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WASHINGTON STATE
SUPREME COURT

NO. 92698-1

SUPREME COURT OF THE
STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

MICHAEL LOUIS RHEM, PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 99-1-04722-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUES PERTAINING TO GRANT OF REVIEW.

1. Under this court's jurisprudence on collateral relief, did the Court of Appeals properly dismiss a personal restraint petition that failed to make any showing of actual prejudice flowing from an alleged constitutional error?
2. Should an appellate court refuse to consider grounds for relief that were not presented in petitioner's timely filed petition or timely amendment when to do so would violate RCW 10.73.090?
3. Has petitioner failed to show that the statute of limitation in RCW 10.73.090 is one that can be waived by the respondent to a personal restraint petition when it restricts the authority of the appellate court to grant collateral relief?
4. As the state and federal constitutions serve different purposes and are not interchangeable documents, would it be improper to treat a claim raised under one constitution as automatically raising a claim under the other?
5. As petitioner had a prior opportunity for judicial review of the closed courtroom claim he argued in his petition, must he meet the heightened standard applicable to collateral relief?

B. STATEMENT OF THE CASE.

Petitioner, MICHAEL LOUIS RHEM, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 99-1-04722-4. Appendix A to State's Original response. Petitioner was charged with eight crimes under this cause number, including drive-by shooting, two counts of unlawful possession of a firearm, and multiple counts of assault in the first degree. Appendix B to State's original response (opinion in

first appeal). Petitioner entered a plea of guilty to one count of unlawful possession of a firearm and went to trial on the remaining counts. *Id.* Petitioner was convicted at trial but the convictions obtained at this trial were reversed on appeal. *Id.* Petitioner was retried and the second jury convicted him of two counts of assault in the first degree, and unlawful possession of a firearm. An appeal followed. The convictions were affirmed in an unpublished decision on March 1, 2005. Appendix D to the State's original response. The mandate issued on February 3, 2006. *Id.*

On July 21, 2006, 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.

Ultimately the Court of Appeals denied all of petitioner's claims in an unpublished decision. Petitioner sought discretionary review and this Court granted review *only* as to issues pertaining to the closed courtroom. Therefore, the remainder of the statement of the case will be limited to facts relevant to the closed court room claim.

In the original petition, Rhem did not support his claim that the courtroom was closed to spectators during jury selection with any evidence other than a citation to the verbatim report of proceedings from his direct appeal. *See* Petition at p.15. Petitioner based his claim solely on the state constitution, art. 1, §10, and made no argument as to how he was prejudiced by this alleged violation. *See* Petition at p.14-15. Petitioner did not raise a claim of ineffective assistance of appellate counsel, as had been done in *In re PRP of Orange*, 152 Wn.2d 759, 100 P.3d 291 (2004), in either his original or amended petition.

The State responded that the verbatim report of proceedings did not show a clear closure of the courtroom and disputed whether one had occurred; additionally, it argued that petitioner had failed to demonstrate any actual prejudice necessary for relief by collateral attack. It argued that either of these reasons, lack of evidence or the failure to show actual prejudice, was a reason to dismiss the claim. *See* State's response at p. 6-14. Petitioner replied that the closure was structural error and that he need not demonstrate any prejudice. Reply at p. 2.

Over the following decade, this case went through a series stays issued by the Court of Appeals while cases on courtroom closures were pending before this Court. After this Court would issue a decision the Court of Appeals would order supplemental briefing.

At one point in this process, the Court of Appeals remanded for a reference hearing as the State had always disputed whether a closure had occurred. The reference hearing was held before the Honorable Ronald E. Culpepper in Pierce County Cause No. 13-2-14151-1. As directed by the Court of Appeals, the trial court forwarded a copy of its findings of fact in April of 2014. *See* Appendix A to respondents Sixth Supplemental brief (“FOF”), *also attached as* Appendix A to this brief. The trial court noted that Judge Felnagle, the judge who presided over petitioner’s trial, had made observations about being committed to an open court and that the comments relied upon by petitioner as an order closing the court did not amount to an explicit order to members of the public to leave the courtroom; the court did not find that Judge Felnagle intended to close the courtroom but only to make room for the venire panel. Appendix A, FOF III XIII, XVIII. The court did find, however, that a reasonable interpretation of Judge Felnagle’s remarks was that members of the public would not be allowed in the courtroom when the venire arrived and that members of petitioner’s family were “effectively” excluded during at least parts of voir dire. *Id.*, FOF XIX, XXI. The court found that there was no evidence of any effect on the trial due to this closure. *Id.*, FOF XXVII.

After this Court decided *In re PRP of Coggin*, 182 Wn.2d 115, 116, 340 P.3d 810 (2014); *In re PRP of Speight*, 182 Wn.2d 103, 107, 340 P.3d 207 (2014), the Court of Appeals issued a decision dismissing

petitioner's closed courtroom claim for failing to show that he was actually prejudiced.

C. ARGUMENT.

1. THE COURT OF APPEALS PROPERLY DISMISSED PETITIONER'S CLAIM OF A CLOSED COURTROOM UNDER **COGGIN** AND **SPEIGHT** AS PETITIONER NEVER MADE ANY SHOWING OF ACTUAL PREJUDICE.

In order to protect the finality of judgments “[r]elief by way of a collateral challenge to a judgment and sentence is extraordinary, and the petitioner must meet a high standard before this court will disturb an otherwise settled judgment.” *In re PRP of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011). Generally, a personal restraint petition filed within one year after the judgment and sentence is final may challenge the conviction on any grounds, but the petitioner must show with a preponderance of the evidence that he or she was actually and substantially prejudiced by a violation of constitutional rights, or that his or her trial suffered from a non-constitutional defect that inherently resulted in a complete miscarriage of justice. *Id.*

While a violation of a public trial right is presumed prejudicial on direct appeal, when such a claim is raised for the first time in a personal restraint petition, the petitioner must show actual and substantial prejudice. *In re PRP of Coggin*, 182 Wn.2d 115, 116, 340 P.3d 810 (2014); *In re PRP of Speight*, 182 Wn.2d 103, 107, 340 P.3d 207 (2014).

All three divisions of the Court of Appeals have recognized this to be the holding of *Coggin* and *Speight*. *In re PRP of Eagle*, 195 Wn. App. 51, ___ P.3d ___ (2016) (Division I); *In re PRP of Schreiber*, 189 Wn. App. 110, 114, 357 P.3d 668 (2015) (Division II); *In re PRP of Mines*, 190 Wn. App. 554, 563, 364 P.3d 121 (2015) (Division III); *see also, Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) (where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.).

From the outset in this case, the State maintained that petitioner was required to show actual prejudice before he was entitled to relief on his public trial claim; it argued that the court should dismiss the claim due to petitioner's failure conclusively show a constitutional error occurred and his failure to address the showing of prejudice. *See*, State's Response to Personal Restraint Petition at p. 13-14; State's Second Supplemental Brief at p. 12-19; State's Fourth Supplemental Brief at p. 6-8; State's Fifth Supplemental Brief.

This was consistent with the two earlier cases where this 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 PRP of Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012) (plurality opinion finding the case was controlled by

Orange); *In re PRP 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.

Even after a reference hearing in this case, petitioner could not show prejudice; the trial 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.” Appendix A, FOF at p. 13. The Court of Appeals properly dismissed this claim under the holding of *Coggin* and *Speight*; the decision below should be affirmed.

“The doctrine of stare decisis ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned.’” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Petitioner has made no effort in his motion for discretionary review to show that this court's jurisprudence on the necessity of showing actual prejudice before collateral relief is granted is either incorrect or harmful.

Coggin and *Speight* flow from a long history of Washington cases that require a showing of actual prejudice before collateral relief is granted and petitioner made no attempt to make that necessary showing in his initial petition. He further asserted that he did not need to make such a showing in his reply to the State's response. *See*, Reply at p. 2. Petitioner was incorrect. His claim must be dismissed.

2. THE PETITIONER MUST BE HELD TO THE GROUNDS AND ARGUMENTS HE RAISED IN HIS TIMELY FILED PETITION AND HIS TIMELY AMENDMENT.

Under the rules of appellate procedure a personal restraint petition must set forth the grounds for relief, which requires:

A statement of (i) the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations, and (ii) why the petitioners restraint is unlawful for one or more of the reasons specified in rule 16.4(c), Legal argument and authorities may be included in the petition, or submitted in a separate brief as provided in rule 16.10(a).

RAP 16.7(a)(2). As indicated by the rule, the petitioner must allege that his restraint is unlawful for one or more of the reasons set forth in RAP 16.4(c); that list includes that the "conviction was obtained,[or sentence entered] in a criminal proceeding ... in violation of the Constitution of the United States or the Constitution or laws of the State of Washington[.]" RAP 16.4(c)(2). The rules also set forth important restrictions on the appellate court's ability to grant relief by a personal restraint petition,

including that relief may be granted only in compliance with RCW 10.73.090, *see* Appendix B, or RCW 10.73.100 and that “[n]o more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.” RAP 16.4(d).

Any petition filed with the appellate court will undergo a preliminary review by the court and may be dismissed summarily if it is clearly frivolous or clearly barred by RCW 10.73.090 or RAP 16.4(d). Failure to comply with the provisions of RAP 16.7(a)(2) in setting forth the grounds for relief will subject the petitioner to dismissal as this is not one of the technical deficiencies that is subject to correction under RAP 16.8(c).¹ This Court has made it clear that the factual basis for the claimed error required by RAP 16.7(a)(2)(i) must be competently presented or the petition is subject to dismissal. *In re PRP of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992), *citing In re PRP of Williams*, 111 Wn.2d 353, 364–65, 759 P.2d 436 (1988). This Court articulated what must be provided as evidentiary support:

If the petitioner’s allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner’s evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative

¹ RAP 16.8(c) provides:

Deficient Petitions. If the clerk of the appellate court determines that a petition submitted does not conform with this rule or with rule 16.7(a)(1), (3), (4), (5), (6), or (7), the petition should be filed and the clerk will direct the petitioner to correct the deficiency within 60 days.

evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

Rice, 118 Wn.2d at 886. A petitioner may seek permission from the appellate court to amend the petition, but “[a]ll amendments raising new grounds are subject to the time limitation provided in RCW 10.73.090 and 10.73.100.” RAP 16.8(e).²

The above law shows that a petitioner must properly and fully articulate his grounds for relief under RAP 16.7(a)(2) and that any amendment to the original grounds must come via permission from the appellate court and will be subject to the statutory time limitations of RCW 10.73.090 and .100. Furthermore any failure to meet the time bar restrictions limits the appellate court’s authority to grant relief. RAP 16.4(d); *In re PRP of Haghghi*, 178 Wn.2d 435, 309 P.3d 459 (2013).

In the case now before the Court, petitioner raised his public trial claim strictly under the state constitution, Petition at p. 14-15. His amendment to his petition, which was approved by the court, did not expand this ground for relief. Later, after petitioner retained an attorney, supplemental briefs were filed that also sought to rely on the Sixth Amendment, but the Court of Appeals refused to consider this claim as

² While this portion of the rule was enacted in 2014, it is consistent with case law that predated the petition filed in this case. See *State v. Benn*, 134 Wn2d 866, 938-40, 952 P.2d 116 (1998).

untimely under RCW 10.73.090. The Court of Appeals properly applied the law and should be upheld.

- a. RCW 10.73.090 is a limitation on the appellate court's ability to grant relief and cannot be waived by the respondent.

Petitioner argues that because the respondent did not move to strike the references in the supplemental briefs, that it should be deemed to have waived any objection to the new claim on the basis that it is outside the statute of limitation in RCW 10.73.090. The statute of limitation in RCW 10.73.090 reflects a legislative goal to limit the availability of collateral relief and to force convicted offenders into bringing timely challenges to their convictions. *See In re PRP of Runyan*, 121 Wn.2d 432, 444, 853 P.2d 424 (1993). This court has described RCW 10.73.090 as "a mandatory rule that acts as a bar to appellate court consideration of PRPs filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based on one of the exemptions enumerated in RCW 10.73.100." *In re PRP of Bonds*, 165 Wn.2d 135, 140, 196 P.3d 672, 675 (2008). RAP 16.4(d) reinforces that this statute of limitation is a restriction on the appellate court's ability to grant relief. Petitioner presents no authority that this provision is one that can be waived by the respondent.

Petitioner's reliance on *U.S. v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979) is misplaced. That case does not hold that

“the burden is properly placed on the defending party to assert a statute of limitations defense” as he represents in his motion for discretionary review. *See* Motion For Discretionary Review, at p. 6. Rather, that case states that a court should not construe a statute of limitation so as to defeat its obvious purpose. *Kubrick*, 444 U.S. at 117. Nothing about the provisions of RCW 10.73.090 suggest that it is waived if not asserted by the respondent. Moreover, RAP 16.8.1(d) indicates that the appellate court will dismiss a petition that is clearly time-barred “without requesting a response.” This shows that no action is required by the respondent in order for the provisions of RCW 10.73.090 to take effect.

Additionally, the original petition was timely filed so it would have been inappropriate for the respondent to raise the statute of limitations at that time. The State’s position throughout the pendency of this collateral attack has been that this ground for relief should be dismissed because the petitioner did not provide sufficient evidence to show a constitutional violation occurred and, further, failed to meet his burden of showing actual prejudice. Petitioner’s failure to meet the requirements of RAP 16.7(a)(2) in his initial petition could only be remedied by a timely amendment to the petition and not by any action taken after the expiration of the time limit in RCW 10.73.090. As he did not timely amend this claim, any grounds raised after the expiration of the time bar were properly rejected.

b. As The State And Federal Constitutions Are Not Interchangeable A Ground For Relief Based Upon One Constitution Should Not Automatically Raise A Ground Based On The Other.

The structure of a state constitution differs from the federal constitution because the federal constitution grants power to federal government while state constitutions put limits on power of state government. *State v. Foster*, 81 Wn. App. 444, 457, 915 P.2d 520, 527 (1996), *aff'd*, 135 Wn.2d 441, 957 P.2d 712 (1998).

Historically, the protections of the federal constitution did not always extend to the states. The United States Supreme Court, at one point, held that many provisions of the federal constitution, specifically those comprising the Bill of Rights, were not applicable to the states. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833). But over time the United States Supreme Court has progressively concluded most liberties protected by the Bill of Rights are applicable to the states via the due process clause of the 14th Amendment. *State v. Sieyes*, 168 Wn.2d 276, 283, 225 P.3d 995, 998 (2010); *see also, Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) (Scalia, J., concurring).

But while this incorporation of federal rights to the states provides a baseline of protection that states may not fall below, states are free to adopt constitutional provisions that are more protective than

corresponding federal rights. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808. (1986). For example, it is now well settled that Washington's constitution Art. 1, § 7, is qualitatively different from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. *State v. Surge*, 160 Wn.2d 65, 70, 156 P.3d 208, 211 (2007).

Additionally, state constitutions frequently contain provisions for which there is no comparable federal counterpart, such as the right to appeal in a criminal case. *Compare, Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931 (1981) (the United States Constitution does not afford convicted defendants a right to appellate review), *with State v. Tomal*, 133 Wn.2d 985, 988, 948 P.2d 833 (1997) (Article I, section 22 (amendment 10) of the Washington Constitution guarantees the right to appeal in all criminal cases). Similarly, the federal constitution has requirements for criminal prosecutions that do not extend to the states, such as prosecution by grand jury indictment. *See State v. Powell*, 167 Wn.2d 672, 684, 223 P.3d 493, 499 (2009), *overruled on other grounds by State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012)

While many state constitutional provisions are interpreted as providing the same protections as their federal counterparts, there is no legal basis or authority for saying that a ground for relief based on a state constitutional provision automatically raises a ground for relief based on the federal constitution or vice versa. *See* RAP 16.4(c)(2) (violation of the

Constitution of the United States, Washington Constitution and laws of Washington listed in the disjunctive as being separate bases for a claim of unlawful restraint).

Additionally, petitioner has not clearly articulated how his untimely Sixth Amendment claims are not satisfied by Court of Appeals' handling of his timely claim under the comparable state constitutional provisions. This court has noted that its decisions employing the *Bone-Club*³ standard for both sections 10 and 22 in the state constitution are similar to the analysis applied under the Sixth Amendment and the United States Supreme Court decision in *Waller v. Georgia*, 467 U.S. 39, 47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321, 325 (2009).

Moreover, under federal law, petitioner's lack of objection in the trial court would preclude him from raising this claim on review. *Levine v. United States*, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960) (failure to object to closing of courtroom is waiver of right to public trial); *Peretz v. United States*, 501 U.S. 923, 936-937, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) (noting that, among the most basic rights of criminal defendants that are subject to waiver, failure to object to the closing of a courtroom constitutes "waiver of right to public trial"); *Johnson v. Sherry*, 586 F.3d 439, 444 (6th Cir.2009), *cert. denied* —

³ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

U.S. —, 131 S. Ct. 87, 178 L. Ed. 2d 242 (2010) (citing *Freytag v. Comm'r*, 501 U.S. 868, 896, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) (“The Sixth Amendment right to a trial that is ‘public,’ provides benefits to the entire society more important than many structural guarantees; but if the litigant does not assert it in a timely fashion, he is foreclosed.” (brackets omitted))); *United States v. Reagan*, 725 F.3d 471, 488–489 (5th Cir.2013), cert. denied 134 S.Ct. 1514 (2014) (defendants waived the claim that their right to a public trial was violated by the closing of the courtroom during voir dire; hence, the claim was unreviewable on appeal); *United States v. Christi*, 682 F.3d 138, 142–143 (1st Cir.2012), cert. denied — U.S. —, 133 S.Ct. 549, 184 L.Ed.2d 357 (2012) (by counsel's failure to object, defendant waived any claim of error in the court limiting public access to the courtroom during most of jury instructions); *United States v. Rivera*, 682 F.3d 1223, 1232 (9th Cir.2012) (defendant may forfeit the right to a public trial by either “affirmatively waiving it or by failing to assert it in a timely fashion”).

The United States Supreme Court’s two leading cases on closure of the courtroom both involve situations where there was an objection to the closure made in the trial court. *Presley v. Georgia*, 558 U.S. 209, 210, 130 S. Ct. 721, 722, 175 L. Ed. 2d 675 (2010)(Presley's counsel objected to the exclusion of the public from the courtroom during voir dire); *Waller v. Georgia*, 467 U.S. 39, 42, 104 S. Ct. 2210, 2213, 81 L. Ed. 2d 31 (1984) (“Over objection, the court ordered the suppression hearing closed to all

persons other than witnesses, court personnel, the parties, and the lawyers.”).

Petitioner wants to rely on a Sixth Amendment claim for what federal law says about structural error. Even if the denial of the right to a public trial is a structural error under federal law, that does not mean that the claim cannot be waived by the failure to object; structural errors are nevertheless subject to the general rules of waiver, forfeiture, and default. *See Johnson v. United States*, 520 U.S. 461, 466, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

Petitioner cannot pick and choose which aspects of Sixth Amendment jurisprudence he wants applied to his claim. Petitioner forfeited his Sixth Amendment claim when he failed to properly preserve it in the trial court with an objection. As he did not object in the trial court, he would not have a viable claim under the Sixth Amendment. Under the circumstances presented here, it is not clear that petitioner would be any more successful under the Sixth Amendment than he was under the state constitution. As such, there does not appear to be a true controversy about the Court of Appeals’ refusal to consider his Sixth Amendment claim.

The court below did not improperly refuse to consider petitioner’s untimely claims.

- c. Petitioner is not entitled to a more lenient standard of review as he did have a prior opportunity for judicial review of the closed courtroom claim he raised in his petition.

As discussed above, a personal restraint petitioner alleging constitutional error must show actual and substantial prejudice. *See In re Personal Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011); *In re Personal Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). This actual and substantial prejudice standard does not apply when the petitioner has not had a prior opportunity to appeal the issue to a disinterested judge. *See In re Personal Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010). This Court has never held that the grant of a reference hearing to resolve factual claims means that the court will then apply a more lenient standard of review. *See, e.g. In re Personal Restraint of Khan*, 184 Wn.2d 679, 683, 363 P.3d 577, 578–79 (2015) (Court remands for a reference hearing to determine whether Khan's constitutional and/or statutory rights were violated by the lack of an interpreter and whether any such violation caused him the requisite prejudice for collateral relief.).

The Court of Appeals found that petitioner's case was not the type subject to the more lenient standard of review. It was correct.

In the original petition, Rhem raised a claim of the trial court improperly closing the courtroom during voir dire; his evidentiary support for this claim was a citation to the verbatim report of proceedings from his direct appeal where the error allegedly occurred. *See* Petition at p.15. He did not ask for a reference hearing on this issue. *Id.* at 14-15, 19-20.

It is clear that Rhem could have raised the identical claim in his direct appeal as he did in his petition as it did not rely on any evidence that was outside the record on review. Therefore, petitioner had a prior opportunity to appeal his issue to a disinterested judge, but failed to do so. He is not entitled to a more lenient standard of review on his petition.

Further, it should be noted that Rhem did not raise this argument regarding the more lenient standard until recently. In a supplemental brief filed on January 5, 2015, almost nine years after he filed his personal restraint petition and approximately eight years after his conviction became final, petitioner argued for the first time that he was entitled to a more lenient standard of review on his personal restraint petition asserting that his claim was “first cognizable” in a personal restraint petition because his factual claims had to be resolved in a reference hearing. Not surprisingly, this change in argument occurred shortly after this Court issued its decisions in *Coggin* and *Speight* holding that he was required to make a showing of prejudice. Once the case law did not support Mr.

Rhem's previously held position, he simply abandoned his prior position and adopted a new one.

Rhem's original petition did not make any argument as to how he was prejudiced by the alleged violation. *See* Petition at p.14-15. He did not present sufficient evidence with his petition to establish a constitutional violation. *Id.* The State responded back in 2006 that Rhem's petition should be dismissed because his evidence did not show there was a closure of the court room and because he failed to show any actual prejudice necessary to obtain collateral relief. Now, ten years later, it is clear that the State was correct and the petition should have been dismissed.

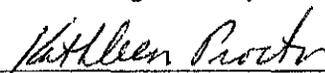
The Court of Appeals correctly held that petitioner was not entitled to a more lenient standard of review.

D. CONCLUSION.

For the forgoing reasons the Court should affirm the Court of Appeals' dismissal of the petition.

DATED: December 5, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

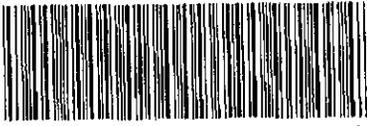
Certificate of Service:

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

12/5/16 
Date Signature

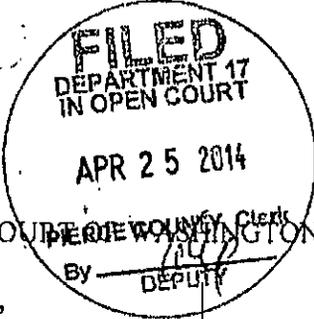
APPENDIX "A"

Findings of Fact



13-2-14151-1 42434718 OR 04-28-14

Case Number: 13-2-14151-1 Date: December 5, 2018
SerialID: 66D5BE24-943D-4D3C-AADF560EB3A2707D
Certified By: Kevin Stock Pierce County Clerk, Washington



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SUPERIOR COURT OF PIERCE COUNTY, WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff / Respondent,

CAUSE NO. 13-2-14151-1 ✓

CAUSE NO. 99-1-04722-4

COA No. 35195-1

vs.

MICHAEL LOUIS RHEM,

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AFTER REFERENCE HEARING

Defendant / Petitioner.

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
15
16 FINDINGS OF FACT

17 I.

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

21
22 II.

23 Trial was called the morning of January 13, 2003. A motion to exclude minors was
24 argued and denied. (Mr. Rhem's three year old son was present with Ms. Ruffin and others in
25 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 Felnagle 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 Feltnagle 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 Feltnagle 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 Feinagle 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.

V.

The duration of the closure:

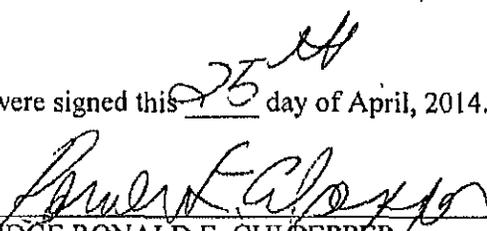
The closure lasted for most, if not all, of the voir dire process.

VI.

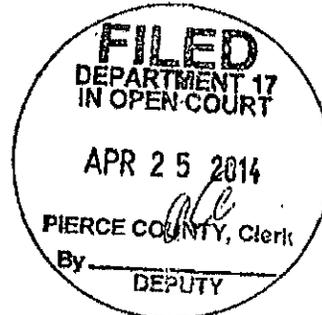
If there was a closure, and the trial court failed to consider the Bone-Club factors, whether this closure resulted in actual and substantial prejudice to the outcome of Rhem's trial, including findings about the nature and extent of this prejudice:

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



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State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 05 day of December, 2016



Kevin Stock, Pierce County Clerk

By /S/Rebecca Ahquin, Deputy.

Dated: Dec 5, 2016 8:42 AM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

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APPENDIX "B"

RCW 10.73.090

RCW 10.73.090**Collateral attack—One year time limit.**

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

[1989 c 395 § 1.]

OFFICE RECEPTIONIST, CLERK

To: Heather Johnson
Cc: Jeffrey Ellis
Subject: RE: In re the Personal Restraint Petition of: Michael Rhem

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Supreme Court Clerk's Office

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From: Heather Johnson [mailto:hjohns2@co.pierce.wa.us]
Sent: Monday, December 05, 2016 1:02 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Jeffrey Ellis <jeffreyerwinellis@gmail.com>
Subject: In re the Personal Restraint Petition of: Michael Rhem

Kathleen Proctor, WSB No. 14811
(253)798-6590
kprocto@co.pierce.wa.us

Attached please find the Supplemental Brief of Respondent