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No. 93038-4

31227-5-III
(Consolidated with 31338-7-III)

FILED
September 15, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

IN THE MATTER OF THE PERSONAL RESTRAINT PETITION OF:

ALEKSANDR V. PAVLIK,

Petitioner.

**SECOND SUPPLEMENTAL BRIEF OF RESPONDENT
REGARDING THE APPLICABILITY OF *STATE V. LOVE***

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorneys
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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The Court has requested a supplemental response regarding the applicability of the Washington State Supreme Court's unanimous decision in *State v. Love*, No. 89619-4, 2015 WL 4366419 (July 16, 2015).

**I. DISCUSSION OF THE APPLICABILITY OF
*STATE V LOVE***

Love, supra, like this case, involves challenges to potential jurors that occurred at a bench conference. Our State Supreme Court addressed two issues in *Love*: (1) whether the exercise of "for cause" challenges at a voir dire bench conference and the use of silent, written preemptory challenges violated the constitutional right to public trial and (2) whether a defendant's absence from a voir dire bench conference violated the defendant's right to be present at a critical stage of the proceedings. *Love*, at p. 1. Petitioner has raised nearly identical issues in his personal restraint petition, claiming that the voir dire bench conference that occurred during his case resulted in a court closure and that his absence from that conference violated his right to be present. *Petitioner's Amended Personal Restraint Petition* at 31 (July 3, 2013); *Petitioner's Reply Brief* at 1-3 (Sept. 18, 2013); *Petitioner's Supplemental Brief* at 1 (Feb. 13, 2015).

1. Public Trial Right

In deciding the first issue raised in *Love*, the Court examined the public trial right as guaranteed by article I, section 22 and article 1,

section 10 of the Washington State Constitution, and the three-step framework that guides the Court's analysis in public trial right cases. In such cases, the Court inquires whether: (1) the public trial right attaches to the particular proceeding at issue, (2) if the right attaches, the court then determines if the courtroom was closed, and (3) if a closure occurred, the Court determines whether the closure was justified.¹ *Love* at p. 2 (citing *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012)).

The *Love* court held that the public trial right clearly attaches to voir dire proceedings, including for cause and preemptory challenges.² *Love* at p. 3. However, in examining the second step of the public trial "framework," the Court held that *Love*'s claim that his public trial rights were violated³ was without merit, as the proceeding was neither "completely and purposefully closed", nor was it "inaccessible to spectators."⁴ *Love* at pp. 3-4. The *Love* court reasoned that the public had

¹ The third prong of the analysis was not reached in *Love* as the court determined no court closure occurred by the method in which jurors were selected at trial.

² See, e.g., *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005).

³ *Love* alleged that the courtroom was "closed" when the court allowed the exercise of for cause challenges at a bench conference and peremptory challenges on a written struck juror sheet. *Love* at p. 2.

⁴ The court has previously examined two types of courtroom closures that have merited reversals on appeal: (1) those closures "when the courtroom

ample opportunity to oversee the selection of Love's jury because no portion of the proceeding was concealed from the public and no juror was questioned in chambers; rather all questioning was done in the courtroom, where the public was "present for and could scrutinize" the selection of the jury, safeguarding the defendant's public trial right that has been found missing in those cases where the court has found the proceeding to be "closed." *Love* at p. 4. While the *Love* court acknowledged that spoken peremptory challenges increase the transparency of jury selection, it also stated that silent, written challenges are still a legitimate method of exercising peremptory challenges; this method of exercising challenges does not amount to a courtroom closure as it is conducted "in open court, on the record, and subject to public scrutiny." *Id.*

As in *Love*, all questioning of the jurors in the defendant's trial occurred in open court. RP 3-106 (Voir Dire). Also, as in *Love*, only *agreed* challenges for cause and *agreed* hardship challenges occurred at

is completely and purposefully closed to spectators so that no one may enter and no one may leave," *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *see Brightman*, 155 Wn.2d at 511-12, 122 P.3d 150 (public excluded from courtroom during voir dire); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 801-02, 100 P.3d 291 (2004), and (2) those closures where a portion of a trial is held someplace "inaccessible" to spectators, usually in chambers. *Lormor*, 172 Wn.2d at 93, 257 P.3d 624; *see also State v. Shearer*, 181 Wn.2d 564, 568, 334 P.3d 1078 (2014) (private questioning of juror in chambers); *Strode*, 167 Wash.2d at 227, 217 P.3d 310 (private questioning of multiple jurors); *State v. Paumier*, 176 Wn.2d 29, 33, 288 P.3d 1126 (2012).

the bench.⁵ The only juror challenged for cause in the present case was juror number 11, and she stated in open court during voir dire that it would be difficult for her to sit in judgment of another person. RP 70 (Voir dire). *Both* the State and Defendant requested this juror be excused. RP 104, lines 13-19. Regarding the hardship challenges,⁶ the parties and the court agreed to releasing jurors 1, 17, 38, and 40, because of their inability to serve the term required for the trial. RP 104. As in *Love*, the parties exercised their peremptory challenges by a written, struck juror sheet, in open court which was subsequently filed for public record. Attach. A.

To be entitled to relief on a PRP, a petitioner must establish by a preponderance of the evidence that there was a constitutional error that resulted in actual and substantial prejudice or that there was a nonconstitutional error that resulted in a fundamental defect, which inherently results in a complete miscarriage of justice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). This requirement is “necessary to preserve the societal interest in finality, economy, and integrity of the trial process. It also recognizes that the

⁵ RP 103-104 (Challenges).

⁶ The *Love* court indicates that hardship excusals are different from for cause and preemptory challenges in that they do not necessarily raise issues about jurors’ neutrality and a party’s motivation for excusing jurors, and suggests without holding that perhaps the discussion of hardship excusals need not be conducted in open court. *Love* at p. 3.

petitioner has had an opportunity to obtain judicial review by appeal.”
Woods, 154 Wn.2d at 409.

This court need not make a determination as to whether Petitioner was prejudiced because under *Love*, no error, constitutional or otherwise, occurred when the trial court took agreed challenges for cause and agreed hardship excusals at a bench conference and allowed peremptory challenges to be exercised by the parties in writing in open court.

2. **Right to Be Present**

State v. Love is also dispositive as to Petitioner’s claim that his right to be present at all critical stages of the proceedings was violated when he was “absent” from the previously discussed voir dire bench conference where the trial judge and the attorneys discussed for cause challenges and hardship excusals. Notwithstanding the fact that jury selection is a “critical stage” under both state and federal constitutions, *see State v. Irby*, 170 Wn.2d, 874, 246 P.3d 796 (2011), the *Love* court held that the record in that case was devoid of any evidence that Mr. Love was unable to consult with counsel about which jurors to challenge or to meaningfully participate in the process. *Love* at p. 4. Mr. Love was present in the courtroom during all of the voir dire, including the potential juror’s answers to questions that formed the basis for challenges. *Id.* The

Court declared that it would not assume facts unsupported by the record for the sake of finding reversible error. *Id.*

The decision in *Love* is consistent with the recent Ninth Circuit decision, *United States v. Reyes*, 764 F.3d 1184 (9th Cir. 2014). In that case, the defendant requested to be present at bench conferences during which the lawyers engaged in the exercise of for cause and peremptory challenges of potential jurors. The court held that with the exception of one sidebar conference,⁷ there was no Constitutional violation on seventeen other occasions where defendant was not physically present for the voir dire bench conference. *Id.* at 1196-97. The court observed:

The district court's decision to exclude Reyes from the seventeen other side bar exchanges—where the attorneys argued that jurors should be excused for cause, exercised peremptory challenges, and discussed whether to proceed in the absence of some prospective jurors—was likewise consistent with the Constitution. These conferences on questions of law are prototypical examples of instances “when presence would be useless, or the benefit but a shadow.” *Snyder*, 291 U.S. at 106–07, 54 S.Ct. 330. Reyes would have merely observed the proceedings while the attorneys made arguments about which jurors should be excused for cause and exercised peremptory challenges. As in *Gagnon*, he “could have done nothing had [he] been at the conference, nor would [he] have gained anything by attending.” *Gagnon*, 470 U.S. at 527, 105 S.Ct. 1482.

⁷ One sidebar conference during voir dire involved the actual questioning of a potential juror. The court held that while the Constitution was not violated by this procedure, defendant's court rule right to be present under Fed. R. Crim P. 43 was violated. *Reyes*, 764 F.3d at 1189.

Reyes, 764 F.3d at 1196-97.⁸

Like *Love* and *Reyes*, the defendant asks this Court find that because he was “not invited” (Pet’r. Ex. 34) to approach the bench for the conference wherein the court and attorneys addressed the *agreed* for cause challenges and hardship excusals that he was deprived of his right to be present at a critical stage of the proceeding. There is no evidence in the record that the defendant was not in the courtroom during the questioning of the jurors, was unable to consult with counsel prior to the bench

⁸ Several other courts have held that Federal Rule 43 does not require the defendant's presence under similar circumstances. *See, e.g., United States v. Curtis*, 635 F.3d 704, 716 (5th Cir.2011) (holding that the defendant's “right to be present at every stage of his trial” was not violated where he “was present when the peremptory challenges were given formal effect via the impaneling of the jury” and had an “opportunity to consult with his attorney before his attorney submitted the peremptory challenges”); *United States v. Gayles*, 1 F.3d 735, 738 (8th Cir.1993) (“[The defendant] was present in the courtroom while the potential jurors were questioned. Although [the defendant] was absent later when his attorney made his strikes ... [the defendant] was present in the courtroom when the clerk gave the strikes effect by reading off the list of jurors who had not been stricken.... [The defendant] was sufficiently present at the jury's impaneling to satisfy Rule 43 and the Constitution.”); *United States v. Bascaro*, 742 F.2d 1335, 1349–50 (11th Cir.1984) (holding that “the defendants were sufficiently present at the impaneling of the jury to satisfy the sixth amendment and Rule 43” where the defendants were in the courtroom when voir dire occurred and they had an opportunity to confer with their attorneys), *abrogated in part on other grounds by United States v. Lewis*, 492 F.3d 1219 (11th Cir.2007) (en banc).

United States v. Reyes, 764 F.3d 1184, 1192 (9th Cir. 2014).

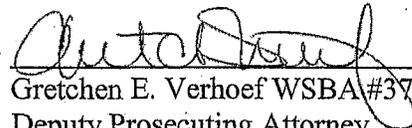
conference, or was unable to otherwise meaningfully participate in the process and give his input. As in *Love*, this court should decline to assume facts unsupported by the record, and thus defendant's claims fail.

II. CONCLUSION

For the reasons stated above, the *Love* decision is dispositive of defendant's claims. It is on point and has clearly established that no court closure occurs where for cause challenges at a bench conference or preemptory challenges on a struck juror sheet are conducted, and thus, no error may be alleged upon these facts. Therefore, Petitioner's personal restraint petition as to these issues must be denied.

Dated this 15th day of September, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney


Gretchen E. Verhoef WSBA #37938
Deputy Prosecuting Attorney
Attorney for Respondent

ATTACHMENT A

FILED

MAR 26 2010

THOMAS R. FALLOQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE - RECORD OF JURORS (JYP)

Case No. 08-1-01641-3

Date: March 16, 2010

STATE OF WASHINGTON, Plaintiff VS. ALEKSANDR PAVLIK, Defendant

(Clerk's Date Stamp)

1	2	3	4	5	6
PAGEL, HOLLY	WALSH, DAWN	JOHNSON, SCOTT	POTTER, JONATHAN	MOSLEY, COLETTE	ANDERSON, GARY
7	8	9	10	11	12
ALVERNAZ, DARYL	PRENTIS, MARY LOU	MULLIN, THOMAS	SULLIVAN, CARLA	BAUMGARTEN, SHANE	FILLMORE, BRADLEY
APPROVED:				ALTERNATE	ALTERNATE
Attorney for the Plaintiff: _____				HULT, MARY	DIETRICH, CATHLEEN
Attorney for the Defendant: _____					

JUDGE LEVEQUE

WORKING COPY

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE - RECORD OF JURORS (JYP)

Case No. 08-1-01641-3

Date: March 16, 2010

(Clerk's Date Stamp)

STATE OF WASHINGTON, Plaintiff VS. ALEKSANDR PAVLIK, Defendant

1	2	3	4	5	6
MONTGOMERY, CAROL	WALSH, DAWN	WALLACE, WILLIAM	BACHELLER, GERRI	SCOTT, JENNIFER	ANDERSON, GARY
Maspin, Carol #16		Reed, Corissa #20	Peller, Braden #21	Greagrey, Ruth #19	
Pogel, Holly #23		Johnson, Scott #26		Mosley, Collette #27	
7	8	9	10	11	12
ALVERNAZ, DARYL	HARDY, KASHEEN	MULLIN, THOMAS	BARTON, BETH	TRIBER, RAMONA	FILLMORE, BRADLEY
	Prentiss, Mary #13		King, Betty #14	Alpert, Terry #18	
			MacPhee, Debra #27	Baumgarten, Shara #32	
			Sullivan, Carla #28		
APPROVED:				ALTERNATE	ALTERNATE
Attorney for the Plaintiff: <i>[Signature]</i>				Nutt, Mary #29	Dietrich, Cathleen #30
Attorney for the Defendant: <i>[Signature]</i>					

P4 - WAIVE
 P5 - WAIVE
 P6 - WAIVE
 PA1 - WAIVE

DL - WAIVE
 DAI - WAIVE

JUDGE LEVEQUE

JuryMan

Trial Panel Report

Judge Jerome J Leveque
STATE V PAVLIK on 03/16/2010 at 09:30 AM

#	Juror #	Juror Name	Remarks
13	2009202071	PRENTISS, MARY LOU	
14	2009186224	KING, BETTY JANE	
15	2009005695	ALMEDA, BETTY A C	
16	2009221532	MASGAI, GERALD D	
17	2009048400	BURTON, SUSIE JO C	
18	2008173685	HURST, TERRY JEANETTE	
19	2009129916	OREAGREY, RUTH A	
20	2008289161	REED, CORISSA N	
21	2009281049	POTTER, JONATHAN	
22	2009024259	BAUMGARTEN, SHANE DAVID	
23	2009266208	PAGEL, HOLLY BRANDI	
24	2009245978	MOSLEY, COLETTE ANN	
25	2009249965	MURRAY, THOMAS O C	
26	2009474636	JOHNSON, SCOTT R	
27	2009214886	MAGPHEE, DELORA FERLEE	
28	2009342845	SULLIVAN, CARLA M	
29	2009463761	HULT, MARY L	
30	2009029479	DIETRICH, GATHLEEN RAE	
31	2009288076	RAY, CORY D	
32	2009184192	KERN, LORETTA JEAN	
33	2009125289	GODDERZ, ANDREW NEAL	

Date Printed Tuesday, March 16, 2010 at 09:21 AM

Page 1 of 2

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Trial Panel Report**Judge Jerome J Leveque
STATE V PAVLIK on 03/16/2010 at 09:30 AM**

#	Juror #	Juror Name	Remarks
34	2009029720	BISHOP, EARL FRANK	
35	2009150540	HENSLEY, GEOFFREY ROSS	
36	2009094882	DWYER, MICHAEL ALAN	
37	2009177705	JORDAN, JADE ANDRAYA	
38	20090848530	TAPPER, ROBERT DANA	
39	2009215885	MAHONEY, BONNIE J	
40	2009060743	CHRISTIANSEN, VALERIE ANN	
41	2009315544	SEARLS, DRU FORREST	
42	2009377160	WHITE, JANET L	
43	2009033421	BOLEY, COLIN W	
44	2009102564	EVANS, IRENE JUNE	
45	2009209837	LOOMIS, VICKI K	
46	2009210703	LOURDEAU, KYLE DAVID	

*** END OF REPORT ***

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

In re: Personal Restraint Petition of

ALEKSANDR V. PAVLIK,

Petitioner,

NO. 31227-5-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 15, 2015, I e-mailed a copy of the Second Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Neil Martin Fox
nf@neilfoxlaw.com

9/15/2015

(Date)

Spokane, WA

(Place)

Crystal McNeese

(Signature)

SPOKANE COUNTY PROSECUTOR

September 15, 2015 - 8:40 AM

Transmittal Letter

Document Uploaded: 312275-Supp Br of Resp Pavlik 312275.pdf
Case Name: Personal Restraint Petition of Aleksandr V. Pavlik
Court of Appeals Case Number: 31227-5
Party Represented: Respondent
Is This a Personal Restraint Petition? Yes No
Trial Court County: Spokane - Superior Court # 08-1-01641-3

Type of Document being Filed:

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- Statement of Arrangements
- Motion: _____
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- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Comments:

Second Supplemental

Proof of service is attached and an email service by agreement has been made to nf@neilfoxlaw.com and scaappeals@spokanecounty.org.

Sender Name: Crystal M Mcnees - Email: scaappeals@spokanecounty.org