25-No. 6225 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED
SEP 29 2025
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SUPREME COURT, U.S.

ALEJANDRO PEÑA SALVADOR PETITIONER
(Your Name)

VS.

State of Washington — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☑ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):
Washington Court of appeals NO. 84552-7-I
7pg ORDER attached.

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☑ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: RAP 16.15; RCW 10.73.150; RCW 10.101.050 = Indigent Counsel, or

☑ a copy of the order of appointment is ~~appended.~~ attached to this form

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FILED
5/19/2023
Court of Appeals
Division I
State of Washington

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF: ALEJANDRO PEÑA SALVADOR, Petitioner.	No. 84552-7-I ORDER PARTIALLY DISMISSING PETITION, APPOINTING COUNSEL, AND REFERRING TO A PANEL

A jury convicted Alejandro Peña Salvador of two counts of rape of a child in the second degree, one count of child molestation in the first degree, and one count of child molestation in the third degree in King County Superior Court No. 18-1-03784-7 KNT. In a published opinion, this court affirmed Peña Salvador's convictions but remanded for minor corrections to his sentence. State v. Peña Salvador, 17 Wn. App. 2d 769, 487 P.3d 923, review denied, 198 Wn.2d 1016, 495 P.3d 844 (2021), overruled on other grounds by State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022). Peña Salvador then filed this timely personal restraint petition challenging his judgment and sentence.

BACKGROUND

The following relevant facts are taken from the opinion of this court affirming Peña Salvador's conviction on direct appeal:

> At the beginning of jury selection, prospective jurors completed a questionnaire regarding the general subject matter of the case. Based on their answers, many of the jurors were called in for individual questioning. Juror 44 was one of the jurors questioned individually about his questionnaire responses. In response to a question asking if there was any reason that he would be unable to be fair and impartial

81915-2

to both sides in a case involving an accusation of sexual abuse of a child, he indicated that he was not sure that he could be impartial: "As a school bus driver, I think of the students as my kids and [grandkids]." Defense counsel asked if he had formed an opinion on Peña Salvador's guilt when he heard the charges, and juror 44 said that he had not, but stated, "I don't know if I can be impartial, and that would be unfair to your client." He said that he "would like to think [he is] an impartial person" but referenced the unconscious bias video that had been shown to the venire and stated, "I believe in the system. I don't want this gentleman to have me have bias against him from the get-go." Defense counsel asked, "[A]re you telling me that you think that you would be biased against my client?" and the prospective juror responded, "I'm afraid I might be . . . and I'm just being honest with you."

The prosecutor then asked what bias he was concerned about, and juror 44 responded that he was worried that the nature of the charges would induce him to make an incorrect decision. The prospective juror was not sure how to answer the question of whether he would be able to presume the defendant innocent. He stated that he believed it was possible for children to both lie and tell the truth about such allegations, and was not sure that he could evaluate the credibility of witnesses: "Sometimes I've had the wool pulled over my eyes by people I've trusted." He believed that he could follow the court's instructions on the law and on which evidence to consider. The prosecutor asked, "[I]s there anything, other than your regular interaction with children and family that would make you think that you would rush to judgment on a case like this?" and the juror responded, "No, because I believe in the system." Juror 44 had served on a jury before, and the prosecutor inquired about his understanding of the system:

> [PROSECUTOR]: But, like you said, you understand the process and what's necessary to sit on a jury and to keep an open mind throughout the course of trial?
>
> JUROR: Yes.
>
> [PROSECUTOR]: Is that something, even with the charges, that you think you could try to do?
>
> JUROR: Yes, I think I could.
>
> Defense counsel proceeded to ask a number of follow-up questions:
>
> [DEFENSE COUNSEL]: Sir, have you—after hearing the allegations—well, not—have you formed an opinion about whether or not you feel my client is guilty or innocent?

> JUROR: Oh, no, that's—that's why I'm afraid if my bias gets in. I don't want to especially go conviction style if I don't feel he's guilty of it. I don't want me, my possible—and I don't know where it sits. I don't want to make a mistake.
>
> [DEFENSE COUNSEL]: Do you think that you would give more weight to the victims, since you're around children and you interact with them all the time?
>
> JUROR: I'm more afraid of what evidence might be brought—
>
> [DEFENSE COUNSEL]: Out against—
>
> JUROR: —and it would be upsetting.
>
> [DEFENSE COUNSEL]: Okay.
>
> JUROR: But, no, I would—I would listen to both sides.
>
> [DEFENSE COUNSEL]: But you do have a question in your mind whether or not you could be fair or impartial, does that still stand?
>
> JUROR: I think so.

Defense counsel moved to exclude the prospective juror for cause. The court denied the motion, explaining, "[H]e doesn't want to make a mistake. The conscientiousness of this juror is exactly what we look for in a juror. He is concerned. He is aware of implicit bias and is conscientiously making efforts to keep that in check." The juror served on the jury and deliberated.

On direct appeal, Peña Salvador argued that he did not receive a fair trial because the court denied his request to dismiss juror 44 for cause, therefore allowing a biased juror to deliberate. Because this court concluded that Peña Salvador did not show juror 44 expressed actual bias, it affirmed the jury verdict. Peña Salvador, 17 Wn. App. 2d at 772.

DISCUSSION

To successfully challenge a judgment and sentence by means of a personal restraint petition, a petitioner must establish either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that

81915-4

inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

Right to Fair Trial

In this petition, Peña Salvador again argues that the seating of juror 44 violated his right to a fair trial by an impartial jury.[1] But "[a] personal restraint petition is not meant to be a forum for relitigation of issues already considered on direct appeal." In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 491, 965 P.2d 593 (1998). A petitioner may not renew issues that were considered and rejected on direct appeal unless the interests of justice require relitigation of those issues. In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). A petitioner may not sidestep this rule by recasting an issue under a different name or legal theory. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 720, 16 P.3d 1 (2001).

Peña Salvador asserts that this court incorrectly held that juror 44 did not demonstrate actual bias. But he shows no grounds to relitigate this question. To the contrary, our Supreme Court recently held that "if a party allows a juror to be seated and does not exhaust their peremptory challenges, then they cannot appeal on the basis that the juror should have been excused for cause." Talbott, 200 Wn.2d at 747-48. If this court were to reconsider this issue, it would be bound to follow Talbott and refuse to reach the merits of Peña Salvador's challenge to the seating of juror 44. This claim must be dismissed.

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[1] Peña Salvador initially asserted that jurors 10, 14, and 23 should also have been removed for actual bias and that his trial counsel was ineffective for failing to do so. However, in reply, Peña Salvador concedes that those three jurors were in fact removed with peremptory challenges and did not sit on the jury.

§1915-5

Ineffective Assistance of Trial Counsel

Peña Salvador argues that his trial counsel provided ineffective assistance by failing to use a peremptory strike on juror 44.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant in a criminal proceeding is guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate both (1) that counsel's representation fell below an objective standard of reasonableness and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to establish either element, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A reviewing court "approaches an ineffective assistance of counsel argument with a strong presumption that counsel's representation was effective." In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). To rebut this presumption, the defendant must establish that there are no legitimate strategic or tactical reasons explaining counsel's performance. McFarland, 127 Wn.2d at 335-36.

Peña Salvador's ineffective assistance of counsel claim turns on his assertion that prejudice must be presumed because juror 44 was actually biased. See State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) ("[t]he presence

81915-6

of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice."). But because this court previously determined on direct appeal that juror 44 did not demonstrate actual bias, there is no basis upon which to presume prejudice.

In addition, juror 44's participation in general voir dire after the challenge for cause was denied suggested that he was capable of being fair and impartial.

> In context, the prospective juror's comments appear to show that he was aware of the possibility of unconscious bias, was worried about hearing evidence that might be upsetting, and was concerned about his ability to evaluate the evidence correctly. Although he initially expressed some preconceived opinions and potential partiality, he affirmatively stated that he understood the presumption of innocence and that he would listen to both sides.

Salvador, 17 Wn. App. 2d at 786. Peña Salvador has not overcome the presumption of effective performance or established a reasonable probability that the verdict would have been different had juror 44 been removed. His ineffective assistance of trial counsel claim must also be dismissed.[2]

Motion for New Counsel

Peña Salvador also argues that the trial court erred in denying his motion to appoint new counsel. He further contends that his appellate counsel provided ineffective assistance by failing to raise this claim on appeal. Because these claims

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[2] Peña Salvador additionally claims that relief is warranted based on the doctrine of cumulative error. "Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). But only one alleged trial error is nonfrivolous, so Peña Salvador is not entitled to relief under the cumulative error doctrine.

8/9/15-7

are not frivolous, they shall be referred to a panel of judges for determination on the merits.

CONCLUSION

Only a portion of Peña Salvador's petition raises a nonfrivolous issue that should be referred to a panel for determination on the merits. Accordingly, the petition must be dismissed under RAP 16.11(b) as to all claims except Peña Salvador's claims that that the trial court erred in denying his motion to appoint new counsel and that his appellate counsel provided ineffective assistance by failing to raise that claim on appeal.

Now, therefore, it is hereby

ORDERED that this personal restraint petition is dismissed under RAP 16.11(b) except Peña Salvador's claims that the trial court erred in denying his motion to appoint new counsel and that his appellate counsel provided ineffective assistance by failing to raise that claim on appeal, which are referred to a panel of this court for review and determination; it is further

ORDERED that Washington Appellate Project is appointed as counsel for Peña Salvador; and it is further

ORDERED that the clerk of this court shall set a supplemental briefing schedule and a date for consideration of these claims on the merits.

Smith, C.J.

Chief Judge

81915-8