

No. 93038-4

February 17, 2015

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

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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IN THE MATTER OF THE PERSONAL RESTRAINT PETITION OF:

ALEKSANDR V. PAVLIK,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT  
PURSUANT TO CLERK'S LETTER OF JANUARY 27, 2014**

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The court has authorized the filing of supplemental briefing regarding the applicability of *In re Coggin*, \_\_ Wn.2d \_\_, 340 P.3d 810 (2014), and *In re Speight*, \_\_ Wn.2d \_\_, 340 P.3d 207 (2014).<sup>1</sup>

### SUPPLEMENTAL BRIEF

*Coggin, supra*, like this case, involves a personal restraint petition. In *Coggin* and *Speight* our State Supreme Court confirmed that a personal restraint petitioner must establish substantial and actual prejudice even for structural error, which in a direct appeal may require reversal without a showing of prejudice.<sup>2</sup> Here, Petitioner Pavlik claims the challenge of one juror for cause and the agreed juror hardship exemptions occurring at a recorded bench conference violated his right to a public trial. However, the facts of the case do not establish any actual and substantial prejudice resulted from this process.

All questioning of the jurors occurred in open court. RP 3-106 (Voir Dire). Only the *agreed* to challenges for cause and *agreed* to hardship challenges occurred at the bench.<sup>3</sup> The only juror challenged for

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<sup>1</sup> *Coggin* \_\_ Wn.2d \_\_, 340 P.3d 810 (2014), and the companion case of *In re Speight*, \_\_ Wn.2d \_\_, 340 P.3d 207 (2014), were filed November 11, 2014.

<sup>2</sup> In *Coggin*, the Court discussed the effect of interviewing 12 jurors in chambers, and decided “[t]his private questioning perhaps worked to benefit *Coggin* by protecting his right to a fair trial by an impartial jury. Under these circumstances, requiring a showing of prejudice is consistent with the general rule applicable to personal restraint petitions.” *In re Coggin*, 340 P.3d 810, 814 (2014).

<sup>3</sup> RP 103-104 Challenges.

cause was juror no. 11. That juror 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 (Defendant's attorney reluctant to keep juror 11 on the panel, believing juror no. 11 might make her decision "based on who she's going to feel sorry for so I don't know."). Regarding the hardship challenges, 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. Juror 1 had to be in Seattle. RP 61-63. Juror 17 was previously excused on the upcoming Thursday because juror 17's mother was having a bone marrow biopsy. RP 59-60. Juror 38 had to be in Lewiston, Montana, on a prearranged musical obligation wherein the juror was the conductor. RP 63. Juror 40 was going to Disneyland. RP 63.

Here, as in *Coggin*, the facts do not support a conclusion that Petitioner was substantially prejudiced by the bench conference. A Defendant is entitled to a jury that will be able to attentively listen, be unbiased, and, importantly, be able to finish his trial. All this was requested by or agreed to by his attorney. It was all for the defendant's benefit. No prejudice has been shown.

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); *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007). This requirement is “necessary to preserve the societal interest in finality, economy, and integrity of the trial process. It also recognizes that the petitioner has had an opportunity to obtain judicial review by appeal.” *Woods*, 154 Wn.2d at 409. Actual prejudice must be determined in light of the totality of circumstances. *In re Pers. Restraint of Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985). The ultimate question in determining whether actual prejudice exists is whether the error “so infected petitioner's entire trial that the resulting conviction violates due process.” *Music*, 104 Wn.2d at 191. An error warrants relief when the reviewing court has a “ ‘grave doubt as to the harmlessness of an error.’ ” *In re Pers. Restraint of Sims*, 118 Wn.App. 471, 477, 73 P.3d 398 (2003) (quoting *In re Pers. Restraint of Smith*, 117 Wn.App. 846, 860, 73 P.3d 386 (2003), overruled on other grounds by *In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 119 P.3d 816 (2005)). Moreover, a criminal defendant is not entitled to any particular juror; he is entitled to an impartial jury. *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995); *State v. Phillips*,

65 Wash. 324, 327, 118 P. 43 (1911). Pavlik has not demonstrated how the release of any juror impacted his right to an impartial jury, nor does any such prejudice appear in the record.

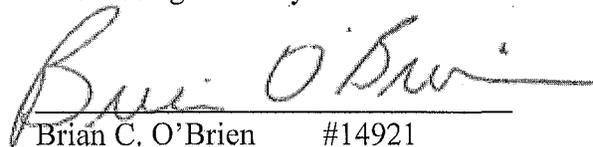
Without a showing of actual and substantial prejudice, the personal restraint petition must be denied. *Coggin, supra.*

### CONCLUSION

For the reasons stated above, *Coggin* is directly on point and has established the standard of review for a personal restraint petition claiming an open court violation. Because there was no prejudice, the defendant's personal restraint petition must be denied.

Dated this 17 day of February, 2015.

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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

(Consolidated with 31338-7-III)

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 17, 2015, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Neil M. Fox  
nf@neilfoxlw.com

and mailed a copy to:

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2/17/2015

(Date)

Spokane, WA

(Place)

Crystal McNeese

(Signature)

**SPOKANE COUNTY PROSECUTOR**

**February 17, 2015 - 11:42 AM**

**Transmittal Letter**

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Case Name: State of Washington v. 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

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**Comments:**

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to [nf@neilfoxlaw.com](mailto:nf@neilfoxlaw.com) and [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org).

Sender Name: Crystal M Mcnees - Email: [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org)