26830-6-III
(Consolidated with 26204-9-III)

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

v.

DALLIN DAVID FORT

IN THE MATTER OF THE PERSONAL RESTRAINT PETITION OF:

DALLIN DAVID FORT,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT PURSUANT TO CLERK'S LETTER OF FEBRUARY 19, 2015

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

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

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The court has authorized the filing of supplemental briefing regarding the applicability of *State v. Frawley*, 181 Wn.2d 452, 334 P.3d 1022 (2014), *In re Coggin*, __ Wn.2d __ , 340 P.3d 810 (2014), and *In re Speight*, __ Wn.2d __ , 340 P.3d 207 (2014).

I. SUPPLEMENTAL BRIEF

APPLICATION REGARDING DIRECT APPEAL

Frawley has little application in the instant case. It applies only to direct appeals from the trial wherein the allegation of the open court violation occurred, or as in the companion case of *State v. Applegate*, from a resentencing where the resentencing was the *situs* of the open court violation. That is not the case here. Petitioner Fort already had his direct appeal of his trial issues and original sentencing. *State v. Fort*, 140 Wn. App. 1023 (2007) (unpublished). In his previous direct appeal, he raised issues relating to prosecutorial misconduct, ineffective assistance of counsel, and the sufficiency of the evidence. *Id.* He also raised issues regarding his sentencing. This Court held: "Dallin David Fort appeals his two first degree child rape convictions. We agree with Mr. Fort that the court erred in refusing his same criminal conduct argument at sentencing. We reject his other error assignments and his pro se additional grounds for review. Accordingly, *we affirm and remand for resentencing*." The convictions were affirmed. The remand was for *sentencing* purposes

only. The opinion was filed September 4, 2007. No. 25139-0-III. The mandate issued December 4, 2007.

Petitioner Fort was resentenced on January 25, 2008. He filed an appeal of his resentencing on February 5, 2008. He appeals *nothing* relating to the sentence imposed. He does not claim any public trial violations occurred at his resentencing, as occurred in *Applegate*, *supra*. Instead, he attempts to raise public trial issues which could have been raised on the first appeal,[1] and which may not be raised in a second appeal. *See* RAP 2.5(c)(1); *State v. Kilgore,* 167 Wn.2d 28, 216 P.3d 393 (2009) ("a case has no remaining appealable issues where an appellate court issues a mandate reversing one or more counts and affirming the remaining count[s], and where the trial court exercises no discretion on remand as to the remaining final counts." *Id.* at 37); *State v. Parmelee*, 172 Wn. App. 899, 292 P.3d 799, 801, *review denied,* 177 Wn.2d 1027, 309 P.3d 504 (2013). As stated in *State v. Sauve,* 100 Wn.2d 84, 87, 666 P.2d 894 (1983), "[T]he general rule is that a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal." Our appellate courts have been committed to this rule

[1]Mr. Fort confesses that the law relating to open court violations predated his first appeal. *See* Brief of Appellant, pp. 8-10, citing *State v. Marsh*, 126 Wash. 142, 217 P. 705 (1923); *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995); *In re Personal Restraint of Orange,* 152 Wn.2d 795, 100 P.3d 291 (2004); *Press–Enter. Co. v. Superior Court,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

that questions determined on appeal, or questions that might have been determined had they been raised, will not be considered on a subsequent appeal of the same case. *See, Davis v. Davis,* 16 Wn.2d 607, 609, 134 P.2d 467 (1943). *Accord, State v. Bauers,* 25 Wn.2d 825, 830, 172 P.2d 279 (1946); *State v. Jacobsen,* 78 Wn.2d 491, 477 P.2d 1 (1970); *State v. Bradfield,* 29 Wn. App. 679, 630 P.2d 494 (1981).

His personal restraint petition is the correct avenue for addressing issues not raised in his original appeal. *Suave*, 100 Wn.2d at 87. This includes constitutional issues that could have been raised in the first appeal.

Personal Restraint Petition

Our Supreme Court recently confirmed that a personal restraint petitioner must establish actual prejudice when raising claims relating to allegations of an open court violation. *In re Coggin, supra. Coggin* seems on point with the present case. Coggin, like Petitioner Fort, was convicted of rape.[2] In *Coggin*, as here, in-chambers voir dire was at issue. *Coggin*, at 811, (¶3).

Here, as in *Coggin*, the facts do not support a conclusion that Petitioner was substantially prejudiced by the in-chambers voir dire. A defendant is entitled to a jury that that is not predisposed to convict him.

[2]Coggin's rapes involved two sisters, Fort's two convictions were for two counts of first degree rape of a child.

To that end, in a sex case, a defendant would want to determine if jurors that had prior experiences with rape and abuse were biased. That was the purpose in this particular case for conducting individual in-chambers voir dire. Even Mr. Fort recognized the importance of juror candor, to the point that he requested that he not be present for the questioning, so that the jurors would openly communicate with his attorney.

> Well, the reason why I decided not to be present was because I felt if the people had experiences, that if I was in the room with them, then they would know what I have been charged with and that they would feel uncomfortable with me in the room and wouldn't be as open to discussion with my attorney.

RP 41, ll. 4-10.

There was no objection to this process by the defense. No prejudice has been shown. The process only involved potential jurors that had responded in a two-question questionnaire that they had personal experiences in sexual abusive situations.[3] It cannot be said that this

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[3]The closure was narrowly tailored by the court to accommodate only those jurors who affirmatively answered one of the following questions:

> [F]irst ... is "Have you had any experience with a similar or related type of incident or with sexual abuse of any nature, whether as a witness, victim or one accused of any assault of a sexual nature. If so, explain."
>
> The second question says, "Have you had a family member, relative or close friend who has had any experience with a similar related type of incident or with sexual abuse of any nature, whether as a witness, victim or one accused of any assault of a sexual nature. If so, explain. Then if you wish to give us some information, you can do so on that line.

process was not highly beneficial to the defendant in his quest for a fair juror. The in-depth discussions his attorney engaged in with these potential jurors could not have been had in an open court setting where the discussions of such personal encounters and feelings would necessarily be stilted.

The insight this type of voir dire provides was best articulated by the Court when juror No. 26 was interviewed; while her responses themselves would not have removed her from the jury for cause, and where the prosecutor did not acquiesce in the removal, the judge removed the juror for cause, noting:

> THE COURT: Well, you know, one of the things I look at in these things is look at their body language and how they react. You know, in some cases, maybe somebody with this situation, you know, might be able to sit. But I think that I really got the sense that this is really a painful situation going on right now that she is still in the middle of living out, because of the whole dynamics with her mother's illness and having to have that contact with her, the whole situation with the step-father, the closeness with the sister, you know. I could see a lot of pain in her face. In some cases, maybe somebody with that history I think could be able to serve, but it just looks like this just really would weigh very heavy on her emotionally right now, given the whole dynamics of the family. So I will go ahead and excuse her.

RP 160, ll. 7-23.

> I am sure that you can appreciate the need for discussing these matters. But, also, we try to respect your privacy in these matters as much as we can.

RP 34-35, ll. 23-13.

Other jurors revealed very personal information that would not have been uncovered in a regular court room. Juror 46 revealed things in the chambers questioning regarding being abused that he had never told anyone other than his mother. RP 179. The trial court was able to ask him if the particular abuse involved penetration. RP 178.

Juror 4 informed the court that her niece had been raped, and was able to discuss the circumstances surrounding the abuse and the fact that the rape was not reported to the authorities.

Juror 6 had been sexually molested by a Boy Scout master while in the fourth grade. He had trusted the molester. He candidly stated he did not think he could be fair: "I don't know if he is guilty or not, but it is hard for me to be impartial if there is evidence pointing in that direction." RP 52. He thought the present case may hit "to close to home." *Id.* Juror 6 was excused. Juror 7's wife's best friend was a victim of sexual abuse as a child - it was her father. Juror 7 did not believe he could be impartial. He was excused. Juror 8 had a friend that was raped while attending university.

Juror 11 had an extensive discussion regarding his wife and step-daughter being victimized. RP 67-73. His wife was victimized from the age of seven through her teens. She later filed charges against her former husband for child molestation. Juror 11's step-daughter was 31 and "still

in a shell from this." RP 69, ll. 2-5. His wife was still haunted by her experiences. RP 69. Asked if he could be fair, he stated: "You know, I would like to think I can, but, to be honest with you, I really don't know, because the issue is too close to home." RP 72, ll. 2-7. His wife never got past it. He was released without objection.

Juror 12's ex-son-in-law was accused of sexual assault, an assault that was witnessed by his granddaughter. RP 74. His granddaughter was not doing well because of the incidents - she had been molested and her friend raped by her father while visiting her father. RP 75. Because of this, he disclosed that he could not be impartial. RP 77-78. He was excused.

Juror 13 had been sexually assaulted by her ex-husband and felt bad because she had not reported it. It was suspected that her son had been molested at day care. Because of this, she divulged that she could not treat the defendant as innocent until proven guilty. She was released. RP 79-86.

Juror 15 was abused as a child by her Godfather and by her babysitter. She was interviewed extensively by the judge and the attorneys regarding the incidents and how she felt about sitting on this type of case. RP 86-99.

Juror 19 revealed that when he was a teacher, a student reported that he had been raped by a fellow student to him. He also had a first cousin that had been assaulted by her father. RP 100-107.

Juror 20 had a daughter that was sexually abused by a family member. The two separate incidents occurred when she was two and four years of age. RP 110. Juror 20 had walked in on one of the assaults. The nephew was prosecuted. He had to write letters of apology when he was released. RP 110-119.

Juror 23 had a daughter that was in counseling for being abused by the juror's brother-in-law's son. The daughter did not disclose who had abused her. It had probably occurred when the daughter was five or six years of age. RP 118-130.

The step-daughter of Juror 25 was abducted from his home around 4:00 a.m., and raped, when the step-daughter was only four years old. RP 130. She had spent most of her life up to that point at the Shriners Hospital because she was disabled. RP 134. She was found in a dumpster by a mechanic where the perpetrator had left her. RP 133. The perpetrator was sent to prison. He had abused multiple victims ranging up to the age of 65 years of age. RP 138.

Juror 26 revealed that her older sister was raped by her step-father at the age of 16. In spite of this, her mother still lived with the rapist.

Juror 26 still visited her mother weekly, which often required her to be in proximity to her step-father. RP 153. Juror 26 was a retired elementary teacher that had dealt with kids that had been abused or raped. RP 150.

Juror 42 had a co-worker who was recently convicted in Idaho of, and was doing 15-25 years for, abusing his girlfriend's two daughters. RP 168-69. Because of his candor with the court when he expressed his concern that he could not be fair, believing the defendant was guilty, he was released. RP 174-75.

Juror 46 was abused more than once when he was nine or ten years of age. The abuse was committed by an adult neighbor. He was now twenty four years of age and had never revealed the abuse to anyone other than his mother prior to this juror service. RP 179. He was asked by the court whether the abuse he had suffered involved penetration. RP 176. Additionally, his little step-sister was molested by his uncle. RP 180. He entrusted that he did not believe he could be fair in this case and was released. RP 183-84.

Juror 47's foster-child was a victim of a sexual abuse. Separately, Juror 47's brother had been accused of abusing his own children. RP 185-194. Juror 49 had a friend that as a child was attacked in the woods. RP 195.

The trial court properly conducted individual in-chambers voir dire to the benefit of the defendant's right to a fair trial. It may be fanciful to believe that these jurors would have revealed this information to the world in the open court room. The potential for embarrassment and shame is obvious; few, if any, people want to divulge their past personal history of being sexually abused; in fact, many do not report the abuse.[4] A more personal and individualized voir dire taking place in a court's chambers – as opposed to the large and unrestricted public open courtroom setting – fosters the honest and open self-disclosure sought by the court and the defendant to ensure his fair trial rights.

The individual in-chambers voir dire was highly beneficial to the defendant. Some courts have recognized the need for and required individual voir dire in these types of sexual abuse cases.[5] Studies validate this more personal voir dire process. What seems intuitive is supported in David Suggs and Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis,* 56 Ind. L.J., Iss. 2, Art. 2 (1981).[6] (*Suggs* hereinafter). The individual private voir dire is more likely to establish

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[4]An average of 68 percent of sexual assaults went unreported to the police between 2008 and 2012. *See* Justice Department, National Crime Victimization Survey: 2008-2012.
[5]*See Commonwealth v. Flebotte,* 417 Mass. 348, 355, 630 N.E.2d 265 (1994). The Supreme Judicial Court has required judges, when requested, to "interrogate individually each prospective juror as to whether the juror has been a victim of a childhood sexual offense." *Id.* at 353. This interview generally takes place at a sidebar.
[6]Available at : http://www.repository.law.indiana.edu/ilj/vol56/iss2/2

honest self-disclosure.[7] The research supports this conclusion. (*See Suggs*, at 259-60 including footnotes 66-72 discussing research). This research also supports the conclusion that an individual interview taking place "away from the group is the best way to determine a person's opinions on a given issue because 'in the interest of bolstering the opinions of others, [individuals within a group] may make statements that deviate from the truth as they see it.'" *Suggs*, at 260-61. Indeed, the in-chambers voir dire system used in the instant case institutes many of the recommendations suggested in the conclusion of the Suggs report:

> There are several specific recommendations for revising the procedures used in conducting voir dire which could encourage self-disclosure among prospective jurors. First, emphasis should be placed on individual rather than group or individual-within-a-group questioning. Second, questioning should be conducted by attorneys rather than

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[7]As the Suggs report states:

> Both the group and the individual-within-a-group styles of questioning are grossly inadequate for producing honest self-disclosure because they engender conformity of responses. It seems intuitively obvious that when people are called for jury duty by a judicial summons, they feel a certain degree of anxiety at being removed from the context of their ordinary lives and ordered to perform a role which will have a significant effect on the lives of others. A variety of investigators find that anxious individuals have an increased need for affiliation while they are awaiting a threatening event. Many prospective jurors perceive interrogation in a public forum to determine their suitability as jurors to be such an event. In addition, conformity increases as the need for affiliation increases. Thus, even before the voir dire begins, there are socio-psychological factors at work which encourage group cohesiveness and conformity of response, thereby militating against honest self-disclosure.

Suggs, at 259-60 (footnotes omitted).

> by the judge. Third, the interviewer should conduct the interview from a distance of three to six feet from the jurors. Fourth, the questioning should take place in a smaller room than is traditionally employed, but should not result in crowding. And finally, the room where voir dire takes place should have a warmer and more intimate atmosphere than that of the cold, hard, ritualistic settings where it is presently conducted. Essentially, these recommendations urge the legal system to de-emphasize the adversarial approach to voir dire and to transform it into a more relaxed proceeding where free and open self-disclosure can take place.

Suggs, p. 268.

This process benefitted the petitioner by enabling him to dismiss potentially biased jurors from the panel.

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 Personal Restraint of Woods,* 154 Wn.2d 400, 409, 114 P.3d 607 (2005); *In re Personal 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 Personal 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 Personal Restraint of Sims,* 118 Wn. App. 471, 477, 73 P.3d 398 (2003) (quoting *In re Personal Restraint of Smith,* 117 Wn. App. 846, 860, 73 P.3d 386 (2003), *overruled on other grounds by In re Personal Restraint of Domingo,* 155 Wn.2d 356, 119 P.3d 816 (2005)).

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). Petitioner Fort has not demonstrated how the personal in-chambers interview of any juror impacted his right to an impartial jury, nor does any such prejudice appear in the record.

By using the in-chambers voir dire, the jurors involved were provided with a private forum to describe, share, and divulge very intimate personal feelings and experiences to both counsel and the court. It is

doubtful that such personal disclosures would have occurred during the voir dire in open court - with the whole world listening.

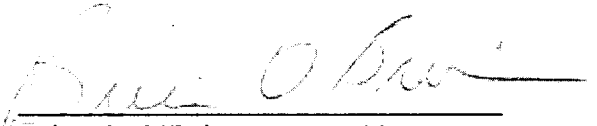
Prejudice is not presumed on collateral review where a private in-chambers voir dire was conducted without the trial court first addressing the *Bone-Club* factors. *Coggin*, 340 P.3d 813-14 (¶11). Without a showing of actual and substantial prejudice, the personal restraint petition must be dismissed. *Coggin, supra.*

II. 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. Mr. Fort is prohibited from raising issues relating to his public trial right on this second "sentencing" appeal that were or could have been raised on the first appeal. Because there was no prejudice, the petitioner's personal restraint petition should be dismissed, and the unchallenged sentencing affirmed.

Dated this 23 day of March, 2015.

LARWRENCE H. HASKELL
Prosecuting Attorney



Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON, Respondent, v. DALLIN DAVID FORT, Appellant,	NO. 26830-6-III (Consolidated with 26204-9-III) CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 25, 2015, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Carl Hueber
ceh@winstoncashatt.com

and mailed a copy to:

Dallin David Fort, DOC #891250
Airway Heights Correction Center
PO Box 2049
Airway Heights, WA 99001

3/25/2015	Spokane, WA	Crystal McNees
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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Comments:

Supplemental Brief Pursuant to Clerk's Letter of 2/19/15

Proof of service is attached and an email service by agreement has been made to scpaappeals@spokanecounty.org and ceh@winstoncashatt.com.

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