

NO. 89585-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

NOEL EVAN CALDELLIS

Petitioner

SUPPLEMENTAL BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

 ORIGINAL

TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1

II. ARGUMENT.....2

A. THE TO-CONVICT INSTRUCTION CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME. THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL FROM BOTH TRIAL AND APPELLATE COUNSEL'S HANDLING OF THE INSTRUCTION.....2

B. TRIAL COUNSEL MADE A REASONABLE STRATEGIC DECISION TO FORGO A SELF DEFENSE INSTRUCTION IN LIEU OF AN EXCUSABLE HOMICIDE INSTRUCTION.....7

C. THE PETITIONER HAS NOT SHOWN THAT HE WAS ACTUALLY PREJUDICED WHEN THE PROSECUTOR MADE A FAIR RESPONSE TO DEFENSE COUNSEL'S ARGUMENT. 12

D. WHETHER THE JUDGE OR JURORS SLEPT IS NOT STRUCTURAL ERROR. THE PETITIONER IS NOT ENTITLED TO A REFERENCE HEARING. 16

III. CONCLUSION23

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Benn</u> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	6, 11
<u>In re Crace</u> , 174 Wn.2d 835, 280 P.3d 1102 (2012).....	6, 16
<u>In re Elmore</u> , 162 Wn.2d 236, 172 P.3d 335 (2007).....	8
<u>In re Glassmann</u> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	15
<u>In re Hagler</u> , 97 Wn.2d 818, 650 P.2d 1103 (1982).....	15
<u>In re Kahn</u> , 184 Wn.2d 679, 363 P.3d 577 (2015).....	22
<u>In re Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1998).....	14
<u>In re Rice</u> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	20, 23
<u>State v. Barstad</u> , 93 Wn. App. 553, 970 P.2d 324, <u>review denied</u> , 137 Wn.2d 1037 (1999).....	3, 4, 7
<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	9, 10
<u>State v. Caldellis</u> , 151 Wn. App. 1012 (2009), <u>review denied</u> , 167 Wn.2d 1020 (2010).....	1
<u>State v. Coristine</u> , 177 Wn.2d 370, 300 P.3d 400 (2013).....	14
<u>State v. Curtiss</u> , 161 Wn. App. 673, 250 P.3d 496, <u>review denied</u> , 172 Wn.2d 1012 (2011).....	15
<u>State v. Dunbar</u> , 117 Wn.2d 587, 817 P.2d 1360 (1991).....	3, 4, 7
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	14
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	14
<u>State v. Fricks</u> , 91 Wn.2d 391, 588 P.2d 1328 (1979).....	14
<u>State v. Hardwick</u> , 74 Wn.2d 828, 447 P.2d 80 (1968).....	2
<u>State v. Henderson</u> , 180 Wn. App. 138, 321 P.3d 298 (2014), <u>affirmed</u> , 182 Wn.2d 734 (2015).....	3
<u>State v. Johnson</u> , 180 Wn.2d 295, 325 P.3d 135 (2014).....	5
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	6, 7
<u>State v. Lamar</u> , 180 Wn.2d 576, 327 P.3d 46 (2014).....	16
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	2, 3
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	6
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2001).....	14, 16
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995).....	13, 14

FEDERAL CASES

<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).....	18
<u>Gomez v. United States</u> , 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989).....	18, 19
<u>United States v. Love</u> , 134 F.3d 595 (4 th Cir. 1998).....	19

<u>United States v. McKeighan</u> , 685 F.3d 956 (10 th Cir. 2012), <u>cert denied</u> , 133 S.Ct. 632 (2012)	21
<u>United States v. Mortimer</u> , 161 F.3d 240 (3 rd Cir. 1998).....	19
<u>United States v. Solon</u> , 596 F.3d 1206 (10 th Cir. 2010).....	19
<u>United States v. Springfield</u> , 829 F.2d 860 (9 th Cir. 1987)	21
<u>WASHINGTON STATUTES</u>	
RCW 9A.32.030(1)(b).....	2, 3
RCW 10.73.090(1)	11
<u>COURT RULES</u>	
RAP 13.7(b)	11, 20
<u>OTHER AUTHORITIES</u>	
WPIC 26.06.....	3, 7

I. STATEMENT OF THE CASE

The facts of the case have been adequately set out in the order from the Court of Appeals dismissing the Personal Restraint Petition and the State's Response to Personal Restraint Petition. The State relies on those sources for the statement of facts.

The petitioner originally cited the facts set out in the order of dismissal in his petition.¹ In his supplemental brief he asserts for the first time and without citation to the record that that Jay Clements, the victim, was holding a 40 oz beer bottle and running toward the petitioner at the time the petitioner shot into the crowd. The record does not support this claim. No witness testified to that alleged fact. One witness saw a figure drop in the driveway after the shots were fired toward the house. 11 RP 1605. The petitioner was standing in the middle of the cul-de-sac when he fired toward the house. 11 RP 1684-1686. Clements was found in the driveway next to a small garden. 11 RP 1815. The Court should reject the unsupported statement of fact.

¹ The statement of facts came from the unpublished opinion in the direct appeal. State v. Caldellis, 151 Wn. App. 1012 (2009), review denied, 167 Wn.2d 1020 (2010).

II. ARGUMENT

A. THE TO-CONVICT INSTRUCTION CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME. THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL FROM BOTH TRIAL AND APPELLATE COUNSEL'S HANDLING OF THE INSTRUCTION.

The petitioner argues that the to-convict instruction did not include all of the essential elements of the crime because it did not track the to-convict instruction for murder by extreme indifference adopted by the WPIC committee in 2008. Instead the court gave the pattern instruction as it was written at the time which followed the statutory language in RCW 9A.32.030(1)(b). He argues that he received ineffective assistance of counsel when neither trial counsel nor appellate counsel challenged the to-convict instruction as an improper statement of the law.

The to-convict instruction must contain all of the essential elements of the crime. State v. Lorenz, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The court should use the language of the statute when instructing the jury where the law governing the case is expressed in the statute. State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968). "A person is guilty of murder in the first degree when under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to

any person, and thereby causes the death of a person." RCW 9A.32.030(1)(b). "Manifesting an extreme indifference" has been construed as "an aggravated form of recklessness which falls below a specific intent to kill." State v. Dunbar, 117 Wn.2d 587, 593, 817 P.2d 1360 (1991). Thus, the elements of first degree murder by extreme indifference to human life are that the defendant (1) acted with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person." State v. Henderson, 180 Wn. App. 138, 145, 321 P.3d 298 (2014), affirmed, 182 Wn.2d 734 (2015).

The definitions of the elements of a crime need not be included in the to-convict instruction. Lorenz, 152 Wn.2d. at 34-35. The 2008 amendment to the WPIC 26.06 added the phrase "that the defendant knew of and disregarded the grave risk of death."² The phrase came from a discussion regarding a permissive inference instruction. State v. Barstad, 93 Wn. App. 553, 568, 970 P.2d 324, review denied, 137 Wn.2d 1037 (1999). The court did not discuss the elements of murder by extreme indifference except to affirm that the former version of the to-convict instruction was a correct statement of the mens rea requirement as set out in

Dunbar. Id. at 565. Thus, the “knew of and disregarded” language was a further refinement of the “aggravated form of recklessness” definition of extreme indifference set out in Dunbar. Because each was a definition of the “extreme indifference” mens rea element of the crime failure to include the newly adopted language from Barstad was not error.

The petitioner argues that where it is reasonably likely that the jury would misunderstand the law in a manner that lowered the State's burden of proof his Due Process right has been violated.³ The mental element of the crime charged is “extreme indifference.” Neither the court's definition of that element as articulated in Barstad nor the WPIC committee's decision to modify the to-convict instruction to include that definition changed that element of the offense. For that reason the court's instruction did not require the jury to find just that the petitioner had created a grave risk of death as the petitioner now argues.⁴ The jury could not have reasonably misunderstood that it was required to find the defendant acted “with extreme indifference” when that element was included in the to-convict instruction. Thus no violation occurred.

² Response to Petition, Ex. 3.

³ Petitioner's Reply at 7-9.

The defendant also argues that the instructions were deficient because instruction 8 only refers to "a substantial risk that a wrongful act may occur." He argues this is inaccurate because the subjective mental state requires an aggravated recklessness resulting in conduct that creates "a grave risk of death" as set out in the to-convict instruction.⁵ This court has recently held it is not error to provide the generic definition of recklessness if the to-convict instruction includes the elements of the offense including the charge specific language for "reckless." State v. Johnson, 180 Wn.2d 295, 307, 325 P.3d 135 (2014). Here both instruction 4 listing the elements of the offense and instruction 5 defining "extreme indifference" told jurors that his recklessness must create a "grave risk of death." Since the mental state specific to murder by extreme indifference was included in the to-convict instruction it was not error to give the general definition for recklessness.

The petitioner also argues he received ineffective assistance of trial and appellate counsel for not challenging the instruction. To prove ineffective assistance of counsel the petitioner must show both that counsel performed deficiently and he was thereby

⁴ Petitioner's Supplemental Brief at 6

⁵ Petitioner's Supplemental Brief at 6-7.

prejudiced, i.e. that the results of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). He need not show any additional prejudice to support his personal restraint petition. In re Grace, 174 Wn.2d 835, 846, 280 P.3d 1102 (2012). Since the instruction set out all of the elements of the crime a challenge to the instruction would not likely have been successful. McFarland, 127 Wn.2d at 337, n.4 (absent an affirmative showing that counsel would have been successful had he performed the challenged act there is no showing of actual prejudice.) Additionally, neither trial nor appellate counsel could be faulted for failing to anticipate a change to the instruction that occurred after the trial. In re Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998).

The petitioner compares his case to State v. Kyllö, 166 Wn.2d 856, 215 P.3d 177 (2009). There this Court found that the pattern instruction for self-defense given was incorrect because it required the defendant to apprehend a greater amount of harm than necessary when he used non-deadly force. Other instructions did not clarify that instruction. Id. at 861-865. This Court held trial counsel performed deficiently for proposing the erroneous instruction because by the time of trial there were several cases

that should have indicated to counsel that the pattern instruction was flawed. Id. at 866.

This case is unlike Kyllo however because the pattern instruction at issue here was not deficient since it contained all of the elements of the offense. The definitional instructions 5 and 8 did not reduce the State's burden of proof on those elements. Further, there was no case authority at the time of trial that should have indicated to counsel that WPIC 26.06 as it was then drafted omitted an essential element. To the contrary, Barstad held that instruction was a correct statement of the mens rea element of the offense as set forth in this court's decision in Dunbar. Barstad, 93 Wn. App. at 565. Reading that case would indicate that WPIC 26.06 was a correct statement of the law. Further direction on the meaning of "manifest extreme indifference" could be included in definitional instructions.

B. TRIAL COUNSEL MADE A REASONABLE STRATEGIC DECISION TO FORGO A SELF DEFENSE INSTRUCTION IN LIEU OF AN EXCUSABLE HOMICIDE INSTRUCTION.

In his statement to the police the petitioner said that after he shot in the air he shot into the crowd "not necessarily trying to point out exactly at this person, but I just shot." The petitioner denied aiming at someone specific. He concluded by stating, "I didn't

mean to shoot anyone.”⁶ Given these statements defense counsel outlined the defense as (1) the petitioner did not cause Jay Clements’ death, or (2) if he did cause Clements’ death it was an accident. “If he did so it was an effort to disperse the crowd and protect his friends, which we would say is lawful force.” 19 RP 3112-3113. Defense counsel sought and received an instruction on excusable homicide. He did not request a self-defense instruction.⁷

The petitioner argues that counsel should have requested a self-defense instruction, and counsel’s failure to do so constituted ineffective assistance of counsel. To establish counsel performed deficiently he must show from the record the absence of a legitimate strategic or tactical reason supporting the challenged conduct. In re Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). There is a strong presumption that counsel’s decisions constituted sound trial strategy. Id.

Since the petitioner denied intentionally shooting anyone counsel reasonably adopted a strategy to defend on the basis that Clements’ death was an accident. Prior to trial this court said “[w]hile a defendant may take actions in self-defense that lead to an

⁶ Petition App G at 21-22, 35.

⁷ Response Ex. 5, instruction 18; Petition App. B, ¶10.

accidental homicide, one cannot actually kill by accident and claim that the homicide was justifiable. The proper defense for an accidental homicide is to argue that the homicide was excusable.” State v. Brightman, 155 Wn.2d 506, 525, 122 P.3d 150 (2005). Given this language defense counsel reasonably concluded that “the only available instructions that fit the evidence and the defense theory of the case were instructions related to excusable homicide.”

8

The petitioner argues that there was evidence other than his own statements to support a self-defense instruction. He points to other statements he made and testimony from other witnesses as evidence that the petitioner reasonably feared death or bodily injury justifying shooting the gun. He argues without citation to authority that self-defense is available even if the shooter is not targeting a specific person.⁹

The existence of other facts that may have supported an alternative theory of the case does not render the decision to defend on the basis of accident deficient performance. Counsel choice of defense was reasonably based on his client's statements.

⁸ Petition App. B., ¶10.

⁹ Personal Restraint Petition at 30-32, Reply in Support of Personal Restraint Petition at 16.

Since the petitioner stated that he was not targeting any specific person when he shot into the crowd his conduct manifested aggravated recklessness, not an intent to use lethal force to defend himself or others. Counsel reasonably understood this and chose a defense that fit the facts of the case. Asserting a self-defense theory would conflict with the petitioner's statements. Given this court's statements in Brightman and the evidence available to the defense, counsel made a reasonable strategic decision to request an excusable homicide rather than self- defense instruction.

The petitioner argues that Brightman does not apply to the facts of this case because it was no accident that he shot the gun.¹⁰ The question is not whether he intended to shoot the gun but whether he intended to kill the victim. Both the petitioner and the defendant in Brightman claimed no intent to kill, but rather in defending himself another was accidentally killed. The analysis in Brightman applies equally here.

Finally the petitioner urges the court to adopt a "transferred self-defense doctrine."¹¹ The petitioner did not raise this issue in

¹⁰ Supplemental Brief at 11.

¹¹ Supplemental Brief at 12.

his motion for discretionary review, and for that reason the court should not consider it. RAP 13.7(b).

The petitioner tacitly concedes that a "transferred self-defense doctrine" is not currently part of Washington's law on self-defense when he asks the Court to join other states and recognize the doctrine. This Court rejected a motion to amend a petition in similar circumstances on two bases in In re Benn, 134 Wn.2d at 939. Since the amendment occurred after the time for filing a petition expired it was barred by the statute of limitations. Additionally, even if there had been an exception to the time bar from a significant change in the law, counsel could not be faulted for failing to anticipate such a change." Id.

For the same reasons articulated in Benn this court should refuse to consider adopting the "transferred self-defense doctrine." It is a new issue raised after the time for filing the petition has expired.¹² Even if this Court adopted that rule, defense counsel could not be faulted for failing to anticipate its adoption.

¹² Personal Restraint Petition at 2 indicates the conviction became final at the latest in April 2010. Any new issue would be time barred after April 2011. RCW 10.73.090(1).

C. THE PETITIONER HAS NOT SHOWN THAT HE WAS ACTUALLY PREJUDICED WHEN THE PROSECUTOR MADE A FAIR RESPONSE TO DEFENSE COUNSEL'S ARGUMENT.

In closing arguments defense counsel discussed jury instructions, including the instruction jurors were not to infer guilt or prejudice the defendant from the fact that he had not testified.¹³ He then proceeded to list five reasons why the defendant may not have testified. Counsel acknowledged that jurors had already heard the petitioner's side, and then relied his statements to police to argue that he had not acted with reckless indifference. 20 RP 3221-24; 3230-31. In rebuttal the prosecutor argued "[h]e listed a bunch of reasons for Noel Caldellis not testifying. He forgot a big one, didn't he? I can think of one more, can you?" The prosecutor did not articulate the reason, but went on to discuss the defense character evidence. 20 RP 3275-3276.

The petitioner argues that the prosecutor's rebuttal argument was an improper comment on his right to remain silent. He further argues trial counsel was ineffective for inviting the response and appellate counsel was ineffective for failing to raise the issue on appeal.

¹³ Instruction number 25, Response Ex. 2. Counsel erroneously referred to the instruction as number 5. 20 RP 3221.

To establish prosecutor error the petitioner must establish the impropriety of the prosecutor's comments and their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Allegedly improper comments are considered in the context of the total argument, issues in the case, and instructions to the jury. Id. A prosecutor is permitted to make a fair response to the arguments of defense counsel. Id. at 87.

The rebuttal argument was fair because defense counsel argument suggested jurors could consider sympathy toward the petitioner as a vulnerable young person whose testimony could be misconstrued due to his youth and inexperience. The argument conflicted with the instruction that jurors were not to consider sympathy in their deliberations. The prosecutor's response addressed that by implying that there were other non-sympathetic factors bearing on his decision not to testify.

The petitioner has also failed to establish prejudice from the remark. The petitioner urges the Court to employ a constitutional harmless error standard in the context of a prosecutorial error argument in a personal restraint petition. Under that standard prejudice is presumed, and the State bears the burden of proving it

was harmless beyond a reasonable doubt. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). This is not the correct standard in the circumstances of this case.

Where constitutional error is alleged in the context of a personal restraint petition the petitioner bears the burden to prove that he was actually and substantially prejudiced. In re Pirtle, 136 Wn.2d 467, 482, 965 P.2d 593 (1998). Failure to object to an allegedly improper argument waives the claim of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not be neutralized by a curative instruction. Russell, 125 Wn.2d at 86.

This court has refused to adopt the constitutional harmless error standard for claims of prosecutor error except in certain narrow circumstances. State v. Emery, 174 Wn.2d 741, 756-757, 278 P.3d 653 (2012). That standard was used in direct appeals where the claim was an improper comment on the defendant's right to remain silent. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996), State v. Fricks, 91 Wn.2d 391, 936-97, 588 P.2d 1328 (1979).¹⁴ But in the context of a personal restraint petition the

¹⁴ The petitioner cites State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2001) in support of his claim that constitutional harmless error applies here. Supplemental Brief at 16. In addition to being a direct appeal, that case involved

petitioner continues to bear the burden of establishing prejudice in prosecutor error claims. In re Glassmann, 175 Wn.2d 696, 286 P.3d 673 (2012). Like the petitioner here, the petitioner in Glassmann did not object to the improper argument. This Court held the error was waived unless the petitioner established flagrant and ill-intentioned conduct that resulted in prejudice that could not be cured by an instruction. Id. at 678. This Court has expressed a preference for finality of convictions, and for that reason has placed the burden of proof on the petitioner. In re Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). Given that the Court should not adopt a new standard. The burden remains on the petitioner to establish that he had been prejudiced.

Here the petitioner has not shown prejudice. The prosecutor's comment was oblique; he did not specifically state the reason he was thinking about why the petitioner had not testified. Given that the petitioner had not remained silent some reference to what he had not said was proper. State v. Curtiss, 161 Wn. App. 673, 699, 250 P.3d 496, review denied, 172 Wn.2d 1012 (2011).

a prosecutor's particularly offense appeal to racial bias that pervaded the entire trial. Under those circumstances the court applied the constitutional harmless error test because it believed that past efforts to address that kind of misconduct had proved insufficient. Id. at 680. The alleged error here is nothing like what

Even if the jurors were to infer the prosecutor meant that he did not testify because he was guilty, the jury was specifically instructed to not draw such inference.¹⁵ The jury was further instructed to disregard any argument by counsel that was not supported by the evidence or the court's instructions.¹⁶ Jurors are presumed to follow the court's instructions. State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014). The petitioner does not point to any evidence that jurors did not follow these instructions.

Since the petitioner fails to show the necessary prejudice to support his claim of error in a petition, then he necessarily fails to show he was prejudiced by counsel's allegedly deficient performance. Crace, 174 Wn.2d at 846-47. Because the petitioner has not shown that he was prejudiced by the prosecutor's remark he has failed to establish his ineffective assistance of counsel claim as to either his attorney at trial or his appellate counsel.

D. WHETHER THE JUDGE OR JURORS SLEPT IS NOT STRUCTURAL ERROR. THE PETITIONER IS NOT ENTITLED TO A REFERENCE HEARING.

The petitioner presented affidavits from his parents and his aunt alleging that the trial judge and three jurors slept for brief

occurred in Monday. That case does not support adopting the constitutional harmless error test for the kind of alleged error that occurred in this case.

¹⁵ Ex. 2, Instruction 25

periods of time during the trial.¹⁷ No other witnesses who provided affidavits noted either the judge or jurors sleeping.¹⁸ The petitioner argued that he was entitled to a new trial because the sleeping judge was a structural error. He acknowledged that sleeping jurors is not prejudicial per se.¹⁹ He now asks this Court to adopt a rule that any claim that a judge or juror slept through a substantial portion of the trial prejudice is presumed prejudicial entitling him to a new trial. Alternatively he asks this Court to grant him a reference hearing to determine whether he was prejudiced by a sleeping judge or jurors.

The Court need not consider the petitioner's invitation to adopt a new rule which would treat these kinds of alleged errors as structural error because he has failed to establish his own proposed threshold burden of proof for such treatment. The petitioner's parents report seeing the judge sleeping for one or two short periods. Neither saw any jurors sleeping.²⁰ The petitioner's aunt states she observed three jurors sleeping, but did not state for how long they appeared to sleep, or during whose testimony she saw

¹⁶ Ex. 2, Instruction 1.

¹⁷ Petition at Appendix J, K, and L.

¹⁸ Petition Appendix B and I; Response Ex. 7-11.

¹⁹ Petition at 43-44.

them sleeping.²¹ He presented no evidence either the judge or jurors were actually sleeping, as opposed to simply closing their eyes to concentrate on the testimony. This evidence is minimal and speculative as to whether any participant missed a significant part of trial. The Court should consider this insufficient evidence to merit consideration of the petitioner's argument that allegations of sleeping judges and jurors are structural errors.

Structural errors are those defects in the trial which affect the entire conduct of the trial from beginning to end, and thus defy harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The petitioner asks the Court to find structural error from his claim the judge slept by comparing his case to those where a trial judge was physically absent. The Supreme Court did find structural error where a federal magistrate presided over jury selection when he was without jurisdiction to conduct a trial. Gomez v. United States, 490 U.S. 858, 876, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). A court held it was structural error when a trial judge had inexplicably disappeared and was unavailable to rule on objections to defense

²⁰ Petition App. J and K.

²¹ Petition App. L.

closing argument in United States v. Mortimer, 161 F.3d 240, 241 (3rd Cir. 1998).

However the court also recognized that whether the error was structural depended on the circumstances of the case. Id. In Solon the court refused to employ the structural error standard when a judge momentarily left the bench during closing argument reasoning that the parties were aware of his absence, the judge was available to rule on objections and nothing happened during his absence. United States v. Solon, 596 F.3d 1206, 1212 (10th Cir. 2010). Similarly plain error, rather than structural error, applied when a judge went into chambers during closing arguments but remained available for objections. United States v. Love, 134 F.3d 595, 604-05 (4th Cir. 1998).

If there is a comparison between error from a physically absent judge and error from a sleeping judge then it should find the error may be harmless, not structural. Unlike the circumstances in Gomez the trial judge does have jurisdiction to preside over the matters. The judge is still present in the courtroom and a parties do have the opportunity to have the judge consider and rule on objections. Even if a judge was sleeping during a portion of a trial

where a party objected, the judge does have the transcript to consult before ruling.

The petitioner has cited no authority that has applied a structural error analysis to error resulting from a sleeping juror, and instead has conceded that kind of error is not per se prejudicial. The court should continue to find this error may be harmless.

Alternatively the petitioner asks the court to remand to the trial court for a reference hearing.²² The petitioner's motion for discretionary review did not raise this issue. The court should not consider whether he is entitled to a reference hearing. RAP 13.7(b).

If the Court does consider whether to remand for a hearing it should refuse to do so. The petitioner must make a prima facie showing that he had been actually prejudiced in order to merit a factual hearing. In re Rice, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). To make that showing he must produce more than factual allegations based on speculation or conjecture. Id. at 886.

He fails to meet his burden with respect to his sleeping judge claim because his evidence does not establish the judge was actually sleeping. At best shows two brief periods where the judge

may not have been paying attention to the proceedings. The judge did have the real-time transcript to consult to rule on objections.²³ The petitioner provides no evidence that the judge was ever confused regarding any objection or motion, or that the judge's rulings would have been any different.

To merit a hearing based on alleged juror misconduct resulting from sleeping jurors the petitioner must show that he was prejudiced to the extent that he did not receive a fair trial. United States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987). Prejudice is considered in light of whether there is evidence that the sleeping juror missed large portions of the trial or particularly critical evidence, whether the court was made aware of the sleeping juror, and whether the record established the juror was actually sleeping. United States v. McKeighan, 685 F.3d 956, 974 (10th Cir. 2012), cert denied, 133 S.Ct. 632 (2012). A general claim that jurors dozed during trial is too vague to establish prejudice. Id.

The petitioner's evidence regarding sleeping jurors is too vague to establish a prima facie showing of prejudice. The evidence does not in fact establish jurors slept; at best it shows

²² Supplemental Brief at 20-21.

²³ Response, Ex. 7.

three jurors appeared to sleep. The witness does not indicate which witness' testimony was presented at the time she made her observations or for how long each juror appeared to sleep. This evidence does not make a prima facie showing that any juror who deliberated actually missed significant evidence which would affect the juror's deliberations.

The petitioner urges this Court to "generously construe" his evidence and grant him a reference hearing, citing In re Kahn, 184 Wn.2d 679, 363 P.3d 577 (2015). There the petitioner supplied his own affidavit as well as affidavits from others stating that he had limited English language skills. From those affidavits he argued counsel performed deficiently by failing to provide him with an interpreter at trial. This court found this evidence sufficient to grant a reference hearing on the question of prejudice. Id. at 692.

Unlike the affidavits before the court in Kahn, the affidavit presented here fails to provide any concrete information from which the court could conclude that the two jurors who deliberated missed any critical evidence and for that reason he was denied a fair trial. The petitioner seeks a reference hearing as an investigative tool to fill in those gaps. This is improper because the court will not grant a hearing to determine whether petitioner actually has evidence to

support his allegations. Rice, 118 Wn.2d at 886. Since he has failed to make a prima facie showing he was prejudiced the Court should deny a reference hearing.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in the State's response and supplemental brief in the Court of Appeals the Court should dismiss the petition.

Respectfully submitted on July 14, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: Kathleen Webber
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

NOEL EVAN CALDELLIS,

Appellant.

No. 89585-6

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

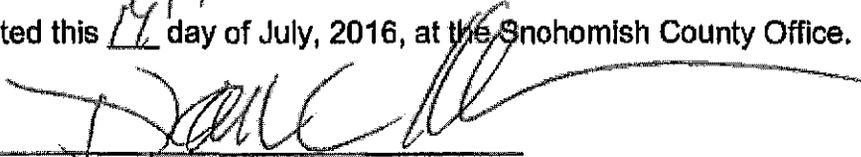
The undersigned certifies that on the 14th day of July, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and R. Renee Alsept and Jeffrey Erwin Ellis, Attorney(s) at Law, jeffreyerwinellis@gmail.com; reneealsept@gmail.com.

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

Dated this 14th day of July, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, July 18, 2016 9:01 AM
To: 'Kremenich, Diane'; 'jeffreyerwinellis@gmail.com'; 'reneealsept@gmail.com'
Subject: RE: In Re PRP of Noel Caldellis

Thank you. Received 7/18/2016.

Supreme Court Clerk's Office

From: Kremenich, Diane [mailto:Diane.Kremenich@co.snohomish.wa.us]
Sent: Monday, July 18, 2016 8:36 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; 'jeffreyerwinellis@gmail.com' <jeffreyerwinellis@gmail.com>; 'reneealsept@gmail.com' <reneealsept@gmail.com>
Subject: RE: In Re PRP of Noel Caldellis

Good Morning...

Yes, that was an oversight on my part. I forgot to mention there were TWO motions attached: Motion to Supplement and Motion for Overlength.

Thanks.

Diane.

From: OFFICE RECEPTIONIST, CLERK [mailto:SUPREME@COURTS.WA.GOV]
Sent: Friday, July 15, 2016 11:08 AM
To: Kremenich, Diane <Diane.Kremenich@co.snohomish.wa.us>; 'jeffreyerwinellis@gmail.com' <jeffreyerwinellis@gmail.com>; 'reneealsept@gmail.com' <reneealsept@gmail.com>
Subject: RE: In Re PRP of Noel Caldellis

A motion to supplement the record was included with the motion for overlength supplemental brief. Did you mean to file that as well?

Supreme Court Clerk's Office

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, July 14, 2016 4:52 PM
To: 'Kremenich, Diane' <Diane.Kremenich@co.snohomish.wa.us>; 'jeffreyerwinellis@gmail.com'; 'reneealsept@gmail.com'
Subject: RE: In Re PRP of Noel Caldellis

Received 7/14/2016.

Supreme Court Clerk's Office

From: Kremenich, Diane [<mailto:Diane.Kremenich@co.snohomish.wa.us>]
Sent: Thursday, July 14, 2016 4:25 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; jeffreyerwinellis@gmail.com;
reneealsept@gmail.com
Subject: In Re PRP of Noel Caldellis

Good Afternoon...

RE: In Re Personal Restraint Petition of: Noel Evan Caldellis
Supreme Court No. 89585-6

Please accept for filing the following attached documents:

- 1: Supplemental Brief of Respondent
- 2: Motion for Overlength Supplemental Brief

Thanks.

Diane.

Diane K. Kremenich
 Snohomish County Prosecuting Attorney - Criminal Division
Legal Assistant/Appellate Unit
Admin East, 7th Floor
(425) 388-3501
Diane.Kremenich@snoco.org

CONFIDENTIALITY STATEMENT

This message may contain information that is protected by the attorney-client privilege and/or work product privilege. If this message was sent to you in error, any use, disclosure or distribution of its contents is prohibited. If you receive this message in error, please contact me at the telephone number or e-mail address listed above and delete this message without printing, copying, or forwarding it. Thank you.

 please consider the environment before printing this email