

NO. 37238-0-II

FILED
COURT OF APPEALS
DIVISION II

08 MAY 16 PM 3:30

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
[Signature]
DEPUTY

In re the Personal Restraint of

DAN STOCKWELL,

Petitioner.

REGARDING THE JUDGMENT AND SENTENCE ENTERED BY
THE SUPERIOR COURT OF KITSAP COUNTY
Superior Court No. 03-1-01319-4

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Neil Fox
Ste. 302, 1008 Western Ave
Seattle, WA 98104

A copy of this brief was sent via U.S. Mail or the recognized system of interoffice communications to petitioner or petitioner's counsel, as noted at left.

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

DATED May 16, 2008, Port Orchard, WA

[Signature]

Original filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF the ISSUES..... 1

II. RESPONSE 1

III. STATEMENT OF THE CASE..... 2

IV. AUTHORITY FOR PETITIONER’S RESTRAINT 6

V. ARGUMENT..... 7

 A. THIS COURT LACKS THE AUTHORITY TO OVERTURN THE SUPREME COURT’S EXPLICIT RULING OF LAW ENTERED IN STOCKWELL’S DIRECT APPEAL. 7

 B. STOCKWELL FAILS TO SHOW HIS PUBLIC-TRIAL RIGHTS WERE VIOLATED BY THE TRIAL COURT’S USE (AND HIS STIPULATION TO) THE USE OF CONFIDENTIAL JURY QUESTIONNAIRES WHERE ALL ACTUAL VOIR DIRE OF THE JURORS WAS HELD IN OPEN COURT, AND HE FAILS TO SHOW THAT THIS CLAIM MAY BE THE BASIS FOR COLLATERAL RELIEF. 8

 1. New procedural rules may not be applied for the first time on collateral review. 8

 2. Stockwell cannot show the right to open or public trial was violated 14

 3. Stockwell invited the error he claims occurred..... 28

 4. Stockwell cannot show the prejudice required for collateral relief..... 32

 5. Stockwell cannot claim a violation of the public’s rights on collateral attack. 33

6.	Even assuming error, the remedy would not be a new trial.....	41
C.	STOCKWELL FAILS TO SHOW THE TRIAL COURT'S RESOLUTION OF THE CAUSE CHALLENGES DURING VOIR DIRE ENTITLES HIM TO RELIEF.	43
D.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TRANSCRIPTS OF THE CHILD INTERVIEWS AS EXHIBITS AFTER STOCKWELL SUCCESSFULLY PERSUADED IT TO ADMIT THE TRANSCRIPT OF ONE OF THE VICTIMS' PRE-TRIAL TESTIMONY AS AN EXHIBIT.....	64
E.	STOCKWELL FAILS TO SHOW THAT COUNSEL WAS INEFFECTIVE ON DIRECT APPEAL.	70
VI.	CONCLUSION.....	72

TABLE OF AUTHORITIES

CASES

<i>Abad v. Cozza</i> , 128 Wn. 2d 575, 911 P.2d 376 (1996).....	38
<i>Almagamated Transit Union Local 587 v. State</i> , 142 Wn. 2d 183, 12 P.3d 603 (2000).....	55
<i>Beard v. Banks</i> , 542 U.S. 406, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004).....	9, 10
<i>In re Becker</i> , 96 Wn. App. 902, 982 P.2d 639 (1999).....	38
<i>In re Benn</i> , 134 Wn. 2d 868, 952 P.2d 116 (1998).....	39
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	2, 6
<i>Brady v. Fibreboard Corp.</i> , 71 Wn. App. 280, 857 P.2d 1094 (1993).....	45, 46
<i>Commonwealth v. Wells</i> , 360 Mass. 846, 274 N.E.2d 452 (1971).....	31
<i>In re Cook</i> , 114 Wn. 2d 802, 792 P.2d 506 (1990).....	32
<i>Copley Press, Inc. v. Superior Court</i> , 228 Cal. App. 3d 77, 278 Cal. Rptr. 443 (1991).....	14, 17
<i>In re Dalluge</i> , 152 Wn. 2d 772, 100 P.3d 279 (2004).....	70
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn. 2d 1, 43 P.3d 4 (2002).....	3
<i>Dixon v. State</i> , 191 So. 2d 94 (Fla. App. 1966).....	31

<i>Dreiling v. Jain</i> , 151 Wn. 2d 900, 93 P.3d 861 (2004).....	41
<i>In re Echeverria</i> , 141 Wn. 2d 323, 6 P.3d 573 (2000).....	32
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).....	18
<i>Holt v. Morris</i> , 84 Wn. 2d 841, 529 P.2d 1081 (1974).....	35, 37
<i>In re James</i> , 96 Wn. 2d 847, 640 P.2d 18 (1982).....	37
<i>In re Johnson</i> , 131 Wn. 2d 558, 933 P.2d 1019 (1997).....	38
<i>Kane v. Smith</i> , 56 Wn. 2d 799, 355 P.2d 827 (1960).....	54
<i>Lambrix v. Singletary</i> , 520 U.S. 518, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997).....	10
<i>In re Lavery</i> , 154 Wn. 2d 249, 111 P.3d 837 (2005).....	3, 7
<i>In re Le</i> , 122 Wn. App. 816, 95 P.3d 1254 (2004).....	7
<i>Leshar Communications, Inc. v. Superior Court</i> , 224 Cal. App. 3d 774, 274 Cal. Rptr. 154 (1990).....	17
<i>Levine v. United States</i> , 362 U.S. 610, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960).....	31
<i>In re Lord</i> , 123 Wn. 2d 296, 868 P.2d 835 (1994).....	71

<i>In re Lybarger</i> , 2 Wash. 131, 25 P. 1075 (1891).....	34
<i>In re Maxfield</i> , 133 Wn. 2d 332, 945 P.2d 196 (1997).....	71
<i>McAllister v. Terr.</i> , 1 Wash. Terr. 360 (1872).....	63
<i>Morissette v. United States</i> , 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).....	55
<i>Newsday, Inc. v. Goodman</i> , 159 A.D.2d 667, 552 N.Y.S.2d 965 (1990).....	16
<i>In re Orange</i> , 152 Wn. 2d 795, 100 P.3d 291 (2004).....	14, 38
<i>Ottis v. Stevenson-Carson Sch. Dist. No. 303</i> , 61 Wn. App. 747, 812 P.2d 133 (1991).....	50
<i>Palmer v. Cranor</i> , 45 Wn. 2d 278, 273 P.2d 985 (1954).....	35
<i>Pasco v. Mace</i> , 98 Wn. 2d 87, 653 P.2d 618 (1982).....	58, 59
<i>Patton v. Yount</i> , 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).....	50
<i>People v. Bradford</i> , 14 Cal. 4th 1005, 60 Cal. Rptr. 2d 225, 929 P.2d 544 (1997)	31
<i>People v. Marathon</i> , 97 A.D.2d 650, 469 N.Y.S.2d 178 (N.Y. App. Div. 1983)	31
<i>People v. Thompson</i> , 50 Cal. 3d 134, 785 P.2d 857 (1990).....	29
<i>Peretz v. United States</i> , 501 U.S. 923, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991).....	31

<i>In re Personal Restraint of Lavery,</i> 154 Wn. 2d 249, 111 P.3d 837 (2005).....	3
<i>In re Personal Restraint of Thompson,</i> 141 Wn. 2d 712, 10 P.3d 380 (2000).....	4
<i>Press-Enterprise Co. v. Superior Court,</i> 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).....	15, 16, 18, 42
<i>Press-Enterprise Co. v. Superior Court,</i> 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).....	18, 19
<i>In re Rafferty,</i> 1 Wash. 382, 25 P. 465 (1890).....	37, 38
<i>Rakas v. Illinois,</i> 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978).....	39
<i>Richmond Newspapers v. Virginia,</i> 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).....	18, 24
<i>Ring v. Arizona,</i> 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).....	13
<i>Roche Fruit Co. v. Northern Pac. Ry.,</i> 18 Wn. 2d 484, 139 P.2d 714 (1943).....	45
<i>Rufer v. Abbott Laboratories,</i> 154 Wn. 2d 530, 114 P.3d 1182 (2005).....	41
<i>In re Runyan,</i> 121 Wn. 2d 432, 853 P.2d 424 (1993).....	36
<i>Schriro v. Summerlin,</i> 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).....	11, 12, 13
<i>Seattle Times Co. v. Ishikawa,</i> 97 Wn. 2d 30, 640 P.2d 716 (1982).....	41

<i>Seattle v. Patu</i> , 147 Wn. 2d 717, 58 P.3d 273 (2002).....	28
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn. 2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	60
<i>In re South Carolina Press Ass'n</i> , 946 F.2d 1037 (4th Cir. 1991)	16
<i>State ex. rel. Beacon Journal Publishing Co. v. Bond</i> , 98 Ohio St. 3d 146, 781 N.E.2d 180 (2002)	15, 16
<i>State ex rel. Murphy v. Superior Court</i> , 82 Wash. 284, 144 P. 32 (1914).....	45
<i>State v. Aho</i> , 137 Wn. 2d 736, 975 P.2d 512 (1999).....	28
<i>State v. Atsbeha</i> , 142 Wn. 2d 904, 16 P.3d 626 (2001).....	65
<i>State v. Bailey</i> , 52 Wn. App. 42, 757 P.2d 541 (1988).....	4, 5
<i>State v. Bone-Club</i> , 128 Wn. 2d 254, 906 P.2d 325 (1995).....	10, 15
<i>State v. Bourgeois</i> , 133 Wn. 2d 389, 945 P.2d 1120 (1997).....	68
<i>State v. Brightman</i> , 155 Wn. 2d 506, 122 P.3d 150 (2005).....	15
<i>State v. Brown</i> , 130 Wn. App. 767, 124 P.3d 663 (2005).....	58
<i>State v. Brown</i> , 132 Wn. 2d 529, 940 P.2d 546 (1997).....	58, 60
<i>State v. Butterfield</i> , 784 P.2d 153 (Utah 1989).....	31

<i>State v. Calle,</i> 125 Wn. 2d 769, 888 P.2d 155 (1995).....	5
<i>State v. Champoux,</i> 33 Wash. 339, 74 P. 557 (1903).....	63
<i>State v. Collins,</i> 50 Wn. 2d 740, 314 P.2d 660 (1957).....	30
<i>State v. Davis,</i> 141 Wn. 2d 798, 10 P.3d 977 (2000).....	61
<i>State v. Delgado,</i> 148 Wn. 2d 723, 63 P.3d 792 (2003).....	5
<i>State v. Duckett,</i> 141 Wn. App. 797, 173 P.3d 948 (2007).....	20
<i>State v. Easterling,</i> 157 Wn. 2d 167, 137 P.3d 825 (2006).....	15
<i>State v. Elmore,</i> 155 Wn. 2d 758, 123 P.3d 72 (2005).....	56
<i>State v. Evans,</i> 154 Wn. 2d 438, 114 P.3d 627 (2005).....	8, 10
<i>State v. Fire,</i> 145 Wn. 2d 152, 34 P.3d 1218 (2001).....	44, 61
<i>State v. Fleming,</i> 140 Wn. App. 132, 170 P.3d 50 (2007).....	58
<i>State v. Gentry,</i> 125 Wn. 2d 570, 888 P.2d 1105 (1995).....	61
<i>State v. Gore,</i> 101 Wn. 2d 481, 681 P.2d 227 (1984).....	7

<i>State v. Gosser,</i> 33 Wn. App. 428, 656 P.2d 514 (1982).....	50, 52, 54
<i>State v. Gunwall,</i> 106 Wn. 2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986).....	58
<i>State v. Guthrie,</i> 185 Wash. 464, 56 P.2d 160 (1936).....	45
<i>State v. Gutierrez,</i> 50 Wn. App. 583, 749 P.2d 213 (1988).....	39
<i>State v. Hanson,</i> 151 Wn. 2d 783, 91 P.3d 888 (2004).....	10
<i>State v. Henderson,</i> 114 Wn. 2d 867, 792 P.2d 514 (1990).....	29
<i>State v. Hicks,</i> ___ Wn. 2d ___, 2008 WL 1821869 (Apr. 24, 2008).....	58
<i>State v. Hodgson,</i> 44 Wn. App. 592, 722 P.2d 1336 (1986).....	4
<i>State v. Hughes,</i> 106 Wn. 2d 176, 721 P.2d 902 (1986).....	49
<i>State v. Jones,</i> 68 Wn. App. 843, 845 P.2d 1358 (1993).....	39
<i>State v. Killen,</i> 39 Wn. App. 416, 693 P.2d 731 (1985).....	45
<i>State v. Kypreos,</i> 110 Wn. App. 612, 39 P.3d 371 (2002).....	39
<i>State v. Langford,</i> 67 Wn. App. 572, 837 P.2d 1037 (1992).....	45
<i>State v. LeFaber,</i> 128 Wn. 2d 896, 913 P.2d 369 (1996).....	29

<i>State v. Logan</i> , 102 Wn. App. 907, 10 P.3d 504 (2000).....	55
<i>State v. Marsh</i> , 106 Wn. App. 801, 24 P.3d 1127.....	45
<i>State v. McCann</i> , 16 Wash. 249, 47 Pac. 443, 49 Pac. 216 [(1896)].....	62
<i>State v. McHenry</i> , 88 Wn. 2d 211, 558 P.2d 188 (1977).....	55
<i>State v. Monroe</i> , 107 Wn. App. 637, 27 P.3d 1249 (2001).....	67
<i>State v. Moody</i> , 7 Wash. 395, 35 P. 132 (1893).....	62
<i>State v. Murphy</i> , 9 Wash. 204, 37 P. 420 (1894).....	62
<i>State v. Myers</i> , 133 Wn. 2d 26, 941 P.2d 1102 (1997).....	55
<i>State v. Neal</i> , 144 Wn. 2d 600, 30 P.3d 1255 (2001).....	68
<i>State v. Neely</i> , 113 Wn. App. 100, 52 P.3d 539 (2002).....	55
<i>State v. Nemitz</i> , 105 Wn. App. 205, 19 P.3d 480 (2001).....	45
<i>State v. Noltie</i> , 116 Wn. 2d 831, 809 P.2d 190 (1991).....	49
<i>State v. Ortiz</i> , 119 Wn. 2d 294, 831 P.2d 1060 (1992).....	63

<i>State v. Rholeder,</i> 82 Wash. 618, 144 P. 914 (1914).....	45
<i>State v. Rice,</i> 120 Wn. 2d 549, 844 P.2d 416 (1993).....	45, 46
<i>State v. Roberts,</i> 88 Wn. 2d 337, 562 P.2d 1259 (1977).....	55
<i>State v. Rupe,</i> 108 Wn. 2d 734, 743 P.2d 210 (1987).....	50
<i>State v. Rutten,</i> 13 Wash. 203, 43 P. 30 (1895).....	61
<i>State v. Smith,</i> 106 Wn. 2d 772, 725 P.2d 951 (1986).....	68
<i>State v. Smith,</i> 122 Wn. App. 294, 93 P.3d 206 (2004).....	28
<i>State v. Stein,</i> 144 Wn. 2d 236, 27 P.3d 184 (2001).....	29
<i>State v. Stenson,</i> 132 Wn. 2d 668, 940 P.2d 1239 (1997).....	65
<i>State v. Stockwell,</i> 129 Wn. App. 230, 118 P.3d 395 (2005).....	2, 4
<i>State v. Stockwell,</i> 159 Wn. 2d 394, 150 P.3d 82 (2007).....	3, 6, 7
<i>State v. Studd,</i> 137 Wn. 2d 533, 973 P.2d 1049 (1999).....	28
<i>State v. Thomas,</i> 128 Wn. 2d 553, 910 P.2d 475 (1996).....	29
<i>State v. Thomas,</i> 150 Wn. 2d 821, 83 P.3d 970 (2004).....	68

<i>State v. Tingdale, ,</i> 117 Wn. 2d 595, 817 P.2d 850 (1991).....	44
<i>State v. Twyman,</i> 143 Wn. 2d 115, 17 P.3d 1184 (2001).....	45, 47
<i>State v. Walker,</i> 93 Wn. App. 382, 967 P.2d 1289 (1998).....	38
<i>State v. Walker,</i> 136 Wn. 2d 678, 965 P.2d 1079 (1998).....	39
<i>State v. Wilcox,</i> 11 Wash. 215, 39 P. 368 (1895).....	62
<i>State v. Williamson,</i> 100 Wn. App. 248, 996 P.2d 1097 (2000).....	46
<i>State v. Witherspoon,</i> 82 Wn. App. 634, 919 P.2d 99 (1996).....	49
<i>In re Teddington,</i> 116 Wn. 2d 761, 808 P.2d 156 (1991).....	32
<i>In re Theders,</i> 130 Wn. App. 422, 123 P.3d 489 (2005).....	70, 71
<i>Toliver v. Olsen,</i> 109 Wn. 2d 607, 746 P.2d 809 (1987).....	37
<i>In re Tortorelli,</i> 149 Wn. 2d 82, 66 P.3d 606	68
<i>In re Twining,</i> 77 Wn. App. 882, 894 P.2d 1331.....	45
<i>United States v. Antar,</i> 38 F.3d 1348 (3d Cir. 1994).....	16

<i>United States v. McDade</i> , 929 F. Supp. 815 (E.D. Pa. 1996)	16
<i>In re Vandervlugt</i> , 120 Wn. 2d 427, 842 P.2d 950 (1992)	8
<i>Wainwright v. Witt</i> , 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)	49
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)	15, 42
<i>In re Williams</i> , 111 Wn. 2d 353, 759 P.2d 436 (1988)	32
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	55
<i>Wright v. State</i> , 340 So. 2d 74 (Ala. 1976)	31

CONSTITUTION, STATUTES AND COURT RULES

Ala. R. Ct. 18.2(b)	21
Alaska R. Admin 15(j)(2)-(3)	21
Ariz. S. Ct. R. 123(e)(9)	21
Ark. Code § 16-32-111(b)	24
Colo. Rev. Stat. §13-71-115(2)	22
Conn. Gen Stat. 51-232(c)	22
Const. art. I, § 10	14, 33
Const. art. I, § 13	35
Const. art. I, § 21	61

Const. art. I, § 22.....	14
ER106	65
ER 801(d)(ii).....	65, 66
ER 803(a)(1)	67
GR 15.....	20
GR 31(j).....	20
Idaho R. Civ. P. 47(d).....	22
Idaho Crim. R. 23(1).....	22
Kan. Dist. Ct. R. 167.....	22
La. Code Crim. Pro. art. 416.1(C).....	24
14 Maine Rev. Stat. § 1254-A(7)-(9).....	22
Mass. Gen. Laws, ch. 234A, § 22	23
Mass. Gen. Laws, ch. 234A, § 22	23
Mich. Ct. R. 2.510(C)(1).....	23
Mich. Ct. R. 6.412(A).....	23
Minn. R. Crim. P. Form 50.....	24
Mo. S. Ct. R. 27.09(b).....	23
N.H. Super. Ct. R. 61-A.....	23
N.J. R. Gen. Applic. 1:38(c)	23
N.M. Stat. § 38-5-11(C)	23
Pa. R. Crim. Pro. 632(B).....	23

RAP 2.5(a)(3).....	33
RAP 9.2(b).....	71
RAP 16.4(c)(2).....	36, 38
RCW 4.44.170(2).....	50, 56, 57
RCW 7.36.130	33, 35, 38
RCW 7.36.130(1).....	36
RCW 9.94A.030(33).....	3, 5
RCW 9.94A.030(33), .570.....	3
RCW 9A.44.070	5
RCW 9A.44.070(1).....	5
RCW 9A.44.070 (1986).....	3
RCW 9A.44.073(1).....	3, 5
Tex. Gov't Code § 62.0132(f).....	24
U.S. Const., Am. I.....	19
U.S. Const., Am. VI.....	49, 58
Vt. R. Crim. P. 24(a)(2)	24

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether this Court lacks the authority to overturn the Supreme Court's explicit ruling of law entered in Stockwell's direct appeal?

2. Whether Stockwell fails to show his public-trial rights were violated by the trial court's use (and his stipulation to) the use of confidential jury questionnaires where all actual voir dire of the jurors was held in open court, and whether he fails to show that this claim may be the basis for collateral relief?

3. Whether Stockwell fails to show the trial court's resolution of the cause challenges during voir dire entitles him to relief?

4. Whether the trial court abused its discretion in admitting the transcripts of the child interviews as exhibits after Stockwell successfully persuaded it to admit the transcript of one of the victims' pre-trial testimony as an exhibit?

5. Whether Stockwell fails to show that counsel was ineffective on direct appeal?

II. RESPONSE

The State respectfully moves this court for an order dismissing the petition with prejudice because Stockwell fails to show he is entitled to relief.

III. STATEMENT OF THE CASE

In 1986 Stockwell was pled guilty and was convicted of the statutory rape of his girlfriend's then 8-year-old daughter, CS, in Pierce County. CP 64, 70; Exh. 16.¹

In 2003, he was charged with molesting his CS's niece, MS, and attempting to molest CS's daughter, EM. CP 1, 14, 42; Exh. 2. After a jury trial, he was convicted as charged, and sentenced as a persistent offender, based on the 1986 offense. CP 83-84; Exh. 1.

Stockwell appealed, alleging that his sentence violated *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and that his statutory rape conviction was not comparable to the offense of rape of a child, and thus not a "strike" under the Persistent Offender Accountability Act (POAA). *State v. Stockwell*, 129 Wn. App. 230, 231, 118 P.3d 395 (2005) (Exh. 3). The Court affirmed. *Id.* In the unpublished portion of the opinion, the Court also rejected a number of contentions regarding the constitutionality of the POAA, and a number of issues presented in Stockwell's statement of additional grounds. Exh. 3, at 6-9.

The Supreme Court accepted Stockwell's petition for review, solely

¹ "Exh." will refer to the exhibits filed by Stockwell in the current proceeding. "RP" and "CP" will refer to the reports of proceedings and clerk's papers from Stockwell's direct appeal, which the Court has ordered transferred to the instant proceeding.

on the comparability issue. *State v. Stockwell*, 159 Wn.2d 394, ¶ 1, 150 P.3d 82 (2007) (Exh. 4). The Court affirmed, as a matter of law:

¶ 5 Since only questions of law are before us, our review is de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The POAA requires a life sentence upon the second (or third) conviction for certain designated crimes or for crimes that are deemed “comparable” to those designated. RCW 9.94A.030(33). First degree rape of a child is a designated strike offense, but in 1986 no crime in Washington bore that name. See RCW 9.94A.030(33)(b)(i), .570. We turn first to whether rape of a child is legally comparable to first degree statutory rape.

¶ 6 We recently considered a similar question in *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005). We reiterated that when “the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense.” *Id.* at 255, 111 P.3d 837 (citing *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998)). While *Stockwell*'s offense was not a foreign one, we will apply a similar approach here.

¶ 7 Thus, if the elements of the strike offense and the elements of the foreign (or prior) crime are comparable, the former (or prior) crime is a strike offense. *Id.* Legal comparability analysis is not an exact science, but when, for example, an out-of-state statute criminalizes more conduct than the Washington strike offense, or when there would be a defense to the Washington strike offense that was not meaningfully available to the defendant in the other jurisdiction or at the time, the elements may not be legally comparable. See *Lavery*, 154 Wn.2d at 256-57, 111 P.3d 837.

¶ 8 Only one element concerns us here. The legislature has added a statutory element to first degree rape of a child, nonmarriage. RCW 9A.44.073(1). The former statutory rape statute, however, did not mention marriage. See former RCW 9A.44.070 (1986), repealed by Laws of 1988, ch. 145, § 24(1). *Stockwell* argues that the modern statute

criminalizes less conduct (by exempting sexual contact between spouses) and provides a defense (of marriage) that would not have been available under the prior law. The Court of Appeals rejected his claim because it found that nonmarriage was an implied, nonstatutory element of the crime of statutory rape and thus the elements were comparable. *State v. Stockwell*, 129 Wn. App. 230, 235, 118 P.3d 395 (2005).

¶ 9 In the 1980s, divisions of the Washington State Court of Appeals split on whether nonmarriage was an implied element of first degree statutory rape: Division Two finding it was, Division One finding it was not. *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); *State v. Hodgson*, 44 Wn. App. 592, 599, 722 P.2d 1336 (1986), *aff'd on other ground*, 108 Wn.2d 662, 740 P.2d 848 (1987).⁴

⁴ Stockwell asserts that this court has already found that rape of a child and statutory rape were not substantially similar in *In re Personal Restraint of Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000). We disagree. In *Thompson*, the petitioner pleaded guilty to a crime (rape of a child) that did not exist on the date of the conduct charged. This court vacated, tolled the statute of limitations, and allowed refiling of the charges under the correct statute. A judgment and sentence is clearly invalid on its face if it is for a crime that did not exist at the time. *Id.* at 719, 10 P.3d 380. The primary issue in *Thompson* was whether the defendant had waived the issue or invited the error by pleading guilty. While there was some discussion of the elements of the two crimes in the context of the statute of limitations and the appropriate scope of a superseding indictment, the parties did not appear to be disputing what the elements were, merely the consequences of them.

¶ 10 In *Bailey*, a defendant was charged with first degree statutory rape of a three-year-old child. The jury was instructed that if it could not reach a verdict on that charge, it could consider whether the defendant had committed indecent liberties as a lesser included offense. The jury returned a

verdict for indecent liberties and Bailey appealed. Bailey argued that, per *Hodgson*, indecent liberties was not a lesser included offense of first degree statutory rape since indecent liberties contained an element not present in first degree statutory rape: nonmarriage.

¶ 11 Division Two disagreed. It concluded:

[t]he analysis in *Hodgson* leads to absurd results. First, the Legislature cannot possibly have contemplated statutory rape in the first degree [as] being perpetrated on one's spouse. In the unlikely event that a child of 10 years [old] or less establishes sufficient necessity to receive permission from the superior court to marry, it is inconceivable that the Legislature intended to criminalize consensual sexual intercourse between spouses, regardless of their ages. The fact that the Legislature did not expressly make nonmarriage an element of first degree statutory rape can lead to only one logical conclusion: the Legislature did not expect that children under the age of 10 would be marrying. Therefore, the only plausible reading of former RCW 9A.44.070 is to consider nonmarriage an implicit element of the crime.

Bailey, 52 Wn. App. at 46, 757 P.2d 541. We agree with Division Two that it is simply inconceivable that the legislature would expect that children 10 years old or less would marry. Nonmarriage is an implied element of the crime of first degree statutory rape.

¶ 12 Further, our purpose today is to determine what the legislature intended. *Cf. State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). The legislature added this comparability clause after a court declined to infer one. *See State v. Delgado*, 148 Wn.2d 723, 725, 63 P.3d 792 (2003) and Laws of 2001, ch. 7, § 2(31)(b)(ii). Given the apparent impetus for adding a comparability clause to the POAA, given *Bailey*, and given the legislative history of these statutes, we hold as a matter of law that first degree statutory rape under former RCW 9A.44.070(1) and first degree rape of a child under RCW 9A.44.073(1) are comparable. See RCW 9.94A.030(33)(b), .570.⁵

⁵ Before 2004, it was clear that prior crimes could also be factually comparable to strike offenses. *Morley*, 134 Wn.2d 588, 952 P.2d 167. Since we find that rape of a child and statutory rape are legally comparable, no fact finding is necessary. Therefore, we do not reach whether *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) requires a jury trial to determine whether a prior offense is factually comparable.

III

¶ 13 Former first degree statutory rape and rape of a child in the first degree are comparable. Therefore, first degree statutory rape is a “strike” under the “two strikes” provision of the POAA. We affirm the Court of Appeals and affirm Stockwell’s life sentence.

Stockwell, 159 Wn.2d 394, ¶¶ 5-13. The Supreme Court issued its mandate on January 29, 2007. Exh. 5.

IV. AUTHORITY FOR PETITIONER’S RESTRAINT

The authority for the restraint of Dan Stockwell lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on June 18, 2004, in cause number 03-1-01319-4, upon Stockwell’s conviction of first-degree child molestation and attempted first-degree child molestation.

V. ARGUMENT

A. THIS COURT LACKS THE AUTHORITY TO OVERTURN THE SUPREME COURT'S EXPLICIT RULING OF LAW ENTERED IN STOCKWELL'S DIRECT APPEAL.

Stockwell first urges this Court to revisit the ruling on direct appeal that his prior conviction for statutory rape was comparable to the present offense of rape of a child, and thus counted in his offender score.

This Court is bound by the Supreme Court's decisions. *In re Le*, 122 Wn. App. 816, 820, 95 P.3d 1254, 1256 (2004) (citing *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984)), *aff'd sub nom. In re Domingo*, 155 Wn.2d 356 (2005). The Supreme Court specifically held on direct appeal that the offenses were legally comparable.² *State v. Stockwell*, 159 Wn.2d 394, ¶¶ 8-13, 150 P.3d 82 (2007). Stockwell's request for this Court to overturn that ruling is misplaced. The contention that that Court overlooked or was not presented with reasons to have reached a different result, it is for that Court alone to consider.

The State will thus not respond further to this contention. It does, however, reserve its right to address this issue should the matter find its way

² Although Stockwell also again argues, as he did on direct appeal, that a factual comparability analysis would be inappropriate under *In re Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005), Brief of Petitioner, at 6-7, the State conceded that point in the Supreme Court on direct appeal.

to the Supreme Court. This reservation includes whether reconsideration would serve the ends of justice, *see In re Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992), and whether the relief Stockwell seeks would require a new rule of law that may not be applied on collateral review, *see infra*, as well as any other pertinent procedural or substantive response.

B. STOCKWELL FAILS TO SHOW HIS PUBLIC-TRIAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S USE (AND HIS STIPULATION TO) THE USE OF CONFIDENTIAL JURY QUESTIONNAIRES WHERE ALL ACTUAL VOIR DIRE OF THE JURORS WAS HELD IN OPEN COURT, AND HE FAILS TO SHOW THAT THIS CLAIM MAY BE THE BASIS FOR COLLATERAL RELIEF.

Stockwell next contends that the trial court erred in “closing” part of the voir dire by sealing the juror questionnaires. This claim must be rejected because Stockwell seeks to have this Court apply a new rule of law on collateral review, because he fails to show any violation of the rights to open or public trials, and because fails to show he was in any way prejudiced, which is a prerequisite to collateral relief.

1. New procedural rules may not be applied for the first time on collateral review.

Except in certain narrowly construed circumstances, a “new rule” of constitutional law may only be applied to cases not yet final on direct appeal. *State v. Evans*, 154 Wn.2d 438, ¶¶ 7-8, 114 P.3d 627, *cert. denied*, 546 U.S.

983 (2005) (citing *In re St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992), and *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)). The Supreme Court explained that this *Teague* analysis “involves a three-step process”:

First, the court must determine when the defendant’s conviction became final. Second, it must ascertain the “legal landscape as it then existed,” and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually “new.” Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) (citations omitted). Applied to the present case, three issues are thus presented:

1. Is Stockwell’s conviction “final”?
2. Does Stockwell seek a “new rule”?
3. If he does, does the propose rule fall within the narrow exceptions to the *St. Pierre/Teague* rule?

“The critical issue in applying the current retroactivity analysis is whether the case was final when the new rule was announced.” *St. Pierre*, 118 Wn.2d at 327. By “final,” the Court means “a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” *St. Pierre*, 118 Wn.2d at 327, citing *Griffith*, 479 U.S. at 321 n. 6.

Here, the mandate issued on January 29, 2007, and the time to certiorari review expired well before this instant petition was filed. His conviction is thus final for the purposes of *St. Pierre* and *Teague*.

A new rule is one that breaks new ground or imposes a new obligation. *Evans*, 154 Wn.2d at ¶ 9 citing *Teague*, 489 U.S. at 301. “A new rule is a ‘result ... not *dictated* by precedent existing at the time the defendant’s conviction became final.’” *State v. Hanson*, 151 Wn.2d 783, 790, 891, 91 P.3d 888 (2004) (emphasis and ellipses the Court’s) (*quoting Teague*, 489 U.S. at 301). The focus of the inquiry is whether reasonable jurists could differ as to whether precedent compels the sought-for rule. *Banks*, 542 U.S. at 413. A decision is “dictated” by then-existing precedent when the “unlawfulness of [defendant’s] conviction was apparent to all reasonable jurists.” *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997). The rule Stockwell seeks fails this test and thus announces a new rule.

While Stockwell relies on existing precedent such as *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), the cases he cites do not “compel” the result he seeks. To the contrary, there is no published authority that holds that juror questionnaires are subject to the public trial rule. Indeed, as will be discussed, *infra*, the court rules contain a presumption that they will be private. Because no existing precedent dictates the result Stockwell

seeks, it is thus a “new rule” subject to *St. Pierre* and *Teague*.

Nor does Stockwell’s proposed new rule fall within either of the narrow “exceptions” to *Teague*. These “exceptions were addressed in *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). In *Summerlin*, Justice Scalia explained that while the courts commonly speak of the *Teague* exceptions, they are more accurately characterized as *substantive* rules that are not subject to *Teague*’s bar. *Summerlin*, 542 U.S. at 352 n.4. Such rules generally apply retroactively:

New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish[.] Such rules apply retroactively because they “necessarily carry a significant risk that a defendant stands convicted of ‘an act that the law does not make criminal’” or faces a punishment that the law cannot impose upon him.

Summerlin, 542 U.S. at 351-52 (emphasis the Court’s; footnote and citations omitted). New procedural rules, on the other hand, because they do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise, generally do not apply to cases already final. *Summerlin*, 542 U.S. at 352. Procedural rules that so impact the reliability of a conviction as to justify disturbing finality are thus extraordinarily rare:

Because of this more speculative connection to innocence, we give retroactive effect to only a small set of “‘watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” That a new procedural rule is “fundamental” in some abstract sense is not enough; the rule must be one “without which the likelihood of an accurate conviction is *seriously* diminished.” This class of rules is extremely narrow, and “it is unlikely that any ... ‘ha[s] yet to emerge.’”

Summerlin, 542 U.S. at 352 (emphasis and editing the Court’s; citations omitted).

Applying these principles, the Court explained that procedural rules are those that affect the manner of determining the defendant’s culpability, not what facts must be found:

A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa.

Summerlin, 542 U.S. at 354. The rule Stockwell seeks will not alter the elements of any offense or the range of conduct that may be punished. Indeed, it only tangentially even affects the manner of determining culpability. It is clearly procedural, not substantive.

Nor would his proposed change create a “watershed” procedural rule. Such rules “implicat[e] the fundamental fairness and accuracy of the criminal proceeding.” *Summerlin*, 542 U.S. at 355. Thus in *Summerlin*, where the issue was the right to a jury, the Court concluded that although the

Constitution may mandate jury factfinding, fairness and accuracy do not:

The question here is not, however, whether the Framers believed that juries are more accurate factfinders than judges (perhaps so--they certainly thought juries were more independent). Nor is the question whether juries actually are more accurate factfinders than judges (again, perhaps so). Rather, the question is whether judicial factfinding so “*seriously* diminishe[s]” accuracy that there is an “impermissibly large risk” of punishing conduct the law does not reach. The evidence is simply too equivocal to support that conclusion.

Summerlin, 542 U.S. at 355-56 (emphasis and editing the Court’s; citations omitted). The Court thus concluded that a jury was not essential to an accurate finding of aggravating circumstances for death penalty purposes, and that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held that aggravating circumstances had to be found by a jury, was not a watershed procedural rule subject to retroactive application. *Summerlin*, 542 U.S. at 358. Surely if a the right to jury finding of aggravating circumstances in a death penalty proceeding, is not a watershed rule, the requirement that juror questionnaires not be sealed cannot rise to that level. Stockwell’s proposed rule thus cannot be regarded as a watershed procedural rule subject to retroactive application. The California Court of Appeal’s resolution of this issue,³ although on estoppels rather than collateral retroactivity grounds, is instructive:

³ The Court found that juror questionnaires were subject to disclosure.

As indicated above, the blanket denial of access to the questionnaires here was unconstitutional. Nonetheless, we conclude that to not honor the trial court's assurance of confidentiality would be unfair to the venirepersons in this case who presumably relied on that assurance. For one thing, those prospective jurors whose backgrounds include information meriting privacy protection were not afforded the opportunity to bypass the written answer to sensitive questions on the questionnaire by requesting an in camera hearing so they could protect potentially legitimate privacy concerns.

Given the representation made to the venirepersons by the trial court, we believe general principles of estoppel should bar release of the questionnaires used in this case. Accordingly, we shall not order them released.

Copley Press, Inc. v. Superior Court, 228 Cal. App. 3d 77, 89-90, 278 Cal. Rptr. 443 (1991). Since Stockwell cannot receive such a rule's benefit, this Court should decline to decide it.

2. *Stockwell cannot show the right to open or public trial was violated*

Even were the rule Stockwell seeks available to him on collateral review, Stockwell fails to compellingly show any right to an open or public trial was violated. Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. Similarly, article I, section 10 provides that “[j]ustice in all cases shall be administered openly.” These rights include jury selection, an important part of the criminal trial process. *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

Generally, when a party requests closure of the courtroom, the trial

court must weigh five factors to balance the competing constitutional interests. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); *State v. Brightman*, 155 Wn.2d 506, 516, 122 P.3d 150 (2005); *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006). To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest. *Orange*, at 806 (citing *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)); *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*).

Stockwell, however, gives short shrift to the threshold issue presented here: whether any closure in a constitutional sense occurred at all. His sole reasoning is a quote from *State ex. rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St. 3d 146, 152, 781 N.E.2d 180 (2002):

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.

Brief of Petitioner at 29. *Bond*, however, is itself conclusory. Its analysis consists entirely of the foregoing passage, followed by the statement (also quoted by Stockwell) that “virtually every other court” to address the issue

concurring. . *Bond*, 98 Ohio St. 3d at 152. An examination of what Stockwell characterizes as that court's "survey[of] the law," however, shows that none of those other courts (six of them) engaged in much critical analysis, either.

In *United States v. Antar*, 38 F.3d 1348, 1359-1360 (3d Cir. 1994), the issue was not the sealing of questionnaires but the sealing of the actual transcripts of the voir dire proceedings. That case thus sheds little light.

In *United States v. McDade*, 929 F. Supp. 815, 817 (E.D. Pa. 1996), a trial court decision, the entire "analysis" consisted of a conclusion:

In *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984), the Supreme Court held that the constitutional guarantee of open public proceedings in criminal trials extends to voir dire. I construe this holding as encompassing all voir dire questioning—both oral and written.

Similarly, in *In re South Carolina Press Ass'n*, 946 F.2d 1037 (4th Cir. 1991), while the court makes passing reference to the fact that questionnaires were used, the only citation in that regard was to a case involving the sealing of a *motion* filed in the court. *South Carolina Press Ass'n*, 946 F.2d at 1040 n.3 (citing *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984)). Moreover, the case was primarily concerned with the trial court's closure of the *entire* voir dire.

The New York Appellate Division was similarly terse in *Newsday, Inc. v. Goodman*, 159 A.D.2d 667, 669, 552 N.Y.S.2d 965 (1990):

Initially, we note that the questionnaires completed by the petit jurors in this criminal action were an integral part of the voir dire proceeding. Indeed, these questionnaires are authorized by statute as a “time saving procedure” to streamline the voir dire (CPL 270.15[1]; 11A Preiser, *1985 Supplementary Practice Commentaries, McKinney’s Cons. Laws of N.Y.*, CPL 270.15 (1990 Pocket Part at 213)). Therefore, the presumption of openness applied to these questionnaires.

In *Copley Press, Inc. v. Superior Court*, 228 Cal. App. 3d 77, 85 n.7, 278 Cal. Rptr. 443. (1991), the Court of Appeal essentially assumed that the questionnaires were “part of the voir dire” and addressed only the narrow contention that they were “discovery” on the ground that the trial court “is not in the discovery business.” *Copley Press*, 228 Cal. App. 3d at 89. No constitutional analysis was undertaken.

Finally, in *Leshar Communications, Inc. v. Superior Court*, 224 Cal. App. 3d 774, 274 Cal. Rptr. 154 (1990), the Court of Appeal for a different district largely based its opinion on that in *Copley*. Its reasoning regarding whether questionnaires were subject to public trial rules was limited to quoting from *Press-Enterprise I* to the effect that voir dire is part of the public trial right, but that some aspects of it might need to be restricted to protect the jurors’ privacy interests. *Leshar Communications*, 224 Cal. App. 3d at 777-78 (*citing Press-Enterprise I*, 464 U.S. at 511-12). The court then concluded: “It follows that the public access mandate of *Press-Enterprise* applies to voir dire questionnaires as well as to oral questioning.” *Leshar*

Communications, 224 Cal. App. 3d at 778. The court failed to in any way explain *why* the Supreme Court’s discussion of live interrogation of jurors during voir dire necessarily included a questionnaire.

Any analysis of this question should obviously begin *Press-Enterprise I*.⁴ In that case, the Court explained why voir dire proceedings should be included within the open-trial right:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S., at 569-571.

Press-Enterprise I, 464 U.S. at 508. Subsequently, in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*) the Court set forth a framework for determining what is and what is not within the scope of the public-trial right. In that case, the Court applied an “experience and logic” test that had been first announced by Justice Brennan in his concurring opinion in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). *Press-Enterprise II*, 478 U.S. at 8-9. This test looks to whether such a right

⁴ Stockwell does not argue that any separate state constitutional analysis is appropriate.

was consistent with “experience and logic.” *Press-Enterprise II*, 478 U.S. at 9.

The “experience” inquiry considers whether there has been a “tradition of accessibility.” *Press-Enterprise II*, 478 U.S. at 8. In other words, a court looks to “whether the place and process have historically been open to the press and general public.” *Id.* A “tradition of accessibility implies the favorable judgment of experiences.” *Id.*

The “logic” inquiry focuses on “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* In conducting this inquiry, a court should consider whether the process enhances the fairness of the criminal trial as well as “the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise II*, 478 U.S. at 9.

These considerations are related as they “shape the functioning of governmental processes.” *Id.* If the right asserted is grounded in both experience and logic, then a right of access to the proceedings in question exists under the First Amendment.

Turning first to the experience prong, it is plain from the cases cited by Stockwell, that a number of trial courts were clearly of the belief that sealing of juror questionnaires is an acceptable and common practice.

Indeed, Washington's court rules and juror information reflect a presumption that such questionnaires are not public documents. For example, GR 31(j) provides that "individual juror information, other than name, is presumed to be private."⁵ The juror handbook appearing on the Washington Courts website clearly anticipates that questioning may occur in private:

After you're sworn in, the judge and the lawyers will question you and other members of the panel to find out if you have any knowledge about the case, any personal interest in it, or any feelings that might make it hard for you to be impartial. This questioning process is called *voir dire*, which means "to speak the truth." ... Though some of the questions may seem personal, you should answer them completely and honestly. ... If you are uncomfortable answering them, tell the judge and he/she may ask them privately.

http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.jury_guide

#A3. Similarly, the video shown to prospective jurors upon their arrival for service tells them to alert the court if they wish to answer certain questions in private. <http://www.courts.wa.gov/newsinfo/resources/>.

And, in July 2000, the Washington State Jury Commission issued its

⁵ The State respectfully submits that Division III of this Court misread that rule in *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007). The Court concluded that GR 31 is subject to GR 15(c), which requires a *Bone-Club* type hearing before closure or sealing may occur. GR 31(j), however, specifically provides that juror information other than name is presumed private, and further specifies the procedure that must be followed before disclosure. It is an absurd conclusion that a court must hold a hearing before "sealing" information that is already not available to the public. *See also Duckett*, 141 Wn. App. at ¶ 27 (Brown, J., dissenting).

Report to the Board for Judicial Administration and recommended that jurors be given an opportunity to discuss sensitive matters in private:

Recommendation 20 ... The court should try to protect jurors from unreasonable and unnecessary intrusions into their privacy during jury selection. In appropriate cases, the trial court should submit written questionnaires to potential jurors regarding information that they may be embarrassed to disclose before other jurors.

http://www.courts.wa.gov/committee/?fa=committee.display&item_id=277&committee_id=101.

Nor is Washington alone in this conclusion. Indeed, the overwhelming number of states that have addressed the issue by statute or rule have concluded that juror questionnaires should not be available to the general public. *See* Ala. R. Ct. 18.2(b) (“If a juror questionnaire containing personal information is obtained from a prospective juror in any case appealed to the Court of Criminal Appeals, that questionnaire shall not be included in the clerk’s portion of the record on appeal. ... Any such questionnaires supplemented into the appellate record shall be available for inspection only by the court and the parties to the appeal.”) Alaska R. Admin 15(j)(2)-(3) (“Trial questionnaires and trial panel lists are confidential. ... The parties, their attorneys, and agents of their attorneys shall not disclose ... the trial questionnaires...”); Ariz. S. Ct. R. 123(e)(9) (“information obtained by special screening questionnaires or in voir dire proceedings that personally

identifies jurors summoned for service, except the names of jurors on the master jury list, are confidential, unless disclosed in open court or otherwise opened by order of the court.”); Colo. Rev. Stat. §13-71-115(2) (“With the exception of the names of qualified jurors and disclosures made during jury selection, information on the questionnaires shall be held in confidence by the court, the parties, trial counsel, and their agents. ... The original completed questionnaires for all prospective jurors shall be sealed in an envelope and retained in the court’s file but shall not constitute a public record.”); Conn. Gen Stat. 51-232(c) (questionnaires may be viewed only by court and parties and are not public records); Idaho R. Civ. P. 47(d) (“In order to provide for open, complete and candid responses to juror questionnaires and to protect juror privacy, information derived from or answers to juror questionnaires shall be confidential and shall not be disclosed to anyone except pursuant to court order.”); Idaho Crim. R. 23(1) (same language); Idaho Admin R 32(g)(7) (providing for confidentiality); Kan. Dist. Ct. R. 167 (suggested form informs jurors that “[t]he juror questionnaire is not a public record and is only made available to court personnel and the attorneys and parties to the case being tried.”); 14 Maine Rev. Stat. § 1254-A(7)-(9) (questionnaires “may at the discretion of the court be made available to the attorneys and their agents and investigators and the pro se parties at the courthouse for use in the conduct of voir dire examination” and such information may not be

further disclosed without court authorization); Mass. Gen. Laws, ch. 234A, § 22 (“A notice of the confidentiality of the completed questionnaire shall appear prominently on the face of the questionnaire.”); Mass. Gen. Laws, ch. 234A, § 22 (information in questionnaires not to be disclosed except to court and parties and is not a public record); Mich. Ct. R. 2.510(C)(1) (questionnaires available only to parties and court absent court order); Mich. Ct. R. 6.412(A) (applying R. 2.510 to criminal cases); Mo. S. Ct. R. 27.09(b) (“Jury questionnaires maintained by the court in criminal cases shall not be accessible except to the court and the parties. Upon conclusion of the trial, the questionnaires shall be retained under seal by the court except as required to create the record on appeal or for post-conviction litigation. Information so collected is confidential and shall not be disclosed except on application to the trial court and a showing of good cause.”); N.H. Super. Ct. R. 61-A (attorneys entitled to a copy of the questionnaire, but “shall not exhibit such questionnaire to anyone other than his client and other lawyers and staff employed by his or her firm.”); N.J. R. Gen. Applic. 1:38(c) (questionnaires are confidential and not public records); N.M. Stat. § 38-5-11(C) (“questionnaires obtained from jurors shall be made available for inspection and copying by a party to a pending proceeding or their attorney or to any person having good cause for access”); Pa. R. Crim. Pro. 632(B) (“The information provided by the jurors on the questionnaires shall be confidential

and limited to use for the purpose of jury selection only. Except for disclosures made during voir dire, or unless the trial judge otherwise orders pursuant to paragraph (F), this information shall only be made available to the trial judge, the defendant(s) and the attorney(s) for the defendant(s), and the attorney for the Commonwealth.”); Vt. R. Civ. P. 47(a)(2) (questionnaires may be made available to public only after names and addresses have been redacted); Vt. R. Crim. P. 24(a)(2) (same); Tex. Gov’t Code § 62.0132(f)-(g) (questionnaires are confidential and may be disclosed only to court and parties); *cf.*, Ark. Code § 16-32-111(b) (questionnaires may be sealed on showing of good cause); La. Code Crim. Pro. art. 416.1(C) (jury questionnaire “may” be made a part of the record); Minn. R. Crim. P. Form 50 (advising jurors that answers are part of the public record).

The more common practice in this country, as documented by court rule and law, is that jury questionnaires are not matters of public record. The experience prong of *Enterprise Press II* thus militates against Stockwell’s claim.

The logic prong does not support Stockwell, either. In *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569-72, 100 S. Ct. 2814, 2834, 65 L. Ed. 2d 973 (1980) the Court identified the following purposes served by openness in criminal proceedings: (1) ensuring that proceedings are conducted fairly, (2) discouraging perjury, misconduct of participants, and

unbiased decisions, (3) providing a controlled outlet for community hostility and emotion, (4) securing public confidence in a trial's results through the appearance of fairness, and (5) inspiring confidence in judicial proceedings through education on the methods of government and judicial remedies.

It is important to note that in this case no juror was challenged or stricken on the basis of information contained in the questionnaires. The forms merely served to "red flag" particular jurors for whom individual voir dire was appropriate.⁶ Those so recognized were interviewed about their concerns in open court and on the record. Only after the subject matter had been thus publicly addressed were any challenges entertained by the court. Thus none of the considerations listed in *Richmond Newspapers* was offended by the procedure used in this case.

Further a procedure like that used here will both protect juror privacy and encourage candid responses. As noted above, this is the general approach that has been recommended and followed in Washington. The American Bar Association likewise recommends private inquiry into sensitive matters. See American Bar Association, *ABA Principles for Juries and Jury Trials (and Commentary)*, at 42-43, http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

⁶ As Stockwell notes, the individual voir dire of jurors was held in open court, just outside the presence of the remainder of the panel.

Further, studies have shown that jurors will respond more frankly if sensitive questions are asked privately:

A number of empirical studies have found that prospective jurors often fail to disclose sensitive information when directed to do so in open court as part of the jury selection process. A 1991 study of juror honesty during voir found that 25% of jurors questioned during voir dire failed to disclose prior criminal victimization by themselves or their family members. In a more recent study of the effectiveness of individual voir dire, Judge Gregory Mize (D.C. Superior Court) found that 28% of prospective jurors failed to disclose requested information during questioning directed to the entire jury panel. ... Thus, failure to protect juror privacy can actually undermine the primary objective of voir dire – namely, to elicit sufficient information about prospective jurors to determine if they can serve fairly and impartially

Paula L. Hannaford, *Making the Case for Juror Privacy: A New Framework for Court Policies and Procedures*, (footnotes omitted).

This case is typical of sexual assault cases where intensely private questions must be asked of jurors. Nine prospective jurors in this case had been sexually abused or raped. Exh. 8, at 69, 85, 115, 127, 139, 173, 175, Exh. 9, at 188, 209. Fourteen jurors had close friends or family members who had been sexually assaulted. Exh. 8, at 32, 66, 74, 77, 89, 100-01, 103, 115, 117, 120, 153, 164, Exh. 9, at 189, 214. One's husband and one's son were murdered. Exh. 8, at 117, Exh. 9, at 223. Another's cousin was molested and murdered. *Id.* One had a prior (discharged) felony offense. Exh. 8, at 160. One had a prior arrest record for drugs. Exh. 8, at 55. One's

wife had a criminal record that had resulted in litigation against the county. Exh. 8, at 80. One's brother was convicted of a domestic violence offense. Exh. 8, at 142. One was falsely accused. Exh. 9, at 206. At least some of these facts were likely hidden from the general community. Five had a relative and one had a mentor that had been prosecuted for a sexually-motivated offense. Exh. 8, at 34, 58, 98, 119, 174, Exh. 9, at 227. Notably, one of these jurors pointed out that one of the difficulties involved was having to keep that fact from her friends and neighbors. Exh. 8, at 41. Even if a juror tells about abuse of another person, it could be easy to link the juror's answers to the actual victim.

A juror should not be forced to disclose such information to the general public simply because he or she received a jury summons and was called upon to sit on this case. Response rates to juror summons are notoriously low. If jurors are not offered the modicum of privacy granted by this *in camera* screening process, that rate is not likely to improve, and it could drop further.

These concerns exist whenever a juror is called to serve and must answer questions in a room of strangers. The concerns are even more acute, however, when the juror is called to answer such questions in public in a small community. In small communities, a juror who is required to answer private questions will necessarily expose sensitive information to neighbors,

friends, acquaintances, co-workers, and fellow parishioners. In this case, for example, several jurors knew participants in the proceedings. Exh. 8, at 9-10. The right to a public trial may be protected without requiring such a high price be paid by jurors performing their civic duty.

In view of the foregoing, both the experience and logic prongs of the *Press-Enterprise II* test support the conclusion that jury questionnaires are not within the scope of the right to a public trial. Because Stockwell fails to demonstrate that his right to a public trial was abridged, this claim should be rejected.

3. *Stockwell invited the error he claims occurred.*

Even if jury questionnaires are deemed to be presumptively open to the public, Stockwell may not seek relief on that account, because he invited the purported error. A defendant who invites error -- even constitutional error -- may not claim on appeal that he is entitled to a new trial on account of the error. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); *State v. Aho*, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); *State v. Smith*, 122 Wn. App. 294, 299, 93 P.3d 206 (2004). The doctrine of invited error applies regardless of whether counsel intentionally or inadvertently encouraged the error. *Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The invited error rule recognizes that “[t]o hold otherwise [i.e. to entertain an error that was invited] would put a premium on defendants misleading trial courts.”

State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

A defendant who is merely silent in face of manifest constitutional error does not “invite” the error. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). But, a defendant who “affirmatively assents” to error may invite it. For example, it has been suggested that, for purposes of applying the doctrine of invited error, there is a distinction between “whether defense counsel merely failed to except to the giving of the instruction, or whether he affirmatively assented to the instruction or proposed one with similar language.” *State v. LeFaber*, 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J. dissenting) (emphasis supplied); see *People v. Thompson*, 50 Cal. 3d 134, 785 P.2d 857 (1990) (failure to object to private voir dire not reviewable where procedure was for defendant’s benefit and the defendant participated without objection). A defendant need not expressly waive constitutional rights; a waiver can be inferred from conduct. *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996) (court inferred waiver of right to testify by defendant’s failure to take the witness stand at trial).

Here, Stockwell affirmatively “stipulated” to the use of the questionnaire, which bore the notation that it was confidential. 3RP 226-27; Exh. 6 at 1. The record shows he reviewed it through counsel before it was submitted to the court. 3RP 214. In addition, he subsequently took an active role in questioning those who desired privacy, and he clearly benefitted from

the procedure, since it is highly unlikely that he would have received the same candor from jurors had they been required to answer such sensitive questions in front of members of their community, as discussed, *supra*. Because he acquiesced, participated, and benefited, he should not now be able to claim error.

Additionally, the Supreme Court has previously held that a defendant who fails to object to partial closure of the courtroom waives any claim that the trial court violated the state constitution. *State v. Collins*, 50 Wn.2d 740, 314 P.2d 660 (1957). In *Collins*, the trial court locked the courtroom door due to overcrowding. The defendant did not object, but raised the issue on appeal. The Supreme Court held:

Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter. *Keddington v. State*, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.).

Collins, 50 Wn.2d at 748. Sealing of questionnaires akin to the highly discretionary decision in *Collins*, where failure to object was a bar to consideration of the issue on appeal. .

The United States Supreme Court and a majority of other jurisdictions

prohibit criminal defendants from raising the public trial claim for the first time on appeal. *See Peretz v. United States*, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) (citing *Levine v. United States*, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960)); *see also, e.g., Wright v. State*, 340 So. 2d 74, 79-80 (Ala. 1976); *People v. Bradford*, 14 Cal. 4th 1005, 60 Cal. Rptr. 2d 225, 929 P.2d 544, 570 (1997); *Commonwealth v. Wells*, 360 Mass. 846, 274 N.E.2d 452, 453 (1971); *People v. Marathon*, 97 A.D.2d 650, 469 N.Y.S.2d 178, 179 (N.Y. App. Div. 1983); *Dixon v. State*, 191 So.2d 94, 96 (Fla. App. 1966); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989).

It is particularly important that defendants be encouraged to assert their rights to a public trial, and that they not lead the trial court astray, because the position taken by a defendant in a criminal case can also impact the public's right to access in the trial courts. Thus, as argued below with regard to automatic standing, a defendant should not be rewarded with a new trial where he has participated in a procedure that is later characterized as an unconstitutional closure of the courtroom.

4. ***Stockwell cannot show the prejudice required for collateral relief.***

A collateral attack will be entertained only if the petitioner makes a *prima facie* showing of prejudicial constitutional error. Only then will a petitioner “have established that the error is of the type that should be subject to full collateral review.” *In re Cook*, 114 Wn.2d 802, 811, 792 P.2d 506 (1990). It is fundamental in evaluating a personal restraint petition, that “[i]f a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed.” *In re Teddington*, 116 Wn.2d 761, 808 P.2d 156 (1991) (quoting *In re Williams*, 111 Wn.2d 353, 364, 759 P.2d 436 (1988)).

If the petitioner makes a *prima facie* showing, he is still not entitled to relief unless he can show that the alleged constitutional errors “worked to ‘his actual and substantial prejudice.’” *Cook*, 114 Wn.2d at 511; see also *In re Echeverria*, 141 Wn.2d 323, 330, 6 P.3d 573 (2000). This standard requires the petitioner to show that, “*more likely than not*, his rights were actually and substantially prejudiced” by the claimed error.” *Cook*, 114 Wn.2d at 814 (emphasis supplied).

As discussed above, it is more likely that Stockwell benefitted from making the jury questionnaires private that was harmed by the sealing. As such he fails to meet his burden on collateral review.

This fact also shows the inappropriateness of Stockwell's reliance on *State v. Duckett*. First, as discussed, *supra*, Stockwell did not merely fail to object to the confidential questionnaires, he specifically stipulated to their use. Secondly, because this is a collateral attack, not a direct appeal, relief depends not on RAP 2.5(a)(3), but on whether he has established actual prejudice. He has not.

5. *Stockwell cannot claim a violation of the public's rights on collateral attack.*

Stockwell also contends that he is entitled to have his conviction set aside due to a violation of the public's Const. art. I, § 10, right to open justice. This request must be denied because the Legislature has not expanded the right of habeas corpus to violations of the constitutional rights of others.

RCW 7.36.130 is derived from a statute passed by the first legislature of Washington Territory. As originally enacted, the statute was a strict limitation on the writ of habeas corpus:

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of confinement has not expired, in either of the cases following:

Upon any process issued on any final judgment of a court of competent jurisdiction. . .

Laws of 1854, p. 213, §445 (codified as RRS § 1075). This statute remained

in effect without amendment for over 90 years. The decisions of the Supreme Court made two points unmistakably clear: R.R.S. § 1075 was constitutional, and it meant what it said.

Shortly after Washington became a state, this statute was unanimously upheld by the Court. *In re Lybarger*, 2 Wash. 131, 25 P. 1075 (1891). The petitioner in *Lybarger* claimed that R.R.S. § 1075 was unconstitutional because it did not allow the court, in habeas corpus proceedings, to go behind the final judgment of a court of competent jurisdiction for any purpose whatsoever. The petitioner claimed that the “writ of habeas corpus is a high prerogative writ known to the common law, and that it is this common-law writ that is secured to us by the constitution of the United States and of this state.” *Lybarger*, 2 Wash. at 134.

The Court examined the common law practice, and determined that it had been more restrictive than R.R.S. § 1075. Under the common law, a return to the writ of habeas corpus could not be challenged. If the return claimed that the prisoner was held by virtue of process issued by a court of competent jurisdiction, further inquiry was precluded: the court would not even decide whether the alleged process existed. *Lybarger*, 2 Wash. at 134-36.

These restrictions on the scope of habeas corpus were never altered by

this Court; they were changed by the legislature. In 1947, the legislature added the following language to R.R.S. § 1075:

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:

(1) Upon any process issued on any final judgment of court of competent jurisdiction except when it is alleged in the petition *that rights guaranteed the petitioner* by the Constitution of the State of Washington or of the United States have been violated.

Laws of 1947, chapter 256, § 3 (emphasis supplied). This statute permitted, for the first time, an examination of the legality of judgments that went beyond the face of the document. *Palmer v. Cranor*, 45 Wn.2d 278, 273 P.2d 985 (1954). The amendment, however, did not expand the privilege of the writ of habeas corpus that was guaranteed by Const. art. I, § 13. *Holt v. Morris*, 84 Wn.2d 841, 843, 529 P.2d 1081 (1974), *overruled on other grounds*, *Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975). This expansion of a Court's authority to examine the legality of judgments did not extend to violations of the rights guaranteed to someone other than the defendant/petitioner.

Since 1947, the Legislature has never extended the statutory writ of habeas corpus to allow a petitioner to obtain relief from a criminal judgment based upon a violation of another's constitutional rights. *See* RCW 7.36.130.

To the contrary, the Legislature attempted to restore some sense of finality to judgments and sentences by placing a time limit upon a petitioner's ability to seek collateral relief. *See* RCW 7.36.130(1). The Legislature's authority to enact such a limitation was upheld by the Washington Supreme Court in *In re Runyan*, 121 Wn.2d 432, 853 P.2d 424 (1993).

Here, Stockwell waived his right to a public trial⁷ under Const. art. I, § 22, by stipulating to the use of the questionnaires. He nonetheless seeks a vacation of his facially valid conviction by claiming that the public's Const. art. I, § 10 right to have justice "administered openly" was violated. If such a claim was cognizable in a collateral attack, then every defendant who waived his or her Const. art. I, § 22 right to a speedy trial, could obtain relief based upon a claim that the granted of his request violated the public's Const. art. I, § 10, right to have justice administered "without unnecessary delay."

Stockwell has identified no statute or constitutional provision that allows this Court to grant him relief based upon the violation of another's constitutional right. The only possible "authority" for providing relief for a violation of the constitutional right of another can be found in an overly broad reading of RAP 16.4(c)(2), which states:

The restraint must be unlawful for one or more of the following reasons:

⁷ Assuming for the sake of argument that the questionnaires come within this definition.

* * *

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington;

This court rule was patterned after the American Bar Association Standards Relating to Post Conviction Remedies. *See In re James*, 96 Wn.2d 847, 852, 640 P.2d 18 (1982) (Utter, J. concurring). The commentary to 4 American Bar Ass'n, *Standards for Criminal Justice*, Std. 22-2.1, at 22-17 (2d ed. 1986), expressly indicates that “[t]he question of whether defendants are eligible for postconviction relief is a question of substantive law.” This substantive law is determined by the federal constitution and each state’s laws. *Id.* Standard 22-2.1 “does not purport to declare the substantive law applicable to postconviction litigation.” *Id.*

The Supreme Court possesses the authority under Const. art. IV, § 4, to establish its own procedure for dealing with writs of habeas corpus. *In re Rafferty*, 1 Wash. 382, 384-85, 25 P. 465 (1890); *Morris*, 84 Wn.2d at 529. That court exercised its power by creating “personal restraint petitions” as a means for dealing with habeas petitions filed in the appellate courts. *See Toliver v. Olsen*, 109 Wn.2d 607, 746 P.2d 809 (1987). From earliest statehood, however, the Supreme Court has recognized that the power conferred upon it by Const. art. IV, § 4, does not permit the Court to ignore

any legislative prohibitions upon granting relief that does not impinge upon the scope of the writ contained in Const. art. I, § 13. *Rafferty*, 1 Wash. at 388.

Rafferty is still valid today. A statute that addresses substantive rights supersedes any contrary court rule. *See, e.g., In re Johnson*, 131 Wn.2d 558, 563-65, 933 P.2d 1019 (1997); *Abad v. Cozza*, 128 Wn.2d 575, 593 n.2, 911 P.2d 376 (1996); *In re Becker*, 96 Wn. App. 902, 906-07, 982 P.2d 639 (1999); *State v. Walker*, 93 Wn. App. 382, 967 P.2d 1289, 1293 (1998). RCW 7.36.130 sets out the substantive law regarding the scope of review for habeas corpus petitions, regardless of which court the petition is filed. To the extent RAP 16.4(c)(2) exceeds the authority contained in RCW 7.36.130, the rule must fall. In other words, no relief may be given in a personal restraint petition or habeas corpus petition for the violation of another's constitutional rights.

This rule is consistent with current case law. To date, petitioners who have collaterally attacked their conviction on the grounds that part of the trial were closed, have only received relief when the claim was personal to them. *See In re Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) (granting relief for a violation of the defendant's Const. art. I, § 22, right to a public trial which was violated by the trial court's exclusion during voir dire, over the defendant's objection, of the defendant's family members and friends). No

case has ever granted relief from a criminal judgment when the defendant's claim was based solely upon Const. art. I, § 10.

Moreover, even aside from the statutory limits on collateral review, a defendant does not have standing to assert the rights – constitutional or otherwise – of others.⁸ *Rakas v. Illinois*, 439 U.S. 128, 138, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978) (search and seizure); *State v. Walker*, 136 Wn.2d 678, 685, 965 P.2d 1079 (1998) (failure of police officers to obtain husband's consent to search marital residence did not invalidate search as to wife); *In re Benn*, 134 Wn.2d 868, 909, 952 P.2d 116 (1998) (failure to challenge search of the jail cell of another inmate was not ineffective assistance of counsel); *State v. Jones*, 68 Wn. App. 843, 847, 845 P.2d 1358, *review denied*, 122 Wn.2d 1018, 863 P.2d 1352 (1993) (one cannot assert the Fourth Amendment rights of another); *State v. Gutierrez*, 50 Wn. App. 583, 749 P.2d 213 (violation of Fifth Amendment rights may not be asserted by a co-defendant), *review denied*, 110 Wn.2d 1032 (1988).

Stockwell essentially requests automatic standing to assert the rights of the public. Automatic standing has been debated in the search and seizure context. *See State v. Kypreos*, 110 Wn. App. 612, 39 P.3d 371 (2002). Proponents of automatic standing claim that if the defendant cannot assert the

⁸ The defendants in *Easterly*, *Orange*, *Brightman*, and *Bone-Club* asserted on appeal their personal rights to a public trial and, thus, the issue of standing was not addressed.

rights of others, wrongful searches will not be addressed, police misconduct will not be curtailed, and illegal evidence will be admitted in courts.

But, even if persuasive in the search and seizure context, automatic standing would be counterproductive in the public trial context. If the defendant asserts his personal right to a public trial, he can vindicate that right on appeal. If he does not assert the right, and if he encourages the trial court to violate the public's right, as Stockwell did, then he was an important cause in its violation.

In effect, automatic standing in the public trial context would provide an incentive for defendants to encourage trial judges to close courtrooms -- or to remain silent when the courtroom is closed -- in the hope that they could take advantage of the closure on appeal. Thus, automatic standing would lead to more violations of Const. art. I, § 10 rather than fewer violations. By contrast, in the search and seizure context, the defendant does not participate in, or control, the decision of police to conduct a search, so he cannot, in effect, *cause* a Fourth Amendment violation. Thus, whatever the merits of automatic standing in the search and seizure context, those merits will have the opposite effect as applied to the open administration of justice.

Second, as a matter of fundamental fairness, a defendant who leads the trial court to violate the public's right to the open administration of justice

should not get a windfall on appeal by asserting the very rights he helped to violate in the trial court, especially where it served his interest in the trial court to violate the public's right.

For these reasons, Stockwell should not be permitted to assert the public's rights under Article I, section 10.

6. Even assuming error, the remedy would not be a new trial.

Even assuming, *arguendo*, that any error occurred, Stockwell fails to explain why the remedy should be a new trial. The usual remedy where the Court finds that *documents* were sealed without conducting the proper weighing under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), is to remand to the trial court to apply the correct rule and then unseal or maintain the documents sealed. *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, ¶ 12, 114 P.3d 1182 (2005) (*citing Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004)).

Further, a *de minimis* violation of the right to open justice, and a new trial should not be ordered unless the matter was properly brought to the trial court's attention and the trial court *thereafter* failed to apply the *Bone-Club* factors. *See Orange*, at 822-27 (Madsen, J. concurring); *Easterling*, at 182-85 (Madsen, J. concurring). This type of case simply does not, as a general matter, raise the same concerns as does the wholesale closures that occurred in the Washington cases -- *Easterling*, *Orange*, *Brightman* and *Bone-Club* --

decided recently by the Supreme Court, or by the cases decided by the United States Supreme Court.

Moreover, the Supreme Court has made it clear that reversal of a conviction is not required each time the public trial right was violated. In *Waller v. Georgia*, the Court ordered a new suppression hearing rather than a new trial. The Court observed that “the remedy should be appropriate to the violation” and that there is no need to provide the defendant with a windfall to vindicate the interests of the public. *Waller*, 467 U.S. at 50.

The Court should consider that granting a new trial in this context would defeat rather than vindicate the public interest. Several groups are protected by the right to open public trial. *Press-Enterprise I*, 464 U.S. at 505-10. The defendant, the public, the press, and the prosecution all have vested interests in open courts. But, when the defendant acquiesces to closure, he is acquiescing that his interests are better-served than they would be if he insisted on public questioning of the jurors. He has chosen between two rights. And when there is no press coverage, and apparently no member of the public who wished to attend, the interests of the press and public have not been directly violated.

That leaves the more general interest of the public. But, who will be punished by reversal and remand for retrial of a criminal defendant who was

fairly tried and convicted? The public will be punished. It will be punished by incurring the additional expense of a retrial, and it may be punished by failure to secure conviction on retrial if circumstances of proof have changed. In the end, the defendant is rewarded (for joining in a violation of the public's right to access) and the public is punished (by an order requiring a new trial). This is illogical, especially where, as here, there is no evidence to suggest that a single member of the public was *actually* excluded from the trial.

C. STOCKWELL FAILS TO SHOW THE TRIAL COURT'S RESOLUTION OF THE CAUSE CHALLENGES DURING VOIR DIRE ENTITLES HIM TO RELIEF.

Stockwell next asserts that the trial court incorrectly granted one and denied two challenges for cause. Supreme Court precedent, however, requires that the claim regarding the denials be rejected because Stockwell fails to show that any biased juror served in his trial. His claim that this rule should be disregarded is based on the contention that the trial court failed to comply with the rule governing challenges for cause. He fails, however, to show that any such exception to the rule applies to denials of challenges. Moreover, the record fails to support the assertion that the trial court did not comply with the juror rule. Finally, Stockwell also contends that the trial court misapplied the standards for considering challenges for cause to the State's challenge of Juror 56. This last claim is based on the fallacious

notions that the State is not entitled to a fair jury and that the presumption of innocence includes a presumption that the State's witnesses are lying.

As Stockwell concedes, Brief of Petitioner at 37, the Washington Supreme Court has held that "if a defendant through the use of a peremptory challenge elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted." *State v. Fire*, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001). Stockwell alleges that two jurors should have been stricken for cause: Juror 2 and Juror 39. The record shows that he used peremptory challenges to excuse these jurors. Exh. 11, at 6. Since he fails to identify any unqualified juror who decided his case, this claim must fail.

Moreover, Stockwell fails to distinguish between the trial court's denial of a challenge for cause and the court's dismissal of a juror. The former act is reviewed under the principles set forth in *Fire*. Thus the court's refusal to excuse jurors 2 and 39 for cause is subject to the *Fire* rule, and prejudice must be shown. Stockwell concedes he cannot show prejudice. He is thus not entitled to relief.

Stockwell seeks to avoid the *Fire* rule by applying *State v. Tingdale*,

117 Wn.2d 595, 600, 817 P.2d 850 (1991), to both the stricken juror (56) and the jurors that Stockwell had to use his peremptory challenges to remove (2 and 39). This argument is flawed.

First, the State would question whether *Tingdale* applies outside its context: the composition of the venire. At issue in *Tingdale* was the composition of the venire itself. This was also the issue addressed in the relevant cases cited in the opinion. See *State v. Killen*, 39 Wn. App. 416, 419, 693 P.2d 731 (1985); *Roche Fruit Co. v. Northern Pac. Ry.*, 18 Wn.2d 484, 139 P.2d 714 (1943); *State v. Guthrie*, 185 Wash. 464, 56 P.2d 160 (1936); *State v. Rholeder*, 82 Wash. 618, 620, 144 P. 914 (1914); *State ex rel. Murphy v. Superior Court*, 82 Wash. 284, 144 P. 32 (1914).

The composition of the venire was also the issue presented in virtually every holding that has cited *Tingdale* since it was decided. See *State v. Twyman*, 143 Wn.2d 115, 122, 17 P.3d 1184 (2001); *State v. Marsh*, 106 Wn. App. 801, 24 P.3d 1127, review denied, 145 Wn.2d 1012 (2001); *State v. Nemitz*, 105 Wn. App. 205, 19 P.3d 480 (2001); *In re Twining*, 77 Wn. App. 882, 894 P.2d 1331, review denied, 127 Wn.2d 1018 (1995); *State v. Rice*, 120 Wn.2d 549, 562, 844 P.2d 416 (1993); *Brady v. Fibreboard Corp.*, 71 Wn. App. 280, 857 P.2d 1094 (1993) review denied, 123 Wn.2d 1018 (1994); *State v. Langford*, 67 Wn. App. 572, 837 P.2d 1037 (1992), review denied, 121 Wn.2d 1007, cert. denied, 510 U.S. 838 (1993). The only

exception has been *State v. Williamson*, 100 Wn. App. 248, 996 P.2d 1097 (2000), which applied *Tingdale* to an appeal from trial court's allowance of peremptory challenge after jury was sworn for trial. Even this case, however, involved an issue outside the context of voir dire.

Assuming, *arguendo*, that it applies in the context of challenges for cause *during* voir dire, *Tingdale* holds that prejudice may not be presumed where there is substantial compliance with the statutory provisions. Thus, most such challenges have been rejected. The Supreme Court has observed "that the purpose of the jury selection statutes is to 'provide a fair and impartial jury, and if that end has been attained and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity'" *Rice*, 120 Wn.2d at 562 (quoting *State v. Finlayson*, 69 Wn.2d 155, 157417 P.2d 624 (1966), and *Rholeder*, 82 Wash. at 620). Before prejudiced will be presumed, there must be "a gross departure" from the statutory scheme. *Rice*, 120 Wn.2d at 562.

The only cases where a material departure has been found are where the appellant "was denied her right to be heard on the question of actual bias, and also her right to have the existence of actual bias determined by the trial judge." *Brady*, 71 Wn. App. at 284. The Supreme Court held that substantial compliance will be found unless: (1) there was "exclusion of any class of citizen or weighting of the jury list or that the jury list was not a

representative cross section of the community”’; (2) ““the jury list, the venire or the jury itself was so composed that there might have been any inherent bias or prejudice against’ the petitioners” or (3) the party was “denied their ‘right to challenge any juror for bias or peremptorily”” *Twyman*, 143 Wn.2d at 122 (citations omitted).

Stockdale fails to show any of these defaults. Instead he argues only that the trial court failed to hold a “trial” on the challenges. As he notes, however, the rule only requires such a trial where, in his words, “the adverse party persists in the challenge” after the judge determines its sufficiency. Brief of Petitioner at 43. More precisely, under the rule, an “exception” to the challenge results in determination of the challenge assuming the facts to be true. CrR 6.4(d)(1). Only if the challenge is “denied” by the opposing party is the “trial” provision of CrR 6.4(d)(2) implicated. *Id.* Clearly, the former provision applies to disputes over whether the facts warrant dismissal of the juror, which is plainly a legal issue. The latter applies where the parties are in disagreement over what the juror actually said, thus presenting a factual issue. *See also* 4 Karl B. Tegland, *Wash. Prac: Rules Prac.*, CR 47 (7th ed. 2008) (“If the facts would be sufficient to sustain the challenge, but the adverse party contests the accuracy of the facts underlying the challenge, the court will conduct an evidentiary hearing to determine the facts”).

Before addressing the record, the State must finally note that it has

found no case that has applied *Tingdale* to the *denial* of a cause challenge. Although the State thus maintains that the question only applies to the excusal of jurors, not the denial of a challenge (which are subject to the *Fire* rule), even a cursory review of the record shows that in the case of all three jurors of which Stockwell complains, 2, 39, and 56, the requirements of CrR 6.4(d) were not only substantially, but *fully* complied with. In each case, the parties and court conducted a lengthy individual examination of the juror.⁹ Exh. 8, at 33-46 (Juror 2); Exh. 9, at 189-99 (Juror 39); 227-33 (Juror 56). This examination was followed by a challenge for cause. Exh. 8, at 48 (Juror 2); Exh 9, at 199 (Juror 39); 233 (Juror 56). The parties in each instance then argued whether the facts as elicited were sufficient to warrant a cause challenge. Exh. 8, at 47-49 (Juror 2); Exh 9, at 199-201 (Juror 39); 233-34 (Juror 56). In none of the three instances did either party dispute the essential facts. *Id.* Instead they disputed only the inferences to be drawn and the legal effect of them. *Id.* Notably, no party asked for further evidentiary input. *Id.* The trial court then ruled on the challenge, without further objection (or “persistence” in Stockwell’s language) by any party. Exh. 8, at 49 (Juror 2); Exh. 9, at 201 (Juror 39); 234-35 (Juror 56). Clearly all three of the challenges were properly decided by the trial court as “excepted” challenges

⁹ Notably, an evidentiary objection by Stockwell during the course of the initial examination of Juror 56 was sustained by the trial court. Exh. 9, at 229.

under CrR 6.4(d)(1) without further evidentiary proceedings. Since the procedure was in full compliance with the rule, no prejudice may be presumed and since Stockwell does not claim actual prejudice, this claim must fail.

Finally, even were Stockwell entitled to have the trial court's actions reviewed in the absence of any showing of prejudice, he fails to show that the trial court improperly decided these challenges for cause. The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee every criminal defendant the right to a fair and impartial jury. To ensure this right, a juror will be excused for cause if his or her views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Hughes*, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)).

The denial of a challenge to a juror for cause is within the trial court's discretion. *State v. Witherspoon*, 82 Wn. App. 634, 637, 919 P.2d 99 (1996). This Court defers to the judgment of the trial judge regarding whether a particular juror is able to be fair and impartial, because the trial judge is in the best position to evaluate "the fairness of a juror by the juror's character, mental habits, demeanor, under questioning and all other data which may be disclosed by the examination." *State v. Noltie*, 116 Wn.2d 831, 839, 809

P.2d 190 (1991) (quoting 4 Lewis H. Orland & Karl B. Tegland, *Washington Prac.: Trial Prac.* § 203, at 332 (4th ed.1986)).

However, if a potential juror demonstrates actual bias, the trial court must excuse that juror for cause. *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 752-53, 812 P.2d 133 (1991). Actual bias is “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.” RCW 4.44.170(2).

Equivocal answers alone do not require that a juror be removed when challenged for cause. *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). The question is whether a juror with preconceived ideas can set them aside, and the trial judge is best situated to determine a juror’s competency to serve impartially. *Patton v. Yount*, 467 U.S. 1025, 1039, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); *State v. Gosser*, 33 Wn. App. 428, 434, 656 P.2d 514 (1982).

The trial court rejected Stockwell’s claim that Juror 2 would not be able to be impartial:

Based on what I have seen so far, I am going to deny the motion for cause. She was very explicit about what would cause her to faint. It would be graphic, pictorial-type depictions of medical procedures, and we don’t have that in

this case. I thought her answers were very thoughtful about what a serious matter this was, and thoughtful responses, and she also indicated she could separate her cousin's situation from the facts of this case. So at this point I will deny the challenge for cause.

Exh. 8, at 49. Stockwell plucks a single, equivocal, statement¹⁰ out of an extensive examination of this juror to argue that the trial court abused its discretion. He utterly ignores the juror's other statements that the trial court properly concluded showed she could be fair. Indeed, she prefaced the line Stockwell quotes with an assertion that she could be fair:

I think I could probably be fair, because everyone's lives are at stake here and everyone has the same chance -- you know, deserves the same chance to have a good life.

Exh. 8, at 39. She later further elaborated on how she would treat the child witnesses' testimony:

JUROR NO.2: I think I value children's words for what they are. They don't always -- They are coming from somewhere in that child, from their experience, for whatever reason, and adults around them have to filter through stuff to find the real child there. That's how I view a child's testimony, that there may be things that they see one way that are coming from some other kind of -- I don't know. There's lots of reason for children to say things.

MR. TALNEY [defense counsel]: So, it sounds like you would take everything they say or don't say in consideration in trying to figure out what's going on.

JUROR NO.2: I would.

¹⁰ "If I have a bias, it would *probably* be on behalf of a child." Exh. 8, at 39, Brief of Petitioner at 35.

Exh. 8, at 43.

Stockwell also ignores another important factor: that the juror had a relative accused of a sex crime, whom she felt was not fairly treated by the system. Exh. 8, at 37. As a result, she felt that judging another person accused of such a crime would be “quite daunting” and that the decision “would stay with you for a long time.” *Id.* Plainly this juror understood the stakes at issue. As she put it: “Something like this, it’s quite serious. I don’t take it lightly.” Exh 8, at 45. And indeed, even in his challenge for cause, Stockwell acknowledged that the juror understood her responsibility “fair and impartial.” Exh 8, at 49. The only issue was whether her personal experiences would affect her ability to carry out that duty. The trial court, with the benefit of being able to view the juror’s demeanor, acted within its discretion in concluding that she could.

Stockwell also argues that Juror 39, whose daughter was raped, should have been excused for cause. He again emphasizes two statements from a lengthy colloquy. Brief of Respondent at 36 (*quoting* Exh 9, at 192, 194-95).

The State would first submit that the emphasized portion of the second statement, “I am not trying to suggest, you know, that the accused is innocent,” Exh 9, at 194, was either misreported or was a misstatement by the

juror. Taken in context it is plain that he was trying to say that he was not suggesting the accused was *guilty*. His subsequent responses make this clear: “I think I can put the emotion aside. I have made judgment based on the evidence,” Exh. 9, at 196, and “*As I said* I can presume the accused is not guilty.” Exh. 9, at 199. His earlier comments also support this reading: “I’d like to be fair to the accused. I don’t know whether he did it or not, so –.” Exh. 9, at 191.

Additionally, when the inquiry is considered as a whole, it cannot be said the trial court abused its discretion in not excusing Juror 39. Indeed, defense counsel observed to him, “[Y]ou obviously seem to realize what your job is as a juror, to be fair and impartial,” and that “It seems clear that you want to carry that out.” Exh. 9, at 196. Counsel then asked him he could live up to those expectations, and he explained that despite the emotional impact, he ultimately could:

I have pretty good training as far as that, but what -- I may, through the course of the -- after court, being questioned, I might break down. That’s what I would like to -- Now I’ve started to -- I am getting very emotional, and I think it’s rather unfortunate that I would inasmuch as I would like to participate as a citizen, I would like to participate with this process, but I don’t like to be in the predicament that it’s up to you to decide, but, you know --

Exh. 9, at 197. Counsel followed up on this, and some of the juror’s medical issues, and ultimately asked whether any of this would interfere with his

ability to be fair and impartial. Juror 39 responded that it would not:

I don't think so. I don't think so. *As I said* I can presume the accused is not guilty unless I see --

Exh. 9, at 199.

Notably, Stockwell conceded to the trial court that the juror's actual answers met the test for impartiality. Exh. 9, at 199. He instead argued that based on his body language, the court should excuse him. *Id.* The court, which had the benefit of observing that body language, was unpersuaded that the juror should be excused. Stockwell fails to show any abuse of discretion.

The final juror at issue, 56, was excused for cause on the State's motion. Stockwell argues that the trial court failed to apply the proper standard to this juror.

Stockwell contends that the presumption of innocence includes a presumption that the State's witnesses are lying unless shown otherwise, and that therefore the juror's inability to credit the testimony of a child molestation victim was not grounds for recusal. He cites no authority in support of this surprising contention. As the petitioner, Stockwell bears the burden of establishing that he is entitled to the relief he seeks. *Kane v. Smith*, 56 Wn.2d 799, 806, 355 P.2d 827 (1960). His failure to cite legal authority that establishes that the trial court erred or to provide any argument in support of his claim is grounds for summarily rejecting his contentions.

Almagamated Transit Union Local 587 v. State, 142 Wn.2d 183, 203, 12 P.3d 603 (2000); *State v. Neely*, 113 Wn. App. 100, 108, 52 P.3d 539 (2002). “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000), quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

It is a well-established principle that every person accused of a crime is constitutionally endowed with a presumption of innocence that extends to every element of the charged offense. *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 256, 96 L. Ed. 288 (1952); *State v. McHenry*, 88 Wn.2d 211, 558 P.2d 188 (1977). This presumption is enforced by the rule that the prosecution must prove every element of its case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970); *State v. Roberts*, 88 Wn.2d 337, 340, 562 P.2d 1259 (1977).

Nothing in any case the State has located, however, extends the presumption of innocence to the witnesses and evidence presented at trial. Indeed, to the contrary, it is equally well-established that the jury is the sole judge of credibility. *E.g.*, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997); *also* WPIC 6.01.

Also contrary to Stockwell's contention, Brief of Petitioner at 34, all parties to litigation, even the State, have a right to trial before an impartial jury: "*both the defendant and the State* have a right to an impartial jury" *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005) (emphasis the Court's); *see also* RCW 4.44.170(2) (Actual bias is "the existence of a state of mind on the part of the juror in reference to the action, or to *either* party ...") (emphasis supplied). Stockwell cites no authority to the contrary.

Moreover, Juror 56 did more than merely state that he would begin by assuming that the complaining witnesses were not telling the truth, and that he would always have a doubt as to whether they were being truthful. Brief of Petitioner at 33.

He informed the court that after thinking about it overnight, he had concluded that he "would have to side with ... the defense." Exh. 9, at 228. He did not know whether he could put aside the false accusation of his cousin of child molestation: "Boy, I don't know. I don't know. That's a hard one to answer." *Id.* When asked if could credit the victims' testimony, he stated that it "would be hard to speculate right now on how I would react to that. I think I might be a little more biased, you know thinking maybe they would be untrue or not saying the whole truth." Exh. 9, at 229-30. He further stated that he thought he would carry that belief into his decision-making process. Exh. 9, at 230.

Stockwell attempted to rehabilitate the juror, but without success. Counsel asked whether he could evaluate the witnesses' testimony without any advance presumptions, and Juror 56 was unable to respond that he could:

Boy, I don't know. That's a hard one to answer. It just seems -- it was like my cousin went through so much, through his trial and everything, and then to have it come out that she stated that she was lying, and it just -- it pretty much really devastated his life, and *I would have a hard time not listening to their testimony with a tainted ear* thinking, maybe, you know, they are not telling the truth, maybe they are bringing up false charges, you know.

Exh. 9, at 231. He did not feel he could put this aside. Exh. 9, at 232. He felt it would affect his ability to be fair to the State: "I think I might not be able to give them a fair trial." *Id.* At no point did the juror ever state that he thought he could overcome his bias or give the State a fair trial. The trial court did not abuse its discretion in excusing Juror 56.

Because it is clear that no error occurred during voir dire, it is unnecessary for this Court to address Stockwell's contention that the State constitution should allow relief absent a showing of prejudice. The State would note, however, that such a claim is unfounded. Stockwell bases this claim on two separate provisions. The State will address each in turn.

Const. art. I, § 22, provides that "[i]n criminal prosecutions the accused shall have the right to ... trial by an impartial jury." Stockwell

essentially concedes that this provision is no different from the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury.” Brief of Respondent at 53. Although he purports to show that this state provision should be addresses more broadly than its federal counterpart, he does not actually address this provision independently of Const. art. I, § 21. As such, he fails to show why Const. art 1, § 22 should be read more expansively than its nearly identical federal counterpart. *See State v. Brown*, 132 Wn.2d 529, 595, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

The Supreme Court has suggested that Const. art. I, § 21, does indeed provide for a broader jury-trial right than its federal counterpart. *State v. Hicks*, ___ Wn.2d ___, ¶¶ 35-36, 2008 WL 1821869 (Apr. 24, 2008) (*citing Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982)). But the question remains as to the contours of that greater right. Notably, this Court has repeatedly held that the broader language of this provision does not give a defendant the right to an instruction on jury nullification. *State v. Fleming*, 140 Wn. App. 132, ¶¶ 83-88, 170 P.3d 50 (2007); *State v. Brown*, 130 Wn. App. 767, ¶¶ 7-12, 124 P.3d 663 (2005).

Stockwell fails to show that anything in Const. art. I, § 21, requires the granting of a new trial where a defendant was tried and convicted by an impartial jury. Applying the criteria in *State v. Gunwall*, 106 Wn.2d 54, 59,

720 P.2d 808, 76 A.L.R.4th 517 (1986), fails to suggest that Const. art 1, § 21, requires reversal of a fair trial before an impartial jury.

The first *Gunwall* criterion, the language of the state constitution, is neutral in this case. 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.

Nothing in the language of this constitutional provision addresses the question presented.

The second *Gunwall* criterion, comparison of the state and federal constitutional language, is also neutral on the question. Stockwell contends that it is significant that the state constitution contains language in art. I, § 21, that the federal constitution does not. Stockwell relies on *Mace*, 98 Wn.2d at 97, which held that the defendant was entitled to a jury trial on a misdemeanor charge. That case, however, is inapposite. It relied on language in art. I, § 21, that specifically addressed the right to a jury trial in courts not of record. There is no specific language in this provision that addresses the question presented here.

With respect to the third *Gunwall* factor, state constitutional history, the Stockwell's argument is not persuasive. He argues that this provision is

broader than most other states'. But he makes no argument regarding the specific issue before the Court. In addition, the Supreme Court has held that the third Gunwall factor does not support an argument that the state constitution provides a broader right to trial by jury than does the federal right. *Brown*, 132 Wn.2d at 596. "Additionally, the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right." *Id.* (citing *The Journal of the Washington Constitutional Convention*, 510-11 (Beverly P. Rosenow ed., 1962)).

Analysis of the fourth Gunwall factor, preexisting state law, does not aid the Stockwell. In *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989), the Supreme Court held that Const. art. I, § 21, preserved the scope of the right to trial by jury as it existed at the time the state constitution was adopted. But Stockwell cites no preconstitutional case that establishes a right to a new trial for an alleged jury selection error that does not result in a biased juror being seated.

Stockwell's reliance on Justice Sanders's dissenting opinion in *Fire* is misplaced. Even that dissent recognized that no *constitutional* issue was presented:

The basis for the rule that a defendant is presumed to be prejudiced when he is compelled to exhaust his peremptory challenges to remove a juror who should have been removed

for cause *is found in neither the state nor the federal constitution.*

Fire, 145 Wn.2d at 177 (Sanders, J., dissenting) (emphasis supplied). This view is underscored by the concurring opinion of Justice Alexander, who explicated found that the rule announced in that case was permissible under the state constitution:

The language of article I, section 22 of our state constitution is similar to that of the Sixth Amendment and has been construed to ensure and protect one's right to a fair and impartial jury. *State v. Davis*, 141 Wn.2d 798, 855, 10 P.3d 977 (2000). In addition, Washington Constitution article I, section 21 states that a defendant has a right to be tried by an impartial 12 person jury. *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995) (applying Wash. Const. art. I, § 21). Neither provision provides that a person has a right to a jury containing a particular juror or jurors. I subscribe to the view that *these constitutional rights are not infringed when a defendant exercises a peremptory challenge to cure an erroneously denied for cause challenge.*

Fire, 145 Wn.2d at 167 (Alexander, J., concurring) (emphasis supplied).

In any event, nothing in the dissenting opinion establishes that the rule Stockwell seeks was established as part of the right to jury trial at the time the constitution was established. *Sofie*. The earliest cases cited therein, were decided after the constitution was adopted. The first case that explicitly adopted such a rule was *State v. Rutten*, 13 Wash. 203, 204, 43 P. 30 (1895), decided *after* the constitution was adopted. *Rutten* cites no authority for its holding. It appears to have been an exception to the general rule at the time.

The earlier cases cited in *Rutten* involved a juror who should have been excused but actually served. In *State v. Wilcox*, 11 Wash. 215, 217, 39 P. 368 (1895), the juror actually served. Of significance, the Court opined that there was “no occasion in this case for imposing this juror upon the defendant,” and that the cause challenge was denied after the defendant had exhausted all his peremptory challenges. *Wilcox*, 11 Wash. at 223. The obvious implication was that the outcome on appeal might have been different had the juror been peremptorily stricken. Likewise, in *State v. Murphy*, 9 Wash. 204, 208, 216, 37 P. 420, 421 (1894), a juror served that should have been excused and the Court observed that the defendant’s peremptory challenges were all exhausted. Again, the implication appears to be that had the defendant been able to strike the juror peremptorily, his right to an impartial jury would have been preserved. And in *State v. Moody*, 7 Wash. 395, 396-97, 35 P. 132 (1893), the Court held that the defendant failed to show prejudicial error where he was able to use a peremptory to strike a juror he alleged should have been excused for cause.

Most notably, in *State v. Champoux*, the Court explicitly endorsed the rule recently revived in *Fire*:

The alleged error in not sustaining the challenges for cause to jurors Carr, Ziegler, and Wilson, if error at all, was without prejudice, as they were afterwards removed by peremptory challenges. *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216 [(1896)]. And under the rule announced in *State v.*

Moody, 7 Wash. 395, 35 Pac. 132, the error, if error it was, in not sustaining challenge for cause to the juror Brown, was not prejudicial, for the reason that the defendant proceeded to trial without exhausting his peremptory challenges

State v. Champoux, 33 Wash. 339, 352, 74 P. 557 (1903).

These cases are consistent with preconstitutional case law as well. In *McAllister v. Terr.*, 1 Wash. Terr. 360, 362 (1872), the Supreme Court ruled that any error committed by the trial court in seating the jury was harmless unless an unqualified juror was seated.

The State concedes that the fifth Gunwall factor, the differences in the structures of the federal and state constitutions, always supports independent analysis. *See State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

The sixth Gunwall factor requires consideration of matters of state or local concern. Stockwell points to no particular local or state concern regarding this rule. He merely observes that other states have adopted different rules.

In view of the foregoing, Stockwell fails to show that the State constitution should be read as requiring a new trial where no unqualified juror sat on his case. His essential contention is that where there is a wrong there must be a remedy. Brief of Petitioner at 58. The manifest purpose of the constitutional provisions in question is to ensure a fair trial by an unbiased jury. Given that no unbiased person sat on his jury, he fails to explain how

any wrong occurred in any constitutional sense. Nor does he explain how this theoretical wrong can justify the expense to the taxpayers of this State or the pain to his victims that his proposed “remedy” would require.

Finally, as discussed with regard to the previous issue, Stockwell fails to explain how any of the considerations obviate the necessity that a petitioner on collateral review show *prejudicial* error before relief be granted. Nor has he explained why this obviously new rule of procedure should be applied retroactively to his final conviction. This claim should be rejected.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TRANSCRIPTS OF THE CHILD INTERVIEWS AS EXHIBITS AFTER STOCKWELL SUCCESSFULLY PERSUADED IT TO ADMIT THE TRANSCRIPT OF ONE OF THE VICTIMS’ PRE-TRIAL TESTIMONY AS AN EXHIBIT.

Stockwell next argues that the Court should reconsider its rejection of an issue raised in Stockwell’s statement of additional grounds on direct appeal: that the trial court erred in admitting the child examiner’s “near-verbatim” transcripts into evidence. While Stockwell is correct that it appears that the original resolution was based on a misreading of the record, he still fails to show that the trial court committed reversible error where Stockwell himself also successfully requested that a witness transcript be admitted into evidence.

This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* The rules of evidence guide the trial court's discretion in evidentiary matters. *State v. Atsbeha*, 142 Wn.2d 904, 917, 16 P.3d 626 (2001).

Stockwell moved to admit the transcript of MS's testimony at the child hearsay hearing as trial exhibit 5. 5RP 570. The State then moved under the "rule of completeness, ER 106, to introduce the transcripts of the child interviews (trial exhibits 1 and 2). 5RP 574. The trial court observed that the reason it did not originally admit exhibits 1 and 2 other than for demonstrative purposes was that it was concerned that sending the exhibits back to the jury would unduly highlight Conrad's testimony. 5RP 576. The trial court concluded, however, that since the jury was going to receive exhibit 5, in fairness it ought also be able to compare it to exhibits 1 and 2. *Id.*

The trial court found that the statements were admissible under ER 801(d)(ii) as prior consistent statements. 5RP 581. It also rejected Stockwell's assertion that the exhibits were not "statements" because they were not verbatim, based on Conrad's testimony that they were near-verbatim, and that the critical portions relating to the child abuse were in fact

verbatim.¹¹ *Id.* The court concluded that in any event, such concerns went to the weight, not the admissibility of the evidence. *Id.*

In her testimony at the child hearsay hearing (which was admitted as trial exhibit 5), MS testified that that she never saw Stockwell touch EM. 1RP 114, 116. MS also testified that Stockwell had never touched her. 1RP 116. Stockwell appears to acknowledge that exhibit 5 opened the door to evidence of MS's prior consistent statement offered to rebut a claim of recent fabrication. ER 801(d)(1)(ii); Brief of Petitioner at 61. Contrary to Stockwell's contention, however, this evidence, although from MS's mouth, also suggests that EM's trial testimony was a recent fabrication. Thus the statements of both girls were admissible to rebut that charge.¹²

Stockwell's contention that the statements were not prior statements of the witness but of Conrad is without merit. Conrad's reports consisted of her observations of the girls' statements. Nothing in ER 801(d) requires a verbatim accounting of the prior statement. Even to the extent that it could be argued (which Stockwell does not) that the statements of the girls were hearsay within hearsay, Conrad's statement would clearly be a present sense

¹¹ Conrad testified that "near-verbatim" was a "term of art" meaning you write down what you ask and what the child says, and it's called near verbatim because there may be a word or two that is not exact." 3RP 250-51.

¹² Curiously, Stockwell asserts that there was no suggestion that EM's testimony was fabricated, but in almost the next breath he argues that the alleged error was not harmless because his case rested on an attack on the credibility of both girls.

impression under ER 803(a)(1). *See* 3RP 251-52 (Conrad explained that she took her notes at the time of the statements and transcribed them as soon as possible afterward).

Stockwell also contends that even if the substance of Conrad's reports was admissible, allowing the jury to view them as exhibits was prejudicial. Decisions regarding the admission of exhibits as evidence are within the sound discretion of the trial court and will not be disturbed on review absent a showing of abuse of discretion. Although *State v. Monroe*, 107 Wn. App. 637, 27 P.3d 1249 (2001), cited by Stockwell, generally holds that testimonial exhibits should not be sent unsupervised to the jury, under the circumstances, Stockwell cannot claim error.

Stockwell specifically asked that the testimonial exhibit containing MS's child-hearsay hearing testimony be admitted as an exhibit and sent back to the jury. But for this request, the trial court would not have allowed the child interview reports to be have been also sent back to the jury. Stockwell cannot ask that the jury be allowed to consider one exhibit freely and then call foul when the trial court allows the State's exhibit the same consideration. Nor can Stockwell object that the jurors might have dwelt upon these exhibits when he urged them in closing argument to do just that: "I would encourage you to take your time both looking through the pretend transcripts created by Ms. Conrad, keeping in mind that they are not transcripts, they are a revision

of her notes, and Exhibit 5, which is truly a transcript, which is the sworn testimony at a prior proceeding of Megan Sawyer.” 5RP 630-31. *See In re Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606, *cert. denied*, 540 U.S. 875, (2003) (defendant cannot complain of admission of exhibit or the jury’s use of it where he invited the error).

Even if error occurred, it would be harmless. If an error results from a violation of an evidentiary rule, the appellate court must query whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (*quoting State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). The error is harmless “if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (*quoting State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

Here, Stockwell does not argue that the *content* of the exhibit was not properly before the jury. He only complains of its form. A review of the record shows that other than MS’s denials at the hearsay hearing, which were also admitted in transcript form as an exhibit, all of the evidence before the court was consistent: that Stockwell committed the acts charged.

Moreover, counsel thoroughly cross-examined Conrad on the

accuracy of the reports, and her interviewing technique. 3RP 281-91, 297-307, 311-14. Counsel also extensively cross-examined EM's mother, intimating that the girls might have changed their stories on several occasions. 3RP 358-63, 369-74, 378-80. He conducted a similar cross-examination of MS's mother. 4RP 450-63, 465-71, 484-87. Similar examination was also conducted of MS's stepfather. 5RP 544-55. Stockwell did not present any witnesses. Moreover, any emphasis that the jury might have placed on the reports is surely counterbalanced by the their receipt of the child-hearsay transcript.

Finally, the harmlessness of any purported error is highlighted by examining the closing arguments. Contrary to Stockwell's assertions, the State did not dwell on Conrad's reports. In an argument that consumed 20 pages of transcript, 5RP 600-20, the State spent less than four full pages on both reports. 5RP 606-10. In fourteen pages of rebuttal, it devoted one *sentence* to the reports.

Even more significant, however, is Stockwell's argument. He plainly felt the juror's consideration of the reports would not harm his case. To the contrary, he devoted a significant portion of his argument to attacking Conrad's technique and the accuracy of her reports. 5RP 625, 630-35. In that context, he confidently urged the jury to look closely at her reports, and to compare them to the child-hearsay transcript. 5RP 630-31, 638. Plainly he

was not concerned at trial that the jury would dwell excessively on these reports. Any error would be harmless. Because of this, and because it lacks merit, this claim should be rejected.

E. STOCKWELL FAILS TO SHOW THAT COUNSEL WAS INEFFECTIVE ON DIRECT APPEAL.

Stockwell's final claim is that his counsel on direct appeal was ineffective with regard to the offender score and jury issues already discussed. As these claims are legally without merit, he fails to meet his burden.

"[A] criminal defendant has a right to have effective assistance of counsel on his first appeal of right." *In re Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004). However, the defendant bears the burden of establishing a violation of that right by showing both deficient performance and resulting prejudice. *In re Theders*, 130 Wn. App. 422, ¶ 31, 123 P.3d 489 (2005), review denied, 156 Wn.2d 1031 (2006) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Deficient performance is established on proof that counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances." *Id.* Prejudice is established where "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would

have been different.” *Id.* There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment. *Id.*

In order to establish deficient performance, the defendant must show the which legal issue appellate counsel failed to raise had merit. *In re Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). However, failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance, and the exercise of independent judgment in deciding what issues may lead to success is the heart of the appellate attorney’s role. *In re Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994). To meet the prejudice prong, the defendant must show that he was actually prejudiced by the failure to raise or adequately raise the issue, *i.e.* that he would have obtained relief. *Maxfield*, 133 Wn.2d at 344; *Theiders*, 130 Wn. App. at ¶ 36.

Stockwell contends that he received ineffective assistance of counsel because his appellate counsel failed to request the voir dire. However, RAP 9.2(b) specifically provides “[a] verbatim report of proceedings provided at public expense will not include the voir dire examination ... unless so ordered by the trial court.” There is no evidence that any of the issues Stockwell now argues were apparent from the court file or that counsel was informed of possible issues by trial counsel. As such counsel cannot be deemed deficient for failing to request a transcript of the voir dire. Moreover, as thoroughly

discussed above, Stockwell fails to show that any of these issues had merit. This claim must fail.

Stockwell also alleges that appellate counsel was ineffective in her argument regarding the inclusion of his prior child sex offense in his offender score. That issue, as discussed at the first point, *supra*, was decided adversely to him as a matter of law by the Supreme Court. However, to find prejudice, *i.e.*, that the issue has merit, this Court would have to overturn that Supreme Court precedent. As this Court lacks the authority to do that, this claim must fail.¹³

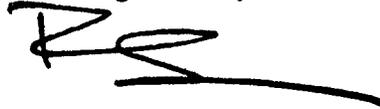
VI. CONCLUSION

For the foregoing reasons, Stockwell's petition should be denied.

DATED May 16, 2008.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

G:\APPEALS\STOCKWELL, DAN 01C1 08-5\APPEAL DOCS\STOCKWELL COA PRP RESPONSE.DOC

¹³ The State again reserves the right to argue the merits of *Stockwell* should this case find its way to the Supreme Court.