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NO. 67484-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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In re Personal Restraint Petition of

JEFFREY MCKEE,

Petitioner.

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**STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION**

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**A. ISSUES PRESENTED**

1. Whether McKee's claim that his right to a public trial was violated and that he received ineffective assistance of appellate counsel should be rejected on grounds that he has provided insufficient evidence supporting his claim, that this case is controlled by State v. Momah,<sup>1</sup> that appellate counsel rendered effective assistance in light of Momah, and that In re Personal Restraint of Morris<sup>2</sup> is wrongly decided, incorrect and harmful.

2. Whether McKee's claim that his firearm enhancements should be dismissed based on State v. Bashaw<sup>3</sup> should be rejected because Bashaw was overruled by State v. Nuñez.<sup>4</sup>

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Jeffrey McKee, with four crimes: Rape in the First Degree with a firearm allegation (Count I, victim L.K.), Attempted Rape in the Second Degree (Count II, victim J.B.), Rape in the Second Degree (Count III, victim M.A.), and

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<sup>1</sup> State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

<sup>2</sup> In re Personal Restraint of Morris, \_\_\_ Wn.2d \_\_\_ (No. 84929-3, filed 12/21/12), 2012 WL 5870496 (attached for the Court's convenience).

<sup>3</sup> State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

<sup>4</sup> State v. Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012).

Rape in the First Degree with a firearm allegation (Count IV, victim J.L.R.). CP 11-13.<sup>5</sup> These charges arose from an extensive investigation showing that McKee perpetrated a series of sexual assaults against known or suspected prostitutes on Pacific Highway South in King County.

McKee was tried by a jury before the Honorable Douglas McBroom. RP (3/23/05) - RP (5/3/05). The jury found McKee guilty as charged on counts I and IV, including the firearm enhancements, and acquitted on counts II and III. CP 93-98.

McKee requested an exceptional minimum sentence below the standard range on grounds that the multiple offense policy of the Sentencing Reform Act (SRA) resulted in a sentence that was clearly excessive. CP 99-105, 232-38. The State opposed this request on grounds that the multiple offense policy does not apply to multiple armed rapes of multiple victims. CP 106-11, 224-31. The trial court granted McKee's request for an exceptional sentence, and ordered that the minimum base sentences for each of the rapes should be served concurrently rather than consecutively. CP 113-23. The trial court cited the multiple offense policy as justification for the sentence. CP 213. In support of its

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<sup>5</sup> Citations to the clerk's papers in this brief reference the page numbers from McKee's first direct appeal, No. 56504-4-I.

conclusion that the presumptive sentence was excessive, the court observed that the victims were prostitutes who willingly entered the defendant's truck in order to have sex with him for money.

RP (6/28/05) 9-11.

McKee timely appealed, and the State timely cross-appealed on the issue of the exceptional sentence. McKee's appellate claims were rejected and his exceptional sentence was reversed in a partially published opinion. State v. McKee, 141 Wn. App. 22, 167 P.3d 575 (2007). McKee filed a second direct appeal after his resentencing within the standard range, and his claims were rejected in an unpublished decision. State v. McKee, 152 Wn. App. 1030, 2009 WL 3083779.

McKee now seeks relief in this personal restraint petition.

## **2. SUBSTANTIVE FACTS**

### **a. Count I: L.K.**

Late one night in June 2003, L.K. was walking near Pacific Highway South when a clean-cut white male in a red pickup truck pulled over and asked if she needed a ride. RP (4/11/05) 72. L.K., who engaged in prostitution to support her drug habit, was not planning to proposition the man for sex because he looked like an

undercover police officer; however, she accepted his offer of a ride. RP (4/11/05) 75. He asked if she'd been drinking, and L.K. admitted that she had. The man then drove her to a convenience store and bought her a wine cooler and a pack of cigarettes.<sup>6</sup>

RP (4/11/05) 72.

After they left the store, L.K. tried to give the man directions to where she wanted to go. He ignored her, drove to a dead-end road, and parked. RP (4/11/05) 76, 80. He unbuttoned his pants, exposed his penis, put a gun to her head, and said, "Suck my dick, bitch." L.K. knew the gun was real because of the weight of the steel against her head.<sup>7</sup> RP (4/11/05) 76-77. He shoved L.K.'s head down to his groin, and forced her to perform fellatio at gunpoint. RP (4/11/05) 76, 78.

Next, the man ordered L.K. to undress and turn around. He then raped her vaginally and anally from behind. It was very painful, and she was crying and terrified. RP (4/11/05) 78-79. When he was finished, the man opened the door, threw L.K.'s

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<sup>6</sup> The police later seized the receipt for these purchases from McKee's bedroom pursuant to a search warrant. RP (4/20/05) 548.

<sup>7</sup> The police seized a .380 semiautomatic pistol and ammunition from McKee's bedroom. RP (4/11/05) 44-45.

clothes out of the truck, and said, "Get out, bitch." L.K. was left naked in the street. RP (4/11/05) 79.

L.K. later reported the rape to Detective Sue Peters of the King County Sheriff's Office. RP (4/11/05) 84. L.K. was able to describe the rapist in detail, including his hazel eyes. She also remembered several details about the red truck, including its distinctive Harley-Davidson floor mats.<sup>8</sup> RP (4/11/05) 86. She could also recall that the truck's license plate started with an "A."<sup>9</sup> RP (4/11/05) 80.

Following McKee's arrest, L.K. identified him in a photographic montage and in a lineup as the man who had raped her. RP (4/11/05) 88-90. She also identified him in court. RP (4/11/05) 73, 85. In addition, Jennifer Gauthier of the Washington State Patrol Crime Laboratory (WSPCL) determined that semen stains from the seat cover of McKee's truck contained a mixture of DNA consistent with McKee's and L.K.'s genetic profiles. RP (4/25/05) 48-50. Gauthier calculated the statistical frequency of the profile consistent with L.K.'s to be one in 6.8 quadrillion. RP (4/23/05) 53.

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<sup>8</sup> The police seized Harley-Davidson floor mats from McKee's red Chevrolet pickup truck. RP (4/11/05) 46-47.

<sup>9</sup> McKee's license number was "A98146J." RP (4/19/05) 104-05.

b. Count II: J.B.<sup>10</sup>

Late one night in late May or early June 2003, J.B. was walking on Pacific Highway South in search of beer money.

RP (4/12/05) 84. J.B. was a known prostitute with an alcohol problem and possible mental health issues. RP (4/19/05) 121-22. After buying a beer, she sat down at a bus stop. A “nice lookin” white male in a clean, red pickup truck pulled over and offered to give her a ride and some money. She accepted. RP (4/12/05) 85-87.

J.B. did not proposition the man for sex right away because she suspected he was an undercover police officer. RP (4/12/05) 88. Eventually, a transaction was discussed, and J.B. agreed to perform oral sex for \$30. RP (4/12/05) 88-90. The man drove to an area near a park, and asked J.B. to put her beer outside because he did not want her to spill it in the truck. RP (4/12/05) 90-91. Then, suddenly, the man grabbed J.B.’s head, forced it toward his exposed penis, and ordered her to “suck his dick.”

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<sup>10</sup> Although McKee was acquitted of counts II and III regarding J.B. and M.A., the trial court ruled and instructed the jury that evidence on each count was cross-admissible for the purposes of proving a common scheme or plan. CP 71. Furthermore, certain evidence on the counts on which McKee was acquitted, such as J.B.’s identification of the license plate and M.A.’s identification of McKee as the person who picked up J.L.R., is cross-admissible as a matter of logical relevance. Therefore, the evidence relating to counts II and III is outlined here in some detail.

RP (4/12/05) 92. Just then, J.B. and the man saw J.B.'s "brothers" approaching. RP (4/12/05) 93. The man pushed J.B. out of the truck, and "burnt rubber" to get out of the area. RP (4/12/05) 129, 131.

J.B. reported the attempted rape to Detective Peters. RP (4/19/05) 103-04. She provided a detailed description of the suspect and his red truck, including its Harley-Davidson floor mats and its license plate number, A98146J. This truck was registered to McKee. RP (4/12/05) 83, 96-97; RP (4/19/05) 104-05. After McKee was arrested, J.B. did not select him in a lineup; however, J.B. stated at the lineup that McKee "would be perfect if he lost 40 or 50 pounds[.]" RP (4/12/05) 146. J.B. did positively identify McKee in court as the man who tried to rape her. RP (4/12/05) 86.

c. Count III: M.A.

At around 2:00 or 3:00 in the morning sometime between January 2001 and May 2003, M.A. was walking near 260th and Pacific Highway South. She had been smoking crack cocaine at a friend's house, and she was trying to get home. RP (4/19/05) 16-19. M.A. flagged down a white male in a red truck, and he agreed to give her a ride. RP (4/11/05) 20. M.A. was not planning

to proposition the man, although she explained she sometimes made money by promising to have sex with men and then stealing their money. RP (4/19/05) 21, 47-49.

The man drove to a quiet, residential neighborhood. RP (4/19/05) 22. He grabbed M.A.'s neck, exposed his penis, and forced her to perform oral sex. RP (4/19/05) 23-25. He then instructed her to remove her clothes, and he raped her vaginally as well. RP (4/19/05) 25-26. M.A. kicked the door and screamed; she got out of the truck, semi-clothed, and the man drove away. RP (4/19/05) 27-28. She did not report the rape to the police. RP (4/19/05) 28.

In May or June 2003, M.A. was walking near Pacific Highway South with her friend, J.L.R. The same man in the same red truck pulled over and offered them a ride. M.A. recognized the man, and warned J.L.R. not to get into the truck. J.L.R. got into the truck anyway; J.L.R. was then raped as well. RP (4/19/05) 32-33.

After McKee was arrested, M.A. identified him in a lineup as the man who had raped her and who had picked up J.L.R. RP (4/19/05) 36-37. She also identified him in court. RP (4/19/05) 15-16. M.A. also identified photographs of McKee's truck, including the Harley-Davidson floor mats. RP (4/19/05) 37-38.

d. Count IV: J.L.R.

In the spring and summer of 2003, J.L.R. was a teenager with a drug problem who was always in trouble with the law. RP (4/20/05) 571. Late one night in May or June 2003, she had been smoking drugs at a friend's house when she decided to get more drugs. J.L.R. went walking near Pacific Highway South with M.A. and a woman named Leslie. Just then, a red truck pulled up and the man inside offered her a ride. RP (4/20/05) 578. The man seemed nice, so she got in the truck. RP (4/20/05) 579.

The man drove to the parking lot of a nearby daycare center. J.L.R. asked why they were stopping, but the man said nothing. RP (4/20/05) 583. Instead, he grabbed her by the hair and pulled a small, black handgun. RP (4/20/05) 584-85. He put the gun to her head, exposed his penis, and said, "Suck my dick, bitch." RP (4/20/05) 586. He forced her head down, and she complied with his demand. RP (4/20/05) 587.

Next, the man ordered J.L.R. to take her clothes off. She was scared, so she complied. The man then raped her vaginally, and also raped her anally from behind. It was painful. RP (4/20/05) 587-90. The man held the gun to her head throughout the rape. RP (4/20/05) 589. During the rape, J.L.R. lied to the man and told

him she was only 14 years old to try to get him to stop. He did not seem to care, and remarked that she must be a prostitute because she got into his truck. RP (4/20/05) 597. When the man was finished raping her, he threw J.L.R. and her clothes out of the truck and drove away. RP (4/20/05) 590. J.L.R. screamed, but no one was there. RP (4/20/05) 591.

J.L.R. saw the man sometime later when she was walking near a 7/Eleven. RP (4/20/05) 597. He got out of his truck, hit her and threatened her because he claimed to have seen her talking to the police. RP (4/20/05) 598. J.L.R. did report the rape to the police. RP (4/20/05) 577.

After McKee was arrested, J.L.R. was unable to pick him in a montage and a lineup. RP (4/20/05) 606, 611. She could not identify him in court, either. RP (4/20/05) 616. However, she positively identified photographs of McKee's truck as the vehicle where the rape occurred, and she specifically noted the seat covers and Harley-Davidson floor mats. RP (4/20/05) 613-14. Her description of the rapist was consistent with McKee's appearance at the time of the rape: a clean-cut, white male with short, blondish-brown hair and a medium build. RP (4/20/05) 604; RP (4/21/05) 17. J.L.R. also stated in court that McKee's gun

looked like the gun that was held to her head during the rape.

RP (4/21/05) 19.

Jennifer Gauthier of the WSPCL identified three DNA profiles in a semen stain on McKee's truck's seat cover that was entirely consistent with a mixture of genetic material from J.L.R., McKee, and an unknown female. RP (4/25/05) 33. Gauthier calculated a statistical frequency of the profile consistent with J.L.R.'s, and determined that the chances of a random match were one in 9,400. RP (4/25/05) 39. However, Gauthier explained that she had performed her calculation very conservatively because J.L.R. was a minor contributor to the mixture, and therefore the peak heights for each allele were much lower than they were for the unknown female, who was the major contributor. RP (4/25/05) 40-44. Nonetheless, Gauthier was confident that J.L.R.'s DNA profile was contained within the semen stain on the seat cover. RP (4/25/05) 45.

e. Voir Dire.

Due to the nature of the subject matter of the trial, both McKee's experienced trial attorney and the prosecutor proposed a jury questionnaire that invited prospective jurors to indicate whether

they wanted to answer certain questions individually rather than in the presence of the entire venire. See PRP, Appendices H and I. As McKee outlines in his petition, the record reflects that the parties eventually formulated an agreed questionnaire that allowed prospective jurors to request private questioning. PRP, at 7-10.

After excusing a number of jurors for hardship, the trial court explained to the remaining jurors that they would be filling out a questionnaire, and that there was an option for individual questioning about sensitive topics:

It's important that you give adequate information, but the way [the questionnaires] are used is the attorneys look at them – one of the questions, I believe, isn't there, on the questionnaire, counsel, a question that anybody wants to be talked to individually?

MR. MINOR [Defense Counsel]: Yes.

THE COURT: That's on the questionnaire?

MR. COOK [Prosecutor]: That is correct.

THE COURT: Okay. So that is one thing we do. I mean, if there's – if you have personal information you are hesitant to share in front of a bunch of people, we will talk to you individually. There will still be the court staff here and the lawyers, but anybody that wants to have sort of a semi-private – and of course nobody will be allowed in the courtroom – question and answer session about something that they just don't feel real comfortable

talking about in front of a group full of people, that will be part of it.

RP (4/6/05) 72-73.

After the prospective jurors filled out the questionnaire, the trial court explained to both parties that individual questioning would occur only with the jurors who requested it, and that only the topics that had caused the jurors to request individual questioning would be discussed. RP (4/6/05) 76-77. After outlining the procedure, the trial court asked if defense counsel was "on the same page," to which counsel replied, "Yes, Your Honor." RP (4/6/05) 78. A number of jurors were then questioned individually in the courtroom.

Juror 2 explained that she had been sexually assaulted when she was younger, and she also shared that a relative had been killed recently. RP (4/6/05) 79-81. She answered several questions from defense counsel about her ability to remain impartial. RP (4/6/05) 80-82. As a result of the individual questioning, defense counsel's challenge for cause was granted and Juror 2 was excused. RP (4/6/05) 91.

Juror 4 explained that a relative had been accused of a sexual assault. Defense counsel questioned this juror as well.

RP (4/6/05) 83-86. Defense counsel did not challenge this juror for cause.

Juror 19 revealed that her daughter had been sexually assaulted. Defense counsel questioned Juror 19 about whether she could remain impartial, given her experience. RP (4/6/05) 87-90. Defense counsel challenged Juror 19 for cause, but the trial court denied the challenge because Juror 19 stated that she would keep an open mind. RP (4/6/05) 91-93.

Juror 32 stated that she had also been the victim of a sexual assault. In response to defense counsel's questioning, Juror 32 stated that it would be difficult for her to be a juror on a rape case. RP (4/6/05) 93-95. Defense counsel's challenge for cause was granted and Juror 32 was excused. RP (4/6/05) 95-96.

Juror 33 revealed that there had been sexual abuse in his family, and that he was upset by the prospect of discussing sexual matters. RP (4/6/05) 96-99. In response to defense counsel's questioning, however, Juror 33 indicated that he could maintain his composure and remain impartial. RP (4/6/05) 99-100. Defense counsel did not challenge Juror 33.

Juror 45 explained that although he did not have any personal experiences with sexual assault, it was a topic he felt

strongly about and was not comfortable discussing with others. RP (4/6/05) 101-02. In response to defense counsel's questioning, Juror 45 stated that the topic was so difficult for him that he would probably just agree with the other jurors during deliberations rather than express his own views regarding the evidence. RP (4/6/05) 103-05. The trial court granted defense counsel's challenge for cause and excused Juror 45. RP (4/6/05) 105-06.

Juror 48 explained that a relative had been sexually assaulted, and he indicated in response to defense counsel's questions that he might sympathize with the victims. RP (4/6/05) 106-09. Defense counsel's challenge for cause was denied, however, based on Juror 48's assurances that he would do his best to put aside his personal experiences. RP (4/6/05) 109-11.

Juror 57 revealed that his sister had been sexually assaulted, that this experience had made him very angry, and that he had experience with DNA testing in his professional capacity. RP (4/6/05) 111. Juror 57 was excused by agreement of the parties. RP (4/6/05) 112.

Juror 71 stated that his sister had been sexually assaulted, and that his wife was very afraid of being assaulted and that they discussed the topic frequently. RP (4/6/05) 112-14. In response to defense counsel's questioning, however, Juror 71 assured the parties and the trial court that he would remain impartial. RP (4/6/05) 114-15. Defense counsel did not challenge Juror 71 for cause.

The following morning, Juror 18 explained that an ex-girlfriend of his had been abducted and sexually assaulted, that Mia Zapata (a local musician who was raped and murdered) was a good friend of his brother's, and that his grandmother had been murdered in her home. RP (4/7/05) 132-36. Juror 18 stated that these experiences could affect his ability to remain impartial. Defense counsel's challenge for cause was granted and Juror 18 was excused. RP (4/7/05) 137-39.

Juror 53 did not request individual questioning; rather, he was questioned individually at defense counsel's request. RP (4/7/05) 139. In response to defense counsel's questioning, Juror 53 stated that he thought he had seen a news report about the case, and also thought he might have heard a talk radio show about the case. Juror 53 stated that he was "outraged" by what he

had heard on the radio show. RP (4/7/05) 139-40. Juror 53 admitted that he would not be able to be fair. RP (4/7/05) 141-42. The trial court excused Juror 53 for cause at defense counsel's request. RP (4/7/05) 143.

Juror 58 also did not request individual questioning, but was also questioned individually at defense counsel's request. RP (4/7/05) 144-45. In response to defense counsel's questioning, Juror 58 indicated that she thought she might have seen McKee on a news broadcast. However, she assured defense counsel that she could put that aside and remain impartial. RP (4/7/05) 145-46. Defense counsel did not challenge Juror 58 for cause.

Despite the trial court's initial remark that "nobody will be allowed in the courtroom," there is no evidence in the record that the courtroom door was locked or that anyone other than the other prospective jurors were actually excluded from the courtroom during any portion of the individual voir dire.

C. **ARGUMENT**

1. **MCKEE IS NOT ENTITLED TO RELIEF BECAUSE THE EVIDENCE DOES NOT SHOW THAT A PUBLIC TRIAL VIOLATION OCCURRED, BECAUSE THIS CASE IS CONTROLLED BY STATE V. MOMAH, AND BECAUSE IN RE MORRIS IS INCORRECT AND HARMFUL.**

McKee first claims that his right to a public trial was violated during voir dire because the trial court allegedly questioned some prospective jurors with members of the public excluded from the courtroom. In the alternative, McKee argues that he received ineffective assistance of appellate counsel due to counsel's failure to raise a public trial violation claim on direct appeal. PRP, at 14-29.

McKee's public trial violation claims should be rejected for three reasons. First, the evidence does not establish that any members of the public were actually excluded from the courtroom during voir dire; thus, McKee has not provided sufficient evidence to support the factual basis for his claim.

Second, McKee's case is indistinguishable from State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), in which the Washington Supreme Court held that the defendant was not entitled to a new trial based on a public trial violation because the

defendant in that case had encouraged, participated in, and benefitted from private individual voir dire, which was performed in chambers in order to safeguard the defendant's right to a fair and impartial jury. In addition, because this case is controlled by Momah, and because McKee is not entitled to a new trial based on the reasoning in that case, appellate counsel was not ineffective for failing to raise a non-meritorious public trial issue on direct appeal.

Third, if this Court rejects the first two bases upon which relief should be denied, the State will argue that the Washington Supreme Court's recent decision in In re Personal Restraint Petition of Morris, \_\_\_ Wn.2d \_\_\_ (No. 84929-3, filed 12/21/12), 2012 WL 5870496, is wrongly decided, incorrect and harmful.

a. There Is No Evidence Establishing That A Courtroom Closure Actually Occurred.

A personal restraint petitioner bears the burden of providing evidence to support his or her claims. More specifically, the petitioner "must state in his petition the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations." In re Personal Restraint of Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992) (citing RAP 16.7(a)(2)(i)). Put

another way, “the petitioner must state with particularity facts which, if proven, would entitle him to relief.” Id. If there is a genuine dispute as to the factual basis upon which the petitioner claims he or she is entitled to relief, the appellate court may order a reference hearing. RAP 16.12. However, “the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations.” In re Rice, 118 Wn.2d at 886.

In this case, McKee alleges that there was a full courtroom closure during the individual voir dire of several prospective jurors. As evidence of the purported closure, McKee points to an offhand remark by the trial judge that “nobody will be allowed in the courtroom,”<sup>11</sup> and he provides his own affidavit stating that he cannot recall anyone other than the trial judge, court staff, attorneys, and corrections officers being present in the courtroom during the individual voir dire. See RP (4/6/05) 73, and Affidavit of Jeffrey R. McKee. No other evidence is provided.

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<sup>11</sup> In addition, the trial court could very well have been referring to other prospective jurors rather than members of the public. This would be consistent with the trial court’s description of the individual voir dire procedure as “semi-private” and “sort of a more private setting,” rather than “private,” “in chambers,” or “closed.” See RP (4/6/05) 73, 79.

This evidence is insufficient to establish that a courtroom closure actually occurred. Nothing in the record shows that the courtroom door was locked, that any member of the public attempted to attend any portion of individual voir dire but was prevented from doing so, or that any member of the public was asked to leave the courtroom after entering the courtroom. McKee has not provided declarations from the attorneys, the court staff, the trial judge (who is retired), the corrections officers, or any other person who might be able to establish whether the courtroom door was locked or whether any members of the public were excluded from the courtroom. The absence of such evidence cannot be construed in McKee's favor, as it is his burden to provide evidence to support his claims.

Instead, McKee provides his own affidavit, which states that he does not recall any members of the public being in the courtroom during the individual voir dire. However, the absence of members of the public in the courtroom is far more likely due to the fact that no one tried to attend, and not because any member of the public was locked out, excluded, or removed.<sup>12</sup> McKee's petition

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<sup>12</sup> In undersigned counsel's personal experience trying dozens of felony cases, it is unusual for any members of the public to attend voir dire.

should be dismissed on this basis alone, as he has not provided sufficient evidence to establish a factual basis for his claim.

Furthermore, even if this Court has questions as to whether there *is* a factual basis for McKee's claim, the remedy at this juncture is not to grant a new trial as McKee requests. Rather, this Court should order a reference hearing, where both parties may present evidence as to whether the trial court's offhand remark actually led to a courtroom closure or not. RAP 16.12.

In sum, the evidence McKee has provided to support his claim is insufficient for this Court to grant relief. McKee's petition should be dismissed; in the alternative, this Court should order a reference hearing in accordance with RAP 16.12.

b. This Case Is Controlled By State v. Momah.

Even if this Court finds that McKee has established a sufficient factual record that a courtroom closure occurred, McKee is still not entitled to relief. This case is virtually indistinguishable from State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), which holds that a new trial should not be granted when the defendant encourages, participates in, and benefits from the private questioning of prospective jurors. McKee's petition should be

dismissed on this basis as well. Moreover, because this case is controlled by Momah, appellate counsel was not ineffective for not raising a public trial issue on direct appeal.

In Momah, a highly-publicized rape case, defense counsel agreed that prospective jurors who had prior knowledge of the case, who had indicated they could not be fair, or who had requested private questioning on their jury questionnaires should be questioned individually in order to preserve the defendant's right to a fair and impartial jury. Momah, 167 Wn.2d at 146. Defense counsel also argued to expand the original list of jurors who would be questioned individually. Id. These jurors were then questioned individually and privately in chambers – not in the courtroom. Id. “Momah’s counsel actively participated in individual juror questioning” and “exercised numerous challenges for cause” as a result of that questioning. Id. at 146-47. On appeal, the defendant then claimed that his right to a public trial was violated by conducting closed voir dire in chambers without the trial court first considering the factors enumerated in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

The Momah court first discussed prior cases in which a public trial violation had resulted in fundamental unfairness such

that the error was “structural” in nature, *i.e.*, not readily susceptible to a harmless error analysis. Momah, 167 Wn.2d at 149-51 (discussing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (closure of suppression hearing), State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) (closure of co-defendant’s motion to sever and plea of guilty), and In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (exclusion of defendant’s family from voir dire over defendant’s objection)). Regarding these cases, the court concluded:

In the aforementioned cases, the closure errors were held to be structural in nature. Prejudice to the defendant in those cases was sufficiently clear and required the remedy of a new trial. In each case, the trial court closed the courtroom based on interests other than the defendant’s; the closures impacted the fairness of the defendant’s proceedings; the court closed the courtroom without seeking objection, input, or assent from the defendant; and in the majority of cases, the record lacked any hint that the trial court considered the defendant’s right to a public trial when it closed the courtroom.

Momah, 167 Wn.2d at 151. In distinguishing Momah’s case from these prior cases, the court observed:

Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant but also closed the courtroom after consultation with the defense and the

prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests. Where, as here, a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate.

Id. at 151-52.

The court further explained that the defendant's right to a public trial and his right to an impartial jury were in conflict, as the denial of one was necessary to secure the other. Id. at 152. In such cases, "to ensure that a criminal defendant receives a fundamentally fair trial, we permit the accused to make tactical choices to advance his own interests and ensure what he perceives as the fairest result." Id. at 152. Accordingly, although the court found that the issue of a courtroom closure could be raised for the first time on appeal despite the defendant's failure to object, the court held that Momah's case presented a situation akin to "invited error": the well-established doctrine whereby a party cannot set up an error at trial and then obtain a new trial by raising that error for the first time on appeal. Id. at 154-55.

Ultimately, the court rejected Momah's public trial violation claim, because Momah had "affirmatively accepted the closure,

argued for the expansion of it, actively participated in it, and sought benefit from it,” and thus, he was not entitled to a new trial. Id. at 156. A very similar case presents itself here.

In this case, both parties proposed jury questionnaires that allowed prospective jurors to request individual questioning. PRP, Appendices H and I. The parties eventually formulated an agreed questionnaire, which included that option. After distributing the questionnaire, the trial court outlined the procedure to be followed for individual questioning by the parties. RP (4/6/06) 76-77. When the trial court asked defense counsel if he was “on the same page” with respect to that procedure, defense counsel responded, “Yes, Your Honor.” RP (4/6/05) 78.

The prospective jurors who had requested individual questioning were then questioned one at a time in the courtroom – not in chambers as in Momah. As previously noted, there is no evidence in the record that the door was locked or that any member of the public was actually excluded or removed. In any event, defense counsel actively questioned these jurors regarding their ability to be fair and impartial, and the trial court granted several of defense counsel’s challenges for cause based on that questioning. RP (4/6/05) 79-115; RP (4/7/05) 132-39.

In addition, as in Momah, defense counsel expanded the scope of the individual questioning. Juror 53 and Juror 58 had not requested private questioning; rather, they were questioned individually at defense counsel's request. RP (4/7/05) 139, 144-45. As a result of that expanded individual questioning, the trial court granted defense counsel's challenge for cause as to Juror 53. RP (4/7/05) 143.

As in Momah, assuming that a courtroom closure occurred in this case, McKee "affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it," and thus, he is not entitled to a new trial. Momah, 167 Wn.2d at 156. The individual voir dire that occurred in this case was suggested jointly by the parties, and McKee's counsel expressly agreed to the procedure, actively participated in it, and successfully removed several biased jurors from the venire as a result of it. These actions were clearly the result of tactical decision-making in an effort to secure McKee's right to an impartial jury. As in Momah, McKee received the benefit of this procedure at trial, and cannot now receive a new trial as a result of that procedure.

Nonetheless, McKee argues that this case is different from Momah because the trial court was concerned with juror privacy

rather than the defendant's right to a fair trial. See PRP, at 21. Although the trial court stated that the jurors' privacy was of paramount concern,<sup>13</sup> this does not change the fact that McKee suggested individual questioning, agreed to the trial court's proposed procedure for individual questioning, actively participated in the individual questioning, asked for that questioning to be expanded, made several successful challenges for cause based on that questioning, and thereby received the benefit of the individual questioning. In sum, there is no legally significant basis upon which to distinguish this case from Momah, and thus, McKee's request for relief should be denied.

For these same reasons, McKee's appellate counsel was not ineffective for failing to raise this issue on direct appeal.

To prove ineffective assistance of counsel, the defendant must meet both prongs of a stringent two-part test by showing: 1) that counsel's performance was actually deficient (the performance prong); and 2) that the deficient performance resulted in actual prejudice (the prejudice prong). Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

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<sup>13</sup> See RP (4/6/05) 76.

Counsel's performance is deficient only when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs only when, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. McFarland, 127 Wn.2d at 335.

In light of the reasoning in Momah, appellate counsel was not deficient and McKee suffered no prejudice due to the fact that no public trial issue was raised on direct appeal. Appellate counsel doubtless reviewed the record, noted that McKee encouraged, participated in, and benefited from the individual voir dire procedure, and ultimately made a reasonable tactical decision not to raise the issue because it was meritless. Moreover, in spite of what McKee now argues in his petition, appellate counsel surely recognized that this case is significantly different from In re Orange, in which the defendant's family was excluded from general voir dire due to space limitations over the defendant's specific objections, and where there was clearly no benefit to the defendant from this partial courtroom closure. In re Orange, 152 Wn.2d at 801-02. Lastly, because McKee is not entitled to a new trial based on the

reasoning in Momah, he cannot meet the prejudice prong of Strickland, either.

In sum, this case is the same as Momah in every legally relevant way. Accordingly, the result in this case is controlled by Momah, and McKee is not entitled to relief.

c. In re Morris Is Incorrect And Harmful.

If this Court were to decide that a courtroom closure occurred and that this case is not controlled by Momah, and thus, that McKee is entitled to a new trial, the State will argue that the Washington Supreme Court's decision in In re Personal Restraint of Morris is wrongly decided, incorrect and harmful.<sup>14</sup>

Washington Supreme Court precedent should be overruled if it is shown to be incorrect and harmful. State v. Nuñez, 174 Wn.2d 707, 713, 285 P.3d 21 (2012). A decision is incorrect if it is not supported by the authority upon which it relies, or if it conflicts with other Washington Supreme Court precedent. Id. A decision is harmful if it undermines an important public policy or a fundamental legal principle. Id. at 716-19. The decision in In re Morris is both incorrect and harmful under this test.

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<sup>14</sup> Although this Court cannot overrule precedent from the Washington Supreme Court, the State is preserving this issue for further review if necessary.

In In re Morris, the trial court conducted private questioning of a number of jurors in chambers without first considering the Bone-Club factors. 2012 WL 5870496, at \*1. It appears from the court's opinion that the trial court conducted the questioning in chambers *sua sponte*, and not at the request of the parties. Id. Nevertheless, the defendant did not object to the private questioning, his attorney actively participated in the private questioning, and several challenges for cause were exercised as a result of that questioning. Moreover, the defendant waived his own right to be present for the private questioning. Id. at \*1-2.

Five members of the Washington Supreme Court (the lead opinion, signed by four justices, and a concurrence by Justice Chambers) held that the defendant was entitled to a new trial based on the theory that had he received ineffective assistance of appellate counsel, because appellate counsel had not raised a public trial violation issue on direct appeal. In re Morris, at \*4-5; id. at \*8 (Chambers, J., concurring). In reaching this decision, the five justices concluded that appellate counsel's performance was deficient because Morris's case was indistinguishable from In re Orange, 152 Wn.2d 795, and that prejudice resulted because Morris would have been entitled to a new trial if the issue had been

raised on direct appeal. In re Morris, at \*4-5; id. at \*8 (Chambers, J., concurring). Both of these conclusions are deeply flawed.

First, In re Orange is plainly distinguishable from what occurred in In re Morris. As noted previously, the defendant in In re Orange specifically objected to excluding his family members from the courtroom during voir dire, and the trial court excluded them anyway despite that specific objection. In re Orange, 152 Wn.2d at 801-02. Moreover, the trial court excluded Orange's family from the courtroom due to concerns about limited seating space, and *not* for any reason that resulted in a substantial benefit to the defendant, such as the right to an impartial jury. Id. In fact, the court in In re Orange specifically found that the defendant had been *harmed* by the courtroom closure, due to "*the inability of the defendant's family to contribute their knowledge or insight into the jury selection and the inability of the venirepersons to see the interested individuals.*" In re Orange, 152 Wn.2d at 812 (quoting Watters v. State, 328 Md. 38, 48, 612 A.2d 1288 (1992)) (emphasis added by the Washington Supreme Court). Accordingly, the error in Orange was "conspicuous in the record" and thus, appellate counsel was ineffective for failing to raise it on direct appeal. In re Morris, at \*15 (Wiggins, J., dissenting).

In In re Morris, by contrast, the defendant did *not* object to conducting individual voir dire in chambers, and was *not* harmed as a result of that procedure. To the contrary, the defendant waived his own right to be present for individual voir dire, and he received a benefit from the private questioning because several jurors were removed for cause as a result of that questioning. Id. at \*1-2. Accordingly, the purported public trial violation was *not* “conspicuous in the record,” as it had been in Orange.

In light of these obvious and legally significant differences between the two cases, the court’s conclusion that In re Orange and In re Morris are indistinguishable and that Morris’s appellate counsel was ineffective for failing to raise the issue on direct appeal is simply incorrect. The defendant’s objection to the courtroom closure and the harm that resulted from that closure were central to the Orange court’s finding of ineffective assistance of appellate counsel. But these key features are notably absent from Morris. In sum, In re Morris is incorrect because it is not supported by the authority upon which it relies.

For similar reasons, the court’s conclusion that defendant Morris had established prejudice is also incorrect. With no analysis, other than citing to Orange, the court stated that

defendant Morris had suffered prejudice because he would have been entitled to a new trial if the issue had been raised on direct appeal. In re Morris, at \*5; id. at \*8 (Chambers, J., concurring). Again, however, because Orange is fundamentally different from Morris in legally significant ways – *i.e.*, Orange objected while Morris did not, and Orange was harmed while Morris was not – the court’s conclusion is again not supported by the precedent it cites. The court’s decision is incorrect in this respect as well.

In re Morris is also incorrect because it conflicts with other Washington Supreme Court precedent. As noted by both dissents, a wealth of precedent had rigorously adhered to the well-settled principle that a personal restraint petitioner is required to show actual and substantial prejudice in order to obtain relief. In re Morris, at \*10 (Madsen, C.J., dissenting); id. at \*13-14 (Wiggins, J., dissenting). Other than the conclusory and incorrect statement that Morris’s case was the same as Orange’s case, the 5-justice majority in In re Morris identified no prejudice whatsoever.

Moreover, as noted in both dissents, the majority’s conclusory analysis in Morris also conflicts with In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992),

wherein the court specifically held that a *higher* standard for prejudice applies on collateral attack:

We have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders. *Therefore, we decline to adopt any rule which would categorically equate per se prejudice on collateral review with per se prejudice on direct review.* Although some errors which result in per se prejudice on direct review will also be per se prejudicial on collateral attack, the interests of finality of litigation demand that a *higher standard* be satisfied in a collateral proceeding.

In re St. Pierre, 118 Wn.2d at 329 (citation omitted) (emphasis supplied); see also In re Morris, at \*9 (Madsen, C.J., dissenting); id. at \*13 (Wiggins, J., dissenting). But rather than apply this higher standard as required, the majority in In re Morris collapsed the rules for direct appeal and the rules for collateral attack into a single standard under the rubric of ineffective assistance of appellate counsel. As such, the decision is erroneous.

In sum, the decision in In re Morris is incorrect because it is not supported by the authority it relies upon, and because it conflicts with well-settled precedent. Furthermore, the decision in In re Morris is harmful, because it undermines the public policy

considerations and fundamental legal principles inherent in collateral review.

It is axiomatic that “[a] personal restraint petition is not to operate as a substitute for a direct appeal.” In re St. Pierre, 118 Wn.2d at 328. To the contrary, because collateral relief “undermines the principles of finality of litigation” and “degrades the prominence of the trial,”<sup>15</sup> collateral relief is reserved for cases in which the fundamental fairness of the proceedings has truly been compromised:

The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence . . . . In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary remedy, a bulwark against convictions that violate fundamental fairness . . . . Those few who are ultimately successful [in obtaining collateral relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation . . . . Accordingly, it hardly bears repeating that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.

Brecht v. Abrahamson, 507 U.S. 619, 633-34, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Accordingly, it has long been the law in Washington that a personal restraint petitioner is entitled to relief only when the petitioner carries the burden of showing either

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<sup>15</sup> In re St. Pierre, 118 Wn.2d at 329.

constitutional error from which he has suffered actual and substantial prejudice, or non-constitutional error that constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

The court's decision in In re Morris undermines these fundamental principles. Rather than safeguard the finality of litigation and the prominence of the trial, the Morris decision grants the unjustified windfall of a new trial under circumstances where no prejudice has been shown. Indeed, the Morris decision grants the windfall of a new trial under circumstances where the defendant received a *benefit* from the procedure employed at trial.

As Justice Wiggins stated in dissent,

The right to a public trial is not a magic wand granting new trials to all who would wield it. Openness is a crucially important value in our criminal justice system, but so is finality. It does not serve the interests of justice to reopen this long-decided case, requiring a young girl to relive old traumas, and granting a windfall new trial to a man convicted of sexually molesting his daughter. We require personal restraint petitioners to show actual and substantial prejudice because we value finality and seek to avoid outcomes of this nature. Morris should be required to meet that burden just like every other personal restraint petitioner.

In re Morris, at \*16 (Wiggins, J., dissenting). Similarly, in this case, it would defeat the ends of justice to grant the windfall of a new trial to a defendant convicted of raping vulnerable women at gunpoint based on a voir dire procedure to which he did not object, and from which he received a substantial benefit.

In short, In re Morris dispenses with the fundamental principle that a personal restraint petitioner is required to show actual and substantial prejudice in order to obtain relief. As such, the decision is harmful, because it undermines the public's interest in the finality of criminal convictions, and it will result in needless retrials for criminal defendants whose first trials were fundamentally fair.

In sum, In re Morris is incorrect and harmful. It should be overruled.

**2. STATE V. BASHAW HAS BEEN OVERRULED BY STATE V. NUÑEZ.**

McKee also claims that the firearm enhancements imposed by the jury should be dismissed based on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). He claims that the instructions required the jury to be unanimous in order to answer “no” to the

special verdict, and that he suffered prejudice as a result. He also claims that his trial attorney was ineffective for failing to raise the issue. PRP, at 29-37. These claims must be rejected, because Bashaw was overruled by State v. Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012), which held that Bashaw was incorrect and harmful. Thus, McKee's sentencing enhancements were properly found by the jury, and he is not entitled to relief on this basis.

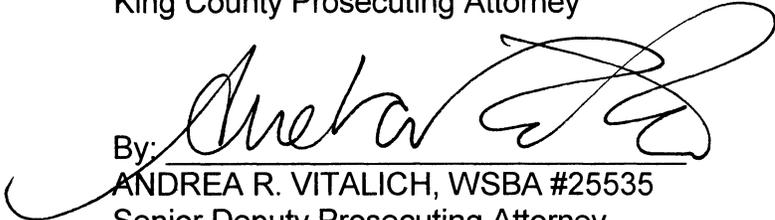
**D. CONCLUSION**

McKee's personal restraint petition should be dismissed. In the alternative, this Court could remand this case for a reference hearing to determine whether a courtroom closure actually occurred.

DATED this 17<sup>th</sup> day of December, 2012.

Respectfully submitted,

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## Appendix

2012 WL 5870496  
Supreme Court of Washington,  
En Banc.

In the Matter of the Personal Restraint  
Petition of Patrick L. **MORRIS**, Petitioner.

No. 84929-3. | Argued May 5,  
2012. | Decided Nov. 21, 2012.

**Synopsis**

**Background:** After his convictions for two counts of first degree sexual molestation and one count of first degree rape were affirmed on direct appeal, defendant filed personal restraint petition (PRP). The Court of Appeals certified defendant's PRP for review.

**Holdings:** The Supreme Court of Washington, Owens, J., accepted review, and held that:

[1] appellate counsel's failure to raise issue of violation of right to public trial was ineffective assistance of counsel, and

[2] trial court's error in precluding testimony of proposed expert witness did not result in a complete miscarriage of justice.

Reversed and remanded.

Chambers, J., filed concurring opinion.

Madsen, C.J., filed dissenting opinion.

Wiggins, J., filed dissenting opinion in which James M. Johnson and Charles W. Johnson, JJ., joined.

West Headnotes (17)

[1] **Criminal Law**

☞ Raising issues on appeal; briefs

Failure of defendant's appellate counsel to raise issue, on appeal from convictions of sexual molestation and rape, of violation of his right to public trial when trial court conducted part

of voir dire in chambers was both deficient and prejudicial, and thus constituted ineffective assistance of counsel, as remedy on appeal for such presumptively prejudicial error would have been remand for new trial. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[2] **Criminal Law**

☞ Appeal

To establish ineffective assistance of appellate counsel, defendant must establish that: (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the defendant. U.S.C.A. Const.Amend. 6.

[3] **Criminal Law**

☞ Deficient representation in general

Performance is deficient, as element of claim for ineffective assistance of counsel, if it falls below an objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

[4] **Criminal Law**

☞ Presumptions and burden of proof in general

Defendant claiming ineffective assistance of counsel must overcome a strong presumption that counsel's performance was reasonable. U.S.C.A. Const.Amend. 6.

[5] **Criminal Law**

☞ Admissibility

The Supreme Court reviews a trial court's decision to exclude expert testimony for abuse of discretion.

[6] **Criminal Law**

☞ Review De Novo

The Supreme Court reviews a trial court's interpretation of case law de novo.

[7] **Habeas Corpus**

⚡ Evidence

To prevail on collateral review on a claim of evidentiary error, defendant must show that the error constitutes a fundamental defect amounting to a miscarriage of justice.

[8] **Criminal Law**

⚡ Miscellaneous matters

Trial court did not abuse its discretion in prosecution for sexual molestation and rape in precluding testimony of proposed expert witness as to “standard of care” of police investigations involving allegations of sexual abuse; detective admitted that she did little investigatory work, including that she did not interview any witnesses for case, and admitted that police department did not have any procedures or policies regarding investigation of sex abuse cases, and thus, defense was able to establish that little police investigation occurred without admission of expert testimony highlighting what should have been done. ER 702.

[9] **Criminal Law**

⚡ Aid to jury

**Criminal Law**

⚡ Matters involving scientific or other special knowledge in general

**Criminal Law**

⚡ Knowledge, Experience, and Skill

Expert testimony is admissible if: (1) the witness qualifies as an expert; (2) the opinion is based upon an explanatory theory generally accepted in the scientific community; and (3) the expert testimony would be helpful to the trier of fact. ER 702.

[10] **Criminal Law**

⚡ Aid to jury

Expert testimony will be deemed helpful to the trier of fact only if its relevance can be established. ER 702.

[11] **Criminal Law**

⚡ Reception and Admissibility of Evidence

A trial court's evidentiary ruling is an abuse of discretion only if it is manifestly unreasonable or based upon untenable grounds or reasons.

[12] **Criminal Law**

⚡ Children

Trial court abused its discretion in prosecution for sexual molestation and rape in precluding testimony of proposed expert witness regarding the suggestibility of young children; court should have considered whether testimony about suggestibility of young children, as it related to specific interview techniques, would have been helpful to the jury. ER 702.

[13] **Habeas Corpus**

⚡ Exclusion of evidence

Trial court's error in prosecution for sexual molestation and rape in precluding testimony of proposed expert witness regarding the suggestibility of young children did not result in a complete miscarriage of justice warranting grant of personal restraint petition; trial judge allowed testimony on difference between experts' interviews and techniques, which could have included some of the relevant information defense sought to introduce as “suggestibility” evidence, and defense was also able to cross-examine other witnesses about suggestibility of child witnesses and therefore to present theory in argument. ER 702.

[14] **Criminal Law**

⚡ Presentation of witnesses

Trial counsel's decision not to call former police investigator to explain videotaped interview of victim, after its admission in prosecution for sexual molestation and rape, was reasonable trial strategy, and therefore was not ineffective assistance. U.S.C.A. Const.Amend. 6.

[15] **Criminal Law**

⚡ Presentation of witnesses

Generally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics. U.S.C.A. Const.Amend. 6.

[16] **Criminal Law**

⚡ Documentary evidence

Trial counsel's failure to object to admission of videotaped interview of victim was reasonable trial strategy, and therefore was not ineffective assistance in prosecution for sexual molestation and rape. U.S.C.A. Const.Amend. 6.

[17] **Criminal Law**

⚡ Grounds in general

Cumulative error doctrine applies when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.

**Attorneys and Law Firms**

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Jeffrey Erwin Ellis, Oregon Capital Resource Center, Portland, OR, Suzanne Lee Elliott, Attorney at Law, Seattle, WA, Amicus Curiae on behalf of Washington Association of Crimin.

**Opinion**

OWENS, J.

\*1 ¶ 1 Patrick L. Morris filed this timely personal restraint petition, alleging a violation of his right to a public trial when the trial court conducted part of voir dire in chambers. Further, he claims his appellate counsel was ineffective

for failing to raise the violation on direct review. In *In re Personal Restraint of Orange*, 152 Wash.2d 795, 814, 100 P.3d 291 (2004), we resolved a similar claim on ineffective assistance of appellate counsel grounds. This case is analytically indistinguishable from *Orange*. We therefore reaffirm *Orange* and hold that where appellate counsel fails to raise a public trial right claim, where prejudice would have been presumed on direct review, a petitioner is entitled to relief on collateral review. **Morris** additionally challenges evidentiary decisions by the trial court relating to a proposed defense expert witness and argues that his trial counsel was ineffective in handling the expert testimony issue. We hold that **Morris** fails to meet his burden on the evidentiary and trial counsel issues. Because of **Morris's** ineffective assistance of appellate counsel, we reverse and remand for a new trial.

**FACTS**

¶ 2 In 2004, **Morris** was convicted of two counts of first degree sexual molestation and one count of first degree rape of his daughter, A.W., who was five years old when she disclosed the abuse. **Morris's** defense was that the allegations were false and part of an effort by A.W.'s mother to terminate his parental rights. The jury disagreed and he was sentenced to 189 months in prison.

¶ 3 The record indicates that jury selection began in open court. After conducting some of the voir dire proceedings in the courtroom, the trial court announced, "Well, Ladies and Gentlemen, we have some interviews to do of those people who indicated they wanted to talk privately. We have quite a few of those to do, actually." Pers. Restraint Pet. with Legal Arg. & Auths. (PRP), App. A at 45.<sup>1</sup> The trial court then moved proceedings into chambers.

¶ 4 The record does not contain any reference to the factors a court must consider when closing proceedings to the public under *State v. Bone-Club*, 128 Wash.2d 254, 258-59, 906 P.2d 325 (1995).<sup>2</sup> Nor does it contain any other discussion or acknowledgment of **Morris's** right to a public trial. The record does not reveal if anyone besides the prospective jurors, counsel, court employees, and the defendant was present in the courtroom before proceedings were moved into chambers. Neither the State nor counsel for **Morris** moved for the private voir dire and neither objected to conducting the proceedings in chambers. However, **Morris** did waive his own right to be present during the portion of voir dire

conducted in chambers. In so waiving his right to be present, defense counsel indicated that “it would be more likely for jurors to be more forthcoming with what they are talking about if [Morris] were not in the room.” PRP, App. A at 46.

\*2 ¶ 5 Once in chambers, the prosecutor and defense counsel, along with the trial judge, questioned 14 prospective jurors and excused 6 for cause. The prospective jurors were selected for private interviews based only on their personal preferences indicated in their questionnaires. Some jurors opted for private questioning to discuss prior personal experiences with sexual violence, while others revealed just that they preferred to not talk in front of groups. The remainder of voir dire “resume[d] in the courtroom.” *Id.* at 93.

¶ 6 During trial, as part of his defense, Morris proposed to call Lawrence Daly, a former police investigator with experience interviewing child victims of sexual abuse, to testify about several subject matters relating to the State's investigation of the case. The State challenged Daly's testimony. After hearing testimony from Daly and the parties' arguments about the admissibility of his testimony, the trial court limited Daly's testimony to certain subject matters. The trial court ruled that Daly *could* testify about the differences between his interview of A.W. and the interview of A.W. conducted by the State's investigator, Candy Ashbrook, including differences in interview techniques. However, the trial court ruled that Daly could not testify about the suggestibility or potential coaching of A.W. The trial court ruled that testimony about scientific studies about the suggestibility of children was inadmissible under this court's holdings in *State v. Swan*, 114 Wash.2d 613, 656, 790 P.2d 610 (1990), and *State v. Willis*, 151 Wash.2d 255, 261, 87 P.3d 1164 (2004).

¶ 7 The trial judge additionally ruled that Daly could not testify about the “standard of care” of law enforcement officers as it compared to Detective Kathleen Ryan's investigation of this case. Detective Ryan acknowledged during cross-examination that she did not personally interview anyone for this case, that she did not carefully read the medical reports, and that the Anacortes Police Department does not have any policies or procedures for the investigation of sexual abuse allegations. With regard to admitting Daly's proposed testimony about a standard police investigation of sexual abuse allegations of a child and how it compares to Detective Ryan's investigation, the trial judge reasoned that “[t]he jury isn't going to be asked to evaluate Detective Ryan's standard of care. [They] may think she's a lousy Detective, but that doesn't really matter in terms of what they have to decide,

does it?” Verbatim Report of Proceedings (VRP) (June 14, 2004) at 76.

¶ 8 Morris's defense ultimately did not call Daly as a witness. While both Daly and the defense expressed timing concerns regarding Daly's availability, the reason for not calling him is unclear because, on the same day that he was present and the trial court approved his testimony in part, the defense called Morris, not Daly, to the stand. The defense also rested its case without showing the videotape of Daly's interview of A.W. after which the State called a rebuttal witness and sought to play the videotape of Daly's interview of A.W. for the jury. Defense counsel indicated some concerns about playing the videotape but ultimately did not object:

\*3 THE COURT: You want the whole [tape]?

[DEFENSE COUNSEL]: Yes, if it's going to be played at all.

THE COURT: All right. What do you mean “if it's going to be played at all”?

[DEFENSE COUNSEL]: Well, apparently it's going to be played.

THE COURT: No objection then to playing the whole thing from beginning to end?

VRP (June 15, 2004, afternoon) at 3–4. There was no objection. The defense did not object to the foundation of the videotape or to identifying the interviewer as a “defense child interview expert.” VRP (June 16, 2004) at 2–3. The defense did not call Daly to the stand to explain anything about the interview.

¶ 9 On direct appeal, Morris challenged several evidentiary decisions of the trial court, particularly the admission of testimony by four State witnesses. He also claimed ineffective assistance of counsel for his counsel's failure to object to the witnesses' testimony. The appeal did not include a claim regarding the right to a public trial. The Court of Appeals affirmed Morris's conviction. We denied Morris's petition for review and the mandate issued in August 2007. He timely filed this PRP with the Court of Appeals in August 2008, raising several new issues. The Court of Appeals stayed review pending the final resolution of two cases, which impacted the public trial right issue *State v. Momah*, 167 Wash.2d 140, 217 P.3d 321 (2009), *cert. denied*, — U.S. —, 131 S.Ct. 160, 178 L.Ed.2d 40 (2010), and *State v. Strode*, 167 Wash.2d 222, 217 P.3d 310 (2009) (plurality

opinion). Upon their resolution, the Court of Appeals certified **Morris's** PRP for review by this court based on his public trial right claim. Specifically, the Court of Appeals asked “[w]hether a personal restraint petitioner must establish prejudice before he or she may obtain relief from an alleged violation of the right to a public trial?” Order of Cert. We accepted review of all issues raised in **Morris's** PRP.

## ISSUES

¶ 10 1. Did the trial court violate **Morris's** right to a public trial by conducting voir dire in chambers?

¶ 11 2. Did the trial court err in refusing to admit portions of proposed expert testimony?

¶ 12 3. Did **Morris** receive ineffective assistance of counsel at trial for the handling of the expert witness's testimony?

¶ 13 4. Did these errors, if not individually redressible, result in cumulative error?

## ANALYSIS

### 1. Closure of the Courtroom During Voir Dire

¶ 14 **Morris** claims that the trial judge violated his right to a public trial by privately questioning 14 potential jurors in chambers. We hold that an appellate counsel's failure to raise a public trial right violation under such facts constitutes ineffective assistance of appellate counsel.

¶ 15 When we initially accepted review of this case it was to address how *Momah* and *Strode* impacted *Orange* and the courtroom closure issue. Since accepting review, we have decided two more cases, *State v. Wise*, — Wash.2d —, — P.3d — (2012), and *State v. Paumier*, — Wash.2d —, — P.3d — (2012), which guide our analysis on the courtroom closure issue. Those cases make it clear that failing to consider *Bone-Club* before privately questioning potential jurors violates a defendant's right to a public trial and warrants a new trial on direct review. *Wise*, — Wash.2d at —, — P.3d —; *Paumier*, — Wash.2d at — — —, — P.3d —. We need not address whether a public trial violation is also presumed prejudicial on collateral review because we resolve **Morris's** claim on ineffective assistance of appellate counsel grounds instead.

\*4 [1] [2] ¶ 16 To establish ineffective assistance of appellate counsel, a petitioner must establish that (1) counsel's performance was deficient and (2) the deficient performance actually prejudiced the defendant. *Orange*, 152 Wash.2d at 814, 100 P.3d 291; *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Here, there is little question that the second prong of this test is met. In *Wise* and *Paumier*, 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 Orange*, 152 Wash.2d at 814, 100 P.3d 291 (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.

¶ 17 The State, in claiming otherwise, attempts to circumvent the underlying public trial right violation by claiming that **Morris** implicitly waived his right to a public trial when he waived his right to be present. Waiver of the right to be present, however, should not be conflated with waiver of the right to a public trial. *See State v. Duckett*, 141 Wash.App. 797, 805–07, 173 P.3d 948 (2007). **Morris** waived his right to be present only *after* the trial judge moved voir dire proceedings in chambers. The rationale **Morris's** counsel gave for his waiver was that “it would be more likely for jurors to be more forthcoming with what they are talking about if he were not in the room.” PRP, App. A at 46. One can easily imagine that such a consideration is especially valid in the presumptively close quarters in chambers, as compared to the open courtroom. The closure itself may have compelled **Morris** to waive his right to be present. Moreover, a defendant must have knowledge of a right to waive it. *Duckett*, 141 Wash.App. at 806–07, 173 P.3d 948. Here, there was no discussion of **Morris's** public trial right before the closure. Thus, we do not find that **Morris** waived his right to a public trial.

[3] [4] ¶ 18 Having established prejudice, the remaining question is deficiency. “[P]erformance is deficient if it falls ‘below an objective standard of reasonableness.’ ” *State v. Grier*, 171 Wash.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). This is a high threshold, and the petitioner “must overcome ‘a strong presumption that counsel's performance was reasonable.’ ” *Id.* (quoting *State v. Killo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009)). One method of overcoming this presumption is by proving that

counsel's performance was neither a legitimate trial strategy nor a reasonable tactic. *Id.* at 33–34, 246 P.3d 1260.

¶ 19 In this case, proving deficient performance necessarily requires proving that counsel should have known to raise the public trial right issue on appeal. Here, **Morris's** appellate counsel should have known to raise the public trial right issue even though we had yet to decide *Strode*. **Morris** filed his appeal in March 2005. *Orange* had been decided at that time and clarified, without qualification, both that *Bone–Club* applied to jury selection and that closure of voir dire to the public without the requisite analysis was a presumptively prejudicial error on direct appeal. *Orange*, 152 Wash.2d at 807–08, 814, 100 P.3d 291.

\*5 ¶ 20 **Morris's** appellate counsel had but to look at this court's public trial jurisprudence to recognize the significance of closing a courtroom without first conducting a *Bone–Club* analysis. This case is no different from the situation in *Orange* where the appellate counsel failed to raise the public trial right issue. In *Orange*, “[t]he failure to raise the courtroom closure issue was not the product of ‘strategic’ or ‘tactical’ thinking, and it deprived Orange of the opportunity to have the constitutional error deemed per se prejudicial on direct appeal.” 152 Wash.2d at 814, 100 P.3d 291. The *Orange* rule derived from the clear rule in *Bone–Club*. 152 Wash.2d at 812, 100 P.3d 291. The court reasoned that “had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in *Bone–Club*, remand for a new trial.” *Id.* at 814, 100 P.3d 291. We accordingly remanded for a new trial in *Orange*. *Id.* We do the same here.

## 2. Trial Court's Exclusion of Expert Testimony

[5] [6] [7] [8] ¶ 21 **Morris** challenges two of the trial court's decisions to preclude specific testimony of his proposed expert witness, Daly. The trial court ruled that Daly could not testify about the “standard of care” of police investigations involving allegations of sexual abuse nor about studies regarding the suggestibility of young children. “We review a trial court's decision to exclude expert testimony for abuse of discretion.” *Willis*, 151 Wash.2d at 262, 87 P.3d 1164. “We review a trial court's interpretation of case law de novo.” *Id.* at 261, 87 P.3d 1164. To prevail on collateral review on a claim of evidentiary error, a petitioner must show that the error constitutes a “‘fundamental defect’ amounting to a ‘miscarriage of justice.’” *In re Pers. Restraint of Pirtle*, 136 Wash.2d 467, 489, 965 P.2d 593 (1998) (quoting *In re*

*Pers. Restraint of Cook*, 114 Wash.2d 802, 811, 792 P.2d 506 (1990)).<sup>3</sup>

[9] ¶ 22 ER 702 allows for the admission of expert testimony. Such testimony is admissible if “(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.” *State v. Allery*, 101 Wash.2d 591, 596, 682 P.2d 312 (1984).

[10] ¶ 23 On the two topics at issue, the trial court found that the information would not be helpful to the jury. “Under ER 702, expert testimony will be deemed helpful to the trier of fact only if its relevance can be established.” *State v. Greene*, 139 Wash.2d 64, 73, 984 P.2d 1024 (1999).<sup>4</sup> The trial court ruled that Daly could not testify about the “standard of care” for police investigations of sexual abuse allegations. The stated rationale was that it would not be helpful to the jurors because “[t]he jury isn't going to be asked to evaluate Detective Ryan's standard of care.” VRP (June 14, 2004) at 76. The State argued that the standard of care and breach are civil legal matters and were therefore irrelevant. The exacting focus on the terminology “standard of care,” though the term came from the defense, was misguided. The defense's theory was clearly that the allegations of sex abuse were created by A.W.'s mother as part of a child custody dispute and went unchecked. The fact that the police failed to conduct a thorough investigation of the charges, beyond merely funneling information to the prosecutor's office, is relevant to the defense's theory.

\*6 [11] ¶ 24 However, we review the ruling under an abuse of discretion standard; a trial court's evidentiary ruling is an abuse of discretion only if it is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995). Even if we were to go as far as saying that the failure to admit testimony about standards for a police investigation was untenable, **Morris** must show that the error resulted in a “complete miscarriage of justice.” *Cook*, 114 Wash.2d at 812, 792 P.2d 506.

¶ 25 He cannot meet this burden. Detective Ryan admitted that she did little investigatory work, including that she did not interview any witnesses for this case. She also admitted that the Anacortes Police Department does not have any procedures or policies regarding the investigation of sex abuse cases. The defense was able to clearly establish that little police investigation occurred without the admission of

expert testimony highlighting what should have been done. As a result, there was not a complete miscarriage of justice.

[12] ¶ 26 On the issue of testimony about the suggestibility of young child witnesses, the trial judge ruled, “That is the one thing *Swan* and *Willis* say; it's not admissible under this expert's testimony, the suggestibility of young children and how their memory could be affected by adult manipulation. This is not coming in.” VRP (June 14, 2004) at 84. The trial court treated *Swan* and *Willis* as creating a categorical rule excluding expert testimony about the suggestibility of young children, but we clarified in *Willis* that this is not the case. *Willis*, 151 Wash.2d at 261, 87 P.3d 1164. The court observed that, while the suggestibility of young children is generally understood by the jury, “specialized knowledge regarding the effects of specific interview techniques and protocols ‘is not likely within the common experience of the jury.’” *Id.* (quoting *State v. Willis*, 113 Wash.App. 389, 394, 54 P.3d 184 (2002)). The *Willis* court held that “merely because it is a matter of general knowledge that children's memories are changeable does not preclude testimony that specific interview techniques might compromise specific memories.” *Id.* The trial court's statement of the law is an erroneous oversimplification. Because the rationale for the ruling was based on “untenable grounds,” *Powell*, 126 Wash.2d at 258, 893 P.2d 615, the trial court abused its discretion. Under *Willis*, the trial court should have considered whether testimony about the suggestibility of young children, as it related to specific interview techniques, would have been helpful to the jury.

[13] ¶ 27 While error, **Morris** cannot show that it resulted in a complete miscarriage of justice. See *Cook*, 114 Wash.2d at 812, 792 P.2d 506. The trial judge allowed testimony on the difference between the State's and defense's experts' interviews and techniques, which could have included some of the relevant information the defense sought to introduce as “suggestibility” evidence. The defense was also able to cross-examine other witnesses about the suggestibility of child witnesses and therefore to present this theory in argument.

\*7 ¶ 28 We hold that **Morris** cannot meet his burden to show that any evidentiary errors made by the trial court regarding the inadmissibility of certain subjects of proposed expert testimony resulted in a complete miscarriage of justice.

### 3. Ineffectiveness of Trial Counsel

¶ 29 To prove ineffective assistance of counsel at trial, **Morris** would have to show that his trial “attorney's performance

was deficient and not a matter of [reasonable] trial strategy or tactics” and that he was prejudiced. *State v. Mannering*, 150 Wash.2d 277, 285, 75 P.3d 961 (2003) (citing *State v. Hendrickson*, 129 Wash.2d 61, 77–78, 917 P.2d 563 (1996); *Strickland*, 466 U.S. at 687–89, 104 S.Ct. 2052); *Grier*, 171 Wash.2d at 34, 246 P.3d 1260. **Morris** alleges that two of defense counsel's actions meet this exacting standard. First, counsel failed to object to Daly's videotaped interview of A.W. Second, counsel decided not to call Daly as a witness to explain the videotape after its admission. Neither action, however, establishes ineffective assistance of counsel.

[14] [15] ¶ 30 “Generally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics.” *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 742, 101 P.3d 1 (2004); see also *Mannering*, 150 Wash.2d at 287, 75 P.3d 961 (finding the failure to call a defense expert witness to be strategic). Here, there are possible strategic reasons for not calling Daly, including that he was argumentative with the judge and the prosecutor on the stand during the proffer for the admission of his testimony. VRP (June 14, 2004) at 42–43, 87 (“[DEFENSE COUNSEL]: ... I noticed a definite deterioration between the two, [the prosecutor] and Mr. Daly, as the interview progressed.”). To the extent the defense wanted to draw comparisons between Daly's interview and Ashbrook's interview of A.W., that was possible without Daly's testimony.

[16] ¶ 31 **Morris** also fails to rebut the presumption that his trial counsel's failure to object to the admission of the videotape was strategic or tactical. The certified record does not include the videotape or a transcript of it. However, defense counsel described the videotaped interview of A.W. as “[a]lmost a complete recantation” of statements A.W. made in the interview with Ashbrook. *Id.* at 75. Defense counsel also stated that A.W.'s statements “to Mr. Daly [were] virtually identical to what she testified to on the stand.” *Id.* Admission of the interview, therefore, could be strategic. Even if it was not, **Morris** cannot show prejudice from the failure to object since the videotape, according to counsel, was redundant of testimonial evidence that was already admitted. We hold that **Morris** cannot meet his burden to show that any of trial counsel's actions were deficient.

### 4. Cumulative Error

[17] ¶ 32 Finally, **Morris** argues that the alleged errors resulted in reversible cumulative error. The cumulative error doctrine applies “when there have been several trial errors

that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wash.2d 910, 929, 10 P.3d 390 (2000). For the reasons already noted, particularly that the defense was able to get in additional evidence relevant to its theory of the case, we hold that the alleged errors “had little or no effect on the outcome at trial” and therefore did not deprive **Morris** of a fair trial. *Id.*

## CONCLUSION

\*8 ¶ 33 We hold that the trial court erred by conducting part of voir dire in chambers without considering the *Bone-Club* factors, effecting a violation of **Morris's** public trial right. We reaffirm *Orange* and hold that **Morris** is entitled to relief under his ineffective assistance of appellate counsel claim because this error would have been presumed prejudicial on direct review. On this basis, we reverse and remand for a new trial. Finally, while we note errors in the trial court's reasoning regarding the admission of the defense's proposed expert testimony, we hold that **Morris** fails to meet his burden to get relief on the bases of evidentiary errors and ineffective assistance of counsel at trial.

WE CONCUR: MARY E. FAIRHURST and DEBRA L. STEPHENS, Justices, and GERRY L. ALEXANDER, Justice Pro Tem.

CHAMBERS, J. (concurring).

¶ 34 I agree with the lead opinion that this case is analytically indistinguishable from our decision in *In re Personal Restraint of Orange*, 152 Wash.2d 795, 100 P.3d 291 (2004), and that *Orange* therefore controls the disposition of this case. I write separately to address several points.

¶ 35 This court's jurisprudence regarding public trials under article I, sections 10 and 22 is still developing. As a threshold question in public trial rights cases, we should always decide first whether a closure of the courtroom has occurred. If there is no closure, then the analysis ends there.

¶ 36 We have just set forth a new test for determining whether an event constitutes a courtroom closure. In *State v. Sublett*, — Wash.2d —, —P.3d — (2012) (plurality opinion), we adopted an “experience and logic” test from the United States Supreme Court. *Id.*, — Wash.2d at —, —, — P.3d — (quoting *Press-Enter. Co. v. Superior Court*, 478

U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). Under that test, a closure is determined by examining (1) whether the place and process in question have historically been open to the public and (2) whether public access plays a significant positive role in the functioning of the process in question. *Id.*, — Wash.2d at —, — P.3d —.

¶ 37 It will not always be necessary to use this new test. For example, it is “well settled that the right to a public trial ... extends to jury selection.” *State v. Brightman*, 155 Wash.2d 506, 515, 122 P.3d 150 (2005). The private questioning of individual jurors is plainly part of jury selection. Once this court has decided that a set of circumstances does or does not represent a closure, the issue is settled and it is no longer necessary to revisit the question with an experience and logic test or other analysis.

¶ 38 In this case, the question boils down to whether the defendant's counsel on appellate review should have known to raise the public trial issue. As the lead opinion makes clear, *Orange* had been decided at the time **Morris** filed his appeal. Lead opinion at 10. *Orange* stated without qualification that a *Bone-Club*<sup>1</sup> analysis applied to jury selection and that closure of jury selection without the required analysis was a presumptively prejudicial error on direct appeal. *Orange*, 152 Wash.2d at 807–08, 814, 100 P.3d 291. Because *Orange* should have made clear to all that private questioning of jurors outside the courtroom was an issue worth raising on appeal, I concur in the lead opinion.

MADSEN, C.J. (dissenting).

\*9 ¶ 39 There are several cases presently before the court involving a criminal defendant's right to a public trial, including *State v. Sublett*, No. 84856–4, — Wash.2d —, — P.3d — (2012) (plurality opinion); *State v. Paumier*, — Wash.2d —, — P.3d — (2012); *State v. Wise*, — Wash.2d —, — P.3d — (2012); and *In re Personal Restraint of Morris*, — Wash.2d —, — P.3d — (2012) (plurality opinion). I am troubled by many aspects of the court's jurisprudence in this area and therefore have written an extensive concurrence in *Sublett* addressing many of the issues that have been presented in numerous recent cases before our court and the Court of Appeals. I am also writing in each of the cases to highlight important points that relate to the individual cases.

¶ 40 The present case, like *Wise* and *Paumier*, involves limited, private questioning of a few potential jurors on

sensitive subjects. The only confirmed error regarding the public trial right that occurred in *Morris* (the present case), *Wise*, and *Paumier* is that the trial courts did not engage in the five-factor inquiry that is required under article I, section 22, of the Washington State Constitution prior to closing a portion of a criminal trial. This test was set out in *State v. Bone-Club*, 128 Wash.2d 254, 906 P.2d 325 (1995), and parallels the test required under the Sixth Amendment to the United States Constitution that must be satisfied before criminal proceedings are closed. See *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

¶ 41 Under *Bone-Club*, inquiry must be made into whether the interest that the proponent of closure contends justifies closure is a compelling interest that overrides the defendant's right to a public trial and whether the proposed closure is essential to preserve that interest. The closure, if approved, must be the least restrictive form of available closure that will protect the threatened interest. An opportunity must be made for objections to closure. *Bone-Club*, 128 Wash.2d at 258–59, 906 P.2d 325.

¶ 42 We do not know, in these three voir dire cases presently before the court, whether the trial courts would have ordered the same closures in these cases following proper *Bone-Club* inquiries because none were made. Nonetheless, the majorities in these cases, as in other cases that have come before the court, conclude that reversal of the defendants' convictions and new trials are required because no *Bone-Club* inquiry occurred.

¶ 43 But with these holdings, the inquiry into whether closure was justified has been turned into the issue of whether the right to a public trial has been violated. Even when a closure would be fully justified under the *Bone-Club* inquiry, and accordingly would be a fully constitutional closure and *not* a violation of the right to a public trial, nevertheless reversal and a new trial are required because the *Bone-Club* inquiry was not made.

\*10 ¶ 44 This approach makes little sense when a posttrial *Bone-Club* inquiry could be made and could establish whether or not the closure met constitutional standards. As I show in my *Sublett* concurrence, many courts in other jurisdictions make such posttrial inquiries, either on the appellate record or on remand from an appellate court for entry of factual findings, or by way of a hearing and findings where the record is inadequate to resolve the issue.

¶ 45 Our state courts should do the same. There is no precedent or compelling constitutional principle that prevents a posttrial assessment. I do not say that the failure to conduct the *Bone-Club* analysis is not error. It is a serious error. But I believe it is senseless to turn the failure to conduct the inquiry, alone, into the most serious form of constitutional error that can occur, when a posttrial evaluation might show that no closure without adequate justification actually occurred. I have addressed this problem more extensively in my concurrence in *Sublett*, as well as in my dissents in *Wise* and *Paumier*.

¶ 46 *Morris* presents the issue in a different context than *Wise* and *Paumier*. *Morris* is here on collateral review. One would ordinarily think this means that the standards for review of personal restraint petitions would apply. But a majority of the court does not agree. Just as decisions of this court have taken the public trial right out of the normal realm of constitutional review, so has this decision turned its back on our directly applicable rules for collateral review.

¶ 47 I cannot agree with this approach. There is nothing about this issue that requires that we provide relief when Mr. *Morris* can show no actual and substantial prejudice, as he is required to show for claimed constitutional error raised for the first time on collateral review. *In re Pers. Restraint of Cook*, 114 Wash.2d 802, 810, 792 P.2d 506 (1990). As Justice Wiggins correctly shows in his dissent, we have rejected the premise that error that is presumed prejudicial on direct appeal is also presumed prejudicial on collateral review. *In re Pers. Restraint of St. Pierre*, 118 Wash.2d 321, 328–29, 823 P.2d 492 (1992).

¶ 48 A majority of the court, however, concludes that this case is controlled by *In re Personal Restraint of Orange*, 152 Wash.2d 795, 100 P.3d 291 (2004). There are significant differences, however. First, as Justice Wiggins explains, the error in *Orange* was conspicuous in the record and appellate counsel should have noticed it.

¶ 49 Here, in contrast, all that the record shows is that no *Bone-Club* inquiry was made. But this does not equate to a violation of the right to a public trial. Moreover, the record shows that there was a valid reason for the limited voir dire in chambers on sensitive topics and this would indicate to reasonable appellate counsel that no constitutional violation occurred. The record also shows that the defendant affirmatively approved of the procedure, even going so far as waiving his right to be present so that jurors were

encouraged to be more forthcoming in their responses to sensitive questioning than they might have been if he had been present.

\*11 ¶ 50 Appellate counsel reviewing this record could reasonably conclude that the closure was justified on grounds of the jurors' interests in privacy *plus* the defendant's interest in a fair trial decided by unbiased jurors. Closure for the purpose of obtaining full answers to sensitive questioning served both of these purposes. At the same time, appellate counsel could well conclude that this closure for purposes of obtaining full disclosure did not contravene any of the purposes served by the right to a public trial. The proceedings were recorded and transcribed as part of the public record of this case. Thus, at all times counsel and the court were contemporaneously and continuously reminded of their responsibilities in the criminal justice system and of the need to carry out these responsibilities fully and fairly. Because no witnesses were involved at this stage, there were no questions pertaining to witnesses, encouraging their testimony, or avoiding perjury.<sup>1</sup> Thus, the values that underlie the right to a public trial do not suggest a public trial violation.

¶ 51 Accordingly, there was no deficient performance that is apparent on the appellate record as there was in *Orange*. Rather, what is obvious is a sound trial choice to close the proceedings in aid of selecting unbiased jurors, and very little likelihood that the closure was unjustified.

¶ 52 But even if an issue remains about the ultimate questions, whether the right to a public trial was violated or whether appellate counsel should have acted differently, there is an existing procedure for finding answers to these questions. RAP 16.11 provides that a personal restraint petition can be sent to superior court for a reference hearing to determine disputed facts. If the *Bone-Club* inquiry conducted as part of a reference hearing leads to the conclusion that the closure was justifiable, then appellate counsel could not have been ineffective in failing to pursue the matter. Certainly no prejudice would have existed.

¶ 53 Like courts in other jurisdictions have done, this court can remand for a reference hearing to determine whether the closure of the proceedings for a limited time for limited questioning of a few of the potential jurors on sensitive topics was a constitutionally permitted closure of the proceedings. This is a far better course to take in this case than a summary decision that reversal and a new trial are required. I address this more fully in my concurrence in *Sublett*.

¶ 54 In short, I disagree with the treatment of this case as if it presents the same circumstances as in *Orange*. This is not true because in *Orange* the record showed that objection had been made to the closure. Here, both defense counsel and the defendant engaged in conduct that shows they agreed to the closure so that potential jurors would be more forthcoming in their answers regarding sensitive matters. These circumstances make this a far different case from *Orange*. Moreover, the closure here was of plainly apparent benefit to Mr. **Morris**. That was not true in *Orange*.

\*12 ¶ 55 Moreover, to the extent there is a question whether the closure of the proceedings violated the right to a public trial, the rules of appellate procedure provide a method for inquiring into the matter. The rules should be utilized. I dissent.

WIGGINS, J. (dissenting).

¶ 56 Eight years ago, Patrick **Morris** was convicted of two counts of first degree sexual molestation and one count of first degree rape of his daughter, A.W. A.W. was five years old when she disclosed the abuse to her mother and stepfather. At trial, **Morris** never objected to the trial court's decision to conduct partial voir dire of 14 venirepersons in chambers instead of in open court. On appeal, **Morris** never raised the partial voir dire in chambers as an error. Neither **Morris** nor the lead opinion can articulate any prejudice that resulted from this brief chambers voir dire. And yet, eight years later, the lead opinion overturns **Morris's** conviction and orders a new trial, subjecting this now-older but still-young girl to endure again the ordeal of testifying about this intensely private and hurtful experience.

¶ 57 We must never shrink from ordering a new trial when a defendant has been prejudiced by the violation of fundamental constitutional rights. Conversely, if a defendant cannot show prejudice from the violation of a constitutional right, we should not order a new trial. This is such a case and I therefore dissent.

¶ 58 In *State v. Wise*, — Wash.2d —, — P.3d — (2012) and *State v. Paumier*, — Wash.2d at —, — P.3d — (2012), a majority of this court held that in-chambers voir dire without a *Bone-Club* analysis is reversible error on direct appeal. But it is a completely different question whether the same error requires us to grant relief in a personal restraint petition (PRP). Our PRP procedures reflect a crucial and enduring belief in the importance of finality, recognizing

that collateral relief degrades the prominence of the trial and sometimes costs society the right to punish admitted offenders. It is for this very reason that we require personal restraint petitioners to demonstrate prejudice as a prerequisite to relief. This burden exists as a matter of PRP procedure in all cases, regardless of the nature of the underlying error alleged by the petitioner.

¶ 59 The lead opinion would discard this burden entirely for public trial errors, ignoring the unique procedural situation of a PRP and treating the public trial right as a trump card annulling the principles of finality long enshrined in our PRP procedures. Indeed, the lead opinion's extension of *In re Personal Restraint Petition of Orange*, 152 Wash.2d 795, 100 P.3d 291 (2004), to this case (and seemingly to any public trial violation) collapses the distinction between direct and collateral review for these cases by equating the two as long as the defendant says the magic words: ineffective assistance of appellate counsel. This not only strains our notions of what is fair in the criminal justice system but ignores our decision in *In re Personal Restraint of St. Pierre*, 118 Wash.2d 321, 823 P.2d 492 (1992), which says that even a presumptively prejudicial error will not necessarily be treated as such on collateral review. It also invites an onslaught of PRPs from petitioners like **Morris** who can identify anything in their trial record that could conceivably be labeled a violation of the right to a public trial. Until **Morris** can demonstrate some prejudice to the outcome of his case, I would deny collateral relief. On the other issues before the court in this case, I agree with the lead opinion.

#### **I. A new trial should not be automatic when a public trial violation is raised for the first time on collateral review**

\*13 ¶ 60 Ordinarily, when a personal restraint petitioner alleges a constitutional violation, the petitioner must “satisfy [the] threshold burden of demonstrating actual and substantial prejudice.” *In re Pers. Restraint of Cook*, 114 Wash.2d 802, 810, 792 P.2d 506 (1990). We have held in our public trial cases that, on direct appeal, violations of the public trial right are presumed prejudicial. *State v. Strode*, 167 Wash.2d 222, 231, 217 P.3d 310 (2009) (plurality opinion); *State v. Easterling*, 157 Wash.2d 167, 181, 137 P.3d 825 (2006). If this case were before us on direct review, those cases would be relevant. But we have never held that the presumption of prejudice that attaches on direct appeal eliminates the petitioner's wholly separate burden to show prejudice on collateral review. In fact, in *St. Pierre*, we held that errors that

are presumed prejudicial on direct appeal will not necessarily be presumed prejudicial on collateral review. 118 Wash.2d at 328–29, 823 P.2d 492. We held that a “higher standard” must be met before a presumption of prejudice attaches on collateral review. *Id.* at 329, 823 P.2d 492. Specifically, to meet this higher standard, a constitutional violation must give rise to a “conclusive presumption of prejudice.” *Id.* at 328, 823 P.2d 492.

¶ 61 This reflects the fact that collateral review is not a substitute for direct appeal. An error that justifies reversal on direct review will not necessarily justify reversal on collateral attack. *In re Pers. Restraint of Hagler*, 97 Wash.2d 818, 823–24, 650 P.2d 1103 (1982). This proposition is universally accepted both in Washington and in the federal courts. *See id.* at 824, 650 P.2d 1103 (“‘The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.’” (quoting *United States v. Addonizio*, 442 U.S. 178, 184, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979))); *Brecht v. Abrahamson*, 507 U.S. 619, 633, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (“The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence.”). The reasons for this difference are equally well recognized: “Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs and they require that collateral relief be limited in state as well as federal courts.” *Hagler*, 97 Wash.2d at 824, 650 P.2d 1103 (citing *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)).

¶ 62 We reaffirmed these necessary limits in *St. Pierre*. 118 Wash.2d at 328–29, 823 P.2d 492. There, we held that the “higher standard” on collateral review is met, in the absence of an actual showing of prejudice, only where, in light of the essential purpose of the constitutional right at issue, a violation of the right would necessarily prejudice the defendant. *See id.*; *see also In re Pers. Restraint of Delgado*, 160 Wash.App. 898, 910, 251 P.3d 899 (2011) (“Where the essential purpose of a constitutional protection can be satisfied in a collateral proceeding without a per se prejudice rule, such a rule should not be adopted.” (citing *St. Pierre*, 118 Wash.2d at 328–29, 823 P.2d 492)). Thus, where the petitioner has not made the required showing of prejudice, we must analyze the error at issue under this standard. In *St. Pierre*, the right at issue was a criminal defendant's right to be apprised with reasonable certainty of the charges against him. *St. Pierre*, 118 Wash.2d at 329, 823 P.2d 492. A violation

of that right is presumed prejudicial on direct appeal, but *St. Pierre* held that it would not be on collateral review. The court reasoned that the essential purpose of this right is to provide notice, and a defendant's right to notice is not necessarily prejudiced by a defective charging document. On the other hand, *St. Pierre* cited several cases in which there would be a conclusive presumption of prejudice. See *In re Pers. Restraint of Richardson*, 100 Wash.2d 669, 679, 675 P.2d 209 (1983) (court's failure to inquire about a conflict of interest arising from joint representation gave rise to a conclusive presumption of prejudice); *In re Pers. Restraint of Hews*, 99 Wash.2d 80, 88–89, 660 P.2d 263 (1983) (invalid guilty plea automatically gave rise to a prima facie showing of prejudice). In these cases, the defendant was necessarily prejudiced by a constitutional violation in light of the essential purpose of the right at stake.

\*14 ¶ 63 But the same is not true of in-chambers voir dire of 14 potential jurors. The purpose of the public trial right is to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *State v. Brightman*, 155 Wash.2d 506, 514, 122 P.3d 150 (2005) (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir.1996) (citing *Waller v. Georgia*, 467 U.S. 39, 46–47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984))). None of these goals is necessarily jeopardized when counsel questions a handful of potential jurors in chambers in an attempt to encourage them to be more forthcoming about sensitive topics. This is particularly true where, as here, the defendant appeared to approve of the tactic and wanted to benefit from increased candor—**Morris** waived his right to be present during the questioning because he thought jurors would be more forthcoming in his absence. The defendant certainly may be prejudiced by in-chambers voir dire, but such prejudice is not “conclusive,” nor should it be presumed. To conclude otherwise ignores the differences between direct and collateral review.

¶ 64 Like every other personal restraint petitioner, **Morris** is required to make a threshold showing of actual and substantial prejudice. Since he has not done so, we should deny relief.

## II. This case is factually different from *Orange* and the result in that case does not require a new trial here

¶ 65 By extending *Orange* beyond its facts, the lead opinion equates direct and collateral review for any petitioner claiming a public trial violation as long as they remember to say “ineffective assistance of appellate counsel.” This is not

only overly simplistic, it is wrong under the law and virtually guarantees a flood of public trial PRPs.

¶ 66 Instead, we should recognize the reality of the situation, which is that this case is factually different from *Orange* and not controlled by that case. In *Orange*, we found that appellate counsel's failure to raise a public trial issue was ineffective assistance of appellate counsel. In that case, ineffective assistance of counsel was clear from the facts. Here it is not. To show ineffective assistance of appellate counsel, under the test set forth in *Strickland v. Washington*, the defendant has the burden to show (1) that counsel's performance was deficient, meaning it “fell below an objective standard of reasonableness” based on consideration of all the circumstances and (2) resulting prejudice, meaning that “there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” 466 U.S. 668, 687–88, 669, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. Murray*, 477 U.S. 527, 535–36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (applying *Strickland* test to ineffective assistance of appellate counsel). There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment. *State v. Kylllo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). A “ ‘fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.’ ” *State v. Grier*, 171 Wash.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

\*15 ¶ 67 In *Orange*, counsel's performance was deficient because it fell below an objective standard of reasonableness. Counsel failed to raise a public trial issue that was conspicuous in the record and that was developed at trial. The trial judge in that case closed the courtroom for between two and four days of voir dire over the objection of the defendant's family, who wished to observe the entire trial. *Orange*, 152 Wash.2d at 801–03, 100 P.3d 291. Defense counsel pursued the issue and objected on the record. *Id.* On appeal, appellate counsel did not raise the public trial right violation even though it was conspicuous in the record and raising it would have resulted in a new trial. Moreover, counsel did not raise the public trial issue even though it was well established at the time of the appeal that the public trial right extended to the closure at issue, a total closure of voir dire. See *id.* at 804–05, 100 P.3d 291 (citing *Press-Enter. Co. v. Superior Court*, 464

U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)). Based on these facts, we held that failing to raise the public trial issue constituted ineffective assistance of appellate counsel. *Id.* at 814, 100 P.3d 291. And indeed, under those circumstances, appellate counsel should have known to pursue the issue and would have been remiss in making a conscious decision not to pursue it.

¶ 68 **Morris's** case is different. First, the public trial violation was not conspicuous in the record. There was no objection at trial to in-chambers voir dire, unlike the contemporaneous objection in *Orange*, and the issue was in no way developed below. In fact, the opposite is true: the conduct of **Morris** and his attorney suggests that both approved of the closure and sought to benefit by it. **Morris** agreed to waive his right to be present during in-chambers questioning because he thought jurors would be more forthcoming if he were not in the room. Unlike *Orange*, it is not clear under these facts that counsel would be deficient in failing to develop the issue on appeal. Second, and perhaps more importantly, it was not at all clear at the time of **Morris's** appeal that the public trial issue would be a winning issue on appeal or that it should even be pursued. It may seem clear with the benefit of hindsight after *Strode*, 167 Wash.2d 222, 217 P.3d 310, but before *Strode* this court had never held that partial chambers voir dire would violate the public trial right. **Morris's** appeal was decided four years before *Strode*, so it is unlikely that **Morris's** appellate counsel was constitutionally deficient for failing to raise and develop what may have been a novel legal argument at the time. This is especially true in light of the fact that in-chambers voir dire appeared to be a common practice before *Strode*. See Lauren A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?*, 3 Rutgers J.L. & Urb. Pol'y 287, 311 (2006) (The author surveyed 18 federal judges. "Virtually all" of them allowed potential jurors to answer intrusive or embarrassing questions "privately at the bench or in chambers, with only the judge, the court reporter, and the opposing counsel present."). **Morris's** attorney either decided not to raise the public trial issue in this case as a strategic matter or else he did not notice it because it was not conspicuous in the record and the case law was undeveloped. Either way, his performance was not deficient. We do not require appellate counsel to be perfect. Nor do we require appellate counsel to raise every nonfrivolous claim on appeal. Instead, we seek to eliminate hindsight bias by employing a presumption that counsel's performance was not deficient.

### III. Conclusion

\*16 ¶ 69 The right to a public trial is not a magic wand granting new trials to all who would wield it. Openness is a crucially important value in our criminal justice system, but so is finality. It does not serve the interests of justice to reopen this long-decided case, requiring a young girl to relive old traumas, and granting a windfall new trial to a man convicted of sexually molesting his daughter. We require personal restraint petitioners to show actual and substantial prejudice because we value finality and seek to avoid outcomes of this nature. **Morris** should be required to meet that burden just like every other personal restraint petitioner.

¶ 70 I respectfully dissent.

WE CONCUR: JAMES M. JOHNSON and CHARLES W. JOHNSON, Justices.

1 We rely on the additional Verbatim Report of Proceedings (VRP) that appears in "Appendix A" of the PRP because the transcripts that were certified to this court exclude the voir dire portion of trial proceedings. VRP (June 8, 2004) at 3.

2 "1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

"2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

"3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

"4. The court must weigh the competing interests of the proponent of closure and the public.

"5. The order must be no broader in its application or duration than necessary to serve its purpose."

*Bone-Club*, 128 Wash.2d at 258–59, 906 P.2d 325 (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wash.2d 205, 210–11, 848 P.2d 1258 (1993)).

3 Here we apply the nonconstitutional error standard for collateral review. **Morris** argues that his evidentiary claims rise to the level of constitutional error because he was allegedly prevented from presenting a defense. *Cf. State v. Maupin*, 128 Wash.2d 918, 928–30, 913 P.2d 808

(1996) (treating failure by the court to allow Maupin to call a witness as constitutional error). However, **Morris** was allowed to present almost everything he wanted and explore the theory of his case through both direct testimony and cross-examination.

4 We decline to address the State's argument, raised for the first time on review, that Daly was unqualified as an expert and that his proposed testimony was not based on theories that are generally accepted. Further, there is sufficient evidence in the record regarding Daly's experience and the bases for his proposed testimony.

1 *State v. Bone-Club*, 128 Wash.2d 254, 906 P.2d 325 (1995).

1 There is considerable irony in the fact that a process that benefited the defendant because it promoted more forthcoming disclosure by potential jurors and so aided in jury selection is now challenged because it was not conducted in public where this benefit would not have accrued to the defendant.

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Nelson, the attorney for the petitioner, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the State's Response to Personal Restraint Petition, in IN PERSONAL RESTRAINT OF JEFFREY MCKEE, Cause No. 67484-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

12/17/12

Date