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Court of Appeals
Division I
State of Washington

NO. 67484-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint Petition of
JEFFREY MCKEE,
Petitioner.

**SUPPLEMENTAL BRIEF ADDRESSING RECENT AUTHORITY
ON PUBLIC TRIAL CLAIMS**

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A. ISSUE

1. Whether a personal restraint petitioner must show prejudice from a claimed public trial violation.

2. Whether appellate counsel provided constitutionally sufficient representation in the year 2006 – before any appellate court in Washington had announced that private inquiry of jurors without specific findings violated public trial rights – when she raised and competently argued several issues, but did not raise a public trial issue?

B. FACTS AND PROCEDURAL HISTORY

McKee was charged with two counts of rape in the first degree and two counts of attempted rape in the first degree for a series of sexual assaults against four different women spanning a period of time from January, 2001 through July, 2003. CP 11-13.¹ McKee's modus operandi was to pick up and attempt to rape prostitutes. He was convicted by a jury of two counts of rape in the first degree and the jury found that he was armed with a firearm during commission of those crimes. CP 93-98. The trial court imposed an exceptional mitigated sentence because McKee's victims were prostitutes. As described in more detail below, that sentence

¹ The facts of McKee's crimes were more fully presented in the State's response to McKee's personal restraint petition and in this Court's opinion in McKee's direct appeal. State's Resp. to PRP at 1-11; State v. McKee, 141 Wn. App. 22, 27-29, 167 P.3d 575 (2007).

was overturned on appeal, McKee was resentenced, he appealed again, and his second sentence was affirmed. He then filed this personal restraint petition (PRP).

The facts regarding jury selection show that before voir dire the parties and the trial court agreed that , in order to respect juror privacy and to elicit the most relevant information possible, jurors who had previously been sexually assaulted or whose family members or friends had such experiences could be interviewed outside the presence of other jurors.² Numerous jurors were individually questioned in this manner by defense counsel and several were excused because it became clear from their candid answers that they might not be fair to the defendant in their consideration of the case. State's Resp. to PRP at 13-17.

The record available to this court demonstrates the efforts made on appeal by Ms. Dana (Lind) Nelson, counsel for McKee. She filed an opening brief on April 28, 2006 and raised four arguments, two of which were successful. See State v. McKee, 141 Wn. App. at 22-23; (ACCORDS Docket #56504-4 (listing date opening brief was filed)). First, counsel argued that the weapon enhancement should be reduced because there was insufficient evidence in the record to prove McKee had been armed with a real gun when he raped one victim. Counsel pointed

² These facts were set forth in greater detail in the State's first response to McKee's PRP. State's Resp. to PRP at 11-17.

out that the victim had given an inconsistent description of the weapon, that her description did not match the gun later recovered from McKee, and that McKee also owned fake guns, so it was possible he had used a fake gun during the rape. McKee, at 31. Second, counsel argued that the evidence was insufficient to convict him of rape on Count 4 and counsel identified a number of weaknesses in the evidence: the victim could not identify him in a photo montage, a lineup, or in court; there were inconsistencies in the victim's description of her attacker and his vehicle; there was evidence of another suspect; and the DNA sample was mixed thus leading to a test result that was insufficiently discriminating and unreliable. Id. at 32. Third, counsel for McKee argued that the trial court erred in ordering him not to possess or peruse pornographic materials as a condition of community custody because "pornographic materials," without further definition, was an unconstitutionally vague and overbroad term. Id. at 35-37. Fourth, counsel argued that the trial court erred in ordering certain community custody conditions related to alcohol. Id. at 34. Counsel also defended the mitigated sentence imposed by the trial court. Id. at 32-34.

On December 5, 2006, McKee, acting pro se, filed a statement of additional grounds for review raising six issues not addressed by defense counsel. Id. at 37 (ACCORDS Docket #56504-4). Neither McKee, acting

pro se, nor Ms. Nelson complained that the trial court had improperly closed proceedings during voir dire.

This Court rejected McKee's arguments as to the sufficiency of the evidence supporting the firearm enhancement and supporting Count 4, accepted McKee's two arguments that sentencing conditions needed to be modified (at least in part), and accepted the State's arguments that the mitigated sentence should be reversed. McKee, at 31-37. All six pro se claims were rejected. Id. at 37. The supreme court denied review in July, 2008. A mandate was issued on September 12, 2008.

McKee was resentenced to a standard range sentence; he appealed and argued that mental health treatment should not have been ordered as a condition of community placement, and this Court rejected that claim in an unpublished opinion. State v. McKee, 152 Wn. App. 1030 (2009).

McKee then filed a personal restraint petition on June 27, 2011, and argued that his public trial rights were violated by the procedure used during voir dire, and that he was entitled to a new trial. This Court stayed proceedings to await decisions from the Washington Supreme Court regarding whether a personal restraint petitioner must show prejudice from a public trial violation. Those decisions (and others) have now been filed and this Court has called for additional briefing regarding recent case law on this topic.

C. SUPPLEMENTAL ARGUMENT

The State argued in its first response brief that McKee's petition should be dismissed for three reasons: 1) he failed to show a courtroom closure; 2) he encouraged, fully participated in, and benefitted from the voir dire process that was conducted in his trial, so his case is controlled by State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009); and 3) that the decision in In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012), to the extent it might be viewed as controlling, was incorrect and harmful and should be overturned by the Washington Supreme Court.

As directed, this brief will focus on recent authority from appellate courts concerning public trial claims made in a collateral attack.

1. MCKEE MUST PROVE THAT THE COURTROOM WAS ACTUALLY CLOSED.

Recent authority from the Washington Supreme Court makes clear that McKee cannot overcome the State's first response to his PRP, to wit: he has not established that his trial was actually closed. State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068, cert. denied, 135 S. Ct. 880 (2014). In Njonge, the trial court had said that spectators would be excluded due to limited seating, but it was not clear whether seating actually became

available as voir dire proceeded. The court held that ambiguity as to that fact required affirmance.

A defendant asserting violation of his public trial rights must show that a closure occurred. ...'[O]n a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.'

...On this record, there is no conclusive showing that spectators were totally excluded from the juror excusals. We cannot presume the existence of facts to which the record is silent.

Njonge, 181 Wn.2d at 556 (citations and internal quotation marks deleted).

The same is true in this case. The trial court made an off-hand remark indicating that people might be excluded from the courtroom due to space limitations but there is no indication in the record that any exclusion actually occurred. See State's Resp. to PRP at 20-22. And, given the more demanding standard of review applied in collateral attacks, there is no reason to "presume the existence of facts to which the record is silent." Njonge, at 556. McKee has the burden to prove by a preponderance of the evidence that the courtroom was closed, and he has failed to carry that burden. His petition should be dismissed.

2. MCKEE MUST SHOW ACTUAL AND SUBSTANTIAL PREJUDICE TO PREVAIL IN THIS PETITION; HE CANNOT SHOW PREJUDICE BECAUSE INDIVIDUAL QUESTIONING INURED TO HIS BENEFIT.

Even if McKee could show a closure, he cannot show prejudice.

His petition should be dismissed for this reason.

It has long been understood that the standard of review on collateral attack of a criminal judgment is more demanding than the standard applied on direct appeal. A personal restraint petition is not simply a second appeal. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 316 P.3d 1007 (2014). An error that is presumed prejudicial on direct appeal will not necessarily be prejudicial in a collateral attack. Because collateral relief “undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders,” a personal restraint petitioner must establish by a preponderance of the evidence that a constitutional error worked to his actual and substantial prejudice. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992).

Two recent decisions from the Washington Supreme Court confirm that this more demanding collateral attack standard of review applies to public trial claims. In re Pers. Restraint of Coggin, 182 Wn.2d 115, 340 P.3d 810 (2014); In re Pers. Restraint of Speight, 182 Wn.2d 103, 340

P.3d 207 (2014). In each case, four justices signed a plurality opinion authored by Justice Charles Johnson holding that petitioners alleging a violation of open court principles must show actual and substantial prejudice to obtain relief in a collateral attack. Coggin, at 121-22; Speight, at 107. The Chief Justice concurred in this holding.

[B]ecause guidance is needed I would agree with the majority that the error here, failure to engage in the analysis outlined in State v. Bone-Club³ ... *requires a petitioner in a personal restraint petition to prove prejudice* unless he can demonstrate that the error in his case “infect[ed] the entire trial process” and deprived the defendant of “basic protections,” without which “no criminal punishment may be regarded as fundamentally fair.”

Coggin, 182 Wn.2d at 123; Speight, 182 Wn.2d at 108.⁴ Thus, a majority of the justices of the Washington Supreme Court have held that a personal restraint petitioner must prove actual and substantial prejudice to obtain relief. Neither petitioner was able to show that private inquiry of jurors resulted in prejudice, so both petitions were dismissed.

Division Three of the Court of Appeals reached the same conclusion under similar facts in a decision predating Coggin and Speight. In re Pers. Restraint of Stockwell, 160 Wn. App. 172, 180-81, 248 P.3d 576 (2011). Division Two of the Court of Appeals reached that

³ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

⁴ The Chief Justice disagreed with the plurality opinion in other respects. She would have held that Coggin's claim was barred by the invited error doctrine. Coggin, at 124-25 (Madsen, C.J. concurring). In Speight, the Chief Justice would have held that Speight failed to show a public trial error and, alternatively, that any such error was invited. Speight, at 110-11 (Madsen, C.J. concurring).

conclusion based on Coggin and Speight. In re Pers. Restraint of Schreiber, 189 Wn. App. 110, 357 P.3d 668 (2015) (“Coggin and Speight require a petitioner to make a showing of actual and substantial prejudice resulting from a public trial violation to prevail on collateral review.”).

These decisions require that McKee’s petition be dismissed. His lawyer individually questioned multiple jurors because the lawyer realized that a searching inquiry of those jurors was in his client’s interest and he thereby eliminated from the jury several people who were perhaps predisposed against his interests. Because McKee has failed to prove actual and substantial prejudice, his petition must be dismissed.⁵

3. FAILING TO CHALLENGE AN UNDENIABLY EFFECTIVE AND WIDELY ACCEPTED VOIR DIRE PRACTICE THAT HAD NOT BEEN CONDEMNED BY ANY WASHINGTON APPELLATE COURT IS NOT DEFICIENT PERFORMANCE.

McKee also claims in his PRP that appellate counsel was ineffective for failing to challenge the method of individual questioning used during voir dire. A recent decision of Division Three of the Court of Appeals supports his argument. See State v. Fort, ___ Wn. App. ___, 360

⁵ Another case from Division III addresses these issues but in the context of an untimely PRP. See In re Mines, No. 25729-1-III, slip op. at 15 (filed Oct. 8, 2015) (“...although Mr. Mines shows a violation of his right to public trial, he fails to prove actual and substantial prejudice justifying relief. His claim of ineffective assistance of counsel was untimely filed in a motion to amend the petition; the motion is denied.”). McKee’s petition was timely so that holding in Mines is inapposite.

P.3d 820, 836-37 (filed September 15, 2015), but the State respectfully suggests that decision should not be followed.⁶

Fort involved a method of voir dire similar to the practice at issue here, whereby jurors were questioned privately. The court of appeals opinion in Fort treats the case as controlled by Orange⁷ and Morris, restates and then applies the holdings of those cases, and then orders a new trial for Fort.

The State respectfully submits that the reasoning in Fort violates the principles of Strickland v. Washington.⁸ Under Strickland, a lawyer is presumed competent and the defendant must establish prejudice. The Fort approach turns this standard on its head and presumes both deficient performance and prejudice. Orange, Morris, and Fort do not establish ineffective assistance of counsel as that constitutional doctrine has been defined by the United States Supreme Court.

The State has already argued in this case that Morris was an improper extension of Orange and was incorrectly decided and harmful. See State's Response to Personal Restraint Petition at 30-38. The remainder of this brief will supplement that argument, with a focus on

⁶ Both parties in Fort have sought discretionary review. The supreme court is scheduled to consider the motions for discretionary review in late March, 2016.

⁷ In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004).

⁸ 466 U.S. 668, 104 S. Ct. 205, 280 L. Ed. 2d 674 (1984).

how the decision of the court of appeals in Fort illustrates why and how the supreme court erred in Orange and Morris, and why Orange and Morris should not be extended to the context of private voir dire of jurors to elicit sensitive information.

a. The Standards For Determining Ineffective Assistance Of Counsel.

It has long been understood that an effective appellate lawyer should exercise discretion in bringing issues before the court.

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.” Smith v. Murray, 477 U.S. 527, 536, 106 S. Ct. 2661, 2667, 91 L.Ed.2d 434 (1986) (quoting Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313, 77 L.Ed.2d 987 (1983)). Here, appointed counsel has thrown the chaff in with the wheat, ignoring their duty under RPC 3.1 to present only meritorious claims and contentions and leaving it for this court to cull the small number of colorable claims from the frivolous and repetitive. ... We hereby provide notice that such behavior will not be tolerated in the future.

Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 302-03, 868 P.2d 835, decision clarified sub nom. In re Pers. Restraint Petition of Lord, 123 Wn.2d 737, 870 P.2d 964 (1994). Thus, it follows that not all conceivable issues must be included in an appellate brief.

Effective assistance of counsel is guaranteed by both the federal and state constitutions. See U.S. CONST. amend. VI; WASH. CONST. art. I,

§ 22. It is well-settled that to demonstrate ineffective assistance of counsel, a defendant must show two things: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A failure to make either showing requires dismissal of the claim. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The same standard applies to claims of ineffective assistance of appellate counsel. Smith v. Robbins, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).

Review of counsel's performance starts with the strong presumption that counsel acted reasonably. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Counsel has a duty to research relevant law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-91), and to investigate all reasonable lines of defense. In re Pers. Restraint of Davis, 152 Wn.2d 647, 744, 101 P.3d 1 (2004) (citing Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Importantly, "[i]n assessing

performance, the court must make every effort to eliminate the distorting effects of hindsight.” State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (quoting In re Pers. Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992)). Ineffective assistance of counsel is a fact-based determination that is “generally not amenable to per se rules.” State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.

Strickland, 466 U.S. at 696.

Moreover, an attorney’s failure to raise novel legal theories or arguments is not ineffective assistance. See, e.g., Anderson v. United States, 393 F.3d 749, 754 (8th Cir.) (“Counsel’s failure to raise [a] novel argument does not render his performance constitutionally ineffective”), cert. denied, 546 U.S. 882 (2005); Haight v. Commonwealth, 41 S.W.3d 436, 448 (Ky.) (“while the failure to advance an established legal theory may result in ineffective assistance of counsel under Strickland, the failure to advance a novel theory never will”), cert. denied, 534 U.S. 998 (2001), overruled on other grounds by Leonard v. Commonwealth, 279 S.W.3d 151 (Ky.2009). Similarly, counsel is effective even if she does not

anticipate changes in the law. State v. Grimes, 165 Wn. App. 172, 192, 267 P.3d 454 (2011) (trial counsel's failure to challenge widely-accepted jury instruction later disapproved by the supreme court was not ineffective assistance of counsel); State v. Brown, 159 Wn. App. 366, 372, 245 P.3d 776 (2011) (collecting several cases). See also Randolph v. Delo, 952 F.2d 243, 246 (8th Cir. 1991) (trial counsel was not ineffective for failing to raise a voir dire challenge under Batson v. Kentucky, 476 U.S. 79, 96, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), two days before Batson was decided, because reasonable conduct is viewed in accordance with the law at the time of conduct); Knowles v. Mirzayance, 556 U.S. 111, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) (defense counsel's performance was not deficient when he counseled defendant to abandon NGI claim that stood almost no chance of success even though defendant asserted that he had "nothing to lose" by making the claim); Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant, if counsel, as a matter of professional judgment, decides not to present those issues). Counsel has no duty to pursue strategies that are not reasonably likely to succeed. McFarland, 127 Wn.2d at 334 n.2.

b. The Decisions In Orange And Morris Did Not Faithfully Apply Strickland.

In light of the principles set forth above, it is clear that a finding of ineffective assistance of counsel – whether at trial or on appeal – should not follow as a per se or a mechanical determination; it should be found only when counsel has wholly failed to function as intended by the Sixth Amendment.

Yet, the Washington Supreme Court’s opinions in Orange and Morris contain no meaningful analysis of attorney performance as required by Strickland. Instead, the holdings are mechanistic and invert the usual presumptions. The holdings also overstate the breadth of the holdings in Orange; a matter that has become apparent with the recognition of the “experience and logic” test and after viewing the myriad nuances that have arisen in cases decided in the last several years. Looking at this body of law as a whole, and remembering that the practice of private voir dire on sensitive matters was widespread and unremarkable in 2006, it cannot be said that appellate counsel provided constitutionally deficient performance.

The majority opinion in Orange devoted a single paragraph to the ineffective assistance of appellate counsel claim and *deficient performance* is relegated to a passing mention in a single sentence.

As to the remedy for the violation of Orange's public trial right, we granted the defendant in Bone-Club a new trial, stating that "[p]rejudice is presumed where a violation of the public trial right occurs." ... Thus, had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial. Consequently, we agree with Orange that the failure of his appellate counsel to raise the issue on appeal was both *deficient* and prejudicial and therefore constituted ineffective assistance of counsel. ... The failure to raise the courtroom closure issue was not the product of "strategic" or "tactical" thinking, and it deprived Orange of the opportunity to have the constitutional error deemed per se prejudicial on direct appeal. ... The remedy for counsel's failure to raise on appeal the violation of Orange's public trial right is remand for a new trial.

In re Orange, 152 Wn.2d at 814. This cursory paragraph makes the damning finding of incompetent counsel on far less a showing than required by Strickland.

The analysis in Orange is perfunctory, likely due to the fact that the issue was never briefed in the supreme court.⁹ Although Orange asserted ineffective assistance of appellate counsel in passing in the court of appeals, he filed a motion for discretionary review in the supreme court in which he changed his argument as to why relief should be granted.¹⁰

⁹ The briefs filed in Orange are available at the Washington Supreme Court, the King County Law Library, and at the Marian Gallagher Law Library at the University of Washington School of Law.

¹⁰ In the court of appeals, Orange devoted only 10 lines to the argument that appellate counsel was ineffective for failing to raise the public trial issue on appeal and he did not cite or analyze Strickland. See Appendix A31-32. He raised the issue again in his reply brief in the court of appeals, but only to assert that the State conceded the issue by not contesting it. Appendix A33. He made no attempt in the court of appeals to analyze either the performance or prejudice prongs under Strickland; the case was not cited even

His motion for discretionary review argued that reversal was warranted because the public trial error was structural; he did not argue ineffective assistance of appellate counsel at all.

After review was granted by the supreme court, Orange filed two separate briefs addressing the public trial claim and never once argued ineffective assistance of appellate counsel or cited to Strickland in his 53 pages of briefing.¹¹ Rather, as he had argued in his motion for discretionary review, Orange claimed that the appellate court must reverse because the public trial error was structural. Obviously, because he did not claim ineffective assistance of appellate counsel, there was no discussion in his brief of deficient performance, and whether competent counsel could or should have raised the public trial issue on appeal. An amicus brief was filed on the public trial issue but that brief did not argue that Orange was entitled to a new trial due to ineffective assistance of appellate counsel.¹² And, because Orange was no longer claiming ineffective assistance of counsel, the State's briefs did not address that

once. The court of appeals dismissed the PRP in an unpublished order and, because it found no error, it rejected the ineffective assistance claim in a single sentence. See In re Pers. Restraint of Orange, No. 19959-2-III, 2002 WL 508351 (filed April 4, 2002).

¹¹ Orange filed a brief entitled "Petitioner Mr. Orange's Supplemental Brief" (20 pages) and a brief entitled "Petitioner Mr. Orange's Post-Reference Hearing Supplemental Brief" (33 pages). See Appendix A1-7, A8-13. He also filed three statements of additional authority. He never cited Strickland.

¹² The amicus brief was filed by Allied Dailey Newspapers and other media outlets.

issue, either. This likely explains why the supreme court's opinion is so spare on whether counsel's performance was deficient.

Strangely, the same thing happened in Morris. Morris did not argue ineffective assistance of appellate counsel in the supreme court so he never cited or applied Strickland in his briefing.¹³ The only brief to address the issue was the amicus brief by the Washington Association of Criminal Defense Lawyers. That brief also did not cite or apply the test of Strickland. Rather, the 17 lines of argument simply cited Orange and urged the court to apply its reasoning.¹⁴ There was no discussion of whether or how a competent appellate lawyer should have known to raise the issue in 2006 before Frawley was decided.¹⁵ Nor was any consideration given to the huge spike in litigation over public trial claims, or all nuanced case law created since approximately 2008.

Fort has now taken the truncated ineffective assistance of counsel analysis from Orange and applied it in a manner that violates Strickland more obviously than may have been apparent in either Orange or Morris. Essentially, Fort establishes a rule that appellate counsel *must* always raise

¹³ Available at http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.searchRequest&courtId=A08 (last accessed 1/3/16).

¹⁴ Amicus Brief of The Washington Association of Criminal Defense Lawyers (WACDL), at 3-4. <http://www.courts.wa.gov/content/Briefs/A08/849293%20WACDL%20amicus.pdf> (last accessed 1/2/16).

¹⁵ State v. Frawley, 140 Wn. App. 713, 167 P.3d 593 (2007).

a public trial, even as to a procedure that was widely accepted at the time, that had not been condemned by any appellate court, and that benefitted the defendant in the trial court. Such a rule stands Strickland on its head. Keeping the usual Strickland principles in mind, it is apparent that appellate counsel performed reasonably.

- c. Appellate Counsel Was Not Deficient – Most Lawyers And Judges In The Year 2006 Would Not Have Considered Private Inquiry Of Jurors On Sensitive Matters To Be A Public Trial Violation, Especially Where The Inquiry Was Wholly Supported By Trial Counsel And Benefitted The Defendant.

As argued above, the supreme court's decisions in Orange and Morris have failed to correctly apply the Strickland "deficient performance" analysis. At this point, the relevant question is not whether private inquiry of jurors may occur without special findings; that has been decided. Rather, the relevant question for purposes of this PRP is whether, in 2006, an appellate lawyer was objectively unreasonable if she failed to raise the public trial issue under these particular facts. Given what was reasonably believed at that time, and seeing what has been decided in case law since, it cannot be said that it was objectively unreasonable for an appellate lawyer to forego a public trial claim in a case where it isn't clear the courtroom was closed, the defendant clearly

wanted to conduct private inquiry, that inquiry inured to his benefit, and where there were no appellate cases that required detailed findings before a court conducted private voir dire on sensitive subjects. This court should find that appellate counsel was not deficient.

The trial judge in Fort reacted as many lawyers and judges did when State v. Frawley was decided in 2007—they were caught completely by surprise.

And I think that kind of highlights that, you know, really, the Frawley decision caught everybody off guard and came out of left field, so to speak, because that was, certainly, the established practice as far back as anybody can remember doing these kinds of cases; that—to respect the privacy of—of the prospective jurors that we would question them about prior sexual assaults, those kind of things, in private session.

....

My view is, you know—and, certainly, I'm sure that this isn't the last time that this fine point will be discussed—is that, you know, Frawley did represent a change of law; that, in my view, at least in terms of a defendant in Mr. Fort's position whose appeal has been concluded and has that aspect of finality to it, that the change of law does not work to his—to his benefit; that it would, in my view, only be applicable to those cases where a finality of judgment had not been achieved. Obviously, the—the final call on that is going to be up to the Court of Appeals or the Supreme Court; but that's the way I see it; that—that Frawley would not have a retroactive application should the Frawley decision survive before the Supreme Court.

Fort, 360 P.3d at 827-28.

That Frawley's holding was surprising to many (if not most) trial judges is evident from the spike and the sheer volume of appellate

decisions in Washington (published and unpublished) that appeared after Frawley. See Anne L. Ellington & Jeanine Blackett Lutzenhiser, In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions, 88 Wash. L.Rev. 491 (2013) (tracing appellate decisions and the divergent results and rationales issuing from appellate courts). This sudden spike in litigation shows that experienced trial judges from every region in the State had routinely allowed limited private inquiry of jurors as to sensitive matters without realizing that special findings were required to justify that inquiry. See, e.g., State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) (King County); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (Ferry County); State v. Frawley, 181 Wn.2d 452, 334 P.3d 1022 (2014) (Spokane County); State v. Applegate, 163 Wn. App. 460, 259 P.3d 311 (2011) (Whatcom County); State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012) (Mason County).¹⁶

This explosion in litigation shows that, before Frawley, appellate lawyers did not generally believe they could challenge a widely accepted practice which had never been disapproved by any appellate court. The explosion also shows that Frawley was an extension, rather than a simple application, of Orange.

¹⁶ All of these cases appear to have been tried in superior court between the years 2005 and 2007. This list is representative, not exhaustive.

Moreover, the practice of private voir dire was encouraged by indicators from the supreme court, including the fact that GR 31 mandated juror information be kept private. An experienced litigator and law school academic had warned around the same time of the dangers of exposing juror information and that author documented the widespread efforts of jurists to protect jurors. See Lauren A. Rousseau, Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?, 3 Rutgers J.L. & Urb. Pol’y 287, 311 (2006) (The author surveyed 18 federal judges. “Virtually all” of them allowed potential jurors to answer intrusive or embarrassing questions “privately at the bench or in chambers, with only the judge, the court reporter, and the opposing counsel present.”).

The rule and the practice are logical and sensible. Jurors could not be expected to disclose highly personal matters in public, and defense counsel would therefore not obtain as much pertinent information about jurors as would occur with private questioning. Thus, the practice was widespread, and judges did not realize that a limited private inquiry would be considered a “closure” of the court, especially since closure orders were almost never entered. There is no reason to think that these trial judges were indifferent to public access to the courts or ignorant of controlling precedent. Rather, these trial courts (and most lawyers practicing in those

courts) likely believed that a limited private inquiry of jurors required a balancing of interests – the potential juror’s privacy rights *and* the defendant’s right to empanel a fair and impartial jury against the public’s right of access to the courts. Most trial courts appear to have believed that private inquiry of jurors on sensitive subjects was at best a *de minimis* intrusion on the public’s general (but not absolute) right of access to the courts, and was outweighed by juror privacy and the defendant’s constitutional right to an impartial jury.

Appellate courts, too, differed greatly over whether Orange required automatic reversal of a conviction where jurors were questioned privately. Until September, 2007, when Division Three decided State v. Frawley, no appellate court decision called into question the well-established practice of privately questioning jurors on sensitive matters. Even the majority opinion in State v. Duckett, 141 Wn. App. 797, 807, 173 P.3d 948 (2007) – decided just two months after Frawley – recognized that GR 31 protected sensitive juror information and that “GR 31 has not heretofore been tested against the constitutional right to a public trial.” The dissenting judge in Duckett set forth the view likely shared by most judges and lawyers at the time:

...exploring confidential answers to the questionnaires in a limited setting open to the parties and their counsel does not present a public trial issue *except in a strained and formalistic sense*.

Nothing in this process undermined the public's trust and confidence in the case outcome or disturbed Mr. Duckett's rights. Indeed, the process enhanced Mr. Duckett's opportunity to receive a fair trial by encouraging maximum juror participation and candor. Mr. Duckett points to no practical and identifiable consequence to him of the court's chosen procedure.

* * *

...the process comported well with accepted fair trial principles.

Duckett, at 811-12 (italics added). And the dissenting judge argued that the facts in Orange involved very different closures and should not govern private inquiry of jurors during voir dire. Id. at 812.

Many appellate judges expressed similar views. This Court rejected Frawley when the case was cited in 2007 as authority to forbid private inquiry of jurors. See State v. Momah, 141 Wn. App. 705, 716, 171 P.3d 1064 (2007) ("To the extent that Frawley holds that all in-chambers proceedings are per se closed to the public, we decline to follow Division Three's reasoning in that case."), aff'd, 167 Wn.2d 140 (2009). See also State v. Erickson, 146 Wn. App. 200, 213, 189 P.3d 245 (2008) (Quinn-Brintnall, J. dissenting);¹⁷ State v. Leyerle, 158 Wn. App.

¹⁷ "Where, as here, the defendant needs to inquire into potential jurors' sexual experiences, the parties have fundamentally important reasons to allow potential jurors to answer such questions privately. Regarding sexual abuse, privacy is essential to encourage candid and truthful answers. Candid and truthful answers are essential to allow an attorney to soundly exercise challenges to the jury pool, thus ensuring an unbiased and unprejudiced jury. And the right to an unbiased and unprejudiced jury is an essential component of a defendant's constitutional right to a fair trial."

474, 490, 242 P.3d 921 (2010) (Hunt, J., dissenting);¹⁸ State v. Wise, 148 Wn. App. 425, 436, 200 P.3d 266 (2009), rev'd, 176 Wn.2d 1 (2012).¹⁹

The controversy over whether and when a defendant should be entitled to a new trial when jurors are questioned privately did not abate in the Washington Supreme Court. Rather, the issue caused deep divisions within the court. Numerous and lengthy opinions were written concurring and/or dissenting in the result reached by the court, and several cases did not even command a majority opinion. This divergence of opinions was on most prominent display in fourteen opinions issued in four cases decided on the same day in 2012. See State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012) (three opinions); State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012) (three opinions); State v. Sublett, 176 Wn.2d 58, 292

¹⁸ “In addition to lacking case law support, in my view, the majority’s approach is neither prudent nor necessary to advance the cause of justice. As the United States Supreme Court noted in Waller, the unnecessary grant of a new trial may create a “windfall for the defendant,” which is “not in the public interest.” [Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)]. Such windfalls consume scarce judicial resources without providing any corresponding benefit to the public or to defendants who have already received fair trials. Furthermore, unnecessary new trials undermine “public understanding and trust in the judicial system” a core value inherent in the right to a public trial. Majority at 924....Nor do I agree with the bright-line rule that the majority advances: “[W]here the trial court fails to sua sponte consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant’s conviction.” Majority at 925 With all due respect, the cases on which the majority relies ... do not support this bright-line approach. Instead, the case law embraces a case-by-case approach that requires a “remedy ... appropriate to the violation,” which does not automatically involve reversal. Under this case-by-case approach, Leyerle is not entitled to a new trial.” (citations omitted).

¹⁹ “We, therefore, hold that the trial court was not required to sua sponte conduct a Bone-Club analysis prior to this temporary relocation of voir dire to chambers for the purpose of asking prospective jurors sensitive questions.”

P.3d 715 (2012) (four opinions); In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012) (four opinions). Several justices offered pointed critiques of the view that Orange mandated a new trial in every case where a public trial violation had occurred. See, e.g., Morris, 176 Wn.2d at 177-79 (Madsen, C.J., dissenting)²⁰ and 176 Wn.2d 184-86 (Wiggins, J. dissenting).

Numerous justices continue to express strong views on the private voir dire issue in the most recent cases—cases decided eight years after Ms. Dana Nelson filed her brief in this case. See State v. Shearer, 181 Wn.2d 564, 334 P.3d 1078 (2014) (plurality opinion by Owens, J.

²⁰ “A majority of the court, however, concludes that this case is controlled by In re Personal Restraint of Orange. ... There are significant differences, however. First, as Justice Wiggins explains, the error in Orange was conspicuous in the record and appellate counsel should have noticed it. ... Here, in contrast, all that the record shows is that no Bone-Club inquiry was made. But this does not equate to a violation of the right to a public trial. Moreover, the record shows that there was a valid reason for the limited voir dire in chambers on sensitive topics and this would indicate to reasonable appellate counsel that no constitutional violation occurred. The record also shows that the defendant affirmatively approved of the procedure, even going so far as waiving his right to be present so that jurors were encouraged to be more forthcoming in their responses to sensitive questioning than they might have been if he had been present. ... Appellate counsel reviewing this record could reasonably conclude that the closure was justified on grounds of the jurors’ interests in privacy plus the defendant’s interest in a fair trial decided by unbiased jurors. Closure for the purpose of obtaining full answers to sensitive questioning served both of these purposes. At the same time, appellate counsel could well conclude that this closure for purposes of obtaining full disclosure did not contravene any of the purposes served by the right to a public trial. The proceedings were recorded and transcribed as part of the public record of this case. Thus, at all times counsel and the court were contemporaneously and continuously reminded of their responsibilities in the criminal justice system and of the need to carry out these responsibilities fully and fairly. Because no witnesses were involved at this stage, there were no questions pertaining to witnesses, encouraging their testimony, or avoiding perjury. Thus, the values that underlie the right to a public trial do not suggest a public trial violation. Accordingly, there was no deficient performance that is apparent on the appellate record as there was in Orange. Rather, what is obvious is a sound trial choice to close the proceedings in aid of selecting unbiased jurors, and very little likelihood that the closure was unjustified.”

reversing convictions); at 575-77 (Gordon-McCloud, J. – arguing for a doctrine of clear waiver) (Gonzalez, J. dissenting with Madsen, C.J. and J.M. Johnson, J. – “Our constitution does not demand that those called to serve on a jury recount their worst memories in open court.”); at 575-76 (waiver could be found if it is expressly and knowingly made) (McCloud, J., concurring); at 579-81 (Wiggins, J. dissenting on several points).

Moreover, recent decisions show that “history and logic” are integral to the analysis, and also that simple labels do not determine whether a public trial violation has occurred. In Sublett, a majority of the justices of Washington Supreme Court adopted the history and logic test to determine whether a particular type of proceeding falls within the ambit of the public trial right. Sublett, 176 Wn.2d at 73-74. Under this test, general voir dire has been held to fall within the right, but other appurtenances to voir dire do not. The exact nature of the inquiry is relevant. For instance, it was held in State v. Slert, 181 Wn.2d 598, 605-06, 334 P.3d 1088 (2014) (González, J., lead opinion), that consideration of juror questionnaires in chambers was not a public trial violation. And, determining juror hardships and administrative excusals is qualitatively different from challenging a juror’s ability to serve as a neutral factfinder in a particular case, meaning that the public trial right attaches to the latter but not to the former. See In re Pers. Restraint of

Coggin, 182 Wn.2d at 117. In State v. Russell, 183 Wn.2d 720, 357 P.3d 38, 43 (2015), the supreme court held that for purposes of discerning the scope of the public trial right, the label “jury selection” was not necessarily determinative, because that term

...encompasses significantly more than attorney voir dire, and the mere label of ‘jury selection’ does not mean the public trial right is automatically implicated. ... Relevant cases, statutes, and court rules show that, as a matter of experience, Russell’s public trial right was not implicated when the judge, Russell, and the attorneys held work sessions to review juror questionnaires for hardship.

Russell, 183 Wn.2d at 43. These decisions illustrate that justices of the supreme court now recognize that determining the scope of the public trial right is not a simple matter. History, logic, statutes, rules, and subtle distinctions will factor into the determination of whether a public trial violation occurred, and of whether that violation might be cognizable on appeal or collateral attack.

This continued struggle in the supreme court – eight years after the divided opinions in Frawley and Duckett were decided – strongly suggests that application of Orange to private voir dire on sensitive subjects was hardly a foregone conclusion in 2006. It is apparent that judges in trial courts and on the court of appeals, as well as several justices of the supreme court, did not see Orange as dictating a new trial in all private voir dire cases where Bone-Club findings were not made. Time has also

shown that determining the scope of the public trial right, the manner in which that right must be preserved, and the remedy if it is violated, are not as simple for litigants and courts as the court in Morris – deciding the case without adequate briefing – believed.

McKee’s deficient performance claim must, however, be evaluated against the backdrop of the law as it appeared in July, 2006. If the issue is viewed in that context, it should be apparent that Ms. Dana Nelson can be found “ineffective” only if one looks through the distorting lens of hindsight.

This case was tried in 2005, the appeal was filed in June, 2005 and an opinion was filed by this Court in July, 2007. At that time, most courts conducted some form of private voir dire without first making special findings to justify the “closure” and no appellate court had disapproved this practice. Orange reversed and remanded for retrial in a case where closure was obviously improper, where trial counsel objected, and where Orange’s family was clearly harmed. The Frawley and Duckett decisions from Division Three extending Orange to this new context were not filed until September and November of 2007, and both of those decisions included a dissenting opinion.

In the ensuing years, countless published and unpublished appellate decisions appeared, many with a divided court. Application of

the Orange holding and remedy to private inquiry of jurors – especially where defense counsel invited or tolerated the practice and benefitted from it – was a new and unexpected extension of the public trial right and remedy. Many appellate judges (and several supreme court justices) have strongly disagreed with it. Appellate counsel is not *constitutionally* ineffective for failing to anticipate such extensions of the law.

Thus, applying the usual test from Strickland, it cannot be said that McKee has overcome the strong presumption that appellate counsel Dana Nelson was competent in April of 2006 when she filed a brief that did not include a challenge to voir dire. It was reasonable for her to believe for any number of reasons that a challenge to the trial court’s process would be fruitless. The process was widely accepted and McKee’s trial lawyer appeared to invite it, and the claim would have been, by any standard applied in 2006, deemed waived pursuant to RAP 2.5(a), and it may not have appeared to appellate counsel that there was really a “closure” of the court and, perhaps most importantly, appellate counsel would reasonably have recognized that McKee benefitted from the procedure, so it might seem odd to challenge on appeal a procedure that benefitted the client at trial. Moreover, counsel raised and competently briefed several plausible arguments on appeal, including two that resulted in partial victories.

The mechanistic approach to finding deficient performance used in both Orange and Morris are irreconcilable with Strickland. This court need not apply that mechanistic approach to the question whether private inquiry of jurors should have been raised by appellate counsel because, unlike the unceremonious exclusion of Orange's family by the trial court, a reasonable appellate lawyer in 2006 may not have thought that a challenge to private voir dire would be unsuccessful under these facts.

D. CONCLUSION

For the foregoing reasons, McKee's personal restraint petition must be dismissed.

DATED this 5th day of January, 2016.

Respectfully submitted,

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APPENDIX A

HEARD

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WASHINGTON SUPREME COURT NO. 72485-7

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RECEIVED
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STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT

OF

CHRISTOPHER A. ORANGE,

Petitioner.

CLERK

BY C. J. MERRITT

2003 MAR 24 P 3:38

STATE OF WASHINGTON
SUPREME COURT

FILED

PETITIONER MR. ORANGE'S POST-REFERENCE HEARING
SUPPLEMENTAL BRIEF

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WASHINGTON SUPREME COURT NO. 72485-7

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT

OF

CHRISTOPHER A. ORANGE,

Petitioner.

PETITIONER MR. ORANGE'S SUPPLEMENTAL BRIEF

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SUPREME COURT

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WASHINGTON SUPREME COURT NO. 72485-7
CA No. 19959-2-III

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT
OF
CHRISTOPHER A. ORANGE,
Petitioner.

MOTION FOR DISCRETIONARY REVIEW

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NO.

72485-7

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

IN RE THE PERSONAL RESTRAINT OF
CHRISTOPHER A. ORANGE,
Petitioner.

OPENING BRIEF OF PETITIONER
IN SUPPORT OF PERSONAL RESTRAINT PETITION

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<u>State v. Vike,</u> 125 Wn.2d 407, 885 P.2d 824 (1994)	43
<u>State v. Vladovic,</u> 99 Wn.2d 413, 662 P.2d 853 (1983)	28, 38
<u>State v. Wilson,</u> 125 Wn.2d 212, 883 P.2d 320 (1994)	21, 22, 39
<u>Strickland v. Washington,</u> 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	35, 43
<u>United States v. Cook,</u> 45 F.3d 388 (10th Cir. 1995)	56
<u>United States v. Dixon,</u> 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993)	28
<u>United States v. Kissick,</u> 69 F.3d 1048 (10th Cir. 1995)	56
<u>United States v. McLaughlin,</u> 164 F.3d 1 (D.C. Cir. 1998), <u>cert. denied,</u> 119 S.Ct. 1485 (1999)	32, 33, 34
<u>Waller v. Georgia,</u> 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)	52, 53, 54

STATUTES

D.C. Code §§ 22-501 and 22-3203	32
D.C. Code §§ 22-504.1 and 22-3202	32

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there was no dispute at trial about the fact that he fired the shots that killed Ms. McClure and injured Mr. Walker. The only dispute involved whether he saw Mr. Walker reach for his gun first and, hence, whether Mr. Walker then drew his own gun in self-defense thereafter. Failure to request a proper self-defense instruction in this situation therefore prejudiced the single defense that Mr. Orange advanced. There was no conceivable tactical purpose for trial counsel's failure to request a proper self-defense instruction. The elements of ineffective assistance of counsel are therefore satisfied in this case.

B. Ineffective Assistance of Appellate Counsel

A criminal defendant is entitled to effective assistance of counsel on his first direct appeal.⁴⁰ Appellate counsel's failure to raise clearly meritorious issues constitutes ineffective assistance of counsel.⁴¹ Appellate counsel's failure to raise

⁴⁰Evitts v. Lucey, 469 U.S. 387, 395-96, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (first appeal as of right not adjudicated in accord with due process if appellant lacks effective assistance of counsel, whether retained or appointed); McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 436, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1987).

⁴¹In United States v. Kissick, 69 F.3d 1048, 1055 (10th Cir. 1995), for example, the Tenth Circuit explained, "In [United States v. Cook] [45 F.3d 388 (10th Cir. 1995)], we held that an attorney who had

the meritorious issues listed here -- the ones that were apparent from the record, and needed no additional factual development -- constituted ineffective assistance. There was no conceivable strategy involved in withholding these claims.

VII. CONCLUSION

For all of the foregoing reasons, the conviction and sentence in this case should be reversed.

DATED this 20th day of February, 2001.

Respectfully submitted,



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failed to raise an issue on appeal that was (in Judge Easterbrooks' colorful parlance) "a dead-bang winner" had provided ineffective assistance under Strickland. "Cook, 45 F.3d at 395 (citations omitted).

OPENING BRIEF IN SUPPORT OF PRP - 57

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FILE NO.

72485-1

NO. 19959-2-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

IN RE THE PERSONAL RESTRAINT OF
CHRISTOPHER A. ORANGE,
Petitioner.

REPLY BRIEF OF PETITIONER

Sheryl Gordon McCloud
1301 Fifth Avenue, Suite 3401
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(206) 224-8777
Attorney for Petitioner
Christopher A. Orange

blame the parties for this failure: "The court, while it may not have entered any written findings on its own motion, and none were presented by either the State or Petitioner" Response, p. 22. The parties, however, *opposed* closure. The parties' failure to submit proposed findings in support of closure cannot, therefore, be read as an endorsement of the trial court's findings, but must be read as opposition to it! As we explained in the Opening Brief, this absence of findings alone appears to constitute sufficient error to necessitate reversal.¹⁷

V. THE STATE FAILS TO RESPOND TO THE CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE THE DOUBLE JEOPARDY, SRA, AND COURTROOM CLOSURE ISSUES.

The state apparently acknowledges that a criminal defendant is entitled to effective assistance of

¹⁷See Press-Enterprise II, 478 U.S. 1, 13-14, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("proceedings cannot be closed unless specific, on the record findings are made" which show closure essential and narrowly tailored); Waller, 467 U.S. at 45, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (findings must be sufficient to support closure, may not be "broad and general"); Press Enterprise I, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (findings must be sufficiently specific for appellate review); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public").

counsel on his first direct appeal,¹⁸ and that appellate counsel's failure to raise meritorious issues constitutes ineffective assistance. We say that the state apparently concedes this point, because we see no argument in opposition.

In the Opening Brief, we argued that defense appellate counsel's failure to raise the meritorious issues listed there -- the ones that were apparent from the record, and needed no additional factual development -- constituted ineffective assistance, because there was no conceivable strategy involved in withholding these claims. The state does not dispute, or discuss, that point either. The issues that were clear from the record and, hence, that were available to be raised on direct appeal, include the double jeopardy bar against charging both murder and attempted murder using the same acts and intent; the improper consecutive sentencing on the murder and attempted murder as "separate and distinct" criminal

¹⁸Evitts v. Lucey, 469 U.S. 387, 395-96, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (first appeal as of right not adjudicated in accord with due process if appellant lacks effective assistance of counsel, whether retained or appointed); McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 436, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1987).

conduct; and the closure of the courtroom during voir dire.

The state's failure to make any argument in opposition to these claims essentially concedes them. RAP 10.3(a)(5), RAP 10.3(b); State v. Fortun, 94 Wn.2d 754, 626 P.2d 504 (1980) (failure to provide argument and citation of legal authority precludes appellate consideration of error).

VI. CONCLUSION

For all of the foregoing reasons, the personal restraint petition should be granted.

DATED this 10th day of May, 2001.

Respectfully submitted,

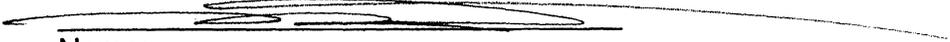

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Dana Nelson, the attorney for the petitioner, at Nelsond@nwattorney.net, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in Re Personal Restraint of Jeffrey Robert McKee, Cause No. 67484-6, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 5 day of January, 2016.


Name:
Done in Seattle, Washington