

FILED
COURT OF APPEALS
JAN 21 2011

COURT OF APPEALS

No. 37238-0-#
STATE OF WASHINGTON
BY: [Signature]

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

IN RE THE RESTRAINT OF:

DAN STOCKWELL,

Petitioner.

OPENING BRIEF OF PETITIONER

Judgment in Kitsap County Superior Court No. 03-1-01319-4
The Hon. Karlynn Haberly, Presiding

NEIL M. FOX
WSBA No 15277
Cohen & Iaria
1008 Western Ave. Suite 302
Seattle WA 98104

Phone: 206-624-9694
Fax: 206-624-9691
e-mail: nmf@cohen-iarria.com

ORIGINAL

TABLE OF CONTENTS

| | <i>Page</i> |
|--|-------------|
| A. <u>ASSIGNMENTS OF ERROR</u> | 1 |
| B. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> | 2 |
| C. <u>STATEMENT OF FACTS</u> | 4 |
| D. <u>ARGUMENT</u> | 4 |
| 1. <u>The 1986 Conviction is Not Comparable to a Most Serious Offense</u> | 4 |
| a. <u>The Supreme Court Was Wrong in its Comparability Analysis</u> | 6 |
| b. <u>The Supreme Court’s Decision Violated Mr. Stockwell’s Constitutional Rights</u> | 22 |
| 2. <u>The Conviction Should be Vacated Because of Constitutional Errors in Jury Selection</u> | 26 |
| a. <u>The Court Improperly Closed Part of the Voir Dire Proceedings</u> | 26 |
| b. <u>The Court Improperly Used Different Standards to Decide State and Defense Challenges for Cause</u> | 32 |
| i. <i>Failure to Follow the Statutory Framework</i> | 39 |
| ii. <i>Other Constitutional Considerations</i> | 45 |
| iii. <i>Gunwall</i> | 51 |

| | | |
|----|---|----|
| 1. | <u>Textual Language</u> | 52 |
| 2. | <u>Differences in Text</u> | 53 |
| 3. | <u>Constitutional History</u> | 54 |
| 4. | <u>Pre-Existing State Law</u> | 55 |
| 5. | <u>Structural Differences</u> | 57 |
| 6. | <u>Matters of Particular State Interest</u> | 58 |
| 7. | <u>Summary</u> | 58 |
| 3. | <u>The Trial Court Erred When It Admitted the Prosecutor’s Investigator’s Notes as Trial Exhibits and Sent Them To the Jury</u> | 59 |
| 4. | <u>Mr. Stockwell’s Appellate Attorney Was Ineffective</u> ... | 62 |
| E. | <u>CONCLUSION</u> | 64 |

TABLE OF CASES

| | Page |
|---|-------------------|
| <i>Washington Cases</i> | |
| <u>Brady v. Fibreboard Corp.</u> , 71 Wn. App. 280, 857 P.2d 1094 (1993) . . . | 41 |
| <u>Erection Co. v. Department of Labor and Industries</u> , 121 Wn.2d 513, 852 P.2d 288 (1993) | 44 |
| <u>In re Andress</u> , 147 Wn.2d 602, 56 P.3d 981 (2002) | 20 |
| <u>In re Evans</u> , 154 Wn.2d 438, 114 P.3d 627 (2005) | 7 |
| <u>In re Frampton</u> , 45 Wn. App. 554, 726 P.2d 486 (1986) | 62 |
| <u>In re Gentry</u> , 137 Wn.2d 378, 972 P.2d 1250 (1999) | 5 |
| <u>In re Holopeter</u> , 52 Wash. 41, 100 Pac. 159 (1909) | 15,16,19 |
| <u>In re Lavery</u> , 154 Wn.2d 249, 111 P.3d 837 (2005) | 7 |
| <u>In re Maxfield</u> , 133 Wn.2d 332, 945 P.2d 196 (1997) | 21,64 |
| <u>In re Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004) | 26, 28, 29, 31,64 |
| <u>In re Thompson</u> , 141 Wn.2d 712, 10 P.3d 380 (2000) | 9,23 |
| <u>Nelson v. Carlson</u> , 48 Wash. 651, 94 Pac. 477 (1908) | 13 |
| <u>Pasco v. Mace</u> , 98 Wn.2d 87, 653 P.2d 618 (1982) | 53,54,55 |
| <u>McMahon v. Carlisle-Pennell Lumber Co.</u> , 135 Wash. 27, 236 P. 797 (1925) | 56 |
| <u>Roche Fruit Co. v. Northern Pac. Ry.</u> , 18 Wn.2d 484, 139 P.2d 714 (1943) | 40 |

| | |
|---|---------------------------|
| <u>Smith v. Kent</u> , 11 Wn. App. 439, 523 P.2d 446 (1974) | 54 |
| <u>State v. Bailey</u> , 52 Wn. App. 42, 757 P.2d 541 (1988), <i>aff'd on other grounds</i> , 114 Wn.2d 340, 787 P.2d 1378 (1990) | 10,23 |
| <u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007) | 32 |
| <u>State v. Boiko</u> , 138 Wn. App. 256, 156 P.3d 934 (2007) | 54 |
| <u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995) | 28,29,30 |
| <u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2003) | 5,20 |
| <u>State v. Duckett</u> , ___ Wn. App. ___, ___ P.3d ___ (25614-6-III, 11/27/07) | 31 |
| <u>State v. Fire</u> , 145 Wn.2d 152, 34 P.3d 1218 (2001) | 3,30,37,38,39,51,55,56,57 |
| <u>State v. Gore</u> , 101 Wn.2d 481, 681 P.2d 481 (1984) | 25 |
| <u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986) | 3,51,52,57,58 |
| <u>State v. Hodgson</u> , 44 Wn. App. 592, 722 P.2d 1336 (1986), <i>aff'd on other grounds</i> , 108 Wn.2d 662, 740 P.2d 848 (1987) .. | 10,12,19,21,22 |
| <u>State v. Larkin</u> , 130 Wn.2d 531, 228 Pac. 229 (1924) | 39 |
| <u>State v. May</u> , 59 Wash. 414, 109 Pac. 1026 (1910) | 18 |
| <u>State v. Momah</u> , ___ Wn.App. ___, ___ P.3d ___ (No. 58004-3-I, 11/13/07) | 29 |
| <u>State v. Monroe</u> , 107 Wn. App. 637, 27 P.3d 1249 (2001) | 61 |
| <u>State v. Moody</u> , 7 Wash. 395, 35 P. 132 (1893) | 56 |
| <u>State v. Parnell</u> , 77 Wn.2d 503, 463 P.2d 134 (1969) | 55,56 |

| | |
|---|---------------|
| <u>State v. Rutten</u> , 13 Wash. 203, 43 P. 30 (1895) | 56 |
| <u>State v. Stentz</u> , 30 Wash. 134, 70 P. 241 (1902) | 56 |
| <u>State v. Stockwell</u> , 159 Wn.2d 394, 150 P.3d 82 (2007) | <i>passim</i> |
| <u>State v. Thieftult</u> , 160 Wn.2d 409, 158 P.3d 580 (2007) | 6,7 |
| <u>State v. Tingdale</u> , 117 Wn.2d 595, 817 P.2d 850 (1991) | 40,41,45,57 |
| <u>State v. Vreen</u> , 143 Wn.2d 923, 26 P.3d 236 (2001) | 49,50,51 |
| <u>State v. Williams</u> , 132 Wash. 40, 231 Pac. 21 (1924) | 38 |
| <u>State ex rel. Schillberg v. Everett District Justice Court</u> , 90 Wn.2d 794, 585 P.2d 1177 (1978) | 44 |

Federal and Other State Cases

| | |
|---|-----------|
| <u>Almendarez-Torres v. United States</u> , 523 U.S. 224 (1998) | 7 |
| <u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000) | 7 |
| <u>Batson v. Kentucky</u> , 476 U.S. 79 (1986) | 339,36,50 |
| <u>Blakely v. Washington</u> , 542 U.S. 2986 (2004) | 7 |
| <u>Bouie v. City of Columbia</u> , 378 U.S. 347 (1964) | 24,25 |
| <u>Busby v. State</u> , 894 So.2d 88 (Fla. 2004) | 49,58 |
| <u>Coffin v. United States</u> , 156 U.S. 432 (1895) | 32,33 |
| <u>Cohens v. Virginia</u> , 19 U.S. 265 (1821) | 55 |
| <u>Duren v. Missouri</u> , 439 U.S. 357 (1979) | 39,46 |
| <u>Evitts v. Lucey</u> , 469 U.S. 387 (1985) | 63 |

| | |
|---|-------------|
| <u>In re Marriage of J.M.H.</u> , 143 P.3d 1116 (Colo. App. 2006) | 14 |
| <u>In re Winship</u> , 397 U.S. 358 (1970) | 32 |
| <u>Michael M. v. Superior Court</u> , 450 U.S. 464 (1981) | 14 |
| <u>People v. LeFebre</u> , 5 P.3d 295 (Colo. 2000) | 48,49,50,58 |
| <u>Powers v. Ohio</u> , 499 U.S. 400 (1991) | 39,46 |
| <u>Press-Enterprise Co. v. Superior Court</u> , 464 U.S. 501 (1984) (<i>Press-Enterprise I</i>) | 26,27,29 |
| <u>Press-Enterprise Co. v. Superior Court</u> , 478 U.S. 1 (1986) (<i>Press-Enterprise II</i>) | 27,29 |
| <u>Rabe v. Washington</u> , 405 U.S. 313 (1972) | 25 |
| <u>Ross v. Oklahoma</u> , 487 U.S. 81(1988) | 49 |
| <u>State ex rel. Beacon Journal Publishing Co. v. Bond</u> , 98 Ohio St. 3d 146, 781 N.E.2d 180 (2002) | 29 |
| <u>State v. Santelli</u> , 159 Vt. 442, 621 A.2d 222 (Vt. 1992) | 49 |
| <u>State v. Sedlack</u> , 246 Kan. 305, 787 P.2d 709 (1990) | 15,18 |
| <u>United States v. Annigoni</u> , 96 F.3d 1132 (9th Cir. 1996) (en banc) | 50 |
| <u>United States v. Martinez-Salazar</u> , 528 U.S. 304 (2000) | 37,48 |
| <u>United States v. Skurdal</u> , 341 F.3d 921 (9 th Cir. 2003) | 63 |
| <u>Uttecht v. Brown</u> , ___ U.S. ___, 127 S. Ct. 2218 (2007) | 37 |
| <u>Victor v. Nebraska</u> , 511 U.S. 1 (1994) | 32 |
| <u>Witherspoon v. Illinois</u> , 391 U.S. 510 (1968) | 46 |

Statutes, Constitutional Provisions, and Rules

| | |
|---|---------------|
| CrR 6.4 | <i>passim</i> |
| ER 801 | 60 |
| Laws of Washington Territory, 1854, 1 st sess., p. 80, § 33 | 17 |
| Laws of 1909, p. 943, § 184 | 17 |
| Laws of 1963, ch. 230, § 1 | 16 |
| Laws of 1975, § 1, ch. 14 (SHB 208) | 7,9 |
| Laws of 1983, ch. 118 | 20 |
| Laws of 1988, ch. 145, § 2 (SHB 1333) | 8,10,19 |
| Laws of 2001, ch. 7, § 2(31)(b)(ii) | 5,23 |
| Rem & Bal. Code, 1910, Title XIV, Ch. VI, § 2436 | 17,18 |
| RCW 4.44.170 - .190 | 34,35,41 |
| RCW 26.04.010 | 11 |
| RCW 26.04.020 | 12 |
| Former RCW 9.79.020 (1973) | 17 |
| RCW 9.94A.030 | 4 |
| Former RCW 9A.44.030 (Laws of 1975, 1 st Ex. Sess., ch. 14, § 3) | 9 |
| RCW 9A.44.030 (Laws of 1988, ch. 145, § 20) | 10 |
| Former RCW 9A.44.070 | <i>passim</i> |

| | |
|---|---------------|
| RCW 9A.44.073 | <i>passim</i> |
| Former RCW 9A.44.080 | 18 |
| Former RCW 9A.44.090 | 18 |
| Former RCW 9A.44.100 | 22 |
| Remarks of Rep. James A. Andersen, <i>House Journal</i> , Feb. 28, 1963, at 675 | 16 |
| Statutes of Westminster (3 Edw. 1, ch. 13 (1275); 13 Edw. 1, ch. 34 (1285) | 14 |
| United Nations General Assembly of the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, Resolution 1763 A (XVII) of 7 November 1962, entry into force 9 December 1964 | 14 |
| U.S. Const. art. 1, § 10 | 24 |
| U.S. Const. art. III, § 2 | 52,53 |
| U.S. Const. amend. 1 | 26,30 |
| U.S. Const. amend. 6 | <i>passim</i> |
| U.S. Const. amend. 14 | <i>passim</i> |
| Wash. Const. art. 1, § 3 | <i>passim</i> |
| Wash. Const art. 1, § 10 | 27,28,30 |
| Wash. Const. art. 1, § 21 | <i>passim</i> |
| Wash. Const. art. 1, § 22 | <i>passim</i> |

Other Authority

Hall, *General Principles of Criminal Law* (2d ed. 1960) 24,25

A. Hill, “Revealed: The Child Brides Who are Forced to Marry in Britain,”
Observer, February 22, 2004,
[http:// observer.guardian.co.uk/print/0,,486419-102285.00.html](http://observer.guardian.co.uk/print/0,,486419-102285.00.html) . . . 13,14

A. Krishnakumar & T.K. Rajalakshmi, “Child Brides of India,” *Frontline*,
July 2-15, 2005 [http://www.hinduoanet.com/fline/fl2214/stories/](http://www.hinduoanet.com/fline/fl2214/stories/20050715006200400.htm)
[20050715006200400.htm](http://www.hinduoanet.com/fline/fl2214/stories/20050715006200400.htm) 14

Note, “Forcible Rape in Washington – Criminal and Civil Sanctions,”
19 *Gon.L.Rev.* 363, 373-74 (1983/84) 20

P. Salopek, “Early Marriage Survives in the U.S.,” *Chicago Tribune*,
December 12, 2004 14

R. Young, “An Evaluation of Washington Marriage Laws,” 12 *Wash. L.*
Rev. 112, 117 (1937) 15

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it considered the 1986 Pierce County conviction for first degree statutory rape under former RCW 9A.44.070 as a predicate for a life sentence, the prior conviction not being comparable to the crime of first degree rape of a child under RCW 9A.44.073.

2. The Washington State Supreme Court's decision in Mr. Stockwell's own case violated federal and state due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, by retroactively changing the elements of former RCW 9A.44.070.

3. The trial court erroneously closed part of the voir dire proceedings in violation of U.S. Const. amends. 1 & 6 and Wash. Const. art. 1, §§ 10 & 22.

4. The trial court erred when it denied Mr. Stockwell's challenge for cause to Juror Nos. 2 and 39, and when it granted the State's challenge for cause to Juror No. 56.

5. The trial court erroneously used a different standard for the State's challenges for cause than for the defense challenges for cause, thereby denying Mr. Stockwell due process of law and the right to a jury

trial under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, §§ 3, 21 & 22.

6. The trial court failed to follow the procedures set out in CrR 6.4 for conducting trials on challenges for cause.

7. The trial court erred when it admitted as substantive evidence Exhibits 1 and 2¹ and sent them to the jury for unrestricted viewing during deliberations.

8. Mr. Stockwell received ineffective assistance of counsel on direct appeal, in violation of due process under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, and the right to counsel and an appeal under Wash. Const. art. 1, § 22.

9. Mr. Stockwell assigns error to the judgment and sentence.
Ex. 1.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is former RCW 9A.44.070 comparable to RCW 9A.44.073?

2. Did the decision in State v. Stockwell, 159 Wn.2d 394, 150 P.3d 82 (2007), violate due process of law under U.S. Const. amend. 14

¹ Designated as Exhibits 12 and 13 in this PRP.

and Wash. Const. art. 1, § 3, by retroactively changing the elements of the crime of first degree statutory rape?

3. Did the trial court properly seal, and withhold from the public, the written questionnaires of the jurors?

4. Did the trial court use a standard for excusing jurors for cause that excluded a juror who would have applied the presumption of innocence, but did not exclude two jurors who began the case favoring the State?

5. Does the fact that the jurors who ended up serving on the jury were fair and unbiased mean that Mr. Stockwell was remediless for the violation of his rights?

6. Did the trial court follow the dictates of CrR 6.4 for conducting trials on challenges for cause?

7. Where the trial court failed follow the procedures set out in the rules for picking a jury, can the trial court's use of the wrong legal standard for determining challenges for cause be written off as harmless?

8. Would an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) lead to a result different than that which the Supreme Court reached in State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001)?

9. Should the trial court have sent to the jury, for unrestricted and unsupervised reading, Exhibits 1 & 2 – the prosecutor’s child interviewer’s notes of her interviews with the two complaining witnesses?

10. Was Mr. Stockwell’s counsel on appeal ineffective for not raising issues regarding voir dire on direct appeal and for inadequately briefing the issues regarding comparability of the prior convictions?

C. STATEMENT OF FACTS

The facts of this case are set out in detail in the Personal Restraint Petition and are incorporated herein by reference.

D. ARGUMENT

1. The 1986 Conviction is Not Comparable to a Most Serious Offense

Whether the life sentence in this case was valid in part turns on whether or not the 1986 Pierce County conviction for statutory rape in the first degree under former RCW 9A.44.070(1) was comparable to a “second strike” offense listed in RCW 9.94A.030(b)(i).² On direct appeal,

² RCW 9.94A.030(32)(b)(i) & (ii)(2002) defined “persistent offender” as an offender who has been convicted of one of a number of sex offenses, including child molestation in the first degree, and “has, before the commission of the offense under (b)(I) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(I). of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(I) of this subsection.”

(continued...)

Mr. Stockwell contested the trial court's determination that the 1986 conviction was comparable to the crime of rape of a child in the first degree under RCW 9A.44.073(1), focusing on the additional element of nonmarriage in the latter statute. The Supreme Court rejected this argument, holding that "[n]onmarriage is an implied element of the crime of first degree statutory rape," and thus the two crimes are comparable. State v. Stockwell, 159 Wn.2d at 399.

Normally, issues raised on direct appeal are not reviewed in collateral petitions unless the ends of justice would be served by reexamining the issue. In re Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). Here, Mr. Stockwell asks this Court to review the comparability issue on collateral review for two reasons.

First, with all due respect, the Supreme Court's decision was wrong and is premised on a misunderstanding of the elements of the two offenses. Proper briefing by Mr. Stockwell's appellate counsel would have shown this to be the case. Thus, ineffective assistance of counsel on appeal in violation of due process of law, the right to counsel and the right

² (...continued)

This comparability section of the statute was added in 2001 after a court declined to infer one. Laws of 2001, ch. 7, § 2(31)(b)(ii). See State v. Delgado, 148 Wn.2d 723, 725, 63 P.3d 792 (2003).

to an appeal under U.S. Const. amend. 14 and Wash. Const. art. 1, §§ 3 & 22, is a reason to revisit this issue on collateral review.

Second, the Washington State Supreme Court's decision itself, by changing the elements of an offense retroactively, violated due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3. This is a new violation of the United States and Washington Constitutions that did could not have raised in the direct appeal.

a. The Supreme Court Was Wrong in its Comparability Analysis

A comparability analysis requires a two-part examination of the offenses:

A court must first query whether the foreign offense is legally comparable--that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable--that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute. [citation omitted] In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt.

State v. Thieftult, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). Under the requirements of the Sixth Amendment's jury trial right, the Fourteenth

Amendment's due process clause, Blakely v. Washington, 542 U.S. 2986 (2004) and Apprendi v. New Jersey, 530 U.S. 466 (2000), a sentencing court cannot determine any disputed facts concerning the prior conviction, without a jury trial and a reasonable doubt standard. In re Lavery, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005).³

The elements of the statutory rape statute, former RCW 9A.44.070, are clearly different than the elements of first degree statutory rape under RCW 9A.44.073.⁴ Former RCW 9A.44.070(1) provided:

A person over thirteen years of age is guilty of
statutory rape in the first degree when the person engages in

³ Because Mr. Stockwell's case was not final and was still on direct review when Blakely issued, there is no question but that Blakely applies to Mr. Stockwell's case. In re Evans, 154 Wn.2d 438, 443-44, 114 P.3d 627 (2005).

The trial court, however, explicitly engaged in the type of judicial fact-finding that Blakely prohibited, looking beyond the guilty plea statement and judgment from the 1986 conviction to find that Mr. Stockwell's conduct in that case was comparable to the crime of rape of a child in the first degree. RP 670-72. The Supreme Court avoided this issue by finding legal comparability. However, if the statutes are not legally comparable, factual comparability cannot be judicially determined without violating Blakely and U.S. Const. amends. 6 & 14.

Additionally, prior decisions to the contrary, Mr. Stockwell asks this Court to hold that the jury trial right of U.S. Const. amend. 6 and due process under U.S. Const. amend. 14 require that the fact of a prior conviction and the identity of the defendant be proven to the jury with a reasonable doubt standard. This Court should not follow arguably contrary decisions in State v. Thieftult, *supra*, & Almendarez-Torres v. United States, 523 U.S. 224 (1998).

⁴ Former RCW 9A.44.070 was adopted in 1975 as part of a thorough rewriting of Washington's laws on sexual assault. Laws of 1975, § 1, ch. 14 (SHB 208).

sexual intercourse with another person who is less than eleven years old.

RCW 9A.44.073(1),⁵ on the other hand, provides:

A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

These two statutes differ in other significant ways. At the outset, the age of the victim in the statutory rape statute is a person under *11* years old, while the age of the victim in the rape of a child statute must be less than *12* years of age. For rape of a child in the first degree, the age of the perpetrator need only be *24 months older* than the victim, whereas the age of the perpetrator in the statutory rape statute must be *over 13 years of age*. Apart from issues about comparing months to years (i.e. is a month 30 days or 31 days?), it is apparent that someone who was one day shy of 14 years of age (13 years and 364 days) who had sex with another child who was one day shy of 12 (11 years and 364 days) could be guilty of rape of a child in the first degree, but not of statutory rape in the first degree. Similarly, a child who was 11 who had sex with another child who was

⁵ This statute was adopted in 1988, again after a rewriting of the sexual assault statutes. Laws of 1988, ch. 145, §. 2 (SHB 1333).

only nine would be guilty of rape of a child, but not of statutory rape. See In re Thompson, 141 Wn.2d 712, 722, 10 P.3d 380 (2000) (explaining differering age requirements for each statute).

The statutes also have different defenses. Under the statutory rape scheme, there was a defense based upon mistake of age:

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be older based upon declarations as to age by the alleged victim.

Former RCW 9A.44.030 (Laws of 1975, 1st Ex. Sess., ch. 14, § 3). This statute is very different from the current defense statute for rape of a child in the first degree:

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

(3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:

(a) For a defendant charged with rape of a child in the first degree, that the victim was at least twelve, or was less than twenty-four months younger than the defendant. . .

RCW 9A.44.030 (Laws of 1988, ch. 145, § 20).

The older statutory defense was very amorphous and did not require the defendant to have a specific belief as to the alleged victim's age. The post-1988 statute is completely different and explicitly reflects particular alleged victim and offender age requirements for each sex offense.

In addition to these differences, the element of nonmarriage to the rape of a child statute clearly makes the statutes non-comparable. While the Supreme Court in Mr. Stockwell's direct appeal rejected this argument, and implied an element of nonmarriage into the first degree statutory rape statute, this construction is not warranted.

In State v. Stockwell, *supra*, the Supreme Court agreed with Division Two's analysis in State v. Bailey, 52 Wn. App. 42, 46-47, 757 P.2d 541 (1988), *aff'd on other grounds*, 114 Wn.2d 340, 787 P.2d 1378 (1990), disagreed with Division One's analysis in State v. Hodgson, 44

Wn. App. 592, 599, 722 P.2d 1336 (1986), *aff'd on other grounds*, 108 Wn.2d 662, 740 P.2d 848 (1987), and held that “it is simply inconceivable that the legislature would expect that children 10 years old or less would marry.” Stockwell, 159 Wn.2d at 399.

The Supreme Court reached this conclusion without the benefit of careful briefing by Mr. Stockwell’s attorney on direct appeal, who never actually analyzed the legislative intent. Yet, a review of the evolution of Washington’s marriage and sexual abuse statutes would have shown that in 1975, when the first degree statutory rape statute was adopted, the Legislature anticipated that children under the age of 11 could be legally married, but adopted legislation that would have prevented them from having sexual intercourse with their spouses who were over 13 years of age.

RCW 26.04.010 currently provides:

(1) Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable.

(2) Every marriage entered into in which either the husband or the wife has not attained the age of seventeen years is void except where this section has been waived by a superior court judge of the county in which one of the parties resides on a showing of necessity.

As the dissent in State v. Stockwell, 159 Wn.2d at 401 (Sanders, J., dissenting) pointed out, and as Division One held in Hodgson, this statute specifically allows for marriages for individuals under the age of 17 with judicial permission “on a showing of necessity.”

Notably, child marriages are not prohibited in RCW 26.04.020, which states:

(1) Marriages in the following cases are prohibited:

(a) When either party thereto has a wife or husband living at the time of such marriage;

(b) When the husband and wife are nearer of kin to each other than second cousins, whether of the whole or half blood computing by the rules of the civil law; or

(c) When the parties are persons other than a male and a female.

(2) It is unlawful for any man to marry his father's sister, mother's sister, daughter, sister, son's daughter, daughter's daughter, brother's daughter or sister's daughter; it is unlawful for any woman to marry her father's brother, mother's brother, son, brother, son's son, daughter's son, brother's son or sister's son.

(3) A marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection (1)(a), (1)(c), or (2) of this section.

§ 3 of this statute specifically recognizes marriages that are valid in other jurisdictions to be valid in Washington if they are not prohibited under the other sections of the statute. The prohibitions only reach marriages between close relatives, marriages between same-sex couples, and polygamous marriages. The prohibitions do not include child marriages, and, thus, the plain reading of the statute is that Washington will recognize a marriage involving children if such a marriage is valid in another jurisdiction.⁶

An analysis of the plain language of the statute, though, is just the beginning. In 1975, when former RCW 9A.44.070 was adopted, it was not inconceivable that the young children could be married in other jurisdictions.

Culturally and historically, the issue of child marriages has been controversial. In some cultures, it is possible, if not common, for young children, even below the age of puberty, to be married off either to other children or to adults.⁷ The persistence of the problem of child marriages

⁶ With some exceptions, Washington historically has recognized marriages that are valid in the jurisdiction where they are contracted and consummated under the principle of *lex loci contractus*. Nelson v. Carlson, 48 Wash. 651, 654, 94 Pac. 477 (1908).

⁷ See e.g. A. Hill, "Revealed: The Child Brides Who are Forced to Marry in
(continued...)

in various parts of the world has led to the adoption by the United Nations General Assembly of the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, Resolution 1763 A (XVII) of 7 November 1962, entry into force 9 December 1964.⁸

In the Anglo-American tradition, the statutory rape statutes had their origins in “the Statutes of Westminster enacted during the reign of Edward I at the close of the 13th century (3 Edw. 1, ch. 13 (1275); 13 Edw. 1, ch. 34 (1285)). The age of consent at that time was 12 years, reduced to 10 years in 1576 (18 Eliz. 1, ch. 7, § 4). This statute was part of the common law brought to the United States.” Michael M. v. Superior Court, 450 U.S. 464, 494 n.9 (1981) (Brennan, J., dissenting). See also In re Marriage of J.M.H., 143 P.3d 1116, 1119 (Colo. App. 2006) (“Under English common law, children below the age of seven were incapable of marrying. After that age they could marry, but the marriage was voidable

⁷ (...continued)

Britain,” *Observer*, February 22, 2004 (<http://observer.guardian.co.uk/print/0,,486419-102285,00.html>); P. Salopek, “Early Marriage Survives in the U.S.,” *Chicago Tribune*, December 12, 2004; A. Krishnakumar & T.K. Rajalakshmi, “Child Brides of India,” *Frontline*, July 2-15, 2005 (<http://www.hinduonnet.com/fline/fl2214/stories/20050715006200400.htm>).

⁸ Notably, the United States signed this convention, but never ratified it.

until they became able to consummate it, which the law presumed to be at age fourteen for males and twelve for females.”).

Child marriages have persisted until modern times even in American jurisdictions. See State v. Sedlack, 246 Kan. 305, 787 P.2d 709 (1990) (indecent liberties charge against defendant who was in common law marriage with fourteen year old girl dismissed because of element of nonmarriage – court noted that Kansas recognized common law marriages of girls who were as young as twelve years of age). In Washington State, too, up until the not-too-distant past, the common law age for marriage was twelve for females and fourteen for males. R. Young, “An Evaluation of Washington Marriage Laws,” 12 *Wash. L. Rev.* 112, 117 (1937).

In light of this common law experience, in the early 20th Century, the Washington State Supreme Court specifically held that the prior statute setting minimum ages for marriages applied only the issuance of marriage licenses, and that a marriage between youths under the statutory age (19 and 14) was still valid despite their ineligibility to obtain a license. In re Holopeter, 52 Wash. 41, 100 Pac. 159 (1909). The Holopeter court went so far as to note that even though the laws against sexual intercourse with

females under 18 would seem to apply, they would not apply in a situation where the youths had married. 52 Wash. at 45-46.

In 1963 (only twelve years before former RCW 9A.44.070 was adopted), the Legislature finally changed the common law and specifically stated that marriages of children under 17 were void, except upon judicial waiver. Laws of 1963, ch. 230, § 1.⁹

Even though *Washington* raised the marriage age (in the absence of a judicial waiver), that did not mean that Washington would not recognize valid child marriages from other jurisdictions, or that adults who married children and had sex with them were guilty of crimes. The sexual assault statute which preceded the 1975 statutory rape statute, Carnal Knowledge, required that the State prove beyond a reasonable doubt the element of nonmarriage:

Every male person who shall carnally know and abuse any female child under the age of eighteen years, *not his wife*, and every female person who shall carnally know and abuse any male child under the age of eighteen years, *not her husband*, shall be punished as follows:

⁹ The Legislative history for this statutory change makes it clear that the law was intended to allow for judicial approval of marriages of children under 17 where there was a pregnancy. See Remarks of Rep. James A. Andersen, *House Journal*, Feb. 28, 1963, at 675.

(1) When such an act is committed upon a child under the age of ten years, by imprisonment in the state penitentiary for life;

(2) When such an act is committed upon a child of ten years and under fifteen years of age, by imprisonment in the state penitentiary for not more than twenty years;

(3) When such act is committed upon a child of fifteen years of age and under eighteen years of age, by imprisonment in the state penitentiary for not more than fifteen years.

Former RCW 9.79.020 (1973) (emphasis added).¹⁰

¹⁰ The significance of the element of nonmarriage is also illustrated by the fact that the first statute in Washington Territory on this subject did not contain this element:

Every person who shall unlawfully have carnal knowledge of a woman against her will, or of a female child under twelve years of age, shall be deemed guilty of a rape, and upon conviction thereof, shall be imprisoned in the penitentiary not more than thirty years, nor less than one year, and in prosecutions for such offence, proof of penetration shall be sufficient evidence of the commission thereof.

Laws of Washington Territory, 1854, 1st sess., p. 80, § 33.

The element of nonmarriage was added in 1909, Laws of 1909, p. 943, § 184:

Every person who shall carnally know and abuse any female child under the age of eighteen years, *not his wife*, shall be punished as follows:

(1) When such child is under the age of ten years, by imprisonment in the state penitentiary for life;

(2) When such child is ten and under fifteen years of age, by imprisonment in the state penitentiary for not less than five years.

(3) When such child is fifteen and under eighteen years of age,
(continued...)

That the element of nonmarriage was a “real” element in the old carnal knowledge statute was recognized by various courts, which required proof of this element (although usually noting that the proof could be of the circumstantial nature). See State v. May, 59 Wash. 414, 415, 109 Pac. 1026 (1910) (“While it is the rule that want of the marriage relation is an essential ingredient of the crime, and must be alleged and proved, still it is not absolutely necessary to prove that fact by direct and positive testimony; but, like any other fact, it may be proved by facts and circumstances from which the conclusion may be drawn.”). See also State v. Sedlack, *supra* (if child was in common law marriage, husband could not be prosecuted for having sexual relations with her).

In 1975, only twelve years after changing the laws regarding the age for marriage in Washington, the Legislature removed the element of nonmarriage from the new first degree statutory rape statute (while keeping it in the second and third degree statutes).¹¹ The Legislature

¹⁰ (...continued)

and of previously unchaste character, by imprisonment in the state penitentiary for not more than ten years, or by imprisonment in the county jail for not more than one year.

Rem & Bal. Code, 1910, Title XIV, Ch. VI, § 2436 (emphasis added).

¹¹ Former RCW 9A.44.080 & .090.

obviously understood the history of child marriage, both in Washington State and elsewhere (i.e. internationally), and adopted a statute which made it clear that the Supreme Court's decision in Holopeter – that sex between a child and an adult who was married to her was not a crime – was no longer to be followed. In 1975, the Legislature made it clear that even if a young child was married off either to an older child or to an adult, in some other jurisdiction, that sexual intercourse between the two of them was still illegal.

Thirteen years later, the Legislature, when adopting the 1988 rape of a child statute, returned to previous law and again included an element of nonmarriage. Laws of 1988, ch. 145, § 2 (SHB 133). A review of the legislative history of this change fails to find any specified reason for adopting it, although obviously the holding of State v. Hodgson, *supra*, that indecent liberties was not a lesser included offense of statutory rape because of the element of nonmarriage, would have been on the mind of the legislators. When the Legislature adopted three levels of rape of a child and three levels of child molestation, it clearly adopted parallel statutes, obviously to avoid the problem of lesser included offenses – so that child molestation could be a lesser included offense of rape of a child.

The conscious tinkering with this element by the Legislature must be given effect by the courts, and cannot just be written off as bad drafting. See In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) (giving effect to changes in law in 1975, distinguishing 1975 felony murder statute from prior version); State v. Delgado, supra (refusing to read into pre-2001 statute a comparability analysis for “two strikes” cases). Given the history of child marriages and the legislative history of the various schemes, it cannot be said that the first degree statutory rape statute, in effect from 1975 to 1988, contained within it an implied element of nonmarriage.¹² The Legislature was clear – from 1975 to 1988, even if one was legally married in some other jurisdiction (India, for instance) to a child under 11 years of age, that person could not have sexual intercourse with her. The Supreme Court in Stockwell was wrong when it disregarded this clarity and legislative intent.

¹² In the 1970s and early 1980s, the Legislature was also very concerned with the issue of spousal rape, with the spousal exception for forcible rape ultimately removed from the crimes of first and second degree rape in 1983. Laws of 1983, ch. 118. From the standpoint of 2007, arguments about a spousal exception to rape seem as remote as arguments about slavery. But there was much controversy over the spousal rape issue at the time. See Note, “Forcible Rape in Washington – Criminal and Civil Sanctions,” 19 *Gon.L.Rev.* 363, 373-74 (1983/84). The issue of the inclusion of the element of nonmarriage in the child sexual assault statutes of the same era must be viewed through this lens of the overall spousal rape controversy.

Combined with the other differences in the structures of the two statutes (ages and defenses), this Court should hold that the two crimes – statutory rape in the first degree and rape of a child in the first degree – are not legally comparable, and that it was error to use the 1986 Pierce County conviction as a predicate for a life sentence for the Kitsap County conviction.

None of the legislative history was explored by Mr. Stockwell's attorney in the direct appeal, other than just a reference to Hodgson. The failure to explore the structure and history of the statute and the reasons why nonmarriage as an element was removed from the 1975 statute constituted ineffective assistance of counsel on appeal, in violation of due process under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, and the constitutional right to counsel and an appeal under Wash. Const. art. 1, § 22. See In re Personal Restraint of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997) (court finds ineffective assistance of counsel on appeal and considers issue as if on direct appeal).

b. **The Supreme Court's Decision Violated Mr. Stockwell's Constitutional Rights**

In 1986, when Mr. Stockwell was charged with and convicted of committing the crime of statutory rape in the first degree in 1985, the elements of the crime were set out clearly in the statute:

1. Defendant was over 13.
2. He had sexual intercourse with another.
3. The other person was under the age of 11.

These are the elements that were contained in the information, Ex. 14, and the elements to which Mr. Stockwell admitted in his guilty plea form. Ex. 15. Mr. Stockwell pled guilty on July 29, 1986, and was sentenced on September 26, 1986. The conviction came after the Court of Appeals issued its decision (on July 23, 1986) in State v. Hodgson, *supra*.

In Hodgson, after a bench trial for the charge of statutory rape in the first degree, the judge found the defendants guilty on some counts of indecent liberties, under former RCW 9A.44.100, as "lesser included offenses." The Court of Appeals reversed these convictions because indecent liberties could not be a lesser included offense of first degree statutory rape due to the former crime's element of nonmarriage. 44 Wn. App. at 599-600. Because a person could not be constitutionally convicted

of a crime for which he or she was not charged (under U.S. Const. amend. 6 and Wash. Const. art. 1, § 22), the indecent liberties' counts were vacated.

Thus, as of the date of Mr. Stockwell's conviction, not only was the statute covering Mr. Stockwell's conduct clear as to what the elements were (a statute that had been adopted only a decade earlier and which had changed the law from the prior statute), but there was a published Court of Appeals decision that made it clear that the element of nonmarriage was constitutionally significant, such that a person could not be convicted of indecent liberties if charged with statutory rape in the first degree.¹³

In 2001, the Legislature adopted a statute that allowed for the imposition of a life without parole sentence on an offender who was convicted of certain sex offenses if he or she had a prior sex offense under earlier versions of Washington's statutes that were "comparable" to current offenses. Laws of 2001, ch. 7, § 2. In construing this statute, *over twenty years* after the 1986 conviction, the Supreme Court has now found

¹³ That these were the only elements was apparent also from the Supreme Court's own interpretations of former RCW 9A.44.070. For instance, in State v. Bailey, supra, while the Supreme Court held that the defendant could not challenge the giving of an indecent liberties instruction as a lesser included offense, because of the failure to except to the giving of this instruction, the Court assumed that first degree statutory rape did not have an element of nonmarriage. 114 Wn.2d at 348-49. See also In re Thompson, 141 Wn.2d at 722 (explaining differences between two statutes).

an “implied element” in the 1975 statute – the element of nonmarriage – an element that was specifically removed by the Legislature in 1975 and specifically replaced in 1988. This retroactive changing of the elements violates Mr. Stockwell’s federal constitutional right to due process under U.S. Const. amend. 14 and Wash. Const. art.1, § 3.

In Bouie v. City of Columbia, 378 U.S. 347 (1964), the United States Supreme Court warned of the due process problems where a court construes a statute in an unforeseeable manner to expand criminal liability to cover conduct that previously had not been covered by the statute:

There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. . . . If this view is valid in the case of a judicial construction which adds a "clarifying gloss" to a vague statute [citation omitted] making it narrower or more definite than its language indicates, it must be *a fortiori* so where the construction unexpectedly broadens a statute which on its face had been definite and precise. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. [Citation omitted] The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," Hall, General Principles of

Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. Id., at 61.

378 U.S. at 353-54. See also Rabe v. Washington, 405 U.S. 313 (1972) (reversing conviction under Washington's obscenity statute where Washington Supreme Court had unexpectedly broadened the plain meaning of the statute to include defendant's conduct); State v. Gore, 101 Wn.2d 481, 489, 681 P.2d 481 (1984).

Here, twenty years after Mr. Stockwell was convicted of first degree statutory rape, the Washington State Supreme Court changed the elements of the offense retroactively. In this particular case, in order to uphold Mr. Stockwell's life without parole sentence, the Washington Supreme Court added an element to a crime, not to cure any problem with its vagueness or overbreadth, but simply because of a policy decision that first degree statutory rape should be "comparable" to rape of child in the first degree. This retroactive changing of the elements of the offense of first degree statutory rape and the application of this change to Mr.

Stockwell's case violated Due Process of Law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3.

2. **The Conviction Should be Vacated Because of Constitutional Errors in Jury Selection**

a. **The Court Improperly Closed Part of the Voir Dire Proceedings**

The jury questionnaires in this case were sealed at the outset, and copies were provided only to the court and the attorneys. Members of the public who might have been in the courtroom to follow the proceedings were not allowed to see the actual questionnaires, although they apparently would have been able to listen to the individualized questioning that occurred as a result of the confidential questionnaires. Thus, while the entire courtroom was not closed for voir dire, as it has been in some other cases, In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), a portion of the proceedings – the questionnaires – was summarily closed by the trial judge. This constituted reversible constitutional error.

The First and Sixth Amendments to the United States Constitution guarantee the public (and the press) the right to access to criminal proceedings. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505-06 (1984) (*Press-Enterprise I*)(discussing the roots of the open trial in

pre-Norman Conquest England). Openness is recognized as enhancing the basic fairness of a proceeding, avoiding the appearance of unfairness, providing the community with the opportunity to see that justice is being done, and giving assurance that appropriate procedures are being followed.

Id. at 508-09. As the Supreme Court held:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

464 U.S. at 510. Pre-trial and preliminary proceedings enjoy the same presumption of public access because such proceedings may be the sole occasion for public observation of the criminal justice system. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 11-13 (1986) (*Press-Enterprise II*). Accordingly, there is a presumptive right of access, guaranteed under the federal Constitution to voir dire proceedings. Press-Enterprise I, 464 U.S. at 505-08.

In Washington, the right to public access to criminal proceedings is protected also by Wash. Const. art. 1, § 22 (the right to a speedy, public trial) and by Wash. Const. art. 1, § 10 ("Justice in all cases shall be

administered openly.”). These rights extend to jury selection, which is essential to the criminal trial process. In re Orange, 152 Wn.2d at 804.

In Washington, courts seeking to close any portion of proceedings, including voir dire, engage in an on-the-record analysis, addressing a five-part test:

1. The proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a serious and imminent threat to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995)

(internal quotes and changes omitted).

There is no question but that juror questionnaires are part of the voir dire process. As the Supreme Court of Ohio recently held:

Because the purpose behind juror questionnaires is merely to expedite the examination of prospective jurors, it follows that such questionnaires are part of the voir dire process. The fact that a lawyer elicits juror responses from written questions rather than oral questions has no bearing on whether the responses are considered in accepting or rejecting a juror.

State ex rel. Beacon Journal Publishing Co. v. Bond, 98 Ohio St. 3d 146, 781 N.E.2d 180, 188 (2002). The Supreme Court of Ohio, surveying the law, noted “that virtually every court having occasion to address this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness.” Id. & n.3 (citing cases).

While there certainly may be circumstances in which some information potential jurors have would to share during the voir dire process rises to the level of requiring it to be sealed, under Bone-Club, Orange and Press-Enterprise, the trial court must engage in a weighing analysis, and not just seal all juror questionnaires, without making any particularized findings. Bond, 781 N.E.2d at 189-90.

Here, the trial judge engaged in no analysis when she ruled that all juror questionnaires would be sealed, and shown only to the lawyers and the court. Ex. 8 at 22-23. Compare State v. Momah, ___ Wn.App. ___, ___ P.3d ___ (No. 58004-3-I, 11/13/07) (even though individualized voir

dire took place in chambers, court never actually ruled that the public was excluded). The trial judge never made an on-the-record analysis of the Bone-Club factors, and simply sealed all questionnaires, including those filled out by potential jurors who may not have cared if their questionnaires were public or not.¹⁴ Moreover, the jurors were told that they could not even discuss the questionnaire or their answers with anyone:

YOU ARE UNDER THE COURT'S ORDER: YOU MAY NOT DISCUSS THIS QUESTIONNAIRE OR YOUR ANSWERS WITH ANYONE.

Ex. 6.

This blanket order which prevented the public from access to the completed questionnaires violated U.S. Const. amends. 1 and 14, and Wash. Const. art. 1, §§ 10 and 22. Prejudice is presumed where these rights are violated. Bone-Club, 128 Wn.2d at 261-62.

The fact that Mr. Stockwell did not object to the closure of part of the voir dire process is not dispositive.¹⁵ The denial of the right to a public

¹⁴ Indeed, most of the jurors did not request private questioning about what they wrote in the questionnaires, even regarding sensitive subjects.

¹⁵ The judge ruled that the questionnaires would only be shown to the attorneys and the court, but made no mention of the defendant although he apparently may have been able to see his attorney's copies. In any case, it is settled that criminal
(continued...)

trial is an error of constitutional magnitude and can be raised for first time on appeal:

It is well settled that a criminal defendant's right to a public trial is an issue of constitutional magnitude that may be raised for the first time on appeal. [Citations omitted] The failure to assert this right at trial does not effect a waiver, nor free the court from its independent obligation to consider public trial rights before closing all or a portion of the proceedings.

Duckett, Slip Op. at 11. As the Supreme Court's decision in Orange makes clear, the issue can also be raised for the first time on collateral review (with the fact that the issue was not raised on direct appeal being conclusive that appellate counsel rendered ineffective assistance of counsel in violation of due process under U.S. Const. amend. 14 and the right to counsel and the right to appeal under Wash. Const. art. 1, § 22). In re Orange, 152 Wn.2d at 814.

Here, the trial court failed to engage in any balancing at all before not only sealing the juror questionnaires, but also before instructing the jurors that they could not even talk about the questionnaires or their

¹⁵ (...continued)
defendants have the right to make claims in this area on behalf of the public. State v. Duckett, ___ Wn. App. ___, ___ P.3d ___ (25614-6-III, 11/27/07).

answers with anyone. These orders clearly violate the state and federal constitutions. Reversal is required.

b. **The Court Improperly Used Different Standards to Decide State and Defense Challenges for Cause**

“The presumption of innocence is the bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453 (1895). This presumption is required under the Due Process Clause of U.S. Const. amend. 14, and is inextricably tied to the right, under the Due Process Clause of U.S. Const. amend. 14, to a reasonable doubt standard in a criminal case. In re Winship, 397 U.S. 358, 363 (1970).

It is not always easy to articulate exactly what the presumption of innocence and a reasonable doubt standard mean.. See Victor v. Nebraska, 511 U.S. 1, 5 (1994) (“Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication.”). Still,

whatever controversy there may be about the exact wording of reasonable doubt instructions, the presumption of innocence means that the prosecution and defendant do not stand on equal footing at the beginning of the trial. The presumption of innocence means that the legal system as a whole, including the finders of fact, start with the assumption that the defendant is innocent until such time as the evidence demonstrates his or her guilty beyond a reasonable doubt:

Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.

Coffin v. United States, 156 U.S. at 458-59.

In this regard, Juror No. 56 was correct when he stated that he began with a bias against the State, that he would begin by assuming that the complaining witnesses were not telling the truth and he would always have a doubt that the girls were being truthful, although he stated, “It depends on what comes out I guess.” Ex. 9 at 230.

All that Juror No. 56 articulated, in a lay manner, was the presumption of innocence and the reasonable doubt standard. Juror No.

56's self-described bias against the State is exactly what the Due Process Clause of the 14th Amendment requires – an assumption that the defendant is innocent and that the accusers are lying, an assumption that carries through the entire trial and even can linger even after the State has presented its evidence.¹⁶

In contrast, the trial court's conclusion that Juror No. 56 was properly challengeable for cause under RCW 4.44.170 - .190 for actual bias is contrary to the federal constitutional protection of the presumption of innocence:

He clearly stated he could not keep an open mind, that he would start with a -- it wouldn't be a level playing field, would start with the presumption that there was a lie and work from there to determine what the truth was.

Ex. 9 at 235. Nothing in the Constitution requires that the State and the defendant in a criminal case start on a "level playing field," nor does the State have any right to a "fair trial." All jurors should begin with the presumption that there was a lie and work from there to determine what

¹⁶ The reasonable doubt standard allows for conviction even if a juror has a doubt, which is precisely what the State argued in closing. RP 652 ("It does not say you have to be convinced by 100 percent. It does not say beyond all doubt. It doesn't say convinced beyond a shadow of a doubt. It's not a standard of 100 percent certainty.").

the truth is.¹⁷ That is the essence of Due Process under U.S. Const. amend.

14. The trial court misapplied the presumption of innocence when striking Juror No. 56 for cause.

In contrast to Juror No. 56's proper bias in favor of the defendant, Juror No. 2 clearly did not understand the presumption of innocence when she stated: "If I have a bias, it would probably be on behalf of a child, because they are a child and I am a woman." Ex. 8 at 39. This statement is inconsistent with the history of the Due Process Clause and exposes Juror No. 2's unfitness to be a juror. She began the case with a bias in favor of the children who made the allegations against Mr. Stockwell – i.e. a bias in favor of the State. While she claimed that she could "disassociate" herself from her cousin's case, she never said that she

¹⁷ RCW 4.44.170(2) provides for a challenge for cause:

For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

A juror's articulation of the presumption of innocence (a bias in favor of the defense and against the State) is not a basis for a challenge for cause under this statute because the juror's bias does not prejudice the "substantial rights" of the State. The State, as noted, has no right to a "level playing field" in a criminal case, and has only the right to provide a criminal defendant with a trial where all parties (including jurors) begin with the conviction that the defendant is innocent (i.e. a bias in favor of the defendant).

would ever be able to start out applying the presumption of innocence, rather than a presumption of guilt.

Similarly, Juror No. 39 also said he would try to “compartmentalize” his own daughter’s experiences as a rape victim, but he too began with the presumption of guilt:

[W]hen it comes to sexual abuse, family abuse, child molestation, I have a very deep conviction about that, those issues. *I am not trying to suggest that it would influence my decision. I am not suggesting that at all, but it could be a motivating factor, you know. . . .*

. . .

I think I can, but again, going back to the same issue that was first discussed, sexual abuse, I don't know. See, as a father and all, *I am not trying to suggest that the accused, you know, is innocent*, but I'd just like to let the court know how I feel.

Ex. 9 at 192, 194-95 (emphasis added).¹⁸

The defense challenges for cause to these two jurors – Nos. 2 and 39 – were clearly judged by a different standard than the State’s challenge to No. 56. No. 56's bias in favor of the defendant was entirely consistent with the presumption of innocence under the Due Process Clause of U.S. Const. amend. 14, while Juror Nos. 2's and 39's bias against Mr. Stockwell

¹⁸ Notably, although Juror No. 39 stated in his questionnaire that he could follow the law, he also said that his daughter’s experiences would affect his ability to be fair.

ab initio, based simply on the fact that a child was making an allegation of sexual abuse, was inconsistent with the law. The trial court erred when it granted the State's challenge to Juror No. 56 and denied the defense challenges to Juror Nos. 2 and 39.

To be sure, an appellate court must give a certain amount of deference to the trial court's decision on whether to grant or deny a challenge for cause, but the trial court's decisions in this area are not unreviewable. Uttecht v. Brown, ___ U.S. ___, 127 S. Ct. 2218, 2230 (2007) ("The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment."). Here, there was no basis to find that Juror No. 56 had any impairment where all he did was to describe the presumption of innocence. On the other hand, the trial court's failure to find that Jurors Nos. 2 and 39 were actually biased was error.

Mr. Stockwell ultimately used two of his eight peremptory challenges to remove Jurors No. 2 and 39 from the jury. Thus, under narrow majority holding of State v. Fire, *supra*, and under United States v. Martinez-Salazar, 528 U.S. 304 (2000), it could be argued that Mr.

Stockwell suffered no prejudice because ultimately jurors who were “unbiased” ended up on the panel that heard the evidence. Similarly, it could be argued that the fact that the State improperly was allowed to challenge Juror No. 56 did not prejudice Mr. Stockwell because ultimately the jurors picked were impartial. See State v. Williams, 132 Wash. 40, 46, 231 Pac. 21 (1924).¹⁹

These lines of cases, however, should not be followed for the following reasons:

i. These cases are predicated on an assumption that all other aspects of jury selection were conducted according to the applicable statutory and rule framework. Here, as will be discussed, the pertinent rules for jury selection were not followed.

ii. These cases do not address due process considerations, nor do the decisions address the rights of community members, such as Juror No. 56, to serve as a juror.

iii. The holding of State v. Fire, supra (a 5:4 decision) rested narrowly on an interpretation of federal law and held open a different result under state constitutional law.

¹⁹ Mr. Stockwell recognizes that the State did not exhaust its peremptory challenges and that even if Juror No. 56 had not been excused for cause, had the mathematics been right and he somehow ended up in the box or was close to being in the box, the State could have exercised one of its remaining peremptory challenges against him. Nonetheless, the issue is the use of an incorrect standard to judge challenges for cause, a standard which resulted in the denial of defense challenges to two jurors. The court’s ruling granting the State’s challenge to Juror No. 56 illustrates this improper standard.

i. *Failure to Follow the Statutory Framework*

Cases such as Fire are predicated on the assumption that if all other aspects of jury selection follow the requirements of various statutory provisions and rules, then some errors in the jury selection process in and of themselves will not cause prejudice. However, it is not sufficient simply to state that “a litigant has no right to have his case tried by any particular juror or jurors, and his only right in that respect is to have his case submitted to a fair and impartial jury.” State v. Larkin, 130 Wn.2d 531, 533, 228 Pac. 229 (1924). If this was truly the case, then there could never be successful challenges to the exclusion certain groups of people from juries, and cases like Batson v. Kentucky, 476 U.S. 79 (1986), Duren v. Missouri, 439 U.S. 357 (1979), or Powers v. Ohio, 499 U.S. 400 (1991) would have had a different result.

But even outside the rubric of a equal protection and fair-cross section challenges, Washington courts have not hesitated to reverse criminal convictions or vacate judgments in civil cases where there may have been an unbiased jury, but where there were significant deviations from the jury selection procedures.

The Supreme Court of Washington has long held:

[A] litigant is entitled to have his case submitted to a jury selected in the manner required by law; and further, that, if the selection is not made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed.

Roche Fruit Co. v. Northern Pac. Ry., 18 Wn.2d 484, 487, 139 P.2d 714

(1943), quoted in State v. Tingdale, 117 Wn.2d 595, 602, 817 P.2d 850

(1991). Tingdale involved a situation where the court clerk excused three

members of the jury panel based upon their acquaintance with the

defendant. The Court of Appeals affirmed the conviction, holding that the

defendant had not shown any prejudice. See 117 Wn.2d at 598. The

Supreme Court reversed, disagreeing that a showing of prejudice must be

made:

Where the selection process is in substantial compliance with the statutes, the defendant must show prejudice. If there has been a material departure from the statutes, prejudice will be presumed.

117 Wn.2d at 600.

The procedural framework for jury selection, set out in the statutes and the criminal rules, is specifically structured to insure randomness and thus to protect the constitutional right to a jury trial, under U.S. Const.

amend. 6 and Wash. Const art. 1, §§ 21 & 22. This structure requires that challenges for cause be made in court, pursuant CrR 6.4(c), and allowing

the clerk to dismiss jurors constituted a material departure from the statutes. Tingdale, 117 Wn.2d at 601. See also Brady v. Fibreboard Corp., 71 Wn. App. 280, 857 P.2d 1094 (1993) (judges decided qualifications for jury service based upon written questionnaires). In Tingdale, there was no question but that the jurors who ultimately were seated were unbiased. Yet, because the sanctity of the procedures governing challenges for cause was compromised, the Supreme Court reversed Ms. Tingdale's conviction.

Similarly, in the instant case, there were several material departures from the jury selection procedures, set out in the RCWs and the Criminal Rules. To begin with, by adopting a standard that favored jurors who started out biased against the defendant over jurors who were biased in favor of the presumption of innocence, the trial court materially departed from accepted rules and procedures, particularly RCW 4.44.170(2). The trial court's manner of deciding challenges for cause was at odds with the constitutional presumption of innocence.

Moreover, in this particular case, as in Tingdale, the procedures governing challenges for cause under CrR 6.4 were not followed in this

case. CrR 6.4 sets out a detailed procedure of voir dire and challenges for cause:

(a) Challenges to the Entire Panel. Challenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection.

(b) Voir Dire. A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

(c) Challenges for Cause.

(1) If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.

(2) RCW 4.44.150 through 4.44.200 shall govern challenges for cause.

(d) Exceptions to Challenge.

(1) Determination. The challenge may be excepted to by the adverse party for insufficiency and, if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by

the adverse party and, if so, the court shall try the issue and determine the law and the facts.

(2) Trial of Challenge. Upon trial of a challenge, the Rules of Evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or if found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but if not so determined or found otherwise, it shall be disallowed.

CrR 6.4 thereby requires an initial voir dire examination (Step 1), followed by a challenge for cause, either by the judge or by a party (Step 2). Next, a challenge may be excepted to by the adverse party (Step 3), and the judge then determines the sufficiency of the challenge, “assuming the facts alleged therein to be true.” (Step 4). If the adverse party persists in the challenge, “the court *shall* try the issue and determine the law and the facts.” Emphasis added. (Step 5). CrR 6.4(d)(2) governs the “trial of a challenge.” This rule specifically references that the Rules of Evidence applies, and allows for the examination, as a witness, of the challenged juror “or any other person otherwise competent.” Only then does the rule provide for the court to determine whether the challenge was sufficient or not. (Step 6).

Court rules are interpreted as if they were statutes, applying accepted canons of statutory construction. State ex rel. Schillberg v. Everett District Justice Court, 90 Wn.2d 794, 797, 585 P.2d 1177 (1978). “It is well settled that the word ‘shall’ in a statute is presumptively imperative and operates to create a duty. [Citations omitted] The word ‘shall’ in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.” Erection Co. v. Department of Labor and Industries, 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

In the instant case, CrR 6.4's mandatory requirements were not followed. For each of the disputed jurors (Nos. 2, 39 & 56, as well as Juror Nos. 32 & 36) there was only voir dire examination, followed by a challenge, an exception to the challenge, and a ruling – up through Step 4. The trial court failed to continue on to Steps 5 and 6, and failed to hold trials on the challenges, a procedure which would have required bringing the jurors back into court for a more formal examination, subject to the Rules of Evidence, possibly the calling of other witnesses, and only then final rulings by the court. There was not even an attempt to hold such a formal proceeding.

As noted, CrR 6.4's requirements were adopted to protect the constitutional right to a random jury under U.S. Const. amend. 6 and Wash. Const. art. 1, §§ 21 & 22. CrR 6.4(d)(1) uses the word “shall” – “the court shall try the issue and determine the law and the facts” – which imposes a duty on the court. The decision to hold a trial is mandatory, not discretionary. It is an essential step in CrR 6.4.

Where the trial required by CrR 6.4 is skipped, there clearly is a material departure from the procedural requirements governing challenges for cause. Given this departure, the trial court’s disparate standards for challenges for cause cannot be ignored simply because the jurors who were selected were “unbiased.” As in Tingdale, the trial court’s failure to excuse Juror Nos. 2 & 39 (and its erroneous exclusion of Juror No. 56) must be viewed as prejudicial. This Court should therefore reverse the convictions.

ii. *Other Constitutional Considerations*

As noted above, there certainly are cases from the Washington State Supreme Court and the United States Supreme Court which have held that a criminal defendant does not have a constitutional right to have any particular juror serve on his or her panel, and that a defendant does not

suffer any prejudice as long as the jurors in his or her case are unbiased. Yet, such cases cannot be looked at in isolation, as there are also cases which have reversed convictions where biases in jury selection weeded out categories of jurors, leaving other jurors who unquestionably were unbiased and fit to serve. The United States Supreme Court has consistently struck down state jury selection procedures and reversed convictions which where there was the exclusion of jurors based upon race, ethnicity or gender. Powers v. Ohio, *supra*; Batson v. Kentucky, *supra*; Duren v. Missouri, *supra*. Such successful challenges could not have been possible if the Supreme Court rigidly adhered to the statement that a defendant cannot complain if the jurors actually picked were qualified and unbiased. See also Witherspoon v. Illinois, 391 U.S. 510 (1968) (reversing death sentence on 6th and 14th Amendment grounds because of exclusion of venire men with scruples against capital punishment).

There are two principles upon which these cases rest. The first principle is automatic standing, which allows a criminal defendant to make a claim on behalf of the excluded juror. Allowing a defendant to make a challenge on behalf of an improperly excluded juror is allowed because of

the unlikelihood that the excluded juror would ever file his or her own lawsuit and because the improper exclusion of certain categories of jurors places a cloud over the very legitimacy of the proceedings at the outset. See Powers v. Ohio, 499 U.S. at 410-16. Secondly, the exclusion of certain categories of jurors effects the fair cross-section requirement of the Sixth Amendment. Duren v. Missouri, 439 U.S. at 359 n.1.

Those same considerations are present in this case. While the challenges and rulings regarding Juror Nos. 2, 39 & 56 did not appear to have been based upon race, gender or ethnicity, the different rulings were based upon whether the juror would apply the presumption of innocence or whether the juror began being biased in favor of the State. Not only did the trial court's rulings cast a pallor over the legitimacy of the proceedings,²⁰ but the rulings clearly had the effect of interfering with a jury picked from a fair cross-section of the community and resulted in a jury that was unfairly pro-prosecution. See State v. Tingdale, 117 Wn.2d at 602-03 ("As a result of the trial court's rejection of these jurors, qualified jurors were rejected, and petitioner was forced to accept other, possibly "unqualified", jurors (namely, the friend of the sheriff). Had there

²⁰ What message does it send to a criminal defendant, or members of the public, to exclude a juror for cause who merely articulates the presumption of innocence?

been persons acquainted with both parties on the panel, perhaps a more "balanced" (impartial) jury would have resulted.”).

Similarly, to the extent that applicable court rules and the procedures adopted in Mr. Stockwell’s case set out a set number of peremptory challenges for each side, the trial court’s ruling in this case effectively gave the State an unfair advantage. Not only was the State able to get rid of Juror No. 56 without having to use one of its peremptory challenges, but by forcing the defense to use two of its precious peremptory challenges on Jurors Nos. 2 and 39, the court’s rulings effectively changed the rules for the defense mid-trial. The defense used up all of its peremptory challenges and was forced to accept jurors who may not have been as sympathetic to the defense as those waiting to be chosen. This bias in the jury selection process violated due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3.

As the Supreme Court of Colorado held, when a trial court essentially gives the prosecution an amplified role in shaping jury composition, the defendant’s due process rights under U.S. Const. Amend. 14 are violated. People v. LeFebre, 5 P.3d 295, 305 (Colo. 2000). Distinguishing Martinez-Salazar, the Colorado Supreme Court held that

due process was violated when a state does not follow its own procedural rules regarding jury selection:

Allowing the prosecution to shape a jury predisposed to its position is prejudicial error. See Ross v. Oklahoma, 487 U.S. 81, 89, 101 L. Ed. 2d 80, 108 S. Ct. 2273 (1988) (stating that a federal due process violation results if a trial court fails to provide a defendant what state law guarantees him). Because the defendant did not receive what he is guaranteed under our prior decisions -parity with the prosecution in the exercise of peremptory challenges -he suffered a Fourteenth Amendment due process violation.

LeFebre, 5 P.3d at 304. Accord State v. Santelli, 159 Vt. 442, 621 A.2d 222, 224-25 (Vt. 1992); Busby v. State, 894 So.2d 88 (Fla. 2004).

The Colorado Supreme Court's decision in LeFebre is not directly contradicted by the holding by our Supreme Court in Fire. Nowhere in Fire did the Washington Supreme Court directly address a due process argument that a trial court's erroneous rulings regarding cause violated due process by giving the State an unfair advantage in shaping the jury.

The Colorado Supreme Court's decision in LeFebre has explicitly been cited with approval and relied upon by the Washington Supreme Court. In State v. Vreen, 143 Wn.2d 923, 26 P.3d 236 (2001), a case decided a few months before Fire,²¹ a trial court had erroneously denied a

²¹ The decision in Fire does not cite or mention the decision in Vreen.

defense peremptory challenge on Batson grounds. The challenged juror ended up serving on the jury that convicted the defendant. On appeal, the Supreme Court reversed the conviction, citing the Colorado Supreme Court's decision in LeFebre with approval, and holding that the concept of "harmless error" analysis cannot be used to assess a trial court's erroneous use of a peremptory challenge. Citing the Ninth Circuit decision in United States v. Annigoni, 96 F.3d 1132, 1144 (9th Cir. 1996) (en banc), the Washington Supreme Court held:

"It would be difficult if not impossible for a reviewing court to determine the degree of harm resulting from erroneously allowing a juror to sit despite an attempted peremptory challenge." 96 F.3d at 1145. This is due largely to the fact that, short of taping jury deliberations, there is no way of knowing exactly how the error affected the outcome, if at all. "To subject the denial of a peremptory challenge to harmless-error analysis would require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than post-trial hearings and sheer speculation." Id. Thus the court declined to apply a harmless error analysis and found wrongful denial of a peremptory challenge requires reversal. 96 F.3d at 1147. We agree.

143 Wn2d at 930. While it is correct that the challenged juror in Vreen ended up serving on the jury, he was not challenged for cause and there was no hint that he was biased in any way against the defendant.

It is difficult to reconcile the seemingly strict holding of Fire with the holding of Vreen, and the only way the cases can be reconciled is to limit Fire to its facts. Its holding cannot mean that in all cases a trial court can run roughshod over the rules for exercising challenges to jurors, and then, on appeal, its actions are effectively insulated from review because unbiased jurors ultimately sat on the panel that heard the evidence.

Ultimately, where, as here, the trial court used an incorrect standard for jury selection, the error cannot be written off as “harmless” simply because “unbiased” jurors sat on the panel that heard the evidence. Rather, the trial court’s use of a standard for deciding “for cause” challenges, which is inconsistent with the presumption of innocence, gave the State an unfair advantage in shaping the jury and therefore violated due process of law under U.S. Const. amend. 14. This Court should therefore reverse Mr. Stockwell’s convictions.

iii. *Gunwall*

The Washington State Supreme Court explicitly stated in Fire that it was not deciding the case on state constitutional grounds, the defendant having not engaged in a state constitutional analysis under State v. Gunwall, *supra*. See State v. Fire, 145 Wn.2d at 164-65 (“If the party has

not engaged in a Gunwall analysis, this court will consider his claim only under federal constitutional law.”). Such an analysis, however, results in a conclusion that where a trial court uses a biased standard for determining challenges for cause – a standard that excludes jurors who apply the presumption of innocence in favor of those who start out the case in favor of the State – a defendant’s rights under the Washington State Constitution are violated even though “unbiased” jurors end up sitting on the jury.

In Gunwall, the Supreme Court set out six nonexclusive neutral criteria to be examined to determine the contours of a state constitutional right:

(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

Gunwall, 106 Wn.2d at 58.

1. Textual Language

The federal jury trial right in the Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

U.S. Const. amend. 6. Similarly, U.S. Const. art. III, § 2, provides:

The trial of all Crimes, except in Cases of Impeachment, shall by
Jury.

Wash. Const. art. 1, § 22, tracks these federal provisions:

In criminal prosecutions the accused shall have the
right to . . . have a speedy public trial by an impartial jury. .

However, in Washington, there is an additional protection to the
jury trial right:

The right of trial by jury shall remain inviolate, but
the legislature may provide for a jury of any number less
than twelve in courts not of record, and for a verdict by nine
or more jurors in civil cases in any court of record, and for
waiving of the jury in civil cases where the consent of the
parties interested is given thereto.

Wash. Const. art. 1, § 21.

2. Differences in Text

While Wash. Const. art. 1, § 22 is similar to the Sixth Amendment,
there is no language in the United States Constitution which has wording
as strong as that in Wash. Const. art. 1, § 21 (“The right of trial by jury
shall remain inviolate. . . .”). See Pasco v. Mace, 98 Wn.2d 87, 97, 653
P.2d 618 (1982) (recognizing differences between federal and state jury
right provisions). The use of the term “inviolate” reveals the value that
Washington places on jury trials in criminal cases, and historically made

the jury trial right stronger than under the federal system. Pasco v. Mace, 98 Wn.2d at 99 (“It is evident, therefore, that the right to trial by jury which was kept “inviolable” by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789.”).

Wash. Const. art. 1, § 21’s command that the right to a jury trial remain “inviolable” directly ties into the state constitutional right to a unbiased and unprejudiced jury, State v. Boiko, 138 Wn. App. 256, 156 P.3d 934 (2007), which itself is tied into voir dire process and the exercise of peremptory challenges. Smith v. Kent, 11 Wn. App. 439, 443, 523 P.2d 446 (1974).

3. Constitutional History

The Washington Supreme Court has already thoroughly explored the state jury trial right in Washington and has concluded that its framers clearly wished that this right be more protective of the jury trial right than under the federal constitution. Pasco v. Mace, supra. Indeed, the Washington Supreme Court recognized that “few states have found within their constitutional provisions a right to jury trial as liberal as that which the constitution of this state discloses.” 98 Wn.2d at 100 n.6.

4. Pre-existing State Law

“In construing section 21, this court has said that it preserves the right as it existed at common law in the territory at the time of its adoption.” Pasco v. Mace, 98 Wn.2d at 96. Common law, of course, has always been of the view that every wrong deserves a remedy. See Cohens v. Virginia, 19 U.S. 265 (1821) (“The remedy for every species of wrong is, says Judge Blackstone, ‘the being put in possession of that right whereof the party injured is deprived.’”).

More specifically, as Justice Sanders notes, in his dissent in Fire, the common law of Washington, at the time the Constitution was adopted was clear that no special showing of “prejudice” was required if a defendant had to exhaust his peremptory challenges to rectify a trial court’s erroneous denial his or her cause challenges:

For more than one hundred years Washington courts have held a criminal defendant is presumed to be prejudiced if forced to use his last peremptory challenge to remove a juror who should have been removed for cause. . .

....

However when [State v. Parnell, 77 Wn.2d 503, 463 P.2d 134 (1969)] was decided in 1969 there was already long-standing precedent holding a criminal defendant is presumed to have been prejudiced if forced to exhaust his

peremptory challenges to remove a juror who should have been removed for cause. This rule dates to the earliest years of our statehood.

Fire, 145 Wn.2d at 169-70 (Sanders, J., dissenting), *citing* State v. Moody, 7 Wash. 395, 395, 35 P. 132 (1893); State v. Rutten, 13 Wash. 203, 43 P. 30 (1895); State v. Stentz, 30 Wash. 134, 70 P. 241 (1902); McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 28, 236 P. 797 (1925).

While Justice Sanders' opinion in Fire was the dissent, his analysis of common law in Washington was actually joined in by the majority of the Court. Justices Johnson, Madsen and Chambers joined in Justice Sanders' dissent, while Justice Alexander's concurring opinion agreed with the dissent that "under Washington law a defendant in a criminal case is presumed to be prejudiced if that person is forced to use his or her last peremptory challenge in order to remove a juror who should have been removed for cause by the trial court. . . . In this regard I am in accord with the dissent's view that our decision in Parnell has not been undermined and remains good law in Washington." 145 Wn.2d at 166-67 (Alexander, J., concurring). While Justice Alexander believed that as a matter of Washington law, Washington should depart from prior precedent (and thus

he voted with the other four justices), he made clear that he would vote that way if prior rulings were constitutionally based. *Id.* at 168.

Since a Gunwall analysis had never been done in Fire, Justice Alexander’s critical fifth vote should not be seen as an endorsement of the Justice Bridge’s majority opinion’s analysis as a matter of state constitutional law. Rather, Justice Alexander’s fifth vote actually supports Justice Sanders’ analysis of Washington common law. Taken into account in a Gunwall analysis, this determination of common law supports the conclusion that art. 1, §§ 21 & 22 do not require a separate showing of “prejudice” when a judge uses the wrong standards for challenges for cause.

5. Structural Differences

As the Gunwall Court noted, “the United States Constitution is a *grant* of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states, whereas our state constitution imposes *limitations* on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law.” 106 Wn.2d at 66. This factor therefore supports reading art. 1, §§ 21 & 22 more expansively than federal law.

6. Matters of Particular State Interest

There is nothing about the jury trial right which requires national uniformity on the issue of whether defendants must show “prejudice” if a trial court erroneously grants the prosecution’s challenge of cause or if a court erroneously denies a defense challenge for cause, forcing the defense into using its peremptory challenges. Indeed, a number of courts have departed from federal cases and have construed their own state constitutions more broadly in this area. See People v. LeFebre, supra; Busby v. State, supra.

7. Summary

Each Gunwall factor leads to the conclusion that Washington’s state constitutional protections of the jury trial right, in art. 1, §§ 21 & 22, are broader than their federal counterparts, and that no special showing of prejudice is required when it is clear that a trial court has erroneously granted or denied challenges for cause. If the defense must exhaust its peremptory challenges to strike jurors who should have been stricken for cause or if the trial court improperly strikes for cause jurors who should not have been stricken, there must be a remedy for the wrong under the

Washington State Constitution. The remedy is to reverse the convictions.²²

3. **The Trial Court Erred When It Admitted the Prosecutor's Investigator's Notes as Trial Exhibits and Sent Them To the Jury**

On direct appeal, Mr. Stockwell filed a pro se Statement of Additional Grounds for Review, arguing that the trial court had erroneously admitted Exhibits 1 and 2 without any limiting instructions.

The Court of Appeals, when deciding the case, held:

Stockwell mistakenly argues that the trial court erred in allowing this report to be sent back to the jury without an instruction not to place undue emphasis on the testimony. The record does not support this assertion and argument. On the contrary, the record shows that when Stockwell's trial counsel objected, the trial court allowed the read-aloud report for "illustrative" purposes only, and it did not allow the report into the jury room during deliberations.

Ex. 3 at 8.

With all due respect, the Court of Appeals was wrong. The record is clear that not only were Ms. Conrad's notes of MS' interview admitted and sent to the jury room, but also Ms. Conrad's notes of EM's interview

²² As will be discussed below, the failure of Mr. Stockwell's appellate counsel to order the transcripts of voir dire and her failure to raise any issues connected to voir dire constituted ineffective assistance of counsel on appeal.

were admitted and sent to the jury room. RP 580-8, 584-85. Mr. Stockwell raised this error in his petition for review to the Supreme Court, but the Supreme Court did not address this issue.

The trial court admitted the summaries under ER 801(d)(1)(ii) as a prior statement of the witness consistent with the declarant's testimony and offered to rebut a charge of recent fabrication. The problem, though, is that the statements were not the statements of MS and EM, but rather were the statements of Ms. Conrad. No one claimed that Ms. Conrad had recently fabricated her testimony and thus her notes were not admissible under ER 801(d)(1)(ii).

Moreover, the trial court had already admitted as substantive evidence MS' and EM's out-of-court statements to Ms. Conrad during the State's case-in-chief – Ms. Conrad and the prosecutor had read to the jury everything contained in Exhibits 1 & 2. At this point, since their statements had already been admitted, there was no need to admit their statements a second time, in written form. Nothing about ER 801 provides for readmission of evidence already admitted.

Next, even if Ms. Conrad's summaries of her own notes were admissible under ER 801, on the theory that they were tantamount to a

transcript (which they were not), then it was error to admit the exhibits and send them back to the jury for unrestricted review since they were of a testimonial nature. State v. Monroe, 107 Wn. App. 637, 27 P.3d 1249 (2001) (reversal where trial court sent back to jury a transcript of a witness' testimony, because of danger of giving jurors unsupervised and unrestricted access to one witness' testimony). There was no instruction given to the jury governing their review of Ex. 1 and 2 and there was clearly a danger of undue emphasis being placed on these out-of-court statements.²³

Finally, even if Ms. Conrad's summary of her notes from *MS*' interview were admissible, the trial court articulated no reason to admit and send to the jury Ms. Conrad's summary of her notes from *EM*'s interview. There was no claim or argument that the admission of *MS*' pre-trial testimony in Ex. 5 in any way constituted a suggestion that *EM* had recently fabricated her testimony.

Given Mr. Stockwell's defense that he never touched either girl inappropriately, and his attack on the credibility of the two girls and Ms. Conrad, the trial court's error was not harmless. Allowing the jurors to

²³ The State placed great weight on Ms. Conrad and her notes in closing and actually reread the notes to the jury. RP 605-12.

have unrestricted and unsupervised access to Ms. Conrad's notes of her conversations with MS and EM focused undue emphasis on Ms. Conrad's assertions as to what both girls said. This would have undermined Mr. Stockwell's defense.

Mr. Stockwell raised this issue in his own pro se pleadings on direct appeal. However, because this Court mistakenly believed that the exhibits were not actually sent back to the jury room, the Court never addressed the issue on the merits. Accordingly, Mr. Stockwell's constitutional right to Due Process of Law under U.S. Const. amend. 14 and to an appeal under Wash. Const. art. 1, § 22 were violated.

This issue should therefore be reviewed under the direct appeal standard. In re Frampton, 45 Wn. App. 554, 558-61, 726 P.2d 486 (1986).

4. Mr. Stockwell's Appellate Attorney Was Ineffective

Mr. Stockwell's appellate counsel failed to order the transcripts from voir dire, and thus never raised on direct appeal the issue of the closure of part of the proceedings during voir dire. She also did not raise on appeal the issues regarding the different standards for challenges to Jurors Nos. 2, 39 & 56. Her analysis of comparability of the 1986 conviction was flawed and did not adequately address the statutory history.

A criminal defendant in Washington has a constitutional right to an appeal, Wash. Const. art. 1, § 22, and thus the right to effective assistance of counsel on that appeal is guaranteed as a matter of due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3. Evitts v. Lucey, 469 U.S. 387 (1985); United States v. Skurdal, 341 F.3d 921, 926 (9th Cir. 2003) (citing cases).

While certainly appellate counsel may decide not to raise an issue if he or she foresees little chance of success in raising it, if appellate counsel fails to order the transcripts from a key portion of the trial (i.e. voir dire), there are no tactical decisions to which deference should be given. Here, Mr. Stockwell's prior counsel simply failed to review all pertinent portions of the case and thus just missed the jury selection issues.

Furthermore, while counsel did raise an issue on direct appeal concerning the comparability of the prior conviction, the briefing does not address key points such as the history of the sexual assault and marriage statutes in Washington or elements other than nonmarriage that distinguish statutory rape in the first degree from first degree rape of a child.

Accordingly, appellate counsel's performance fell below an objectively reasonable standard and caused prejudice to Mr. Stockwell.

See In re Orange, supra, and In re Maxfield, supra (both cases finding ineffective assistance of counsel on direct appeal because of the failure to raise meritorious issues).

E. CONCLUSION

For the foregoing reasons, and the reasons set out in the petition, this Court should vacate Mr. Stockwell's conviction.

DATED this 21 day of December 2007.

Respectfully submitted,



NEIL M. FOX
WSBA NO. 15277
Attorney for Petitioner

Relevant Statutory Provisions and Rules

CrR 6.4 provides in part:

(a) Challenges to the Entire Panel. Challenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection.

(b) Voir Dire. A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

(c) Challenges for Cause.

(1) If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.

(2) RCW 4.44.150 through 4.44.200 shall govern challenges for cause.

(d) Exceptions to Challenge.

(1) Determination. The challenge may be excepted to by the adverse party for insufficiency and, if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party and, if so, the court shall try the issue and determine the law and the facts.

(2) Trial of Challenge. Upon trial of a challenge, the Rules of Evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or if found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but if not so determined or found otherwise, it shall be disallowed.

(e) Peremptory Challenges. (1) Peremptory Challenges Defined. A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror. In prosecutions for capital offenses the defense and the state may challenge peremptorily 12 jurors each; in prosecution for offenses punishable by imprisonment in the state Department of Corrections 6 jurors each; in all other prosecutions, 3 jurors each. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the number of challenges provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant.

(2) Peremptory Challenges--How Taken. After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called.

ER 801 provides in part:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if-- (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person. . . .

Former RCW 9.79.020 (1973), Carnal Knowledge, provided:

Every male person who shall carnally know and abuse any female child under the age of eighteen years, not his wife, and every female person who shall carnally know and abuse any male child under the age of eighteen years, not her husband, shall be punished as follows:

(1) When such an act is committed upon a child under the age of ten years, by imprisonment in the state penitentiary for life;

(2) When such an act is committed upon a child of ten years and under fifteen years of age, by imprisonment in the state penitentiary for not more than twenty years;

(3) When such act is committed upon a child of fifteen years of age and under eighteen years of age, by imprisonment in the state penitentiary for not more than fifteen years.

RCW 9.94A.030(32)(2002) provided in part:

"Persistent offender" is an offender who:

...

(b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (32)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under (b)(i) of this subsection only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under (b)(i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.

Former RCW 9A.44.070 (1985), Statutory Rape in the First Degree, provided:

(1) A person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old.

(2) Statutory rape in the first degree is a class A felony. . .

RCW 9A.44.073, Rape of a Child in the First Degree, provides:

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

(2) Rape of a child in the first degree is a class A felony.

RCW 9A.44.076, Rape of a child in the second degree, provides:

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Rape of a child in the second degree is a class A felony.

RCW 9A.44.079, Rape of a child in the third degree, provides in part:

(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another

who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim

Former RCW 9A.44.080, Statutory Rape in the Second Degree, provided:

(1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

(2) Statutory rape in the second degree is a class B felony.

Former RCW 9A.44.090, statutory rape in the third degree, provided:

(1) A person over eighteen years of age is guilty of statutory rape in the third degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is fourteen years of age or older but less than sixteen years old.

(2) Statutory rape in the third degree is a class C felony.

Former RCW 9A.44.100, Indecent Liberties, provided in part:

(1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age;

(c) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, 'sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a class B felony.

RCW 26.04.010 provides:

(1) Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable.

(2) Every marriage entered into in which either the husband or the wife has not attained the age of seventeen years is void except where this section has been waived by a superior court judge of the county in which one of the parties resides on a showing of necessity.

RCW 26.04.020 states:

(1) Marriages in the following cases are prohibited:

(a) When either party thereto has a wife or husband living at the time of such marriage;

(b) When the husband and wife are nearer of kin to each other than second cousins, whether of the whole or half blood computing by the rules of the civil law; or

(c) When the parties are persons other than a male and a female.

(2) It is unlawful for any man to marry his father's sister, mother's sister, daughter, sister, son's daughter, daughter's daughter, brother's daughter or sister's daughter; it is unlawful for any woman to marry her father's brother, mother's brother, son, brother, son's son, daughter's son, brother's son or sister's son.

(3) A marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection (1)(a), (1)(c), or (2) of this section.

U.S. Const. art. I, § 10, provides in part:

No State shall . . . pass any Bill of Attainder, ex post facto Law . . .

U.S. Const. art. III, § 2, provides in part:

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .

U.S. Const. amend. 1 provides in part:

Congress shall make no law . . . abridging the freedom of speech, or of the press.

U.S. Const. amend. 6 provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. 14, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. 1, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. 1, § 10 provides:

Justice in all cases shall be administered openly, and without unnecessary delay.

Wash. Const. art. 1, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. 1, § 22 (amend. 10) provides in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the

county in which the offense is charged to have been committed and the right to appeal in all cases.