NO. 268306-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON

v.

DALLIN DAVID FORT

IN THE MATTER OF THE PERSONAL RESTRAINT PETITION OF:

DALLIN DAVID FORT,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER FOR PERSONAL RESTRAINT PETITION

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STATEMENT OF FACTS

Dallin Fort was convicted of felony crimes in Spokane Superior Court on April 3, 2006. (CP 3-5). He filed an appeal from this conviction on April 21, 2006. (CP 25). This appeal raised several issues, including a pro se argument of ineffective assistance of counsel. Along with several other issues, he claimed counsel was ineffective for allowing a juror, who worked as a sexual assault victims advocate, to remain on the jury. This juror was one of several who was talked to privately in chambers in a closed courtroom setting. *State v. Fort*, No. 25139-0-III (Wn. App. 9/4/07; unpublished) at p. 7. The pro se ineffective assistance of counsel claim, in this first direct appeal, did not specifically allege that trial counsel was ineffective in allowing the courtroom to be closed in violation of the State and Federal Constitutions, but the ruling of the court did note that this juror was questioned in chambers, not in open court. Mr. Fort now expands his open and still pending PRP to include the allegation that appellate counsel was ineffective in failing to raise the public trial violation in the first direct appeal.

When the decision in the first direct appeal was issued on September 4, 2007, the defendant/appellant had already filed his Personal Restraint Petition on June 11, 2007. This petition asked for a new trial because of the public trial violation. The defendant filed a PRP, but did not in addition, supplement his appeal. Mr. Fort had

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been represented at trial by Assistant Public Defender Alan D. Rossi. Mr. Rossi filed a Notice of Appeal on behalf of Mr. Fort. (CP 25). Mr. Rossi designated the portions of the transcript that would be transcribed for the appeal. (1/25/08 Sentencing Hearing, RP 15). Mr. Rossi did not designate the voir dire process to be transcribed. (RP 15).

David L. Donnan of the Washington Appellate Project in Seattle was appointed by the Court of Appeals to prosecute Mr. Fort's appeal. Upon reviewing the trial court record, Mr. Donnan recognized that the jury voir dire transcript had not been requested and moved to supplement the record to include this transcript. (RP 15). The supplemental transcript, however, was not received until after Mr. Fort's opening brief had been filed with this Court.

The appellate counsel was aware of the public trial violation because he had ordered the voir dire transcription for this very reason. The direct appeal attorney was also aware of the public trial violation because he knew of the PRP when it was filed on June 11, 2007. Nevertheless, appellate counsel did not supplement his brief and assign error to the violation of the state and federal constitutions public trial rule. Had he done so, Mr. Fort would have received a new trial. There was no tactical benefit or strategy in not raising this issue. This failure was ineffective assistance of counsel.

After the receipt of the voir dire transcript, Mr. Fort filed a Personal Restraint Petition on June 11, 2007, which was based on the supplemental transcript and raised the issue of whether Mr. Fort had been denied his right to a public trial. (RP 15). Mr.

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Fort filed the PRP knowing of the precedent of *In Re Orange*, 152 Wn.2d 795 (2004), which ruled that a public trial error is a structural error and presumptively prejudicial. *Orange* ruled that an appellant counsel's failure to raise this issue on appeal was both deficient and prejudicial. Mr. Fort believed, reading *Orange*, that by filing a PRP, there would be a presumption of prejudice and a new trial for the public trial violation.

Based on the state of the law on June 11, 2007 (i.e., *In Re Orange*), Mr. Fort was assured that filing a PRP would result in a finding of presumed prejudice and give him a new trial. Mr. Fort's PRP has never been decided. It was stayed awaiting decisions from the State Supreme Court on the public trial issue. The Supreme Court has now ruled on these issues and Mr. Fort now supplements his pending PRP with a claim of ineffective assistance of counsel for failing to raise the public trial violation by supplemental brief.

To establish ineffective assistance of counsel, the petitioner must show that counsels performance was deficient and that the deficiency prejudiced the defendant. *In re Morris*, 176 Wn.2d 157 (2012). The failure of counsel on the first direct appeal to raise the public trial violation is the deficiency and under *Orange* and *Morris*, this would create presumptively prejudicial error. As stated in *Morris*, "no clearer prejudice could be established." *Id.* at 167.

ISSUES FOR REVIEW

1. Was *Coggin* wrongly decided and a violation of both the Federal and State

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Constitutions?

2. A petitioner who claims ineffective assistance of appellate counsel under *In Re Orange* and *In Re Morris* for failure to raise the public trial violation on appeal, need not show actual and substantial prejudice.

3. Should this petitioner be granted a new trial because he timely filed, via PRP, complaints about his failure to receive a public trial during his appeal and when raised, *In Re Orange* had established that there would be a presumption of prejudice on this issue on collateral review?

ARGUMENT

ARGUMENT RE: ISSUE NO. 1

ON December 11, 2014, the Washington State Supreme Court decided *In Re Coggin*, ___ Wn.2d ____ 340 P.3d 810 (2014) and *In Re Speight*, ___ Wn.2d ____ 340 P.3d 207 (2014). *Coggin* and *Speight* present the same central issue, but were not consolidated. *Coggin* provides the in-depth analysis of the common issue and *Speight* applies the same analysis. (*Coggin* 340 P.3d at 810 fn 1). These cases ruled that if a public trial violation is raised for the first time on collateral attack, that the petitioner must show actual and substantial prejudice flowing from his denial of a public trial.

The petitioner argues that *Coggin* was incorrectly decided and that the dissenting opinion is a correct analysis of the Federal and State Constitutions and that violation of the public trial right is a violation of the public's and/or the defendant's right to a public trial under Article 1, section 22 of the Washington State Constitution (in criminal prosecutions the accused shall have the right . . . to a speedy public trial)

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and Article 1, section 10 of the Washington State Constitution (justice in all cases shall be administered openly) and the United States Constitution Amendment IV (in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial). These constitutional violations are structural errors, those mistakes that require automatic reversal. *State v. Frost*, 160 Wn.2d 765, 779-782 (2007).

The lead opinion in *Coggin* stated, "while, as mentioned above, we have carved out an exception and will presume prejudice for petitioners who allege a public trial right violation by way of an ineffective assistance of appellate counsel claim, we refuse to extend this exception further.

The *Coggin* Court continued to allow an exception to the actual and substantial prejudice proof requirement. *Coggin* continued the presumption of prejudice standard in PRP's that raise the public trial violation via a claim of ineffective assistance of appellate counsel as outlined in *Orange* and *Morris*. This *Morris/Orange* exception to the general rule of requiring the petitioner to prove by a preponderance of the evidence actual substantial prejudice substitutes a presumption of prejudice if petitioners allege their public trial right violation by way of an ineffective assistance of counsel claim.

In *In Re Morris*, 176 Wn.2d 157 (2012), the court considered, on collateral attack, via PRP, a claim that Mr. Morris' appellate counsel was ineffective for failure to raise a public trial violation on direct appeal. The Washington State Supreme Court ruled on the PRP stating:

> Here, there is little question that the second prong of this test [prejudice] is met. In [*State v.*] *Wise*[, 176 Wn.2d 1,

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> 288 P.3d 1113 (2012)] and [*State v.*]*Paumier*, [176 Wn.2d 29, 288 P.3d 1126 (2012)] we clearly state that a trial court's in-chambers questioning of potential jurors is structural error. Had Morris's appellate counsel raised this issue on direct appeal, Morris would have received a new trial. *See* [*In r Pers. Restraint of*] *Orange*, 152 Wn.2d (795,] 814[, 100 P.3d 291 (2004) (finding prejudice where appellate counsel failed to raise a courtroom closure issue that would have been presumptively prejudicial error on direct appeal). No clearer prejudice could be established.

If the Court declines to allow Mr. Fort to expand his PRP to claim not just a violation of his public trial right, but also an ineffective assistance of appellate counsel claim for failure to raise this public trial violation, Mr. Fort argues that his public trial violation should be considered to have been raised in his first direct appeal. The Court had this claim under consideration, via the PRP, during the first direct appeal and therefore the rules of presumptive prejudice on direct appeal should apply in this case. In addition, Mr. Fort should not be penalized by a need to show actual and substantial prejudice because when he filed his PRP alleging a public trial right, the *In Re Orange* precedent taught him that his public trial violation would be analyzed under the presumptive prejudice standard. Under these circumstances, to require the "impossible" task of showing actual and substantial prejudice would be unjust.

CONCLUSION

Petitioner Dallin Fort requests that he be given a new trial in this case for the

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following reasons:

1. The first trial was not a public trial. It was conducted in violation of Article 1, section 10 and section 22 of the Washington State Constitution and the 6th Amendment of the United States Constitution.
2. A public trial violation in the State of Washington was considered to be structural error and prejudice to the defendant was presumed to exist until the December 11, 2014 decisions in *Coggin* and *Speight*.
3. The Washington Supreme Court had found presumptive prejudice in *In Re Orange*, 152 Wn.2d 795 (2004) in identical circumstances on November 10, 2004. This was two and one-half years before Dallin Fort filed his PRP.
4. Dallin Fort filed a PRP alleging a public trial violation, but appellate counsel failed to supplement his first direct appeal with a claim of a public trial violation. He may have believed that under the *In Re Orange* ruling of presumptive prejudice, the type of pleading (appeal v. PRP) did not matter, but this failure is still deficient. If appellate counsel had raised the public trial issue, Mr. Fort would get a new trial and no clearer prejudice could be established.
5. Division III of the Court of Appeals had Dallin Fort's public trial objections under consideration in the PRP, 3 months before it ruled on the first appeal.
6. The *Coggin* decision states, "We have carved out an exception and will presume prejudice for petitioners who allege a public trial right violation by way of an ineffective assistance of appellate counsel claim, we refuse to extent

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this exception any further." Dallin Fort is a petitioner who alleges a public trial right violation by way of an ineffective assistance of counsel claim and he made his claim of a public trial violation before the appellate court ruled on his appeal. He now claims, in this PRP, both the public trial violation and ineffective assistance of counsel claim.

7. The *Coggin* Court stated, . . . "after a conviction becomes final and a defendant raises a public trial right violation on collateral review, the social costs . . . are much greater." Dallin Fort's appeal was not decided, let alone final, when he raised, by PRP, the public trial violation.

8. The *Coggin* Court stated, "the interests of finality and the process underlying appellate review, require us to draw the line at some point." Drawing the line to sever Mr. Fort's new trial is too harsh, given the timing of his raising this issue and the state of the law (*In Re Orange*) when it was raised.

DATED this 3rd day of April, 2015.

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COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DALLIN DAVID FORT, Petitioner.	COA No. 268306-III Superior Court Cause No. 05-1-00950-1 AFFIDAVIT OF MAILING ***Petitioner's Supplemental Brief***

STATE OF WASHINGTON)
ss.
COUNTY OF BENTON)

JAMES E. EGAN, being first duly sworn, upon oath deposes and says: That he is now and at all times hereinafter mentioned was a citizen of the United States and a resident of Benton County, State of Washington, over the age of twenty-one years; that on the 3rd day of April, 2015, he mailed a copy of Petitioner's Supplemental Brief relevant to the above entitled matter, sealed the same and addressed to Brian Clayton O'Brien, Spokane County Prosecuting Attorney, 1100 W. Mallon Ave., Spokane, WA 99260, Carl Edward Hueber, Winston & Cashatt, 601 W. Riverside Ave., Ste 1900, Spokane, WA 99201 and Dallin David Fort, DOC #891250, c/o Airway Heights Correction Center, P.O. Box 2049, MB 63U, Airway Heights, WA 99001 and on said date caused the same to be deposited Legal Messenger and U.S. 1st Class Mail, respectively, in the City of Kennewick, County of Benton, State of Washington.

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DATED this 3rd day of April, 2015.

JAMES E. EGAN

SUBSCRIBED and SWORN to before me this 3rd day of April, 2015.

JACQUIE D. LINTON
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
MAY 1, 2016

NOTARY PUBLIC in and for the State of Washington residing at Pasco
My Commission Expires: 05/01/16

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