Assess Prejudice

This Court has made it clear: "The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." *State v. Ng*, 110 Wash.2d 32, 43, 750 P.2d 632 (1988). Thus, a juror's post-verdict statements regarding the way in which the jury reached its verdict cannot be used to support a motion for a new trial. *Id*. at 44. As a result, the prejudice inquiry is not whether jurors articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play. *In re Davis*, 152 Wash. 2d 647, 695, 101 P.3d 1, 27–28 (2004).

Conclusion

This Court should conclude that improperly excluding Rhem's family from jury selection undermined one of the essential purposes of the public trial right. Removing Rhem's family such that they were forced to peer through the courtroom windows in order to achieve some semblance of what should have been their right to attend the entire trial both stripped Rhem of the ability to have his family participate in jury selection decisions and cast him in a negative light.

C. CONCLUSION

This Court should reverse and remand for a new trial.

DATED this 5th day of December, 2016.

Respectfully Submitted:

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