FILED
COURT OF APPEALS
DIVISION II
2016 JUN 10 AM 11:45
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUN -9 PM 2:17

No.

IN THE COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

In the Matter of the Personal Restraint of

SERGEY V. GENSITSKIY,

Petitioner.

PERSONAL RESTRAINT PETITION

TODD MAYBROWN
ALLEN, HANSEN, MAYBROWN & OFFENBECHER, PS.
One Union Square, Suite 3020
600 University Street
Seattle, Washington 98101
(206) 447-9681

ATTORNEYS FOR PETITIONER

A. STATUS OF PETITIONER

Petitioner Sergey Gensitskiy, through his attorney Todd Maybrown, hereby applies for relief from confinement.

1. During July 2011, the Clark County Prosecuting Attorney filed an Information charging Petitioner, Sergey Gensitskiy, with twelve counts of child molestation and incest, allegedly based upon the claims of five of Petitioner's children. *See State v. Gensitskiy*, Clark County Superior Cause No. 11-1-01186-1. Per that information, the State also alleged as aggravating factors that Petitioner used his position of trust or confidence to facilitate the commission of the offenses under RCW 9.94A.535(5)(n), and that certain offenses were part of an ongoing pattern of sexual abuse of the same victim under RCW 9.94A.535(3)(g).[1] Petitioner entered a plea of not guilty to all charges.

2. The State was represented by Clark County Deputy Prosecuting Attorney Anna Klein throughout the proceedings. The Petitioner was represented by attorney Charles Buckley at his trial.

3. Petitioner's case proceeded to a jury trial on July 31, 2012. Clark County Superior Court Judge John Wulle presided over those proceedings.

[1] The State filed Amended Informations before and during trial.

4. On August 10, 2012, the jury returned its verdict. Petitioner was acquitted of the offenses charged in Counts 1 and 12; he was found guilty of the offenses charged in Counts 2 through 11. By special verdict, the jury concluded that Petitioner had used his position of trust to facilitate the commission of the current offenses and that certain offenses were part of an ongoing pattern of sexual abuse of the same victim.

5. Thereafter, on October 3, 2012, Judge Wulle imposed the following terms of custody on each offense: 250 months (minimum term) on Count 2; 116 months on Count 3; 60 months on Count 4; 60 months on Count 5; 250 months (minimum term) on Count 6; 250 months (minimum term) on Count 7; 60 months on Count 8; 60 months on County 9; 60 months on Count 10; and 60 months on County 11. The Court entered a Judgment and Sentence that same day.

6. Petitioner filed a timely appeal from the Superior Court Judgment and Sentence. Attorney Lenell Nussbaum represented Petitioner on that appeal. The appeal was ultimately transferred from Division II to Division I. *See State v. Gensitskiy*, Court of Appeals No. 71640-9-I. On July 7, 2014, the reviewing court issued its decision on that appeal. *See State v. Gensitskiy*, 182 Wn.App. 1016 (2014) (unpublished). The court reversed and dismissed with prejudice Counts 6, 8, 9, 10, and 11, and dismissed the conviction for Count 7 without prejudice. The court affirmed the remaining

charges (Counts 2, 3, 4 and 5). The case was then remanded to the Clark County Superior Court for further proceedings.

7. The State chose not to proceed on Count 7 and a re-sentencing hearing before Clark County Superior Court Judge David Gregerson was held on July 6, 2015. Judge Gregerson then imposed the following terms of custody on each offense: 198 months on Count 2; 116 months on Count 3; 60 months on Count 4; and 60 months on Count 5. The Court filed the Amended Judgment and Sentence that same day.

8. Petitioner is currently serving his sentence at the Stafford Creek Correction Center.

B. JURISDICTION

This Court has jurisdiction under RAP 16.3(c), RAP 16.5(a) and RAP 16.24-27.

C. GROUNDS FOR RELIEF

CLAIM 1. Without providing notice to the defense, DPA Anna Klein engaged in unlawful, *ex parte* contacts with Clark County Superior Court Judge Daniel Stahnke in relation to the trial proceedings in this case, so that the prosecutor could clandestinely obtain a copy of the "jury book" and "jury list" prior to trial, thereby prejudicing the rights of the Petitioner, all in violation of Rule of Professional Conduct 3.5, Criminal Rule 3.4,

Criminal Rule 8.2, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution.

CLAIM 2. Without providing notice to the defense, Clark County Superior Court Judge Stahnke engaged in unlawful, *ex parte* contacts with DPA Klein in relation to the trial proceedings in this case, so that the prosecutor could clandestinely obtain a copy of the "jury book" and "jury list" prior to trial, thereby prejudicing the rights of the Petitioner, all in violation of Canons 1, 2, and 3 of the Code of Judicial Conduct, and thereby demonstrating actual bias, or creating an appearance of unfairness and bias, and and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution.

CLAIM 3. DPA Klein presented a legal motion pertaining to this case to Clark County Superior Court Judge Stahnke, in secret and outside the presence of the defendant and outside of the presence of the public, thereby prejudicing the rights of the Petitioner, all in violation of CrR 3.4, Petitioner's Sixth Amendment right to be present at all court proceedings and Petitioner's right to open and public court proceedings as protected by the First, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Washington Constitution.

CLAIM 4. Petitioner received defective legal representation during his trial, in violation of his right to effective assistance of counsel as protected by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 22 of the Washington Constitution.

CLAIM 5. Petitioner received defective legal representation during his appeal, in violation of his right to effective assistance of counsel as protected by the Fourteenth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution.

For all of these reasons, Petitioner's restraint is unlawful, and relief is appropriate pursuant to RAP 16.4(c)(2), (3), (5), (6), and (7). The factual and legal support for this petition is set forth in Petitioner's Opening Brief which is incorporated by reference herein. This personal restraint petition is also supported by the Declaration of Sergey Gensitskiy, Declaration of Charles Buckley, Jr., Declaration of Lenell Nussbaum, Declaration of Todd Maybrown, Declaration of Barbara Corey and the Declaration of Brad Meryhew.

D. STATEMENT OF FINANCES

Petitioner is proceeding at his own expense.

E. REQUEST FOR RELIEF

Petitioner asks this Court to reverse his convictions and sentence and to remand the case to the Clark County Superior Court for such further proceedings as are necessary.

Petitioner requests a reference hearing and further proceedings to facilitate presentation of the factual claims stated herein. Petitioner requests an opportunity to conduct discovery, including a deposition of Deputy Prosecuting Attorney Anna Klein and Clark County Superior Court Judge David Stahnke and any other witnesses that are identified by the State of Washington.

Petitioner requests such further relief as the evidence may support and that the Court feels is appropriate.

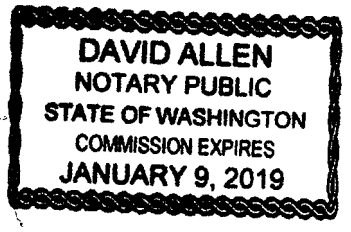
F. OATH AND AFFIRMATION

I, TODD MAYBROWN, after being first duly sworn, on oath, depose and say: That I am the attorney for petitioner, that I have read the petition, know its contents, and I believe the petition is true.

TODD MAYBROWN, WSBA #18557

STATE OF WASHINGTON)
) ss,
COUNTY OF KING)

SUBSCRIBED and SWORN to before me this 1st day of June 2016.



David Allen
NOTARY PUBLIC in and for the
State of Washington, residing at Seattle.
My Commission Expires: 1/9/2019

G. VERIFICATION

I, SERGEY GENSITSKIY, declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

DATED this 26 day of May, 2016.

Sergey Gensitskiy
SERGEY GENSITSKIY, Petitioner

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent by mail / ~~email~~ / ~~messenger~~ a copy of the document to which this certificate is affixed to Anna Klein, APA
PO Box 5000, Vancouver, WA
Dated: 6/9/2016

No. 49044-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

IN THE MATTER OF THE PERSONAL RESTRAINT OF

SERGEY GENSITSKIY,

Petitioner.

AMENDED OPENING BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

ALLEN, HANSEN, MAYBROWN &
OFFENBECHER, P.S.

Attorneys for Petitioner

Todd Maybrown
600 University Street
Suite 3020
Seattle, WA 98101
(206) 447-9681

FILED
COURT OF APPEALS
DIVISION II
2016 JUL 21 AM 10: 36
STATE OF WASHINGTON
BY _____ DEPUTY

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 JUL 19 PM 2: 00

TABLE OF CONTENTS

Table of Authorities iii

A. INTRODUCTION 1

B. PROCEDURAL BACKGROUND 1

C. STATEMENT OF THE CASE 2

1. Background 2
2. Pretrial Proceedings 6
3. Trial Proceedings 13
4. Appellate Proceedings 17
5. Proceedings on Remand 19

D. DISCUSSION 20

1. Personal Restraint Proceedings 21

2. The Deputy Prosecuting Attorney Engaged in Unlawful, *Ex Parte* Communications with a Superior Court Judge in Order to Obtain Unilateral Access to the Jury List Before the *Gensitskiy* Trial 22

(a) Legal Principles 22
(b) The Prosecutor Engaged in Unlawful *Ex Parte* Communication with the Superior Court 25
(c) The *Ex Parte* Communications Amounted to a Structural-Type Error, Although the Petitioner Has Also Demonstrated Prejudice 27

3. The Superior Court Judge's Conduct Violated the Canons of Judicial Conduct and Due Process 30

4. The Court Violated Petitioner's Right To Be Present and His Right to Open Court Proceedings 32

5. Petitioner Received Deficient Legal Representation At Trial 35

(a) Legal Principles 35
(b) No Motion to Sever Charges 37
(c) Failure to Object to Improper and Highly Prejudicial Expert Testimony 38
(d) Petitioner was Prejudiced by these Errors 47

6. Petitioner Received Deficient Legal Representation On Appeal..... 48

E. CONCLUSION..... 50

Proof of Service

TABLE OF AUTHORITIES

Federal Cases

Arizona v. Fulminante, 499 U.S. 279, 310 (1991) 21
Bell v. Cone, 535 U.S. 685 (2002) 28
Boyd v. Brown, 404 F.3d 1159 (9th Cir. 2005) 36
Detrich v. Ryan, 677 F.3d 958 (9th Cir. 2012) 36
Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977) 23
Douglas v. California, 372 U.S. 353 (1963) 48
Etherton v. Rivard, 800 F.3d 737 (6th Cir. 2015) 50
Evitts v. Lucey, 469 U.S. 387 (1985) 48
Faretta v. California, 422 U.S. 806 (1975) 28
Gebaree v. Steele, 792 F.3d 991 (8th Cir. 2015) 47
Guenter v. Comm'r, 889 F.2d 882 (9th Cir. 1989) 23
Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) 36
Kentucky v. Stincer, 482 U.S. 730 (1987) 28
Kimmelman v. Morrison, 477 U.S. 365 (1986) 36
Long v. Butler, 809 F.3d 299 (7th Cir. 2015) 50
McMann v. Richardson, 397 U.S. 759 (1970) 35
Offutt v. United States, 348 U.S. 11 (1954) 24
Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002) 35
Strickland v. Washington, 466 U.S. 668 (1984) 35
Thompson v. Greene, 427 F.3d 263 (4th Cir. 2005) 23
Turner v. Duncan, 158 F.3d 449 (9th Cir. 1998) 36
United States v. Abuhambra, 389 F.3d 309 (2nd Cir.2004) 23
United States v. Carmichael, 232 F.3d 510 (6th Cir. 2000) 24
United States v. Cronic, 466 U.S. 638(1984) 28
United States v. Madori, 419 F.3d 159 (2d Cir. 2005) 28
United States v. Martinez, 667 F.2d 886 (10th Cir. 1981) 25
United States v. Minsky, 963 F.2d 870 (6th Cir. 992) 25, 27, 28

Washington State Cases

In re Brett, 142 Wn.2d 868 (2001) 35
In re Coggin, 182 Wn.2d 115, 119 (2014) 21, 49
In re Cook, 114 Wn.2d 802, 792 P.2d 506 (1990) 21
In re Det. of Kistenmacher, 163 Wn.2d 166 (2008) 27
In re Morris, 176 Wn.2d 156 (2012) 49

In re Orange, 152 Wn.2d 795 (2004) 34, 49
In re Pers. Restraint of Boone, 103 Wn.2d 224 34 (1984) 25
In re Speight, 182 Wn.2d 103 (2014) 34, 49
In re Yates, 177 Wn.2d 1 (2013) 21
Sherman v. State, 128 Wn.2d 164 (1995) 31
State v. Alexander, 64 Wn.App. 147 (1992) 38
State v. Black, 109 Wn.2d 336 (1987) 38
State v. Boehning, 127 Wn.App. 511 (2005) 46
State v. Bone-Club, 128 Wn.2d 254 (1995) 32, 33, 34
State v. Brightman, 155 Wn.2d 506 (2005) 33
State v. Carlson, 80 Wn.App. 116 (1995) 38
State v. Cienfuegos, 144 Wn.2d 222 (2001) 48
State v. Easterling, 157 Wn.2d 167 (2006) 32, 34
State v. Fitzgerald, 39 Wn.App. 652 (1985) 38, 39, 43
State v. Florczak, 76 Wn.App. 55 (1994) 39, 43, 46, 49, 50
State v. Gamble, 168 Wn.2d 161 (2010) 31
State v. Gensitskiy, Clark County Superior Court
Cause No. 11-1-01186-1 1
State v. Gensitskiy, 182 Wn.App. 1016 (2014) 2, 15, 18
State v. Gensitskiy, Court of Appeals No. 71640-9-I 1, 18
State v. Heath, 150 Wn.App. 121 (2009) 34
State v. Hudson, 150 Wn.App. 646 (2009) 38
State v. Irby, 170 Wn.2d 874 (2011) 29
State v. Ish, 170 Wn.2d 189 (2010) 46
State v. Jones, 71 Wn.App. 798 (1993) 50
State v. Love, 183 Wn.2d 598 (2015) 33
State v. Momah, 167 Wn.2d 140 (2009) 33
State v. Montgomery, 163 Wn.2d 577 (2008) 38
State v. Paumier, 176 Wn.2d 29 (2012) 34, 49
State v. Post, 118 Wn.2d 596 (1992) 31
State v. Romano, 34 Wn.App. 567 (1983) 31, 32
State v. Smith, 181 Wn.2d 508 (2014) 32
State v. Watson, 155 Wn.2d 574 (2005) 25, 26
State v. Wise, 176 Wn.2d 1 (2012) 32, 33, 34
Washington State Physicians v. Fisons Corp.,
122 Wn.2d 299 (1993) 38
Wolfkill Feed & Fertilizer Corp. v. Martin,
103 Wn.App. 836 (2000) 30

Cases From Other Jurisdictions

Mangal v. State, 781 S.E.2d 732 (S.C. 2015).....47
State v. Ketchner, 339 P.3d 645 (Ariz. 2014).....47

Court Rules

RAP 16.4 ..... 1, 20
RAP 16.12 ..... 21, 50

RPC 3.5, Comments 1-2..... 22, 23

A. INTRODUCTION

Pursuant to RAP 16.4 *et seq.*, Petitioner Sergey Gensitskiy now petitions the Court for relief from restraint and this memorandum is submitted in support of his Personal Restraint Petition. This Petition is supported by the declarations of Sergey Gensitskiy, Charles Buckley, Jr., Lenell Nussbaum, Todd Maybrown, Barbara Corey, and Brad Meryhew. In addition, Petitioner asks this Court to consider the Clerk's Papers and the Verbatim Reports from the proceedings in the Superior Court.[1]

Petitioner has filed this amended brief at the direction of the Court. In doing so, Petitioner continues to pursue the same claims that are set forth in his Petition. He has not added any new claims; but instead has deleted case discussion pertaining to the claims that have previously been identified.

B. PROCEDURAL BACKGROUND

During August 2012, Sergey Gensitskiy was convicted of ten offenses and the trial judge imposed an indeterminate sentence – with a minimum term of 250 months – for the most serious offenses. *See State v. Gensitskiy*, Clark County Superior Court Cause No. 11-1-01186-1. Petitioner then filed an appeal, which was ultimately transferred from Division II to Division I. *See State v. Gensitskiy*, Court of Appeals No. 71640-9-I. Division I reversed the convictions to all of the alleged

[1] Petitioner believes that these verbatim reports have previously been filed with the Court. If necessary, Petitioner will submit an additional copy to this Court for review.

victims, with the exception of the counts involving Gensitskiy's daughter (who is identified as "C.S.G." in the pleadings and court decision). *See State v. Gensitskiy*, 182 Wn.App. 1016 (2014) (unpublished). Thereafter, the case was remanded to the Clark County Superior Court for further proceedings. On July 6, 2015, the judge imposed a determinate sentence of 198 months on the most serious offense. Petitioner is currently serving his sentence at the Stafford Creek Correctional Center.

C. STATEMENT OF THE CASE[2]

1. Background

Sergey and Yelena Gensitskiy immigrated from the Ukraine with four children in 1990, settling in Clark County, Washington. They now have ten children who were the following ages at the time of trial: S.G. (26), V.G. (24), D.S.G. (23), Z.G. (21), D.G. (20), J.G. (19), R.S.G. (18), C.S.G. (17), V.S.G. (14), and S.S.G. (6). *See* RP 196-98, 1092-93.[3]

The family maintains many old world – or home-country – customs. They often speak Ukrainian at home, eat Russian foods and attend Russian church. *See* RP 387-89. The Gensitskiy parents prohibit drinking, smoking, and sex outside of marriage. Television is not a family

---

[2] The facts and circumstances surrounding these matters are taken from the reported proceedings, Petitioner's declarations and the unpublished decision in *State v. Gensitskiy*, 182 Wn.App. 1016 (2014).

[3] As in the court pleadings and Division One's unpublished decision, the defense will refer to the Gensitskiy children – even the adult children – by their initials.

pastime. The Gensitskiy parents expect respect to elders, humility, hard work, contributions to the household, and church participation. *See* RP 238, 422-24, 486-87, 794-95. As they got older, the children became resistant to these mandates.

In 2004, Sergey and Yelena bought a house near Battle Ground, Washington. With five bedrooms, S.G. and V.S.G. each had a room; the other girls and boys shared bedrooms. *See* RP 197-99, 390, 1016-17, 1076-77. When they bought an adult family home with several bedrooms in Vancouver, Yelena lived there with S.G., caring for the residents. C.S.G. lived there from 2006, when she was 13; D.S.G. moved there in 2008. *See* RP 752-53, 1007-08, 1025-26. Sergey and the other children primarily lived at the home in Battle Ground. *See* RP 199, 1119.

Mitch Edington hired Sergey for a major landscaping in job 1996. He became social friends with the family, visiting several times a year through the summer of 2010. Edington saw no signs of avoidance or aversion. From all he could see, the children adored their father, always clamoring onto his lap. *See* RP 1042-51.

As D.S.G. saw D.G. moving away from the family, she too wanted more independence. She secretly began dating Chris Nicks in July, 2010, knowing her parents would not approve. Unlike her parents, C.S.G. knew of this dating arrangement. Nicks urged D.S.G. to move away from her

parents and to live her own life. *See* RP 249-50, 426-30, 485, 597, 1036.

In September 2010, D.S.G. moved in with another family, the Pattersons, without telling her parents as she was afraid she would disappoint them. According to witnesses, this was her first act of rebellion. *See* RP 426-30, 486, 671. D.S.G. left a lengthy letter saying how she loved her parents, why she was seeking her own way. *See* R.P. 539-40 and Exhibit 2. Nonetheless, she wrote of her unhappiness caring for residents at the adult care home, and the recent family disruption when D.G. left the home. *See id.*

Yelena and Sergey were terrified for their daughter. Yelena thought D.S.G. had been kidnapped until she found the letter. They called everyone they could think of in an effort to locate her. Yelena drove all around Vancouver and three times to Edmonds to see if D.S.G. was staying with D.G. Twice Sergey took Yelena to the emergency room, afraid she was having a heart attack as a result of the ongoing stress. *See* RP 427-28, 789-90, 1004, 1034-35, 1093-95.

Later, Sergey discovered from cell phone records that D.S.G. and C.S.G. had been communicating. Sergey asked C.S.G. about these communications, hoping she would reveal D.S.G.'s whereabouts. But C.S.G. refused to disclose where her sister was staying.

Subsequently, after the Pattersons told D.S.G. that she must

contact her parents, she claimed that she had been molested by her father. *See* RP 438-39, 599-600, 619. D.S.G. then called D.G. in Edmonds, and asked if he thought their father was "a pervert." D.G. claims that he suddenly "flashed" on the memory of an incident in the shower with his father when he was 4 or 5 years old. According to D.G., he recalled a single occasion when his father had touched his penis. Nothing like that ever happened again to him. *See* RP 214-15, 229, 235, 496.

Nicks drove D.S.G. to Edmonds to pick up D.G. *See* RP 489-92. Then, on October 1, 2010, D.G. and Nicks picked up R.S.G. and V.S.G. from school. D.G. then told his younger brothers that they were going to report that their father had molested them. D.G. told his siblings that if they had any similar experiences, it was up to them to decide whether to report it. *See* RP 221-24, 247-52.

D.S.G. then met with C.S.G. and asked if she thought their father was perverted, and if she wanted to say something that could help her get out of the house. As D.S.G. listened and talked to C.S.G. and D.G. over the following days, D.S.G. came to believe things they said had happened to her too. *See* RP 520-22, 529, 664-68, 758-59; CP 146.

During the ensuing days, D.G., C.S.G., D.S.G., R.S.G. and V.S.G. met with several CPS workers and members of the Clark County Sheriff's Department. *See* RP 558-76. The Gensitskiy children were placed in "out

of home care" for a period of time.

Sergey and Yelena only learned where D.S.G. was when police officers arrived at their home on October 1 to take S.S.G., who was then 4 years old, into protective custody. *See* RP 1097. After a court hearing, R.S.G., V.S.G., and S.S.G. were returned to Yelena on condition that they have no contact with their father. *See* RP 126-27, 1011.

Sergey retained attorney Charles Buckley Jr., to represent him on these matters during December 2010. He always told Buckley that the claims in this case were false and that he had never sexually assaulted any of his children. *See Sergey Gensitskiy Dec. ¶ 4.*

2. <u>Pretrial Proceedings</u>

During July 2011, the Clark County Prosecuting Attorney charged Sergey Gensitskiy with twelve counts of child molestation and incest. *See generally Maybrown Dec.* ¶ 5 and App. A.[4] For the Court's convenience, the State's charges are summarized in the chart which is included as Attachment A. The State also alleged as aggravating factors. *See id.*

The charges were based on allegations that Petitioner had sexually assaulted five of his ten children over a 15-year span between 1995 and 2010. *See id.* The children have been identified in court documents by their

[4] The State filed an amended information on August 30, 2011. *See* RP 11-15. The amendment corrected an apparent scrivener's error as to Count 2.

initials: "D.G.," "C.S.G.," "V.S.G.," "D.S.G.," and "R.S.G." *See id.*[5]

Count 1 stemmed from the claims of Petitioner's son, D.G. In the charging document, the State alleged that Petitioner committed child molestation in the first degree based on an incident that allegedly occurred sometime between October 3, 1995 and October 2, 1997.

Counts 2, 3, 4 and 5 stemmed from the claims pertaining to Petitioner's daughter, C.S.G. In Count 2, the State alleged that Petitioner committed child molestation in the first degree based on an incident that occurred sometime between March 1, 2001 and February 28, 2007. In Count 3, the State alleged that Petitioner committed child molestation in the second degree based on an incident that occurred sometime between March 1, 2007 and March 28, 2009. In Count 4, the State alleged that Petitioner committed child molestation in the third degree based on an incident that occurred sometime between March 1, 2009 and October 10, 2010. In Count 5, the State alleged that Petitioner committed child molestation in the third degree based on an incident that occurred sometime between March 1, 2009 and October 1, 2010.

Count 6 stemmed from the claims pertaining to Petitioner's son, V.S.G. In the charging document, the State alleged that Petitioner committed child molestation in the first degree based on an incident that

[5] The information refers to two separate individuals as D.S.G. For purposes of clarity, Petitioner will refer to the alleged victim in Count 1 as D.G.

occurred sometime between November 28, 2006 and November 27, 2007.

Counts 7, 8, 9, 10 and 11 stemmed from claims pertaining to Petitioner's daughter, D.S.G.[6] In Count 7, the State alleged that Petitioner committed child molestation in the second degree based on an incident that occurred sometime between July 16, 1997 and July 15, 2003. In Count 8, the State alleged that Petitioner committed child molestation in the second degree based on an incident that occurred sometime between July 16, 1997 and July 15, 2003. In Count 9, the State alleged that Petitioner committed incest in the second degree based on an incident that occurred sometime between June 1, 2010 and September 30, 2010. In Count 10, the State alleged that Petitioner committed incest in the second degree based on an incident that occurred sometime between June 1, 2010 and September 30, 2010. In Count 11, the State alleged that Petitioner committed incest in the second degree based on an incident that occurred sometime between June 1, 2010 and September 30, 2010.

Count 12 stemmed from a claim of Petitioner's son, R.S.G. In the charging document, the State alleged that Petitioner committed child molestation in the second degree based on an incident that allegedly occurred sometime between October 24, 2005 and October 23, 2007.

The State was represented by Deputy Prosecuting Attorney Anna

[6] The State was permitted to amend counts 8, 9, 10 and 11 during trial, but the Court of Appeals ultimately ruled that this amendment was unlawful.

Klein throughout the trial proceedings. *See Buckley Dec.* ¶ 4. The Petitioner was represented by attorney Charles Buckley throughout the trial proceedings. *See Sergey Gensitskiy Dec.* ¶ 4; *Buckley Dec.* ¶ 3. The *Gensitskiy* case was assigned to Clark County Superior Court Judge John Wulle for trial. *See Maybrown Dec.* ¶ 6; *Buckley Dec.* ¶ 4.

Petitioner was arrested and charges were filed during July 2011. The Superior Court records indicate that defense counsel asked to continue the trial date on three separate occasions. *See Maybrown Dec.* ¶ 10. The first motion was filed on September 21, 2011. *See id.* In pressing that motion, Buckley claimed that he had "not conducted all investigations yet from the officers or the victims." RP 17. The second motion was filed on November 9, 2011. *See Maybrown Dec.* ¶ 10. In pressing that motion, Buckley offered no explanation of the need for this continuance. *See* RP 20-21. The third motion was filed on January 31, 2012. *See Maybrown Dec.* ¶ 10. In pressing that motion, Buckley noted that he had only recently interviewed four of the alleged victims (but that he had yet to interview the fifth alleged victim or the foster parents). He also claimed that the defense would need to locate an expert witness given the new information regarding "suppressed memories" (sic) that was supposedly revealed during the recent interviews. *See* RP 25-26.

The State filed a motion to continue the trial on April 10, 2012.

See Maybrown Dec. ¶ 11. In support of the motion, DPA Klein claimed that the State was seeking to suppress the testimony of a defense expert or to hire an expert to respond to that testimony. *See id.* When the parties appeared to address the State's motion, Buckley explained that the trial judge was not available on the assigned trial date. He also noted that the State was looking to obtain a "second expert" in this matter. *See* RP 29.

The State filed its initial witness list on September 14, 2011. *See Maybrown Dec.* ¶ 12. The State filed the identical list on September 28, 2011, November 17, 2011, and February 7, 2012. In its last iteration of the list, filed on April 25, 2012, the State named an expert, Erin Haley, as a possible witness at trial. *See id.* The defense filed its initial witness list on January 26, 2012. *See id.* ¶ 13. That list was amended on two occasions – first on March 28, 2012 and second on July 30, 2012. *See id.*

The parties appeared for a "compliance" hearing before Hon. Rich Melnick on July 25, 2012. *See generally Maybrown Dec.* ¶ 14 and App. D. DPA Klein then questioned defendant's compliance with discovery obligations. *See* RP 34. Buckley responded that he had provided the State with a brief summary of the proposed testimony for each witness. *See* RP 35. Buckley also agreed to provide additional information regarding the defendant's proposed expert. *See* RP 35-36. The parties' attorneys both confirmed that they would be ready for trial on July 30, 2012.

Sometime during the day on July 25, 2012 – although it is unclear whether this was before or after the compliance hearing – DPA Klein met with another judge (Superior Court Judge Daniel Stahnke) to present the *ex parte* motion relating to the *Gensitskiy* case. *See generally Maybrown Dec.* ¶ 15 and App. E.[7] At that time, the prosecutor asked Judge Stahnke to sign a document entitled "Order Authorizing Review of Jury Book (Including Jury List)." *See id.* This Order, which was drafted by the prosecutor, allowed the State unfettered access to the "juror book" and "jury list" prior to trial. *See id.* By its terms, the Order provided no similar authorization for the defense and it specifically directed that "no other party shall be allowed to review the material." *See id.*

It is apparent that this Order was presented in an *ex parte* proceeding. *See Maybrown Dec.* ¶ 17. The State's request – and its intention to present this type of Order – was never mentioned during the hearing of July 25, 2012. *See id.* Neither defense counsel nor the defendant were present when DPA Klein met with Judge Stahnke. *See Gensitskiy Dec.* ¶ 7; *Buckley Dec.* ¶ 8. Moreover, the Order was presented by DPA Klein, without any indication that the defense had notice of the State's motion. There is no "record" of any public proceeding relating to

[7] Based on all available records, there is no indication that Jude Stahnke had any involvement in the *Gensitskiy* case. Given the *ex parte* nature of this matter (and the very limited information that is set forth in the proposed Order), it is unclear why DPA Klein chose to present this motion to Judge Stahnke.

the motion. Notably, the Order provides no explanation or justification for the *ex parte* nature of this motion.

DPA Klein did not notify defense counsel that she intended to present this Order. Nor did the prosecutor notify defense counsel that she intended to obtain the jury book and jury list prior to trial. Buckley was not aware that DPA Klein had obtained this Order on July 25, 2012 and he had no knowledge that the State was permitted to take custody of the jury book and jury list prior to trial. *See Buckley Dec.* ¶ 8.

In obtaining these materials, the State was given a significant (and unwarranted) advantage in the trial proceedings against Sergey Gensitskiy. *See generally* Corey Dec. ¶¶ 27-31. By utilizing an *ex parte* process, the prosecutor guaranteed that she could conduct a clandestine investigation of the potential jurors in the days leading up to trial. *See id.*

Before trial, Petitioner's counsel filed no substantive legal motions. Buckley never filed any motion for discovery. Nor did he make any attempt to sever the charges that would be presented at trial. And there is no indication that Buckley's omissions were "strategic" in nature. *See generally* Meryhew Dec. ¶¶ 18, 29-44.

On July 25, 2012, Buckley did file a two-page document which set forth a few Motions in Limine. *See Maybrown Dec.* ¶ 22 and App. G. This document identified four separate – but essentially generic –

objections that might be presented at trial. First, the defense objected to the introduction of evidence regarding "past alleged activities." Second, the defense objected to the introduction of statements of the alleged victims. Third, the defense asked to limit each witness' testimony regarding truthfulness or credibility of the other witnesses. Fourth, and finally, the defense objected to the introduction of tape recordings.

Buckley seemed to argue in support of the second issue when the case proceeded to trial. *See* RP 176-77. In particular, he asked the trial judge to hold a hearing outside the presence of the jury in any instance where the State would attempt to present prior statements from certain recanting witnesses. *See id.* The judge never issued any ruling on this matter, but noted that we can "cross that bridge when we get to it." RP 179. Buckley abandoned, any of the remaining motions.

3. <u>Trial Proceedings</u>

Trial in this case commenced on July 31, 2012. A number of witnesses testified, including D.G., V.S.G., D.S.G., C.S.G., R.S.G., detective Barry Folsom, and the Pattersons. Petitioner testified in his own defense and denied the allegations of child molestation and incest. The defense also presented testimony from members of the Gensitskiy family, Mitch Edington, Amy Quint, and a memory expert.

On the first day of trial, D.G. testified and presented an extremely

vague claim regarding a single incident which occurred when he was just 4 to 5 years old. Although D.G. claimed to have previously "repressed" any memory of the event, he told the jury that on this occasion his father had fondled D.G.'s genitals while they were together in the shower. *See* RP 264-65

R.S.G. testified that same day, and presented an extremely vague claim regarding an incident that occurred when he was just 12 years old. According to the witness, he recalled a single occasion where he awoke in his bed to feel someone touching his "nether regions." RP 322. R.S.G. did not see the other person, but he assumed that it must have been his father because he had "heavy breathing." RP 325.

During her testimony on the second and third days of trial, D.S.G. also recanted. The State then used transcripts from D.S.G's interviews with Detective Folsom and her prior sworn statement to impeach her testimony with prior inconsistent statements. Later, on the sixth day of the trial (August 8, 2012), after D.S.G. had completed her testimony and after the State had rested its case, the State was permitted to file a Second Amended Information which substantially modified Counts 8, 9, 10, and 11. *See* RP 1123-6.

On the third day of trial, V.S.G. testified and recanted any claims of abuse. V.S.G. testified Petitioner never touched him inappropriately.

The State then attempted to rely on an interview transcript to refresh V.S.G.'s memory and to impeach his testimony with prior inconsistent statements. Defense counsel objected to the State's use of the transcript for impeachment purposes. *See* RP 394-97.

C.S.G. testified on day five of trial. *See* RP 732-98; CP 144-46. When analyzing a claim regarding the sufficiency of the evidence, the Court of Appeals described her testimony as follows:

> C.S.G. testified that Gensitskiy put his hands down her pants and touched her breasts, buttocks, and genitals on numerous occasions. C.S.G. testified that she could recall "a couple incidents" when her father touched her inappropriately when she was "very young." C.S.G. said that when she was under the age of 7, her father would come into her room, take off her pajamas, and rub her "upper thighs" on "the insides of our legs . . . on the skin." C.S.G. testified that after the age of 10, Gensitskiy would enter the bathroom while she was showering and touch her buttocks. C.S.G. stated that starting around the age of 12 or 13, Gensitskiy would touch her breasts "under my clothes" on a weekly basis.

Gensitskiy, 182 Wn.App. 1016 at *5.

During trial, C.S.G. testified that she never told an adult about what was happening. But she claimed that she told one friend, Amy Quint, that her father improperly touched her. *See* RP 751-52; CP 145. By contrast, Quint testified for the defense and advised the jury that C.S.G. never said anything about sexual abuse. *See* RP 1171-73. C.S.G. said much of the abuse occurred in the Vancouver adult family home, but

none of the residents there ever saw it. *See* RP 765.

The State made herculean efforts to buttress (if not vouch for) the claims of C.S.G. This evidence included testimony from C.S.G.'s foster parents, Randy and Tami Patterson. Perhaps the most influential testimony was offered through Erin Haley, a therapist working at the Children's Center, who was permitted to testify (as a purported expert) to her opinion that C.S.G. was a victim of sexual abuse. *See* RP 282-15. Notwithstanding the relevant case authority, the defense made no proper pretrial or trial objection to Haley's testimony. *See Meryhew Dec.* ¶¶ 49-50.

Sergey Gensitskiy testified in his defense at trial, and denied all of the claims. He very specifically testified that he never abused or molested any of his children. He also emphasized that he had never engaged in any of the conduct that was described by C.S.G. *See* RP 1098-1100, 1111-19.

Yelena Gensitskiy testified and denied the State's claims against her, and most specifically she denied the claims that had been presented by C.S.G. *See* RP 1023-23, 1033. The defense also presented testimony of several persons – including family members – who denied seeing any evidence or even any indication that the children had been abused by their father. *See* RP 846-47, 1017-18, 1052-55, 1057-58, 1063-65, 1072-76, and 1082-83.

Finally, the defense called Dr. Daniel Reisberg, a memory expert, to testify in general fashion about "false memories." RP 959-65.

The jury found Petitioner not guilty of child molestation in the first degree of D.G. as charged in Count 1, and not guilty of child molestation in the second degree of R.S.G. as charged in Count 12. The jury found Petitioner guilty of child molestation in the first degree of C.S.G. and V.S.G., Count 2 and Count 6; child molestation in the second degree of C.S.G. and D.S.G., Count 3 and Count 7; two counts of child molestation in the third degree of C.S.G., Count 4 and Count 5; and four counts of incest in the second degree of D.S.G ., Counts 8, 9, 10, and 11. By special verdict, the jury found Gensitskiy used his position of trust to facilitate the commission of the current offenses and that certain offenses were part of an ongoing pattern of sexual abuse of the same victim

Thereafter, Judge Wulle imposed the following terms of custody on each offense: 250 months (minimum term) on Count 2; 116 months on Count 3; 60 months on Count 4; 60 months on Count 5; 250 months (minimum term) on Count 6; 250 months (minimum term) on Count 7; 60 months on Count 8; 60 months on County 9; 60 months on Count 10; and 60 months on County 11.

4. <u>Appellate Proceedings</u>

Petitioner filed a timely appeal from the Superior Court Judgment.

The appeal was ultimately transferred from Division II to Division I. *See State v. Gensitskiy*, Court of Appeals No. 71640-9-I. On July 7, 2014, the reviewing court issued its decision on that appeal. *See State v. Gensitskiy*, 182 Wn.App. 1016 (2014) (unpublished). Petitioner's attorney did not file any claims regarding: (1) the *ex parte* proceedings whereby the prosecutor obtained a document entitled "Order Authorizing Review of Jury Book (Including Jury List)" on July 25, 2015 and (2) the testimony of the States' expert witness, Erin Haley, to the effect that C.S.G. had a "diagnosis of sexual abuse of a child" and was suffering from post-traumatic stress disorder based upon the conduct of her father.

As to the claim involving V.S.G. charged in Count 6, the court accepted the State's concession that there was insufficient evidence to support any conviction on that charge. *See id.* at *3.

The Court also reversed all convictions as to the charges involving D.S.G. *See id.* at *2-*3. Count 7 was dismissed without prejudice because the charging document did not include an essential element of the offense. *See id.* at *2. Count 8 was dismissed with prejudice because the trial court permitted the State to file a Second Amended Information thereby changing the offense to incest in the second degree. *See id.* Counts 9, 10 and 11 were dismissed with prejudice because the trial court had permitted the State to file a Second Amendment Information thereby

changing the charging period from a few months in 2010 to a span of 16 years. *See id.* at *2-*3.

The court affirmed the remaining charges as to C.S.G. (Counts 2, 3, 4 and 5), after concluding that a "rational trier of fact could have found that Gensitskiy touched the intimate parts of C.S.G. for the purpose of gratifying his sexual desire." *Id.* at *5. However, the Court concluded that Gensitskiy could not face an indeterminate sentence as to Count 2 in light of the constitutional prohibition against *ex post facto* laws. *See id.* at *6. Therefore, the case was remanded for resentencing.

The State filed a motion for discretionary review (Washington Supreme Court Cause No. 90995-4), which was denied on March 4, 2015. *See State v. Gensitskiy*, 182 Wn.2d 1013 (2015).

5. <u>Proceedings On Remand</u>

On remand, the State chose not to proceed on Count 7. Instead, the case was transferred to another judge for re-sentencing based only on the counts involving C.S.G. On July 6, 2015, Clark County Superior Court Judge David Gregerson imposed the following terms of custody on each offense: 198 months on Count 2; 116 months on Count 3; 60 months on Count 4; and 60 months on Count 5. The Court filed the amended Judgment that same day. *See Maybrown Dec.* ¶ *9* and App. C.

D. DISCUSSION

Sergey Gensitskiy now petitions this Court to grant relief under RAP 16.4 *et seq*. As shown below, Petitioner was deprived of his rights in numerous respects when DPA Klein engaged in unlawful *ex parte* communications with Clark County Superior Court Judge Daniel Stahnke in relation to the trial proceedings in the *Gensitskiy* case. As a result of this *ex parte* contact, the prosecutor was able to clandestinely obtain a copy of the "jury book" and "jury list" prior to trial, thereby prejudicing Petitioner's right to a fair trial and impartial jury. Moreover, by engaging in this *ex parte* contact, Judge Stahnke violated Canons 1, 2, and 3 of the Code of Judicial Conduct, and thereby demonstrated actual bias towards the Petitioner. The Judge's conduct also demonstrated an appearance of unfairness in these proceedings. This conduct also constituted a violation of Petitioner's right to be present at all court proceedings pertaining to his case as well as his right to open and public court proceedings.

In addition, Petitioner's trial counsel's performance was deficient in numerous respects. Petitioner suffered substantial prejudice on account of these several deficiencies. Petitioner's appellate counsel, too, provided deficient representation in these matters and Petitioner suffered substantial prejudice due to counsel's failings.

Consequently, this Court must grant relief and set aside the trial

court's Judgment. Should the State dispute any of the factual allegations raised by Petitioner, the Court should remand the case to the Superior Court for a reference hearing pursuant to RAP 16.12.[8]

1. Personal Restraint Proceedings

The Washington Supreme Court has rejected many formal impediments which could be used to block the consideration of personal restraint petitions. *See In re Cook*, 114 Wn.2d 802, 807-14 (1990). When considering constitutional arguments raised in a personal restraint petition, the court must determine whether the petitioner can show that a constitutional error caused actual and substantial prejudice. *See, e.g., In re Coggin,* 182 Wn.2d 115, 119 (2014) (plurality opinion). A stricter standard governs non-constitutional claims in a personal restraint petition. *See In re Yates*, 177 Wn.2d 1, 18 (2013) (relief warranted if there is "a fundamental defect resulting in a complete miscarriage of justice").

A different rule applies to errors that are considered "structural" insofar as they affect the framework within which the trial proceeds, rather than simply an error in the trial process itself. *See, e.g. Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Where there is structural error "'a criminal trial cannot reliably serve its function as a vehicle for

[8] Petitioner believes that DPA Klein and Judge Stahnke are necessary witnesses in these proceedings. Given these circumstances, Petitioner maintains that any such hearing should be held outside of Clark County.

determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Id.* (citation omitted).

Petitioner maintains that the violations in this case – particularly the due process violations that resulted from the *ex parte* communications that permitted the prosecutor to obtain a copy of the jury book and jury list before trial – are structural in nature and that prejudice must be presumed. This type of clandestine activity undermines the reliability of these court proceedings, and it calls into question the basic fairness of the integrity of the jury selection process. However, as discussed further below, Petitioner can establish prejudice as to each of his legal claims.

Moreover, Petitioner is entitled to relief for he has identified legal and constitutional errors that produced fundamental defects in his trial court proceedings. For, without relief, Petitioner's remaining convictions and sentence would amount to a miscarriage of justice.

2. The Deputy Prosecuting Attorney Engaged in Unlawful, *Ex Parte* Communications with a Superior Court Judge in Order to Obtain Unilateral Access to the Jury List Before the *Gensitskiy* Trial

a. Legal Principles

Washington's Rules of Professional Conduct prohibit improper *ex parte* contacts between a prosecutor and the Court pertaining to a pending case. As noted in the comments to RPC 3.5:

> [1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Washington Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
>
> [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

RPC 3.5, Comments 1-2.

Ex parte communications are "anathema in our system of justice." *Guenter v. Comm'r*, 889 F.2d 882, 994 (9th Cir. 1989). Particularly in criminal proceedings, where an individual's liberty is at stake, due process requires that a defendant have not only the opportunity to advance his own position, but "to correct or contradict" the government's claims. *See United States v. Abuhambra*, 389 F.3d 309, 322-33 (2d Cir. 2004). Because they strike at the very heart of this seminal principle, *ex parte* communications are – except in extraordinary circumstances – strictly forbidden. *See, e.g., Thompson v. Greene*, 427 F.3d 263, 269 n.7 (4th Cir. 2005) (prohibition on *ex parte* contacts is "one of the basic tenets of our adversary system"); *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977) (*ex parte* contacts are "prohibited as fundamentally at variance with our conceptions of due process").

Ex parte contacts are improper, in part, because they raise questions

about basic notions of fairness and the legitimacy of the court proceedings. As noted by one commentator:

> Probably the most serious danger of a prosecutor/judge relationship that has grown too cooperative is the opportunity for, and the occurrence of, improper ex parte communications. The close relationship between the prosecutor and the judge can lead to the unethical practice of improper ex parte communications. Prosecutors and courts engage in a number of permissive *ex parte* communications. As a direct result of the close relationship that often exists between the prosecutor and the judge, however, improper *ex parte* communications can routinely happen.

Roberta Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 Neb.L.Rev. 251, 272-73 (2000).

Most significantly, *ex parte* communications undermine that legitimacy by making impossible, as a matter of both perception and reality, the "neutral and detached" fact finder that is the "first and most essential element" of the adversary system. *See* Anne Strick, *Injustice For All* 145 (1996). *Ex parte* communications also threaten the courts' legitimacy as a matter of perception. "Justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954), and giving one party "private access to the ear of the court" is a "gross breach of the appearance of justice." *United States v. Carmichael*, 232 F.3d 510, 517 (6th Cir. 2000).

In appropriate circumstances, courts have granted relief to

aggrieved defendants in light of such improper contacts. *See, e.g., United States v. Minsky*, 963 F.2d 870, 873 (6th Cir. 1992) (reversing conviction based in part on an *ex parte* conversation between the trial judge and prosecutor during trial regarding what statements must be turned over to the defendant); *United States v. Martinez*, 667 F.2d 886 (10th Cir. 1981) (reversing conviction and barring retrial based on strategy meeting between judge and prosecutor).

The Washington Supreme Court has held that a petitioner was denied due process in a revocation proceeding when his probation officer submitted a secret report to the court. *See In re Boone,* 103 Wn.2d 224, 234-35 (1984). *Boone* is noteworthy because the court recognized that the petitioner was afforded lesser due process rights in a parole or probation revocation hearing. Even so, the Court concluded that Boone had been denied his due process rights on account of "obvious Constitutional violations." *Id.* at 969. Although the court questioned whether there was any need for the petitioner in *Boone* to prove actual prejudice, it nonetheless noted that the petitioner had "made as good a prima facie showing of prejudice as could be made in this type of case." *Id.* at 970.

b. The Prosecutor Engaged in Unlawful *Ex Parte* Communication with the Superior Court

In *State v. Watson*, 155 Wn.2d 574 (2005), the Washington

Supreme Court clarified what constitutes an improper *ex parte* communication within the meaning of Washington's rules. On review, the *Watson* court noted that the term "ex parte" refers to something being

> [d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other."

Watson, 155 Wn.2d at 578-79 (*citations omitted*).

Here, there is no doubt that the prosecutor engaged in an *ex parte* communication with Judge Stahnke relating to the *Gensitskiy* matter. *See generally Corey Dec. ¶¶ 23-32.* This violation is particularly egregious because the parties appeared for a hearing before another judge, Judge Melnick, that very same day. At the time of the "compliance" hearing, the attorneys discussed matters relating to the upcoming trial, but the prosecutor never mentioned that she planned to obtain an Order allowing her to obtain a copy of the jury list before trial. This omission is telling – as it apparent that the prosecutor was scheming to hide her intentions from the defendant and his counsel.

At some point on July 25, 2012, DPA Klein had secret communications with Judge Stahnke so she could obtain the "jury book" and "jury list" for her own personal review. *See Maybrown Dec.* ¶¶ 15-19. The defendant was never given notice of this request; and the judge

never provided a similar Order for the benefit of the defendant. *See Buckley Dec.* ¶ *8*; *Gensitskiy Dec.* ¶ 7.

By utilizing an *ex parte* procedure, the prosecutor guaranteed that she could conduct a clandestine investigation of the potential jurors in the days leading up to trial – and so the State would be afforded an extraordinary advantage. Without question, these *ex parte* communications were unlawful. *See Corey Dec.* ¶¶ 23-28 (there is no legal authority for prosecutor to file an *ex parte* motion, participate in an "off the record" proceeding, or to seek a hearing without first providing notice to the defense).

In this case, DPA Klein engaged in the type of unlawful communication that has been condemned in cases like *Minsky*. In fact, the prosecutor engaged in more than a "communication" with a judge – as she secretly presented an Order that would allow for a substantial (and unilateral) benefit at trial. The State could never satisfy the "heavy burden" to show that no prejudice resulted when the defendant was excluded from these communications. *See Minsky*, 963 F.2d at 874.

c. The *Ex Parte* Communications Amounted to a Structural-Type Error, Although the Petitioner Has Also Demonstrated Prejudice

A deprivation of counsel at a critical stage may constitute structural error. *See, e.g., In re Det. of Kistenmacher*, 163 Wn.2d 166, 185

(2008) (Sanders, J., concurring in part). Thus, as noted in *Minsky*, *ex parte* communication between the prosecution and the trial judge can only be "justified and allowed by compelling state interest." 963 F.2d at 874.

The due process clause of the Fifth Amendment grants criminal defendants the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 820 n.15 (1975). *See also United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error ***without any showing of prejudice*** when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.") (*emphasis added*). "Even where a compelling necessity for secrecy exists, it must be weighed against the extent of the intrusion, if any, upon the interests of the excluded defendant." *United States v. Madori*, 419 F.3d 159, 171 (2d Cir. 2005). Here, there was no reason – other than trickery and unfairness – to exclude the defendant from the meeting between DPA Klein and Judge Stahnke.

The Supreme Court has identified the types of events that will constitute a "critical stage" within the meaning of *Cronic* such as proceedings that hold significant consequences for the accused. *See, e.g., Bell v. Cone,* 535 U.S. 685, 695-96 (2002); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). Drawing upon that precedent, the Washington Supreme

Court has adopted a test that focusses upon the fairness of the proceedings. *See, e.g., State v. Irby*, 170 Wn.2d 874, 888-89 (2011).

In *Irby*, the court has noted that "[t]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." *State v. Irby*, 170 Wn.2d 874, 880 (2011) (*citation omitted*). The presentation of a substantial legal motion – a motion that would permit the prosecutor to have early access to the jury book and the jury list pertaining to the case – is certainly a critical stage of the proceedings. To rule otherwise would suggest that the prosecutors are free to meet with the Court in an *ex parte* manner to ensure special privileges before, during and after trial – or any other advantage that would uneven the playing field during the trial process. Here, the defendant's presence would have guarded against this sort of unfairness and would have ensure the fairness of the trial proceedings. *See, e.g., Buckley Dec.* ¶ *9* ("If I had known that the prosecutor intended to obtain the juror list and jury book on July 25, 2012, I would have insisted that these same benefits should have been afforded to the defense. ").

However, this Court need not decide whether the error is structural in this case. For there can be no question but that Petitioner suffered prejudice on account of the *ex parte* proceedings. *See Corey Dec.* ¶¶ 30-31 (explaining how early, unilateral disclosure of the jury list to prosecutor

would provide a significant advantage to State and prejudice to the defense).

It is hard to understate the advantage that the prosecutor obtained in this case. With the jury list in hand a full five days before trial, the prosecution was free to complete an exhaustive investigation of the potential jurors in this case. Given the State's resources, the prosecution was free to search through several databases – including non-public databases – to obtain considerable information about each juror. The prosecution was also free to complete online research as to each juror.

Notably, the prosecutor used all six of the State's peremptory challenges when selecting (and "deselecting") jurors to sit on the case. *See Maybrown Dec.* App. F. Given these facts, the State cannot seriously claim that they did not benefit from the *ex parte* proceedings in this case.

3. The Superior Court Judge's Conduct Violated the Canons of Judicial Conduct and Due Process

The common law, as well as the federal and state constitutions, guarantees a defendant the right to an impartial tribunal, be it judge or jury. The law not only requires an impartial judge, but also requires that a judge ***appear*** to be impartial. Due process, the appearance of fairness, and the Canons of Judicial Conduct require disqualification of a judge who is biased against a party or "whose impartiality may be reasonably questioned." *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn.App.

836, 841 (2000). Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonable person, who knows and understands all the relevant facts, would conclude that the parties received a fair, impartial, and neutral hearing. *See, e.g., State v. Gamble*, 168 Wn.2d 161, 187 (2010); *Sherman v. State*, 128 Wn.2d 164, 205-06 (1995).

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonable person, who knows and understands all the relevant facts, would conclude that the parties received a fair, impartial, and neutral hearing. *See, e.g., State v. Gamble*, 168 Wn.2d 161, 187 (2010); *Sherman v. State*, 128 Wn.2d 164, 205-06 (1995). A defendant claiming an appearance of fairness violation has the burden to provide evidence of a judge's actual or potential bias. *See generally State v. Post,* 118 Wn.2d 596, 619 (1992); *State v. Romano*, 34 Wn.App. 567 (1983) (sentencing judge's *ex parte* communication regarding defendant's income, for purposes of setting restitution, was not revealed to defendant until after sentencing, creating an appearance of unfairness).

As discussed above, Judge Stahnke engaged in an unlawful, *ex parte* contact with DPA Klein prior to trial. Canon 2.2 provides that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." *Id.* And Canon 2.6(A) provides that "[a] judge shall accord to every person who has a legal interest in a

proceeding, or that person's lawyer, the right to be heard according to law." *Id.* Here, Judge Stahnke violated these most-basic principles.

It is astounding that the court would offer this opportunity to the prosecutor, without providing this same benefit (or even notice) to the defense. Given these circumstances, this Court must find that DPA Klein coaxed Judge Stahnke into a violation of the appearance of fairness doctrine. This situation is far worse than a case like *Romano* insofar as Judge Stahnke's actions were calculated to ensure that one party to the litigation would have a leg up at trial. Any reasonable person would conclude this conduct undermined the fairness of the trial proceedings.

4. <u>The Court Violated Petitioner's Right to Be Present and His Right to Open Court Proceedings</u>

"Justice in all cases shall be administered openly." Wash. Const. art. I, § 10. The Washington Constitution flatly prohibits secret tribunals and Star Chamber justice. *See State v. Easterling*, 157 Wn.2d 167, 179 (2006); *State v. Bone-Club,* 128 Wn.2d 254, 258-59 (1995). "A public trial is a core safeguard in our system of justice," and violations of article I, section 10 are structural error and can be raised for the first time on appeal. *See State v. Wise*, 176 Wn.2d 1, 5, 9 (2012). A closure is generally not justified if the trial court does not first conduct a *Bone-Club* analysis on the record. *See State v. Smith,* 181 Wn.2d 508, 520 (2014).

"The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a public trial by an impartial jury." *State v. Momah*, 167 Wn.2d 140, 147 (2009). Article I, section 10 provides the additional guarantee that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." *State v. Love*, 183 Wn.2d 598, 604-05 (2015). "These related constitutional provisions serve complementary and interdependent functions in assuring the fairness of our judicial system" and are often called the public trial right." *Love*, 183 Wn.2d at 605 (*citation omitted*). The public trial right is implicated in the *voir dire* portion of jury selection. *See State v. Wise*, 176 Wn.2d 1, 12 n.4 (2012).

Along these same lines, the state and federal constitutions protect the right of a criminal defendant to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Love,* 183 Wn.2d at 608 (*citation omitted*). This protection is guaranteed by the federal and state constitutions. *See id.* at 608. *See also State v. Brightman*, 155 Wn.2d 506, 514-18 (2005) (defendant's public trial rights were violated where trial court fails to engage in *Bone-Club* analysis before closing courtroom during jury selection).

The open courtroom mandate has clearly been applied to pretrial

hearings in criminal cases. *See Easterling*, 157 Wn.2d at 828-31; *Bone-Club*, 128 Wn.2d at 327-31; *In re Orange*, 152 Wn.2d 795 (2004); *State v. Heath*, 150 Wn.App. 121, 127 (2009). Without question, the right would apply to the presentation of the prosecution's motion for special access to the jury list that was presented in this case. This motion is no different than the motion hearings at issue in cases like *Easterling*, *Bone-Club*, and *Heath*. Moreover, applying the "experience and logic" test, this type of motion that must be presented in open court.

The deprivation of Washington's constitutional right to public trial is a structural error that is not subject to harmless error analysis. *See, e.g., Wise*, 176 Wn.2d at 13-14 (*citing numerous cases*). *Accord State v. Paumier*, 176 Wn.2d 29 (2012). More recently, a plurality of the court stated that a Petitioner must prove actual prejudice when raising such a claim in a post-conviction proceeding (with the exception of a claim of ineffective assistance of appellate counsel). *See, e.g., In re Speight*, 182 Wn.2d 103, 107-08 (2014) (plurality). In the controlling opinion, Justice Madsen concluded that any such error had been invited, but went on to note (in dicta) that a petitioner presenting such a claim would need to prove actual prejudice except in a case where the error "infected the entire trial process." *Speight*, 182 Wn.2d at 108 (Madsen, J., concurring).

Petitioner has demonstrated, under any standard, that he was

substantially prejudiced by the closed proceeding in this case. For it was through this *ex parte* proceeding that the prosecutor was afforded an unfair advantage during the *voir dire* process at trial. But for this closed (and secret) hearing, the defendant would have sought and obtained the very same benefits that were afforded to the prosecuting attorney.[9]

5. Petitioner Received Deficient Legal Representation at Trial

a. Legal Principles

The Sixth Amendment guarantees the right to the effective assistance of counsel. *See, e.g., McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that trial counsel's performance was defective; and (2) a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

The measure of attorney performance is reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. Reasonable tactical choices do not constitute deficient performance, but decisions based on inadequate trial preparation or inadequate legal research are not tactical choices. *See, e.g., In re Brett*, 142 Wn.2d 868, 873 (2001); *Pirtle v. Morgan*,

[9] Moreover, as discussed further below, Petitioner need not show prejudice in light of his appellate counsel's failure to raise this claim.

313 F.3d 1160, 1169-73 (9th Cir. 2002), *cert. denied,* 539 U.S. 916 (2003).

To prevail here, petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. Rather, he must establish that there is a ***reasonable probability*** that, absent counsel's deficiencies, the outcome of the trial might well have been different. *See Strickland*, 466 U.S. at 695 (*emphasis added*). The "ultimate focus of inquiry must be on fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

> A "reasonable probability" of prejudice exists "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome"; indeed, a "reasonable probability" need only be "a probability sufficient to undermine confidence in the outcome."

Detrich v. Ryan, 677 F.3d 958, 1057 (9th Cir. 2012) (*citation omitted*).

The Supreme Court has noted that "a single, serious error may support a claim of ineffective assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986). However, when considering such a claim, the court must always consider the cumulative impact of the errors. *See, e.g., Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995); *Boyd v. Brown,* 404 F.3d 1159, 1176 (9th Cir. 2005). "When an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice." *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998).

b. <u>No Motion to Sever Charges</u>

It is "axiomatic that the defense of a case involving multiple allegations of sexual misconduct is far more challenging than defense of a case involving allegations of only a single victim or single episode of misconduct." *Meryhew Dec. ¶ 30* (*citing cases*). It is almost always in the accused's interest to seek a separate trial in a case involving multiple allegations of sexual misconduct with multiple victims. *See id. ¶ 32.*

At trial, Petitioner faced charges involving five of his children. The charged offenses spanned an extremely broad time period. In Count 1, the State alleged that the conduct occurred in the period from 1995 to 1997. Most of the other counts, by contrast, are based on conduct that allegedly occurred in the 2000's. Three of the counts involved a single incident with Petitioner's sons (Counts 1, 6, and 12); the remaining nine counts (Counts 2, 3, 4, 5, 7, 8, 9, 10, and 11) stemmed from allegations made by Petitioner's daughters. As noted by attorney Meryhew, the allegations were seemingly unrelated and some of the allegations were relatively weak. Moreover, there are serious questions whether (or not) any of the evidence regarding all of these children would have been "cross-admissible" in separate proceedings. *See id.* ¶¶ 37-43.

Nevertheless, trial counsel made no attempt to sever the charges. Meryhew has opined that trial counsel provided deficient representation in

failing to make such a motion. Moreover, given the underlying facts, there is a reasonable probability that such a motion would have been granted. *See id.* ¶ *44.*

c. Failure to Object to Improper and Highly Prejudicial Expert Testimony

No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference. *See, e.g., State v. Montgomery,* 163 Wn.2d 577, 591 (2008). "Legal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony." *Washington State Physicians v. Fisons Corp.*, 122 Wn.2d 299, 344 (1993). Relying on these bedrock principles, numerous courts have reversed convictions where the State has presented expert testimony to the effect that an alleged victim had, in fact, suffered a rape or sexual assault. *See, e.g., State v. Black*, 109 Wn.2d 336 (1987); *State v. Hudson*, 150 Wn.App. 646 (2009); *State v. Carlson*, 80 Wn.App. 116 (1995); *State v. Alexander*, 64 Wn.App. 147 (1992); *State v. Fitzgerald*, 39 Wn.App. 652 (1985).

In *Black*, perhaps the seminal case on this point, the Washington Supreme Court ruled that a rape counselor's testimony that the alleged victim suffered from "rape trauma syndrome" was held inadmissible, not only because the evidence did not pass the *Frye* test, but also because such

testimony would "invade the jury's province of fact-finding and add confusion rather than clarity." *Id.* at 350. The *Black* court noted that this supposed "syndrome" was "merely one type of a larger phenomenon known as 'post-traumatic stress disorder' (PTSD)." *Id.* at 344.[10]

A very similar issue was presented in *State v. Florczak*, 76 Wn.App. 55 (1994). There, the defendants were charged with two counts of first degree rape of KT, a three-year-old child. KT's counselor gave an opinion that KT had been sexually abused. The appellate court ruled:

> [C]onstitutional error did occur when, after being asked whether a diagnosis of posttraumatic stress syndrome is "consistent with a child who has suffered sexual abuse," Wilson stated, "[w]hen we give the child posttraumatic stress, it can be to any traumatic event. It is secondary, in this case, in [KT]'s case, to sexual abuse." By stating that her diagnosis of posttraumatic stress syndrome was secondary to sexual abuse, Wilson rendered an opinion of ultimate fact-*i.e.,* whether KT had been sexually abused-which was for the jury alone to decide . . . .

Id. at 74.

The presentation of expert testimony regarding PTSD, by its very nature presupposes the existence of a sexual assault. Accordingly, the Washington courts have uniformly excluded such testimony when it is offered as a means of corroboration in a prosecution for sexual assault.

---

[10] Similarly, in *Fitzgerald*, the court rejected a pediatrician's testimony to the effect that based on her interviews with the alleged victims she believed that they had been molested. *See* 39 Wn.App. at 656-67. As the court explained, "It is improper for an expert to base an opinion about an ultimate issue of fact solely on the expert's determination of the victim's veracity." *Id.*

See, e.g., Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes*, 27 Seattle U. L. Rev. 453, 521 (2003). Such testimony is most inappropriate when it is used as a vouching tool or as a means to unfairly bolster the credibility of a complaining witness.

Here, the prosecution was permitted to violate all of these most-basic principles – without any proper response or objection – when it presented the testimony of its critical expert witness, Erin Haley. Defense counsel failed to make a motion to exclude this testimony before trial. In fact, counsel never objected to Haley's ultimate opinions or conclusions.

During direct examination, Haley noted that she worked as a "child and family therapist." RP 282. Haley also claimed that she was a licensed marriage and family therapist, and claimed to have completed a 23-credit training with the Washington Coalition for Sexual Assault programs at some unknown time. *See id.* From this, she contended that she was certified to "work with sexual abuse survivors in the state." *Id.*

Haley told the jury that she had been counseling C.S.G. since November 3, 2010 and that she was seeing her weekly or every other week. *See* RP 283. The following colloquy occurred:

> Q. Okay. So, did you ever find out from [C.S.G.] what ***exactly it was that had happened to her sexually***?

A. Yes.

See RP 284 (emphasis added). This type of vouching is clearly inappropriate. But the defense raised no objection. *See* RP 284.

Then, after describing what C.S.G. had "indicated"[11] at some undisclosed time (RP 285), Haley provided the following testimony:

> Q Yes. What sort of problems were you working on with [C.S.G.] that she had?
>
> A [C.S.G.] came in with quite a few difficulties. Initially it was related to anxiety and fear. After she had disclosed the abuse, she had been experiencing some suicidal thoughts and had some plans about killing herself that we needed to work on. She was depressed and crying a lot. She was having difficulty concentrating, paying attention, getting her schoolwork completed. She had fears that her father may try to hurt her or someone in her family may retaliate against her for the disclosures that she had made about the abuse. She was quite fearful and anxious.
>
> Q And did you diagnose her with anything?
>
> A Yes.
>
> Q And what was that?
>
> A Well, I've offered a few diagnoses. Originally when I first met with her on November 3rd, 2010, I offered a ***diagnosis of sexual abuse of a child, which indicates she was a victim of sexual abuse.*** And that is how we treat children who come in through our specific sexual abuse grant.

Id. at 286-87 (*emphasis added*).

---

[11] Given the parameters of the relevant hearsay exception (ER 803(4)) which covers "statements," it is troubling that Haley did not testify to what C.S.G. actually said.

Later, Haley testified that she had concluded that C.S.G. was suffering from PTSD. She described the disorder as follows:

> So posttraumatic stress disorder is a mental health condition that can come on after someone experiences a traumatic event. And it includes responses such a helplessness, extreme fear, anger, and those reactions are quite common to a traumatic event, though the symptoms in posttraumatic stress disorder last at least one month after the trauma and tend to either worsen or get to a level where they're interfering significantly in someone's life's functioning. So that's posttraumatic stress disorder.

RP 288. Thereafter, Haley attempted to justify and validate this supposed diagnosis by noting that all of the purported symptoms were caused by C.S.G.'s "persistent re-experiencing of the trauma." RP 289. Throughout the testimony, Haley testified that "survivors" of abuse, like C.S.G., will often have this condition. *See* RP 288.

There is no indication that trial counsel took any steps to prepare for this testimony. Not surprisingly, he floundered throughout his cross-examination. At one point, counsel asked a series of open-ended questions to suggest that other possibilities could account for the PTSD. *See* RP 296. This examination was ineffectual, if not worse.

In response, the State presented additional inappropriate testimony:

> Q Okay. And what made you feel that her posttraumatic stress disorder is associated with a sexual abuse?
>
> A Well, [C.S.G.] had disclosed that she had

> experienced sexual abuse and that her flashbacks as part of her posttraumatic stress disorder were specific to the sexual abuse trauma.
>
> Q And are her nightmares regarding any specific person or issue?
>
> A Some of the nightmares [C.S.G.] has endorsed are related to fearfulness about her father. They were more generalized, which is common, particularly for children. The nightmares were general about her father hurting her, killing her, just fearful dreams about her father.

Id. at 308-09.

It is remarkable that the State was permitted to present the very testimony that was deemed to be inadmissible in *Black*, *Fitzgerald*, *Florczak*, and so many other cases.[12] Here, the purported expert told was the jury that she rendered a conclusive diagnosis of "sexual abuse of a child, which indicates she was a victim of sexual abuse." RP 287. Moreover, after rending this "abuse" diagnosis, the expert told the jury that C.S.G. was suffering from PTSD and that her condition was the direct

---

[12] The testimony in *Florczak* is virtually indistinguishable from the testimony in this case:

> Q: And a child who is suffering from posttraumatic stress disorder, is that consistent with a child who has suffered sexual abuse?
>
> A: When we give the child posttraumatic stress, it can be to any traumatic event. It is secondary, in this case, in [the alleged victim's] case, to sexual abuse.

Id. at 62. In fact, it is more mild than the conclusory testimony in this case.

result of the supposed abuse perpetrated by her father. *See* RP 308-09.

However, the prosecution did not stop there in this case. Without any defense objection (or even a response), the prosecutor repeatedly harped on this evidence during closing argument. Initially, she argued

> You heard from [C.S.G.'s] therapist, Erin Haley, who has worked with [C.S.G.] for almost two years. You heard that she has worked on these issues with Erin Haley, that she's described for Erin Haley the things that her father did.
>
> And she did that in an effort to get help. You heard that she's been diagnosed with posttraumatic stress disorder. That corroborates what she's saying. You heard that she's had nightmares, flashbacks regarding her father, surrounding fear that she has of him. You heard that she's on medications to help her sleep and to manage her anxiety. You've heard that she's got major depression and that she's been suicidal at times.
>
> And you've also heard that that's not [C.S.G.'s] personality. [C.S.G.] is normally a happy, bubbly girl. She's not a sullen (sic) teenager, but she's going through an extremely hard time in dealing with the abuse at the hands of her father.

RP 1285-86.

Trial counsel had no way to respond to these broad – and inappropriate – arguments. In fact, counsel never mentioned Haley's supposed "diagnosis" at any time during his argument. Instead, he made only one mention of Haley which did little more than remind the jury that Haley "believed" that C.S.G. was abused by her father. *See* RP 1310.

The prosecutor was undaunted. During rebuttal, she stated:

> You've heard -- some of the corroboration you've heard, which we don't need to have corroboration, but there is some corroboration and I want to talk about some of that. You've heard from [C.S.G.'s] therapist, who testified that [C.S.G.'s] been diagnosed with posttraumatic stress disorder. She told you that posttraumatic stress disorder happens from traumatic experience.
>
> You heard that she has difficulty sleeping, that she has nightmares, that she's hypervigilant with her body, that she doesn't want to be touched, that she didn't like it when Randy would try and rub her shoulders when she first moved in. And the therapist said that that is something she commonly sees in people reporting sexual abuse. That they either don't want to be touched or that they go the other way and that they are promiscuous. That corroborates what [C.S.G.] told you.

RP 1333.

Then, at the denouement of the argument, she went further:

> And you heard it from the witness stand, you saw it in the emotion expressed by [C.S.G.], you should know it by the corroboration. As far as the feelings that she's had, the PTSD, all of that speaks to its truth. Those kids were brave and they were strong and they did the hardest thing they've ever had to do. And they've gone through a horrible two years, and that they've gotten nothing -- nothing out of this case, nothing but pain and of the loss of their family. And they came in here and they told the 12 of you strangers the truth.

RP 1340-41.

Had trial counsel objected, the evidence of PTSD would have been excluded and this prejudicial and inflammatory argument would not ever

have been presented to the jury. Sadly, all of the foregoing evidence was presented due to the incompetence of trial counsel.

Moreover, these arguments were clearly improper, as the prosecutor repeatedly vouched for the truthfulness of her witness. *See, e.g., State v. Ish*, 170 Wn.2d 189 (2010); *State v. Boehning*, 127 Wn.App. 511 (2005). But, perhaps more significantly, the prosecution should never have been permitted to use this supposed expert opinion testimony to argue that it "corroborates what [C.S.G.] told you." In presenting this testimony and argument, the prosecution ensured that the defendant was deprived of his right to a fair trial. *See, e.g., Florczak*, 76 Wn.App. at 74 (constitutional error did occur when therapist testified that child was suffering from PTSD as a result of sexual abuse). However, having made no effort to prepare for the testimony of the State's purported expert, defense counsel made no objections to these prejudicial arguments.

Trial counsel was ineffective in failing to take any steps to combat Haley's inflammatory testimony. *See Meryhew Dec. ¶ 48.* In cases of this sort, defense counsel must be vigilant to ensure that prosecutors are not permitted to offer improper expert testimony. *See id. ¶ 46.* Yet here, counsel made no efforts to exclude or limit Haley's testimony. Because of these failings, the prosecutor was free to argue to the jury that Haley's testimony amounted to "corroboration" of C.S.G.'s claims.

This case is analogous to *State v. Ketchner*, 339 P.3d 645 (Ariz. 2014), where the Arizona court concluded that counsel was ineffective for failing to object to introduction of expert testimony regarding domestic violence victims. *See also Mangal v. State,* 781 S.E.2d 732 (S.C. 2015) (counsel ineffective in criminal sexual conduct with a minor case for failing to object to improper bolstering when pediatrician testified that victim had been sexually abused); *Gebaree v. Steele*, 792 F.3d 991 (8th Cir. 2015) (counsel ineffective for failing to object to testimony of State's expert that children's disclosure of the details of sexual abuse were "consistent" and "credible" as well as testimony of a psychologist who administered testing "designed to uncover abusive or neglectful attitudes").

d. <u>Petitioner was Prejudiced by these Errors</u>

Petitioner has identified several, substantial constitutional errors that occurred during his trial. Each error, when viewed separately, is so serious as to compel reversal of his convictions. Even more clearly, the cumulative effect of the errors establishes that Petitioner suffered actual prejudice at trial. Counsel's deficient performance deprived Petitioner of a fair trial. In light of all the evidence presented, the prejudicial effect of counsel's omissions is overwhelming, and the jury's verdict must be reversed.

6. **Petitioner Received Deficient Legal Representation on Appeal**

In *Douglas v. California*, 372 U.S. 353 (1963), the Supreme Court held that the Fourteenth Amendment guarantees a criminal defendant the right to counsel in the first appeal as of right. And in *Evitts v. Lucey*, 469 U.S. 387 (1985), the Court held that a defendant is entitled to effective assistance of counsel in an "appeal as of right." *Id.* at 397. Like the federal courts, Washington has adopted the two-prong test set forth in *Strickland* in determining whether counsel was ineffective. *See, e.g., State v. Cienfuegos*, 144 Wn.2d 222 (2001).

Petitioner was represented by attorney Lenell Nussbaum on appeal. When reviewing the case, Nussbaum obtained a copy of the court file, including all documents that were filed relating to the case. Among those documents, Nussbaum located a copy of the Court's *Ex Parte* Order. *See Nussbaum Dec.* ¶ *6.* Nussbaum could not help but recognize this peculiar Order. In fact, counsel actually wrote a note to herself to document her concerns: "For Π to remove and review, no one else to see, return w/in 24 hrs [No notice to ΔC]." *Id.* and App. B.

Nonetheless, counsel failed to raise any claim regarding this claim on appeal. Apparently, she chose not present this issue in light of the paucity of the court record. *See id.* However, if she had, all of Petitioner's remaining

convictions would have been reversed by the Court of Appeals.[13]

It makes no matter that this issue was not discovered by Petitioner's counsel at the time of trial. A defendant's failure to object to a public trial violation at the time of trial does not preclude appellate review under RAP 2.5, because a public trial violation is structural error. *See Paumier*, 176 Wn.2d at 36-37. Moreover, and perhaps most significantly, a public trial error is presumptively prejudicial, so that appellate counsel's failure to raise the issue on appeal is considered both deficient and prejudicial. *See Orange,* 152 Wn.2d at 814. The holding of *Orange* was recently approved in the *Speight* and *Coggin* cases. *See also In re Morris*, 176 Wn.2d 156, 166 (2012).

Moreover, appellate counsel acknowledges that she provided ineffective assistance by failing to raise any legal claim based upon the admission of the opinion testimony through Erin Haley. As explained by attorney Nussbaum:

> Unfortunately, I failed to identify any issue regarding Ms. Haley's testimony. I do not recall the last time I reviewed *State v. Florczak*, 76 Wn. App. 55 (1994), prior to my work on Mr. Gensitskiy's appeal. Having now read it, I see this issue was held to be a manifest error of constitutional magnitude that could be raised for the first time on appeal. I

[13] The Court would have been obliged to apply a more favorable standard of prejudice if the error had been identified during the appeal process. *See, e.g., Florczak*, 76 Wn.App. at 75 ("Manifest constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict.").

> overlooked this issue. Suffice it to say, I certainly would have raised a legal claim regarding Ms. Haley's testimony if I had identified the issue at that time.

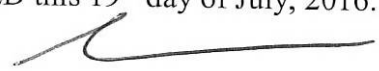
Id. ¶ *8.*

Consistent with *State v. Florczak*, 76 Wn.App. 55 (1994), the introduction of this testimony was "manifest error" that should have been raised on direct appeal. *See id.* at 75. *Accord State v. Jones*, 71 Wn.App. 798, 809 (1993) (witness' opinion, direct or inferential, as to the guilt of the defendant is an error of constitutional magnitude because the error invades the province of the jury); *Etherton v. Rivard*, 800 F.3d 737 (6th Cir. 2015) (appellate counsel ineffective in possession with intent to deliver cocaine case for failing to assert plain error); *Long v. Butler*, 809 F.3d 299 (7th Cir. 2015) (counsel ineffective for failing to assert on appeal a due process claim due to the state's use of perjured testimony).

E. <u>CONCLUSION</u>

For all of these reasons, and in the interests of justice, this Court should grant Petitioner's personal restrain petition. In the alternative, and at a minimum, this Court should remand the case for discovery and a reference hearing pursuant to RAP 16.12.

RESPECTFULLY SUBMITTED this 19th day of July, 2016.



Todd Maybrown, WSBA #18557
Attorney for Petitioner

PROOF OF SERVICE

Todd Maybrown swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 19th day of July, 2016, I sent by U.S. Mail, postage prepaid, one true copy of the Amended Opening Brief in Support of Personal Restraint Petition directed to attorney for Respondent:

Anna Klein
Deputy Prosecuting Attorney
Clark County Prosecutor's Office
P.O. Box 5000
Vancouver, WA 98666-5000

One true copy of the Amended Opening Brief in Support of Personal Restraint Petition was delivered to Petitioner.

DATED at Seattle, Washington this 19th day of July, 2016.

Todd Maybrown, WSBA #18557
Attorney for Petitioner

FILED
COURT OF APPEALS
DIVISION II
2016 JUL 21 AM 10: 36
STATE OF WASHINGTON
BY DEPUTY