

NO. 42377-4-II

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

STATE OF WASHINGTON, Respondent

v.

LARRY ALBERT MOOREHEAD, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 04-1-02493-5

RESPONSE TO PERSONAL RESTRAINT PETITION

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

A. IDENTITY OF RESPONDENT 1

B. AUTHORITY FOR RESTRAINT 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT WHY PETITION SHOULD BE DISMISSED..... 12

 I. MOOREHEAD WAS NOT DENIED EFFECTIVE
 ASSISTANCE OF COUNSEL. 15

 a. This Court should decline to consider Moorehead’s
 declaration about the specific actions and words of his
 attorney..... 19

 b. Moorehead cannot demonstrate actual and substantial
 prejudice. 22

 1. Reasonable investigation 23

E. CONCLUSION 30

TABLE OF AUTHORITIES

Cases

<i>Cuffle v. Goldsmith</i> , 906 F.2d 385, 388 (9 th Cir. 1990).....	17
<i>Dietz v. John Doe</i> , 131 Wn.2d 835, 850, 935 P.2d 611 (1997).....	20
<i>Hicks v. Calderon</i> , 70 F.3d 1032, 1040 (9 th Cir. 1995).....	16
<i>In re Connick</i> , 144 Wn.2d 442, 458, 28 P.3d 729 (2001).....	14
<i>In re Pers. Restraint of Cook</i> , 114 Wn.2d 802, 813, 792 P.2d 506 (1990)	13, 14
<i>In re Pers. Restraint of Hagler</i> , 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982).....	13
<i>In re Pers. Restraint of Hews</i> , 99 Wn.2d 80, 88, 660 P.2d 263 (1983).....	14
<i>In re Pers. Restraint of Stockwell</i> , ___ Wn.App. ___, No 37238-0-II (February 17, 2011).....	13
<i>In re Pers. Restraint of Williams</i> , 111 Wn.2d 353, 365, 759 P.2d 436 (1988).....	13, 14
<i>In re Personal Restraint of Crace</i> , 157 Wn.App. 81, 95, 236 P.3d 914 (2010), review granted, 171 Wn.2d 1035, 257 P.3d 664 (2011).....	22
<i>In re Personal Restraint of Rice</i> , 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).....	22
<i>In re Rozier</i> , 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)	14
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S.Ct. 2574 (1986) .15, 17	
<i>Mickens v. Taylor</i> , 533 U.S. 162, 122 S.Ct. 1237 (2002).....	17
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010).....	27
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	16
<i>State v. Blair</i> , 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991)	21
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S.Ct. 931 (1996)	16
<i>State v. Carpenter</i> , 52 Wn.App. 680, 684-85, 763 P.2d 455 (1988).....	17
<i>State v. Cloud</i> , 95 Wn.App. 606, 613 n.9, 976 P.2d 649 (1999)	12, 20
<i>State v. Crumpton</i> , 90 Wn.App. 297, 952 P.2d 1100 (1998).....	25
<i>State v. Davis</i> , 73 Wn.2d 271, 276, 438 P.2d 185 (1986)	21
<i>State v. King</i> , 24 Wn.App. 495, 505-06, 601 P.2d 982 (1974).....	19
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	16, 17
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	15, 17
<i>State v. Webb</i> , 122 Wn.App. 683, 694, 94 P.3d 994 (2004).....	19
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S.Ct. 2052 (1984)	15, 16, 17, 22
<i>United States v. Cronin</i> , 466 U.S. 648, 656, 104 S.Ct. 2045 (1984).....	15
<i>United States v. Molina</i> , 934 F.2d 1440, 1447-48 (9 th Cir. 1991).....	17

<i>United States v. Phillips</i> , 433 F.2d 1364, 1366 (8 th Cir. 1970)	14
<i>Wright v. Safeway Stores, Inc.</i> , 7 Wn.2d 341, 346, 109 P.2d 542 (1941) .	21
<i>Yarborough v. Gentry</i> , 540 U.S. 1, 8, 124 S.Ct. 1 (2003)	16

Statutes

RCW 5.60.060(2)(a)	19
--------------------------	----

Other Authorities

5A Karl Teglund, <i>Washington Practice: Evidence</i> § 501.23 at 173 (5 th ed. 2007)	12, 20
--------------------------------------------------------------------------------------------------------	--------

Rules

RAP 16.7(a)(2)(i)	13
RPC 1.6(a)	19
RPC 1.6(b)(5)	12, 20

A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this matter.

B. AUTHORITY FOR RESTRAINT

Mr. Moorehead is restrained pursuant to the judgment and sentence of the Clark County Superior Court dated July 23, 2010 under cause number 04-1-02493-5. A copy of the judgment and sentence is attached as Appendix A.

C. STATEMENT OF THE CASE

Larry Moorehead pled guilty to one count of child molestation in the first degree and received a sentence under the Special Sex Offender Sentencing Alternative (SSOSA). See Defendant's Appendix A. Between the time he was placed on the SSOSA he committed several violations of the conditions of his supervision, including three violations for traveling outside of his restricted geographical area without permission of his community corrections officer and one violation for possessing pornography and lying to his community corrections officer. See Defendant's Appendix D. The State twice brought a motion to revoke Moorehead's SSOSA in response to his prior violations. See Defendant's Appendix D. In the violation involving his possession of pornography, which occurred on March 14, 2006, Moorehead was found to have

accessed two pornographic websites and he was found in possession of a video containing a pornographic scene. Defendant's Appendix D. It was also discovered that he was "receiving nude pictures from a young female who [he] was conversing with." Defendant's Appendix D. Moorehead lied to his CCO and said he had nothing in his room that he was not supposed to have, and said he didn't know how the websites "got onto his computer." Defendant's Appendix D. He continued to lie even after the pornographic videotape was discovered. Defendant's Appendix D. He later admitted that he possessed the pornography because he was lonely. Defendant's Appendix D. The CCO noted in his report that it was very concerning that Moorehead was conversing with a young woman this way over the internet because that is the method he used to meet the mother of his victim. Defendant's Appendix D. Moorehead had also lied to his treatment provider by not disclosing that he had been viewing pornography. Defendant's Appendix D. The report by the CCO reveals that Moorehead's adjustment to community supervision had been poor. Defendant's Appendix D. However, the trial court declined to remove Moorehead from SSOSA at that time and imposed a jail sanction. Defendant's Appendix D. In 2007 the State again moved to have Moorehead removed from SSOSA when was found to have left Clark County without obtaining permission in November of 2006. Defendant's

Appendix D. Moorehead was again not removed from SSOSA and merely given a jail sanction. Defendant's Appendix D. In the violation report filed by the Clark County Department of Corrections in 2007 Moorehead's CCO noted that his adjustment to Community Supervision continued to remain poor and that Moorehead continued to pose a risk to himself and the community. See Defendant's Appendix D. He disclosed that he was having deviant sexual thoughts regarding minors while watching Cruise Line commercials on television. *Id.* The CCO noted that this was very concerning in light of how long Moorehead had been in treatment. *Id.* During the 2006 search of his apartment that revealed pornography Moorehead was also found in possession of a Winnie the Pooh ring (it was in his pocket) that belonged to his victim. *Id.* Moorehead lied and said the mother of his victim gave it to him but he had in fact stolen it. *Id.* In the 2007 violation report the CCO noted that after Moorehead was released from custody following his 2006 violations for possessing pornography and repeatedly lying to his CCO, he actually asked his CCO *to return the Winnie the Pooh ring to him.* *Id.* The CCO declined, recalling that Judge John Wulle had characterized the ring as a "trophy from his victim." *Id.* She concluded that report by stating that "Mr. Moorehead is very much aware of what is at stake if he should violate the conditions of his supervision, yet he still continues to do what he pleases." *Id.*

In 2010, the State again sought revocation of Moorehead's SSOSA. Defendant's Appendix D. The basis for the motion was that Moorehead had violated the terms of his SSOSA by being terminated from treatment in May of 2010. Defendant's Appendix D. According to the written report and the testimony from Kelly Chimenti, Moorehead's sex offender treatment provider, Moorehead was terminated from treatment because he was regressing in treatment, had not mitigated any of his risk factors for re-offense, continued to "engage in resistant and negative behavior demonstrated by refusal to participate in group discussions, open hostility toward group members and therapists," and had "maintained a stance of blaming others for his situation, lack of progress, hostility and social isolation." See Defendant's Appendix D, Defendant's Appendix E. He had been ordered to complete arousal conditioning with Steven Whitaker, who works with Ms. Chimenti, to address the deviant arousal he had to a rape scenario on his plethysmograph. Defendant's Appendix E at p. 150.

Ms. Chimenti has been a sex offender treatment provider since 2002. Defendant's Appendix E at p. 115. At any given time she supervises about 50 clients. *Id.* She has terminated clients from treatment fewer than five times and considers it a professional failure on her part. *Id.* at 115, 135. The primary reason she terminated Moorehead from treatment was

that he failed to mitigate any of his risk factors, continuing to score at a high-risk level on his Stable assessment. Defendant's Appendix E at p. 116, 118-131. Stated another way, he was no longer amenable to treatment. *Id.* at 131. In her confidential report on Moorehead's termination from treatment, Ms. Chimenti outlines a number of incidents beginning in February of 2010 that ultimately led to the termination. See Defendant's Appendix D.

On February 8th, Ms. Chimenti sent a quarterly progress report to the Clark County Corrections Department stating that in response to Mr. Moorehead's lack of progress in treatment regarding isolation, his employment search, hostility in his treatment group, lack of follow through regarding arousal conditioning and his failure to pay for treatment she planned on presenting Moorehead with a list of behavioral requirements for him to complete treatment. On February 17th, Moorehead was given the list of requirements and he was asked if he had any thoughts about the list. He said "Is it going to change anything?" He declined further comment. He was asked to sign the agreement and return it with a payment on his delinquent balance of \$550. On February 24th, Moorehead attended his treatment group but didn't check in until he was asked. He didn't bring in the treatment agreement and said he didn't agree with the conditions and refused to sign the agreement. However, he said he would

do the conditions if he had to. When informed that he needed to sign the agreement he reluctantly did so. He made a \$600 payment. Between March 3rd and 24th Moorehead attended group but continued to wait until the last minute to check in and would only do so when asked by the therapist. Moorehead had been directed by Mr. Whitaker who was working with him on arousal conditioning to raise a couple of questions and issues to his group but Moorehead did not comply with this request. He was also confronted with his failure to make his agreed payments and stated that he is unemployed and has no way of paying. He was asked to fill out a payment plan form and to contact Ms. Chimenti about how he intended to address his issues. On March 31st Moorehead was called and reminded that he was out of compliance with his treatment agreement. He was asked to contact Ms. Chimenti and discuss his intentions for treatment. He called her and said he had no way to pay for treatment due to his unemployment. Chimenti told him she would send a suspension/termination report to his CCO. On April 1st, Ms. Chimenti sent a Termination Report to Timothy Larsen, Moorehead's CCO and set a meeting between the three of them for April 6th. The April 6th meeting was attended by Moorehead, Ms. Chimenti, Mr. Larsen and Jayne Keplin. The purpose of the meeting was to give Moorehead a chance to discuss what he was willing to do to stay in treatment. Moorehead said he would "try"

to comply with his treatment agreement and promised to check in weekly regarding meaningful issues and not merely give a 30 second checklist of events. He promised to engage in discussions with members of the group and improve his overall attitude to "a proactive stance." Ms. Chimenti gave Moorehead another chance to pay off his balance of \$425 and return to the group on April 21st. He was told that his case would be reviewed on a week-by-week basis and that if he was not in compliance with all parts of his agreement he would be terminated from treatment. On April 13th, Moorehead made a \$400 payment. On April 21st, Moorehead attended his group but displayed passive aggressive hostility toward both the group and Ms. Chimenti. He also did not make a payment. On April 28th Moorehead checked in for his group session but did not comment on his progress in Arousal conditioning. When a fellow group member attempted to provide Moorehead with a comprehensive list of offender friendly employers in Oregon and Southwest Washington he declined to take it, and when confronted with a group member about his refusal to help himself he yelled "Yeah, go ahead and get me a copy and fuck you!". Moorehead continued to yell "fuck you!" at the same group member when the group facilitator tried to calm the situation. He did not make a payment toward his delinquent balance. On May 5th Moorehead again did not make any updates regarding his Arousal conditioning and refused to comment on the

previous week's outburst. When asked directly about his individual sessions and script for Arousal conditioning he was unable to give a clear answer as to what he was working on. He again did not make a payment toward his delinquent balance. On May 12th Moorehead again did not include any updates regarding his Arousal conditioning, and when asked directly about it he gave a vague, brief answer. His attitude remained mostly negative with passive/aggressive comments. He made an \$80 payment bringing his delinquent balance down to \$120. On May 18th Chimenti called Moorehead to inform him that he was being terminated from treatment due to his overall hostile, resistant pattern in treatment, and his continuous negative attitude toward group members and therapists.

In concluding her report Ms. Chimenti said Moorehead was being terminated from sex offender treatment as it had become apparent that he cannot or would not appropriately engage and is currently unable to gain any benefit from her program. She said:

Over the course of his time in treatment, he has not mitigated any risk factors for re-offense. Should he decide to become motivated to make meaningful and significant changes in his life, it is recommended that he attend a treatment program to once again be given the opportunity to make these modifications.

See Defendant's Appendix D.

At the hearing Ms. Chimenti was aggressively cross examined by Mr. Barrar, Moorehead's attorney. She conceded that she was not familiar with Moorehead's SSOSA evaluation, revealing that, contrary to Moorehead's claim otherwise in this petition, Mr. Barrar did know that Ms. Chimenti hadn't reviewed it. See Defendant's Appendix E at p. 141. She conceded that in the four and a half years Moorehead was in her program he did have periods of time where he would progress, or else she would have terminated him earlier. Defendant's Appendix E at p. 144. When asked what was the "straw that broke the camel's back" in May of 2010 to compel her to terminate Moorehead, she said:

Well, for me it was a—it was a series of events and it had—it had been becoming clear to me over the prior—over the prior year that—that he wasn't taking the steps that he needed to to improve his life and to—to benefit from any of the treatment that he'd been—that he had been involved in. So it was a—a series of events. That's reflected in that report, the termination report.

See Defendant's Appendix E at p. 145. Regarding her ultimatum that Moorehead "come up with the money to pay off his balance" to remain in treatment Chimenti agreed that money was "absolutely" a factor in his termination. *Id.* at p. 146. Chimenti noted, however, that whenever threatened with suspension for failing to pay he always returned the next week with a check, leading to the inference that his failure to pay was contumacious. *Id.* Chimenti conceded that she was running a business and

if someone doesn't pay his bill it could be a basis to terminate treatment. Id. at 146-47.

At the commencement of the hearing the State advised the Court that Moorehead had twice been found in violation of his suspended sentence and serve 140 days of jail in total sanctions. See Defendant's Appendix E at p. 111. The trial judge noted that he normally maintains a "no tolerance" policy for any violation. Id. In announcing his decision to revoke Moorehead's SSOSA, the trial judge again remarked on his no tolerance policy for violations and seemed to express regret at having denied the State's motions to revoke when Moorehead was caught possessing pornography and violating the travel restrictions to which he was subject. Id. at 201-03. Judge Wulle then announced that he was revoking Moorehead's SSOSA because he had failed to progress in treatment and lessen his risk. Id. at 203.

In preparation of his petition, Mr. Moorehead executed a declaration. See Defendant's Appendix K. In it, he claims, inter alia, that in preparation for his SSOSA revocation hearing, his attorney Jeff Barrar visited him in jail three times. He claims that Mr. Barrar believed he was being terminated from treatment for failing to pay for treatment and that he told Barrar that the actual reason was "miscommunications and misunderstandings." See Defendant's Appendix K. He claims that he

asked Mr. Barrar about the possibility of interviewing his treatment provider and her staff and Barrar told him he “was not able to do so.” See Defendant’s Appendix K. He attributes the following irrelevant statement to Mr. Barrar: “[I]t is best not to make [the treatment provider] mad if she is going to take you back into treatment.” This was in response, he claims, to his complaint to Barrar that his hearing was being set over. See Defendant’s Appendix K.

In response to Moorehead’s petition, which relies in part on the claims made by Moorehead in his declaration, the State asked attorney Jeff Barrar if he would be willing to review the declaration and provide a declaration confirming or denying the claims made by Moorehead. He agreed that he would do so. At that time the State moved for an extension of time to file its response so that Mr. Barrar would have an opportunity to provide a declaration. On February 14, 2012 Kim Gordon sent a letter to Mr. Barrar and the State claiming that Mr. Barrar’s proposed declaration, even though it would be specifically limited to the “matters asserted in the PRP,” would violate ABA Formal Opinion 10-456. See State’s Appendix B. Gordon claimed that it was not her intent to interfere with this Court’s ability to obtain “relevant and necessary evidence.” *Id.* In response to this letter, Mr. Barrar called counsel for the State and left a voice mail

indicating that he would not be able to provide a declaration in light of Ms. Gordon's letter. See State's Appendix C.

Although Washington law clearly holds that a client waives the attorney/client privilege by claiming ineffective assistance of counsel, at least to the extent necessary to permit the attorney to respond to the specific allegations of ineffectiveness,¹ counsel for the State nevertheless emailed Gordon on February 14, 2012 asking if her client would be willing to execute a limited waiver so that Mr. Barrar could answer the claims made in the petition. The State agreed to stipulate that the declaration by Mr. Barrar would be released only to her initially and then, after a period of five days, she would either have to release the declaration to the State or file a formal objection to the declaration and ask this Court to conduct an in-camera review to determine whether the information should be disclosed to the State. Gordon and Moorehead said "no." As a result, the State has no ability to contest Moorehead's self-serving declaration because it has no power over the now-intimidated Jeff Barrar.

D. ARGUMENT WHY PETITION SHOULD BE DISMISSED

A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for a direct appeal. *In re Pers. Restraint of*

¹ See e.g. *State v. Cloud*, 95 Wn.App. 606, 613 n.9, 976 P.2d 649 (1999); 5A Karl Teglund, *Washington Practice: Evidence* § 501.23 at 173 (5th ed. 2007); RPC 1.6(b)(5).

Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief undermines the principles of finality of litigation, degrades the prominence of 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. *Id.* A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations and mere assertions alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *In re Pers. Restraint of Stockwell*, 161 Wn.App. 329, 254 P.3d 899 (2011); *Hagler*, supra, at 825. Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. *Hagler*, supra, at 825-26.

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the

personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

In personal restraint petitions, “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion. *Williams*, *supra*, at 365 (citing *In re Rozier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), which quoted *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)). The phrase means “more is required than that the petitioner merely claims in broad general terms that the prior convictions were unconstitutional.” *Williams*, *supra*, at 364.

The evidence that is presented to an appellate court to support a claim in a personal restraint petition must also be in proper form. The Washington Supreme Court has stated:

It is beyond question that all parties appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents. This court will, in future cases, accept no less.

In re Connick, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). Personal restraint petition claims must be supported by affidavits or declarations stating particular facts, certified documents, certified transcripts, and the like. *Williams*, *supra*, at 364.

I. MOOREHEAD WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2045 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.Ct. 2574 (1986).

To demonstrate that his attorney was ineffective, a defendant must satisfy the two-prong test prescribed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); see also *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s performance fell below an objective standard of reasonableness. Second, a defendant must show that but for counsel’s unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899

P.2d 1251 (1995). There is a strong presumption that a defendant received effective assistance of counsel. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931 (1996).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland* at 689. In other words, review cannot be based on whether an otherwise permissible and legitimate trial strategy proved unable to secure a favorable result for the defendant. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland* at 690, *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hicks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1 (2003). A defendant carries the burden of demonstrating that there was no legitimate strategic

or tactical rationale for the challenged conduct. *McFarland* at 336. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn.App. 680, 684-85, 763 P.2d 455 (1988). Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 533 U.S. 162, 122 S.Ct. 1237 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland* at 489. When the ineffectiveness claim is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the outcome of the proceedings would have been different if the motions or objections had been granted. *Kimmelman*, supra, at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate *both* prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, Moorehead has not demonstrated that his attorney's performance was deficient and, more importantly, he has not demonstrated actual prejudice. It is worth noting that Moorehead simply parrots the legal standard from *Strickland* in his brief and argues that Mr. Barrar's legitimate yet unsuccessful tactical decisions "left the Court no reasonable alternative to revocation." See Petition at p. 37. Mr. Barrar, Moorehead's attorney, chose a particular strategy in arguing that his client should not be removed from SSOSA. He chose to argue that the treatment provider's true motivation in terminating his treatment was that she had grown tired of Moorehead's chronic delinquency in paying for his treatment, not because he was failing to progress in treatment. This was a legitimate strategy given the testimony adduced at the hearing and the numerous references to Moorehead's financial delinquency in the confidential report of termination prepared by Ms. Chimenti (see Defendant's Appendix D). Moreover, Moorehead has not demonstrated actual and substantial prejudice by speculating that this trial judge would have continued the SSOSA (despite his repeated past violations and a recent Stable 7 Assessment showing that after nearly five years of treatment he was at a moderate to high risk of recidivism) had Moorehead been able to show that after all these years of treatment he had found a new treatment provider who was willing to take over his case. (see Petition at p. 37).

- a. *This Court should decline to consider Moorehead's declaration about the specific actions and words of his attorney.*

In pursuit of a new SSOSA revocation hearing, Moorehead has executed a self-serving declaration alleging that his attorney ineffectively represented him. See Defendant's Appendix K. The salient details of the declaration are outlined in Respondent's Statement of the Case. As noted in the Statement of the Case, Moorehead has actively thwarted the State's attempt to secure a declaration from Mr. Barrar that would either confirm or deny the assertions made in Moorehead's declaration. One is left scratching her head and asking why? Mr. Barrar is an officer of the court and would unquestionably give a truthful affirmation or denial of the facts. Unless Moorehead has not told the truth in his declaration, Barrar will confirm it in each and every respect. Moorehead's claim that Barrar may not answer the specific assertions made by Moorehead absent a waiver by him is absurd on its face. When the client charges ineffective assistance of counsel, an attorney may reveal otherwise privileged communications with the client. *State v. King*, 24 Wn.App. 495, 505-06, 601 P.2d 982 (1974). Washington law protects confidential communications between attorneys and clients. RPC 1.6(a); RCW 5.60.060(2)(a); *State v. Webb*, 122 Wn.App. 683, 694, 94 P.3d 994 (2004). A client waives the privilege by claiming ineffective assistance of counsel, at least to the extent

necessary to permit the attorney to respond to the allegations. See e.g. *State v. Cloud*, 95 Wn.App. 606, 613 n.9, 976 P.2d 649 (1999); 5A Karl Teglund, *Washington Practice: Evidence* § 501.23 at 173 (5th ed. 2007); RPC 1.6(b)(5).

Moreover, Moorehead has waived any claim of privilege as to the discrete matters asserted in his declaration because he has published them to a third party, to wit, this Court and the State. A client waives the attorney-client privilege “when the communication is made in the presence of third persons on the theory that such circumstances are inconsistent with the notion the communication was ever intended to be confidential.” *Dietz v. John Doe*, 131 Wn.2d 835, 850, 935 P.2d 611 (1997).

This Court needn't give any consideration to Moorehead's self-serving declaration because the logical inference is that the claims he makes are untrue. Under the “missing witness” or “empty chair” doctrine, where the defense fails to produce a logical witness it is proper to draw the inference that the witness would have provided testimony that is unfavorable to him:

It has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, ...he fails to do so,--the jury may draw an inference that it would be unfavorable to him.

State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991); quoting *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1986); *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 346, 109 P.2d 542 (1941). Mr. Barrar is unquestionably within the sole control of Moorehead (see Respondent's Appendices B and C).

The State asks this Court to either disregard Moorehead's declaration in its entirety, conclude that Mr. Barrar's response to Moorehead's declaration would be unfavorable to him, or, if it feels compelled to hear what Mr. Barrar would say in response to the claims, order Mr. Barrar to execute a declaration to that effect. No reference hearing is needed because first, the declaration offered by Moorehead does not contain facts material to the disposition of this petition. This is so because he has not met his burden of demonstrating both prongs of *Strickland* because he has failed to demonstrate that Mr. Barrar's chosen defensive strategy was not a legitimate tactic or that the result of the proceeding would have been different had Barrar chosen the defensive strategy now advocated by his current attorney, Kim Gordon, who sits in the enviable position of having hindsight. Second, a reference hearing is not needed because there are not yet any material disputed facts. This is so because Mr. Barrar has provided *no facts*, thanks to the obstruction of Mr. Moorehead. Only after the parties' materials establish the "existence of

material disputed issues of fact” will the appellate court direct the superior court “to hold a reference hearing in order to resolve the factual questions.” *In re Personal Restraint of Crace*, 157 Wn.App. 81, 95, 236 P.3d 914 (2010), *review granted*, 171 Wn.2d 1035, 257 P.3d 664 (2011), citing *In re Personal Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Here, this Court has the authority to order Mr. Barrar to produce a declaration responding the assertions made by Moorehead, and the State submits that this step must be utilized first because we cannot know whether there are any material disputed facts.

First and foremost, however, the State urges this Court to simply disregard Moorehead’s declaration because he has not done what he must do in this petition, namely satisfy both prongs of the *Strickland* test, as argued below.

b. *Moorehead cannot demonstrate actual and substantial prejudice.*

Moorehead claims he was denied effective assistance of counsel in the following ways: 1) That Mr. Barrar failed to do a reasonable investigation into the allegation that he violated the conditions of his treatment plan; and 2) that Mr. Barrar failed to hire an expert who would dispute Ms. Chimenti’s position that Moorehead had violated the conditions of his treatment plan.

1. *Reasonable investigation*

Moorehead makes a variety of claims in his petition about what Mr. Barrar should have done but supposedly didn't do. To the extent that it relies on Moorehead's self-serving declaration that the State has no ability to dispute, the State again asks this Court to disregard each and every assertion made by Moorehead in his declaration. If they were true, Moorehead would be very eager to have Mr. Barrar tell this Court as much and would not be seeking to prevent this Court from hearing from Mr. Barrar. Even if the statements made in Moorehead's declaration are true, moreover, he has not demonstrated that but for Mr. Barrar's choice of a different strategy than the one he ultimately chose, this trial judge would have chosen to yet again deny the State's motion for revocation and allow him to continue with SSOSA.

Moorehead claims that Barrar was required to, but didn't, review his initial SSOSA evaluation that was conducted in 2005. He claims that by reading the SSOSA evaluation, Barrar would have learned about the underlying offense (which has no relevance to the question of SSOSA revocation), would have learned about the evaluator's "observations and impressions," would have learned that Moorehead had no criminal history prior to his current conviction for child molestation in the first degree (which has no relevance to the question of SSOSA revocation), that he

“potentially” suffered from untreated depression, “was concerned about his victim,” (whose Winnie the Pooh ring he continued to carry around as a trophy and even asked for it back after it was confiscated), was “polite” (except, presumably, for the occasions when was disrespectful to his treatment providers and screamed “f-you” to members of his treatment group), “did not appear to have sexual deviance associated with adolescent stimuli” (except, presumably his underlying crime of child molestation in the first degree and his admitted arousal at the appearance of minors in Cruise Line commercials—See Defendant’s Appendix D) and was “very remorseful.” Moorehead claims that because Chimenti didn’t have a copy of the SSOSA evaluation in her client file, Barrar could have successfully prevented Moorehead (who had repeatedly violated the terms of his SSOSA) from being revoked from SSOSA because he could have shown that Chimenti really didn’t know the person who she had been treating for the previous four and a half years.

Moorehead also claims that Chimenti’s testimony could have been impeached in various ways, such as showing that she never performed a Static 99 on Mr. Moorehead. But as Chimenti repeatedly explained in her testimony, the Static 99 had already been completed when he began treatment with her and is an assessment that looks at static factors about the underlying offense that are unchanging. In other words, the score on

the Static 99 will never change, unlike the Stable assessment. See Defendant's Appendix E at pgs. 135-140.

Moorehead fixates in his petition on the notion that Ms. Chimenti did not, in fact, perform a Stable 7 on Moorehead prior to the one she performed in 2010 (which yielded a score of 12), despite her testimony that she performed one approximately one year prior to that. See Defendant's Appendix E at p. 135, 143. However, Moorehead's current assertion that Chimenti never performed a Stable 7 prior to the one performed in 2010 is solely based on the unsworn assertion of his lawyer, Kim Gordon, in footnote four of his petition (See Petition at page 13). Generally, a motion or petition that is supported by unsworn statements or hearsay affidavits, rather than proper testimonial affidavits, should be dismissed. See *State v. Crumpton*, 90 Wn.App. 297, 952 P.2d 1100 (1998). Additionally, Moorehead has attached Appendix F to his petition which is not a declaration or affidavit from Kelly Chimenti; rather, it is a declaration from Ms. Gordon's paralegal stating that he called Ms. Chimenti and asked her whether she had provided Gordon with all of the records she possessed pertaining to Moorehead's treatment, and Chimenti said she had. This is a declaration based on hearsay rather than a proper testimonial affidavit or declaration. See *Rice*, supra, at 886:

If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify...[T]he petitioner must present evidence showing that his factual allegations are based on more than...inadmissible hearsay.

Why has Moorehead not procured an affidavit from Ms. Chimenti stating that neither she nor anyone in her practice performed a Stable assessment of Moorehead other than the one that was performed in 2010? Why does Moorehead continually fail to provide this Court with supporting evidence of his claims or, in the case of Mr. Barrar, actively thwart this Court's ability to hear evidence which, if true, would bolster his claims? The logical inference, the State again asserts, is that the declarations of Chimenti and Barrar, once procured, would not support his claims. Moorehead asks this Court to take a significant leap by concluding that because Chimenti has not sent Gordon a copy of a prior Stable assessment, such an assessment was never performed. Because Moorehead has not supported his claim that Ms. Chimenti did not perform the disputed Stable 7 assessment with competent and admissible evidence there is no need for the State to either confirm or dispute this fact. There is no fact before the Court on this matter. Moreover, Moorehead must demonstrate that this trial judge, who had given Moorehead numerous

chances to overcome his repeated failure to comply with the requirements of his SSOSA in the past and was very clear that no more leniency was warranted, would probably have denied the State's motion to revoke based on this fact alone. Moorehead has not made such a showing. As noted above, Moorehead merely parrots the legal standard for ineffective assistance of counsel in his petition and fails to point to any remark by the trial court that would lead any reasonable person to conclude that there is any possibility that this trial judge would have denied the State's motion to revoke the SSOSA and again allowed Moorehead to continue with the sentencing privilege that he had repeatedly thumbed his nose at.

In his pursuit to be placed back on SSOSA, Moorehead has retained attorney Amy Muth to prepare a declaration outlining the steps that she would have taken in representing Moorehead, which are identical to the steps she believes any attorney must take before he or she can be deemed to have effectively represented Moorehead. Muth claims, *inter alia*, that the failure to retain an expert who would criticize the conclusions of Ms. Chimenti is ineffective assistance of counsel *per se*. Moorehead cites no authority, beyond the factually inapplicable *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), for the contention that an attorney *must* retain an expert before he can be deemed to have provided effective assistance of counsel at a SSOSA revocation hearing. The declaration of

Amy Muth is exactly the type of Monday morning quarterbacking prohibited by the contemporary assessment rule.

Here, Mr. Barrar made the best argument available to him, which was that Ms. Chimenti's primary motivation in terminating Moorehead's treatment was that she had grown tired of chasing him down each month to pay his bill. If this was her primary motivation in terminating treatment, and the Court had been convinced that the remainder of the allegations had been trumped up, the Court would have been compelled to deny the State's motion to revoke.

What Moorehead's argument entirely ignores is that he must demonstrate that the trial court likely would have kept him on SSOSA, after four and a half years of very little progress and repeated violations of his conditions, simply by finding a new treatment provider willing to take him as a client. The transcript of the hearing, found at Defendant's Appendix E, demonstrates that it is extremely unlikely, if not totally out of the realm of possibility, this would have occurred. The trial court noted that defendants who are awarded the privilege of SSOSA are typically afforded no tolerance for violations. See Appendix E at p. 15. However, Moorehead was given three passes on violations of his sentence before the violation that finally compelled the court to revoke his SSOSA. The court appeared embarrassed by his wasted largesse in granting Moorehead

repeated chances to complete his SSOSA in spite of his repeated violations. It is not as though the court was unaware that finding a new treatment provider was an option. Ms. Chimenti's termination report made it clear that Moorehead had the option of finding a new treatment provider. The court knew that it could have retained Moorehead on SSOSA and allowed him to find a new treatment provider (which is his responsibility, not Mr. Barrar's) but exercised its considerable discretion in removing Moorehead from SSOSA because it was obvious that he would not successfully complete the program.

Moorehead has not shown that he is under unlawful restraint because he has not demonstrated that he received ineffective assistance of counsel. He has not met his burden of demonstrating the defensive strategy employed by Mr. Barrar was not legitimate nor has he shown that the trial judge would have denied the State's motion to revoke SSOSA had Mr. Barrar chosen the defensive strategy now advocated by his current attorney. Moorehead's petition must be dismissed.²

² The State does not address Moorehead's second claim of error that his attorney was ineffective for failing to raise the issue of whether he was entitled to credit for time served. Moorehead acknowledged that the issue would be governed by the Supreme Court's decision in *State v. Pannell*, 173 Wn.2d 222, 267 P.3d 349 (2011). The Supreme Court decided *Pannell* adverse to Moorehead's position. Attorney Kim Gordon emailed counsel for the State and indicated that Moorehead was abandoning this issue in light of the *Pannell* decision.

E. CONCLUSION

The petition should be dismissed.

DATED this 26th day of March, 2012.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: 
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

APPENDIX A

14 C

cc Jeffrey Barrar *ofail*

FILED



JUL 23 2010
4:00 PM
Sherry W. Parker, Clerk, Clark Co.

Superior Court of Washington
County of Clark

State of Washington, Plaintiff,

vs.

LARRY ALBERT MOOREHEAD,
Defendant.

SID: OR13599616
If no SID, use DOB: 10/14/1966

No. 04-1-02493-5

Felony Judgment and Sentence --
Prison

RCW 9.94A.507 Prison Confinement
(Sex Offense and Kidnapping of a Minor)

(FJS)

Clerk's Action Required, para 2,1, 4.1, 4.3a,
4.3b, 5.2, 5.3, 5.5 and 5.7

Defendant Used Motor Vehicle *10-9-04807-2*

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the deputy prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon

guilty plea 4/28/2005 jury-verdict bench trial :

Count	Crime	RCW (w/subsection)	Class	Date of Crime
01	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083 / 9A.28.020(3)(b)	FA	6/1/2004 to 7/31/2004

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.507.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____ RCW 9.94A.839.

The offense was predatory as to Count _____ RCW 9.94A.836.

The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.

Felony Judgment and Sentence (FJS) (Prison)
(Sex Offense and Kidnapping of a Minor Offense)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2009))

59

- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____
_____. RCW 9.94A.825, 9.94A.533.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____
_____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that **minor** in the commission of the offense. RCW 9.94A.833.
- Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A._____.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime(s) charged in Count _____ involve(s) **domestic violence**. RCW 10.99.020.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).
- Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	Cause Number	Court (county & state)
1.			

- Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (county & state)	A or J Adult, Juv.	Type of Crime
1	No known felony convictions					

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525).
- The prior convictions for _____ are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
01	0	X	51 MONTHS to 68 MONTHS		51 MONTHS to 68 MONTHS	LIFE	\$50,000.00

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

- Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are attached as follows: _____

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

- below the standard range for Count(s) _____.
 - above the standard range for Count(s) _____.
 - The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
 - Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.
 - within the standard range for Count(s) _____ but served consecutively to Count(s) _____.
- Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

- That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.
- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): _____
- The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

- 3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.
- 3.2 The court **dismisses** Counts 02 (CHILD MOLESTATION IN THE FIRST DEGREE), 03 (INDECENT EXPOSURE TO VICTIM UNDER 14), 04 (COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES) in the charging document.

*Felony Judgment and Sentence (FJS) (Prison)
 (Sex Offense and Kidnapping of a Minor Offense)
 (RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2009))
 Page 3 of 12*

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

- (a) Confinement. RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

months on Count 01

- The confinement time on Count(s) contain(s) a mandatory minimum term of
The confinement time on Count includes months as enhancement for firearm deadly weapon sexual motivation VUCSA in a protected zone manufacture of methamphetamine with juvenile present sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is:

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

The sentence herein shall run consecutively with any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein:

Confinement shall commence immediately unless otherwise set forth here:

The total time of incarceration and community supervision shall not exceed the statutory maximum for the crime.

- (b) Confinement. RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count 01 minimum term 68 months maximum term Statutory Maximum/Life

- (c) Credit for Time Served: The defendant shall receive 310 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures.

- (d) Work Ethic Program. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community placement or community custody see RCW 9.94A.701)

- (A) The defendant shall be on community placement or community custody for the longer of:
(1) the period of early release. RCW 9.94A.728(1)(2); or
(2) the period imposed by the court, as follows:

Count(s) _____ 36 months Sex Offenses
 Count(s) _____ 36 months for Serious Violent Offenses
 Count(s) _____ 18 months for Violent Offenses
 Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the
 unlawful possession of a firearm by a street gang member or associate)

(Sex offenses, only) For count(s) 01, sentenced under RCW 9.94A.507, for any period of time the defendant is released from total confinement before the expiration of the statutory maximum.

The total time of incarceration and community supervision/custody shall not exceed the statutory maximum for the crime.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) for sex offenses, submit to electronic monitoring if imposed by DOC; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody. For sex offenders sentenced under RCW 9.94A.709, the court may extend community custody up to the statutory maximum term of the sentence.

The court orders that during the period of supervision the defendant shall:

- consume no alcohol.
- have no contact with: _____
- remain within outside of a specified geographical boundary, to wit: _____
- not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030(8).
- participate in the following crime-related treatment or counseling services: _____
- undergo an evaluation for treatment for domestic violence substance abuse mental health anger management, and fully comply with all recommended treatment. _____
- comply with the following crime-related prohibitions: _____
- Additional conditions are imposed in Appendix 4.2, if attached or are as follows: _____

(C) For sentences imposed under RCW 9.94A.507, the Indeterminate Sentence Review Board may impose other conditions (including electronic monitoring if DOC so recommends). In an emergency, DOC may impose other conditions for a period not to exceed seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

Restitution ordered above shall be paid jointly and severally with:

RJN	Name of other defendant	Cause Number	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.3b **Electronic Monitoring Reimbursement.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with AML (female, 6/13/1993) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE (which does not exceed the maximum statutory sentence).

The defendant is excluded or prohibited from coming within:

500 feet 880 feet 1000 feet of:

AML (female, 6/13/1993) (name of protected person(s))'s

home/ residence work place school

(other location(s)) _____

other location _____

for _____ years (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 **Off-Limits Order.** (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **Community Custody Violation.**

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms. You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040 and RCW 9.41.047.

5.6 Sex and Kidnapping Offender Registration. RCW 9A.44.130, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130 (or other registerable offense), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

2. Offenders Who Leave the State and Return: If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

3. Change of Residence Within State and Leaving the State: If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

4. Additional Requirements Upon Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a

fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Reporting Requirements for Persons Who Are Risk Level II or III: If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

8. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

9. Length of Registration:

Class A felony – Life; Class B Felony – 15 years; Class C felony – 10 years

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: _____

5.9 Persistent Offense Notice

The crime(s) in count(s) 01 is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570

The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030.(31)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date:

[Handwritten signature]

[Handwritten signature]
Deputy Prosecuting Attorney
WSBA No. 16330
Print Name: Scott Jackson

[Handwritten signature]
Attorney for Defendant
WSBA No. 18281
Print Name: Jeffrey D. Barrar

Judge/Print Name *John L. Wulke*
[Handwritten signature]
Defendant
Print Name:
LARRY ALBERT MOOREHEAD

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: *[Handwritten signature]*

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, Sherry Parker, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

LARRY ALBERT MOOREHEAD

04-1-02493-5

SID No: OR13599616

Date of Birth: 10/14/1966

(If no SID take fingerprint card for State Patrol)

FBI No. 545042MB1

Local ID No.

PCN No. _____

Other _____

Alias name, DOB:

Race: W

Ethnicity:

Sex: M

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

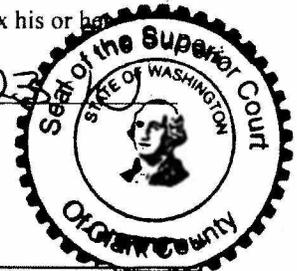
Clerk of the Court, Deputy Clerk

[Handwritten Signature]

Dated:

7-23

[Handwritten Signature]



The defendant's signature:

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously



SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff,

v.

LARRY ALBERT MOOREHEAD,

Defendant.

SID: OR13599616

DOB: 10/14/1966

NO. 04-1-02493-5

**WARRANT OF COMMITMENT TO STATE
OF WASHINGTON DEPARTMENT OF
CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
01	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083/9A.28.020(3)(b)	6/1/2004 to 7/31/2004

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	min - TERM	max
01	CHILD MOLESTATION IN THE FIRST DEGREE	68 Days/Months	/ Life

These terms shall be served concurrently to each other unless specified herein:

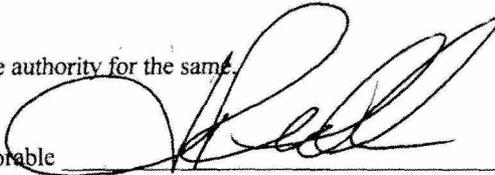
The defendant has credit for 310 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the same.

HEREIN FAIL NOT.

WITNESS, Honorable



John P. Wulle

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: 7-23-10

SHERRY W. PARKER, Clerk of the
Clark County Superior Court

By:



Deputy



APPENDIX B



gordon & saunders

1111 Third Avenue, Suite 2220
Seattle, Washington 98101

Tel 206.340.6034 / Kim Gordon
Tel 206.332.1280 / Jason Saunders
Fax 206.682.3746
www.gordonsaunderslaw.com

RECEIVED

FEB 17 2012

Prosecutor's Office

February 14, 2012

Anne Cruser
Clark County Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666

Dear counsel;

As you know, I am the attorney representing Mr. Moorehead in his Personal Restraint Petition, and the Personal Restraint Petition includes a claim of ineffective representation of counsel. It is my understanding that the prosecution is seeking a Declaration from Mr. Barrar about matters asserted in the PRP. However, neither Mr. Moorehead nor I have received requests, by Mr. Barrar, to consent to his release of any privileged or confidential information. Accordingly, I am writing to express my understanding of the current state of the law and the Rules of Professional Conduct, as they relate to such a request. I expect that if other counsel (other than those cc'd on this correspondence) is participating in seeking confidential or privileged information, that this correspondence will be shared with them. Certainly, it is not my intent to interfere with the Court's ability to litigate Mr. Moorehead's PRP or to obtain relevant and necessary evidence. Rather, it is incumbent upon all of us to make sure that Mr. Moorehead's PRP is litigated in a manner that is procedurally appropriate and consistent with our ethical responsibilities.

In that regard, please consider that requests such as that which Mr. Barrar is considering, were considered in July of 2010 by the American Bar Association and in a Formal Opinion. In doing so, the ABA concluded:

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

I have enclosed a copy of the ABA Opinion, so that it is convenient for you to review.

The Opinion further explains:

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court

requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise. Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent. ... Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client's opportunity to object and obtain a judicial ruling.

(Emphasis added).

The Opinion also addresses whether disclosure would be justified "to establish a defense to a criminal charge or civil claim against the lawyer" and concluded that a "defendant's motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend."

The Opinion cautions lawyers to "take steps to limit 'access to the information to the tribunal or other persons having a need to know it' and to seek 'appropriate protective orders or other arrangements ... to the fullest extent practicable.'"

Finally, the Opinion concludes: "If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim."

Washington's Rules of Professional Conduct seem to be in accord with the analysis discussed by the ABA Opinion. For instance, one comment provides:

The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation "should not be carelessly invoked." *In re Boelter*, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders to make other arrangements minimizing the risk of avoidable disclosure.

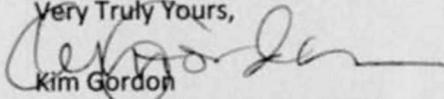
Even where our RPC's differ, they do so in way that seems to provide more protection for clients, not less, as comment 24 to RPC 1.6 explains:

Washington has not adopted that portion of Model Rule 1.6(b) permitting a lawyer to reveal information related to the presentation to comply with "other law." Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by "other law," even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court.

Please feel free to contact me if you would like to discuss this matter further. Once again, it is not my intent to prevent the Court from receiving relevant facts necessary to a resolution of legal facts being

litigated in Mr. Moorehead's PRP. However, I am concerned about making sure that this is accomplished in a way that is consistent with our obligations as lawyers.

Very Truly Yours,



Kim Gordon
Counsel for Larry Moorehead



AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-456

July 14, 2010

Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client's informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant's claim in order to help the prosecution establish that the lawyer's representation was competent.¹ This question may arise, for example, because a prosecutor or other government lawyer defending the former client's ineffective assistance claim seeks the trial lawyer's file or an informal interview to respond to the convicted defendant's claim, or to prepare for a hearing on the claim.

Under *Strickland v. Washington*,² a convicted defendant seeking relief (e.g., a new trial or sentencing) based on a lawyer's failure to provide constitutionally effective representation, must establish both that the representation "fell below an objective standard of reasonableness" and that the defendant thereby was prejudiced, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."³ Claims of ineffective assistance of counsel often are dismissed without taking evidence due to insufficient factual allegations or other procedural deficiencies. Numerous claims also are dismissed without a determination regarding the reasonableness of the trial lawyer's representation based on the defendant's failure to show prejudice. The Supreme Court recently expressed confidence "that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit."⁴ Although it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding, sometimes trial lawyers have done so,⁵ and commentators have expressed concerns about the practice.⁶

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. *See* Rules 1.6 & 1.9(c). The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.⁷

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² 466 U.S. 668 (1984).

³ *Id.* at 694.

⁴ *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 1485 (2010).

⁵ *See, e.g., Purkey v. United States*, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009), *motion to amend denied*, 2009 WL 5176598 (Dec. 22, 2009) (lawyer represented criminal defendant at trial and on appeal voluntarily filed 117-page affidavit extensively refuting former client's ineffective assistance of counsel claim); *State v. Binney*, 683 S.E.2d 478 (S.C. 2009) (defendant's trial counsel met with law enforcement authorities and provided his case file to them in response to defendant's ineffective assistance of counsel claim).

⁶ *See, e.g., Lawrence J. Fox, Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1186-88 (2003); David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14.

⁷ Rule 1.6 cmt. 3. *See, e.g., Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when, under threat of subpoena, it disclosed former client's statement to prosecutor without former client's consent; court stated that "[d]isclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.⁸ Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent.

Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant's ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so. The criminal defendant may be able to make non-frivolous objections to the trial lawyer's disclosures even though the ineffective assistance of counsel claim ordinarily waives the attorney-client privilege and work product protection with regard to otherwise privileged communications and protected work product relevant to the claim.⁹ For example, the criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client's opportunity to object and obtain a judicial ruling. Absent a relevant exception, a lawyer may disclose client information protected by Rule 1.6 only with the client's "informed consent." Such consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rules 1.0(e) & 1.6(a). A client's express or implied waiver of the attorney-client privilege has the legal effect of forgoing the right to bar disclosure of the client's prior confidential communications in a judicial or similar proceeding. Standing alone, however, it does not constitute "informed consent" to the lawyer's voluntary disclosure of client information outside such a proceeding.¹⁰ A client might agree that the former lawyer may testify in an adjudicative proceeding to the extent the court requires but not agree that the former lawyer voluntarily may disclose the same client

prohibited by the disciplinary rules," *id.* at 265 n.5).

⁸ "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that ... the information sought [in a judicial or other proceeding] is protected against disclosure by the attorney-client privilege or other applicable law." Rule 1.6, cmt. 13. The lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-385 (1994) (Subpoenas of a Lawyer's Files) ("If a governmental agency, or any other entity or person, subpoenas, or obtains a court order for, a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena or court order on any legitimate available grounds so as to protect documents that are deemed to be confidential under Rule 1.6."); *see also* Connecticut Bar Ass'n Eth. Op. 99-38 (absent a waiver, subpoenaed lawyer must invoke the attorney-client privilege if asked to testify regarding inconsistencies between former client's court testimony and former client's communications with lawyer and previous lawyer), 1999 WL 33115188; Maryland State Bar Ass'n Committee on Eth. Op. 2004-17 (2004) (if subpoenaed lawyer's client was "estate," lawyer permitted to turn over documents to successor personal representative and may reveal information; if representation included the former personal representative in both his fiduciary and in his individual capacity, lawyer is subject to constraints of Rule 1.6(a)); Rhode Island Sup. Ct. Eth. Adv. Panel Op. No. 98-02 (1998) (lawyer who received notice of deposition and subpoena must not disclose information relating to representation of former client); South Carolina Bar Ethics Advisory Committee Adv. Op. 98-30 (1998) (in response to third party's request for affidavits and/or depositions, lawyer must assert attorney-client privilege and may only disclose such information by order of court); Utah State Bar Eth. Advisory Op. Committee Op. 05-01, 2005 WL 5302775 (2005) (absent court order requiring lawyer's testimony, and notwithstanding subpoena served on lawyer by prosecution, lawyer may not divulge any attorney-client information, either to prosecution or in open court).

⁹ *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim.")

¹⁰ *Cf.* *Clock v. United States*, No. 09-cv-379-JD, slip op. (D.N.H. 2010). In *Clock*, at the prosecution's request, the defendant signed a form explicitly waiving the attorney-client privilege with respect to the issues in her post-conviction petition in order to authorize her trial lawyer to answer questions regarding her ineffective assistance of counsel claim. Based on her office's institutional policy, trial counsel nonetheless declined to respond to the prosecution's questions unless ordered to do so by the court. Based on the defendant's explicit waiver, the court ordered trial counsel to submit an affidavit limited to the issues in the defendant's petition. *Id.* at *2.

confidences to the opposite party prior to the proceeding.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the “self-defense exception” of Rule 1.6(b)(5),¹¹ which provides that “[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” The self-defense exception grows out of agency law and rests on considerations of fairness.¹² Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer’s self-defense.¹³

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so.¹⁴ For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer’s firm, and need not wait until charges or claims are filed before invoking the self-defense exception.¹⁵ Although the scope of the exception has expanded over time,¹⁶ the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation.¹⁷ Consequently, it has been said that “[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer’s associate or agent with *serious* consequences”¹⁸

When a former client calls the lawyer’s representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b) (5) do not apply. The lawyer may not

¹¹ Although the confidentiality duty is subject to other exceptions, none of the other exceptions seems applicable to this situation.

¹² See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. b (“in the absence of the exception . . . , lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group”).

¹³ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83.

¹⁴ Rule 1.6 cmt. 10 (“The rule] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.”). Cases addressing the self-defense exception to the attorney-client privilege are to the same effect. See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974) (lawyer named as defendant in class action brought by purchasers of securities who claimed that prospectus contained misrepresentations had right to make appropriate disclosure to lawyers representing stockholders as to his role in public offering of securities).

¹⁵ See, e.g., *First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557 (S.D.N.Y. 1986) (self-defense exception to attorney-client privilege permits lawyer who is being sued for misconduct in securities matter to disclose in discovery documents within attorney-client privilege if lawyer’s interest in disclosure outweighs interest of client in maintaining confidentiality of communications, and if disclosure will serve truth-finding function of litigation process); Association of the Bar of the City of New York Committee on Prof’l and Jud. Eth. Op. 1986-7, 1986 WL 293096 (1986) (lawyer need not resist disclosure until formally accused because of cost and other burdens of defending against formal charge and damage to reputation); Pennsylvania Bar Association Committee on Legal Eth. and Prof’l Resp Eth. Op. 96-48, 1996 WL 928143 (1996) (lawyer charged by former clients with malpractice in their defense in SEC is permitted to speak to SEC lawyers and reveal information concerning the representation as he reasonably believes necessary to respond to allegations); South Carolina Bar Eth. Adv. Committee Adv. Op. 94-23, 1994 WL 928298, (1994) (lawyer under investigation by Social Security Administration for possible misconduct in connection with his client may reveal confidential information as may be necessary to respond to or defend against allegations; no grievance proceeding pending anywhere else against lawyer).

¹⁶ Disciplinary Rule 4-101(C)(4) of the predecessor ABA Model Code of Professional Responsibility (1980) provided: “A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct,” but did not expressly authorize the disclosure of confidences to establish a claim on behalf of a lawyer other than for legal fees.

¹⁷ Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. See Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 810-11 (1977).

¹⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c (emphasis added).

respond in order "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client," because the legal controversy is not between the client and the lawyer.¹⁹ Nor is disclosure justified "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved," because the defendant's motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

The more difficult question is whether, in the context of an ineffective assistance of counsel claim, the lawyer may reveal information relating to the representation "to respond to allegations in any proceeding concerning the lawyer's representation of the client." This provision enables lawyers to defend themselves and their associates as reasonably necessary against allegations of misconduct in proceedings that are comparable to those involving criminal or civil claims against a lawyer. For example, lawyers may disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation. On its face, the provision also might be read to apply to a proceeding brought to set aside a criminal conviction based on a lawyer's alleged ineffective assistance of counsel, because the proceeding includes an allegation concerning the lawyer's representation of the client to which the lawyer might wish to respond.²⁰

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is *necessary* to do so.²¹ It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable.²² The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements ... to the fullest extent practicable."²³ Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences.²⁴ These limitations are equally applicable to Rule 1.6(b)(5).²⁵

¹⁹ See Utah State Bar Eth. Adv. Op. Committee Eth. Op. 05-01, 2005 WL 5302775, at *6 (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or in court in response to defendant's claim that lawyer's prior advice was confusing; court stated, "[w]hile an arguable case might be made for disclosure under this exception, it ... is fraught with problems. The primary problem is that the 'controversy' is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no 'controversy' between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer."). But see Arizona State Bar Op. 93-02 (1993), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=652> (interpreting "controversy" to include a disagreement in the public media).

²⁰ Cf. State v. Madigan, 68 N.W. 179, 180 (Minn. 1896) (lawyer accused of inadequate criminal defense representation may submit affidavit containing attorney-client privileged information to disprove such charge).

²¹ See Rule 1.6(b)(5) (allowing disclosure only "to the extent the lawyer reasonably believes necessary"); Rule 1.6 cmts. 10 & 14.

²² See Rule 1.0(i) ("Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.")

²³ Rule 1.6 cmt. 14 (emphasis added). Similar restrictions have been held applicable to the related context in which a lawyer seeks to disclose confidences to collect a fee. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 250 (1943), in *OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS ANNOTATED* 555, 556 (American Bar Foundation 1967) ("where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights").

²⁴ For example, in *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 F.R.D. 687, 692 (C.D. Ca. 1988), the district court "reject[ed] the suggestion made by some parties that 'selective' disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed," finding that this suggestion was "directly contrary to the reasonable necessity standard." Accord *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 83 cmt. e ("The lawyer's invocation of the exception must be appropriate to the lawyer's need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence."); cf. *Dixon v. State Bar*, 653 P.2d 321, 325 (1982) (lawyer sanctioned for gratuitous disclosure of confidence in response to former client's motion to enjoin lawyer from harassing her); *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 886-87 (E.D. Pa. 1976) ("In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word 'necessary' in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and to the legal profession.")

²⁵ Courts further recognize that disclosures may be made to defend against a non-client's accusation of misconduct only if the accusation is credible enough to put the lawyer at some risk of adverse consequences, such as a criminal indictment or a civil lawsuit; third parties otherwise would have an incentive to raise utterly meritless claims of lawyer misconduct to gain access to confidential information. Cf. *SEC v. Forma*, 117 F.R.D. 516, 519-525 (S.D.N.Y. 1987) (formal charges need not be issued in order for the self defense exception to apply); *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 566 n.15 (S.D.N.Y. 1986) (former auditor's evidence against lawyer must "pass muster under Fed. R. Civ. P. 11").

Permitting disclosure of client confidential information outside court-supervised proceedings undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding.²⁶ Disclosure of such information might prejudice the defendant in the event of a retrial.²⁷ Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.

Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information.²⁸ If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.²⁹

²⁶ Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. e (before making disclosures under the self-defense exception, a lawyer ordinarily must give notice to former client).

²⁷ Some courts preclude the prosecution from introducing the trial lawyer's statements in a later trial, *see, e.g.*, *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir.), *cert. denied*, 540 U.S. 1013 (2003) (waiver of privilege for purposes of habeas claim does not necessarily mean extinguishment of the privilege for all time and in all circumstances), but not all courts have done so. *See, e.g.*, *Fears v. Warden*, 2003 WL 23770605 (S.D. Ohio 2003) (scope of habeas petitioner's waiver of privilege not waived for all time and all purposes including possible retrial).

²⁸ *See, e.g.*, Utah State Bar Eth. Advisory Op. Committee Op. 05-01, *supra* notes 8 & 19 (where criminal defense lawyer's former client moved to set aside his guilty plea on ground that lawyer's advice about plea offer confused him, lawyer may not divulge attorney-client information to prosecutor to prevent a possible fraud on court or protect lawyer's reputation; lawyer must assert attorney-client privilege in hearing on former client's motion, and may testify only upon court order).

²⁹ *See* Rule 1.6 cmt. 14.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312)988-5300

CHAIR: Robert Mundheim, New York, NY ■ Robert A. Creamer, Evanston, IL ■ Terrence M. Franklin, Los Angeles, CA ■ Paula J. Frederick, Atlanta, GA ■ Bruce A. Green, New York, NY ■ James M. McCauley, Richmond, VA ■ Susan R. Martyn, Toledo, OH ■ Mary Robinson, Downers Grove, IL ■ Philip H. Schaeffer, New York, NY ■ E. Norman Veasey, Wilmington, DE

CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel ©2010 by the American Bar Association. All rights reserved.

APPENDIX C

CLARK COUNTY PROSECUTOR

March 26, 2012 - 11:54 AM

Transmittal Letter

Document Uploaded: prp2-423774-Response.PDF

Case Name: In re Personal Restraint of Moorehead

Court of Appeals Case Number: 42377-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: _____
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Jennifer M Casey - Email: jennifer.casey@clark.wa.gov

A copy of this document has been emailed to the following addresses:
kim@gordonsaunderslaw.com