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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re Personal Restraint Petition of

RICHARD D. HARTMAN,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT ON THE ISSUE OF  
INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

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A. ISSUE PRESENTED

Whether appellate counsel was ineffective in failing to raise a public trial claim where several jurors were questioned in private, and where the private inquiry helped Hartman to seat a favorable jury.

B. SUPPLEMENTAL ARGUMENT

1. A HIGHER PRP STANDARD IS INAPPLICABLE IN THIS UNIQUE CIRCUMSTANCE.

The issue presented in this case was tentatively identified as:

Whether a ... petitioner whose constitutional right to a public trial was violated by the conducting of a portion of jury selection in chambers must show that he was actually and substantially prejudiced by the violation in order to obtain relief.<sup>1</sup>

The “actual and substantial prejudice” standard is a higher standard of review imposed on petitioners seeking relief by collateral attack who have had a prior opportunity to litigate their claims. In re Pers. Restraint of Adolph, 170 Wn.2d 556, 563, 243 P.3d 540 (2010); In re Pers. Restraint of Grantham, 168 Wn.2d 204, 214, 227 P.3d 285 (2010). The standard protects society’s interest in the finality of criminal convictions; simple error does not justify reversal of a conviction on collateral review. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992).

It is undecided whether this standard applies to public trial claims raised in a PRP. *See* In re Pers. Restraint of Morris, 176 Wn.2d 157, 166,

<sup>1</sup> [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme-issues.display&file-ID=2013Sep#P499\\_33669](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme-issues.display&file-ID=2013Sep#P499_33669).

288 P.3d 1140 (2012). Here, however, in his direct appeal, Hartman raised a public trial claim in his Statement of Additional Grounds, claiming that jurors were questioned in private, and that his family had been excluded. As to the former claim, he pointed to excerpts from the report of proceedings suggesting that at least some *voir dire* was conducted in chambers. As to the latter claim, he submitted affidavits of family members. The Court of Appeals rejected his public trial claim on the basis that it was not supported by the record. State v. Hartman, 144 Wn. App. 1044 (2008), review denied, 165 Wn.2d 102 (2009). Appellate counsel had attempted to obtain a full transcript of the proceedings below but, for unknown reasons, the private inquiry of jurors on November 17<sup>th</sup> and 21<sup>st</sup> was not included in the verbatim reports. The existing record was ambiguous, but the additional transcripts would have established that Hartman was correct in alleging *voir dire* was not entirely open. Hartman filed this PRP in February, 2010 to provide a record for his claims.

Under such circumstances, it would seem that direct review was thwarted by the incomplete record, and that Hartman thus did not have the proper opportunity to litigate this claim on direct appeal. Because Hartman's claim would have been resolved under the direct appeal standard had a full transcript been prepared, as requested, he should not face a higher standard of review – actual and substantial prejudice – due to

reasons outside his control. Thus, this case does not raise the PRP-specific issue it appeared to raise; it is more like the numerous other public trial cases currently pending or stayed in this Court. A decision in this case will ultimately be influenced by the outcome of those cases.

2. HARTMAN'S APPELLATE AND TRIAL LAWYERS WERE EFFECTIVE.

Even if Hartman is not required to show “actual and substantial prejudice” as to his public trial claim, his PRP should not be granted on the existing record. Hartman must still show that appellate counsel was deficient and that he was prejudiced by that deficiency.<sup>2</sup> The trial court’s private inquiry of jurors, although a violation of public trial rights, was plainly to the benefit of jurors, Hartman, the prosecution, and the trial court. There is no proof that family members were excluded from trial or that counsel was aware of such exclusion. Thus, neither trial nor appellate lawyer can be deemed to have performed deficiently.

Counsel’s role at trial is “... to ensure that the adversarial testing process works to produce a just result under the standards governing decision.” Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Ineffective assistance of counsel occurs only if

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<sup>2</sup> In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997); In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 777-78, 100 P.3d 279 (2004).

there is “a breakdown in the adversary process that renders the result unreliable.” Strickland v. Washington, 466 U.S. at 687.

The record shows that Hartman’s trial counsel fully participated in a private inquiry of jurors. RP (11/17/06) 1-16; (11/21/06) 17-28. The private *voir dire* revealed that one juror had previously been convicted of incest, RP (11/17/06) 6-8, another had medical issues including excessive urination, RP (11/17/06) 10-11, and another was dealing with an alcoholic teenage son with legal and medical issues, RP (11/17/06) 15-16. One juror thanked the trial court judge for considering her issues in private, clearly grateful that she was not required to share embarrassing details about her criminal past with *venire* members who undoubtedly were also a part of her small community. RP (11/17/06) 8. Each of these jurors was excused for cause. Although the record is silent on trial counsel’s motivations, it would not be surprising if counsel wanted to explore such issues in a setting that would encourage candor, and thus offered no objection to the procedure for tactical reasons. It is also not known from the record whether Hartman’s family was, indeed, excluded from the courtroom by the bailiff, and whether Hartman’s attorney was ever aware of this fact before it occurred.<sup>3</sup> Thus, when appellate counsel considered

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<sup>3</sup> In the context of explaining why Hartman had walked out of court without permission, trial counsel said, “...I understand Mr. Hartman was under the impression that his mother and his brother had been instructed that they couldn’t come in during jury selection. He,

the case in 2007, counsel would have seen a record that showed very little sign that private inquiry of jurors had occurred, and that Hartman's family had been excluded from the courtroom.

There are a number of reasons appellate counsel may not have raised this issue. First, although appellate counsel in 2007 had access to this Court's decision in In re Pers. Restraint of Orange, it was plain from that decision that Orange's lawyer had timely objected to this exclusion. 157 Wn.2d 795, 801-02, 100 P.3d 291 (2004). Second, the court in Orange had expressly ordered a total, albeit temporary, closure of the courtroom to any spectators including family and press. Third, in 2007, limited private inquiry of jurors on sensitive topics was still viewed by many trial counsel and trial courts as a proper way to balance juror privacy concerns under GR 31, and to ensure a candid *voir dire* that would protect the defendant's right to a fair trial, while still respecting public trial rights (all but a sliver of *voir dire* was held out of court). Strickland, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). It was not until two years after Hartman's appeal, in this Court's decisions in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) and State v. Strode, 167

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feeling a need to speak with them, went outside." RP (11/21/06) 41. It is unclear whether counsel is saying that Hartman believed his family had been excluded from all of *voir dire* or just the private inquiry. *Voir dire* was complete by this point.

Wn.2d 222, 217 P.3d 310 (2009) that it became apparent that a limited private inquiry of jurors required findings pursuant to State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), and that failure to conduct the inquiry was always reversible error even without an objection.

In addition, there is no record in this case as to whether trial counsel and Hartman discussed private *voir dire* of jurors and whether such *voir dire* was in Hartman's interests. This Court in Orange skipped over any such inquiry, essentially presuming that appellate counsel would not discern any advantage to trial counsel's strategy, rather than inquiring into the reasons counsel acquiesced in private *voir dire*. To be faithful to the presumption of competence, appellate courts should inquire into counsel's motives and conversations with the defendant.

Under such circumstances, it would not be unreasonable for appellate counsel to conclude that a timely objection under RAP 2.5(a) was required to preserve any error for appellate review, and that Hartman's case did not present a sufficient record to litigate his claims. "The process of winnowing out weaker arguments ... and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." In re Pers. Restraint of Lord, 123 Wn.2d 296, 302, 868 P.2d 835 (1994) (internal quotation marks omitted). Counsel should not be deemed constitutionally deficient for

failing to raise an unpreserved error of this nature, on a record as thin as the one provided.

Hartman must also show prejudice to prevail on any ineffective assistance of counsel. Although this Court said in Orange that ineffective assistance of appellate counsel is established whenever appellate counsel failed to raise a meritorious claim, in fact, in all published Washington appellate decisions where ineffective assistance of appellate counsel has been discussed, there was some link between the claimed trial court failure overlooked by the appellate attorney, and a potential for prejudice to the trial court interests of the accused. In re Personal Restraint of Netherton, No. 83925-5, slip op., Wash. Sup.Ct., July 18, 2013 (2013 WL 3761516) (firearm enhancement must be stricken); In re Personal Restraint of Theders, 130 Wn. App. 422, 123 P.3d 489 (2005) (evidence admitted violates the Confrontation Clause ); In re Personal Restraint of Davis, 152 Wn.2d 647, 746, 101 P.3d 1 (2004) (failure to challenge trial exhibits offered in penalty phase in a capital case); In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 775, 100 P.3d 279 (2004) (failure to challenge court's lack of authority over juvenile); State v. McDonald, 143 Wn.2d 506, 513, 22 P.3d 791 (2001) (conflict of interest of trial counsel); In re Personal Restraint of Maxfield, 133 Wn.2d at 344 (failure of appellate counsel to raise search issue); In re Pers. Restraint of Lord, 123 Wn.2d 296, 314, 868

P.2d 835 (1994) (petitioner must show the merit of the underlying legal issues his appellate counsel failed to raise). Even in Orange, it was plain after a reference hearing that Orange's family had been precluded from attending *voir dire*, that Orange had objected, and that his right to a public trial was materially diminished. *See also In re Personal Restraint of Brown*, 143 Wn.2d 431, 452, 21 P.3d 687 (2001) (ineffective assistance claim must establish actual prejudice).

Hartman's situation is different from all the above cases. The right to a public trial is different than most other rights that the Supreme Court has deemed "structural" errors. Most structural errors, like the right to conflict-free counsel or the right to be tried by an unbiased jury, protect the defendant against constitutional violations that quite likely will harm his interests. Strickland, at 692. But, closure of a trial quite often will advance rather than detract from a defendant's case. Thus, in the context of an ineffective assistance of counsel claim, it matters greatly whether trial counsel acquiesced to a closure for tactical reasons because such tactical reasons are likely to exist. When trial counsel accepts a procedure that helps, rather than hurts his client's cause the "prejudice" requirement under a Strickland analysis is not satisfied.<sup>4</sup> Even when the procedure is

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<sup>4</sup> "The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants

ordinarily presumed to be prejudicial, that presumption should be rebutted by actual facts showing that counsel was acting in his client's best interests. Strickland, at 693 ("Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense."). Thus, the existing record prejudice from trial or appellate counsel's strategy.

Hartman has provided sufficient evidence to raise a question of fact as to whether his family may have been excluded from trial, what trial and appellate counsel knew, and what was discussed with Hartman. RAP 16.11(b). Just as a full reference hearing was deemed appropriate in Orange, a reference hearing should be ordered here, too. In re Orange, 152 Wn.2d at 803; In re Morris, at 185 (Wiggins, J., dissenting) (the error in Orange was "conspicuous in the record" and thus, appellate counsel was ineffective for failing to raise it on direct appeal).

3. PRPs SHOULD GENERALLY REQUIRE A SHOWING OF ACTUAL AND SUBSTANTIAL PREJUDICE.

As pointed out above, the unique procedural history of this case makes the usual PRP standard inapposite. Still, should this Court address that issue, the State respectfully asks this Court to reconsider, for the

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receive a fair trial." Strickland, 466 U.S. at 689. Similarly, although ensuring open courts is a high priority, the purpose of the Sixth Amendment is not to punish lawyers or courts for failing to perfectly apply those principles; the purpose is to ensure that a defendant received a fair trial.

reasons set forth above and for the reasons identified by four justices, whether its plurality decision in Morris, was correct. See Morris, at 177 (Madsen, C.J., dissenting); id. at 180 (Wiggins, J., dissenting). Preserved and unpreserved errors are distinct and, especially in the unique context of private juror inquiry, it is likely that trial counsel acquiesced to private inquiry because it was best for his client. Neither trial counsel nor appellate counsel should be deemed constitutionally deficient if trial counsel acted in his client's best interests.

For the foregoing reasons, the State respectfully asks this Court to order a reference hearing to determine whether Hartman's family was excluded from *voir dire*, whether this exclusion was considered by his trial attorney, and whether, as a consequence, his appellate lawyer was ineffective for failing to raise the claim on appeal.

DATED this 10<sup>th</sup> day of September, 2013.

Respectfully submitted,

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By: 

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the petitioner, Nancy Collins @ nancy@washapp.org, and to attorneys for respondent, Michael Dorcy @ michaed@co.mason.wa.us, and to Timothy Higgs @ timh@co.mason.wa.us, containing a copy of the Supplemental Brief of Respondent on the Issue of Ineffective Assistance of Appellate Counsel, in IN RE PERSONAL RESTRAINT OF RICHARD D. HARTMAN, Cause No. 81225-0-1, in the Supreme Court, for the State of Washington.

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

W Brame  
Name  
Done in Seattle, Washington

9/10/13  
Date 9/10/13

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Please accept for filing the attached document (Supplemental Briefs of Respondent on the Issue of Ineffective Assistance of Appellate Counsel), In re the Personal Restraint Petition of Richard Hartman, No. 81225-0.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Jim Whisman's direction.

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