

No. 89585-6

No. 67090-5-I

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

IN RE PERSONAL RESTRAINT PETITION OF:

NOEL EVAN CALDELLIS,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

Jeffrey E. Ellis #17139
B. Renee Alsept # 20400

Attorneys for Mr. Caldellis
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com
ReneeAlsept@gmail.com

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A. INTRODUCTION

A Personal Restraint Petition (PRP) can be based on the trial record, extra-record evidence, or both. In this case, Caldellis' petition contains both record-based, extra-record claims, and "mixed record" claims of error. Although the State argues that Mr. Caldellis' petition should not be granted, the State does not even remotely suggest that it is frivolous.

Consequently, RAP 16.11 sets forth the applicable procedure for deciding this case. Because at least some of Caldellis' claims cannot be decided "solely on the record," this Court should transfer the extra-record claims to the trial court for a reference hearing. RAP 16.11(b). Because not all of Caldellis' claims require a hearing, this Court should not transfer the entire case to the trial court for a decision on the merits. Instead, this Court should direct the trial court to conduct an evidentiary hearing on those claims which involve disputed material facts. Once this Court receives "findings of fact" from the reference hearing court, then the Court should permit supplemental briefing and the case should be referred to a panel for decision. RAP 16.11(b).

Consistent with the requirements of the RAP, Caldellis' initial focus in this brief is in distinguishing those claims that require a hearing from those that do not. As to the former claims, Caldellis seeks only to demonstrate that he has made out a *prima facie* claim of error based on facts that are in conflict—the relevant threshold for an evidentiary hearing.

For those claims not in need of a hearing, Caldellis replies to the merits of the State's argument.

To be clear, Caldellis does not object to this Court granting his petition based on the record-based without first conducting an evidentiary hearing. For example, the failure of the "to convict" instruction to include all of the elements of the crime is a claim that needs no further factual development and merits the same relief sought in the extra-record claims. However, Caldellis is concerned that, if this Court does so and the State then successfully seeks review by the Washington Supreme Court, that such a piecemeal approach will result in judicial inefficiency.

In any event, Caldellis presents several claims of error which merit reversal. His jury was permitted to convict him based on facts which do not constitute the crime of extreme indifference murder. His trial attorney did not propose proper instructions. There is evidence that some of the jurors and the judge slept through some of the trial. The prosecutor told jurors that Caldellis may have chosen not to testify simply because he was guilty. In sum, Caldellis' trial ran afoul of the constitution and he was harmed by those violations.

At the conclusion of this PRP, it will be clear that this Court should reverse and remand for a new trial.

B. ARGUMENT

CLAIM NO. 1: THE “TO CONVICT” MURDER INSTRUCTION OMITTED ONE OF THE ELEMENTS OF THE CRIME, DENYING CALDELLIS HIS RIGHT TO DUE PROCESS AND A JURY TRIAL ON ALL OF THE ELEMENTS OF THE CRIME.

CLAIM NO. 2: APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ASSIGN ERROR TO THE DEFICIENT JURY INSTRUCTION. IF APPELLATE COUNSEL HAD RAISED THE ISSUE, THERE IS A REASONABLE LIKELIHOOD OF A DIFFERENT OUTCOME ON APPEAL, ESPECIALLY GIVEN THE DIRECT APPEAL HARM STANDARD.

CLAIM NO. 3: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A “TO CONVICT” INSTRUCTION CONTAINING ALL OF THE ELEMENTS OF THE CRIME.

Introduction

Despite the fact that an “extreme indifference” murder requires a *mens rea* not found in the “to convict” instruction, the State argues that the instruction was not deficient. Instead, the State argues that instructing Caldellis’ jury that they must find that Caldellis “engaged in conduct under circumstances manifesting an extreme indifference to human life” adequately informs jurors that they must also find Caldellis “knew of and disregarded” the grave risk of death his conduct created. In other words, the State argues that lay persons would clearly understand that conduct which manifest extreme indifference necessarily requires proof of knowing and reckless disregard of a grave risk of death—that the two elements are redundant. The State is wrong.

The Instructions Violated Due Process Because They Permitted the Jury to Return a Guilty Verdict Without Finding All of the Elements of the Crime.

Mr. Caldellis' jury was instructed they must find the following elements in order to convict:

1. That on or about the 3rd day of September, 2006, the defendant discharged a firearm;
2. That the conduct of the defendant created a grave risk of death to another person;
3. That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
4. That Jay Daniel Clements died as a result of defendant's acts.

Instruction No. 4 (attached as Appendix D to PRP).

WPIC 26.06 requires the following:

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about _____, the defendant created a grave risk of death to another person;
- (2) That the defendant knew of and disregarded the grave risk of death;
- (3) That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (4) That _____ died as a result of defendant's acts;

The current WPIC is an accurate statement of the law, a point not contested by the State. There is an obvious difference between the instruction given to Caldellis' jury and the one required by law. Caldellis' instruction omits the mental element that he "knew and disregarded" the grave risk of death his actions allegedly created. The instruction given by

the trial court required jurors only to find that Caldellis engaged in conduct which *created* a grave risk of death, not that Caldellis *knew* his conduct created a grave risk of death. What the instruction given to Caldellis' jury does not make clear is that Caldellis' actions needed to reflect a mental state of knowing and reckless disregard.

First degree murder by extreme indifference requires both a knowledge and conduct prong. The required mental element is a "knowing disregard of a *grave risk of death* to others." *State v. Barstad*, 93 Wash.App. 553, 567, 970 P.2d 324 (1999). "And, the defendant's conduct and knowing disregard of such grave risk must occur in circumstances which manifest an extreme indifference to human life." *Id.* See also *State v. Madarash*, 116 Wash.App. 500, 511, 66 P.3d 682 (2003)("...in order to act with extreme indifference to human life, a person must know that his or her behavior creates a grave risk of death to another.").

While the State does not challenge the holding of *Barstad* construing the statute to include the *mens rea* reflected in the current WPIC, the State argues that *Barstad* also approved an instruction identical to the one in this case. *State's Response*, p. 11.

What the State fails to mention is that the instruction immediately following the "to convict" in *Barstad* stated:

INSTRUCTION NO. 11

A person engages in conduct manifesting an extreme indifference to

human life when:

1. He engages in conduct creating a grave risk of death to others; and
2. He *knows of and disregards* the grave risk of death to others; and
3. His conduct and disregard of such grave risk occurs under circumstances which manifest his extreme indifference to human life.

Id. at 565. The jury was not given an equivalent instruction in this case.

Further, it is important to note that Barstad did not complain about the adequacy of his “to convict” instruction. *Barstad* did not argue that Instruction No. 10 (the “to convict”) was inadequate in light of Instruction No. 11. Instead, Barstad complained that argued a different and more culpable mental state than the one reflected in Instruction No. 11 was required—that the law required the State to prove that he acted in a manner calculated to put the lives of many persons in jeopardy, with full consciousness of the probable consequences. The Court rejected Barstad’s argument on this point.

What *Barstad* makes clear is that the instructions must make the *mens rea* clear. That did not happen in Caldellis’ case. Instead, the instruction following the “to convict” focused on conduct, rather than intent and provided that “(c)onduct which creates a grave risk of death under circumstances manifesting an extreme indifference” is an “aggravated recklessness which creates a very high degree of risk greater than that

involved in recklessness.” Instruction No. 5 (Appendix D to PRP).¹

Even if Instruction No. 5 can be construed by this Court to contain the requisite *mens rea*, there is a reasonable likelihood that jurors did not understand that it required such proof.

As a matter of due process of law and the right to trial by jury, the trial court must clearly instruct the jury as to the State's burden of proving every essential element in a criminal case. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); U.S. Const. amends. 5 & 14; Wash. Const. art. 1, §§ 3, 21, 22. To ensure the State meets its burden, jury instructions must accurately and completely set forth all elements of the crime charged. *Mullaney v. Wilbur*, 421 U.S. 684, 701-02, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002).

The Due Process Clause requires a State to prove beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Where there is a reasonable likelihood that a jury misunderstood the law in a manner that lowered the State's burden of proof on an essential element, the defendant is deprived of this clearly established

¹ The State places far too much reliance on *State v. Yarbrough*, 151 Wn.App. 66, 210 P.3d 1029 (2009), a case that involves the admissibility of ER 404(b) evidence in an extreme indifference prosecution, not a challenge to the adequacy of the instructions. Likewise, *State v. Asaeli*, 150 Wn.App. 543, 580, 208 P.3d 1136 (2009), addresses the prejudice associated with the wrongful admission of gang evidence. Neither case purports to define the elements of extreme indifference murder or the adequacy of instructions defining those elements. *State v. Pastrana*, 94 Wn.App. 463, 470, 972 P.2d 557 (1999), is concerned with whether manslaughter is a lesser of extreme indifference, not with instructional error.

constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 73 n.4 (1991); *Boyd v. California*, 494 U.S. 370, 380 (1990) (recognizing that an instruction, “not concededly erroneous,” can be “subject to an erroneous interpretation” that renders it unconstitutional). The “reasonable likelihood” standard is clearly established to be a likelihood of jury confusion greater than a bare “possibility,” yet less than “more likely than not.” *Boyd*, 494 U.S. at 380.

It is “self-evident” that the Due Process right, under *Winship* and its progeny, to a jury that understands the elements of the charged offense is “interrelated” with the Sixth Amendment right to a jury trial. See *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

In *Sandstrom*, the United States Supreme Court established that a conviction may be unconstitutional where a jury instruction is not facially erroneous, but is subject to an erroneous interpretation. 442 U.S. at 517. In such circumstances, this Court undertakes a “realistic assessment” of how a jury likely understood a set of instructions. See *Perry v. Johnson*, 532 U.S. 782, 804 (2001) (holding instructions may have misled jury about constitutional role in sentencing); *Bollenbach v. United States*, 326 U.S. 607, 612-14 (1946) (assessing likely impact on jury of erroneous supplemental instruction). Where it is reasonably likely that a jury was confused about a principle of law important to carrying out its fact-finding role, there is a constitutional violation. See *Perry*, 532 U.S. at 804; *Yates v. Evatt*, 500 U.S. 391, 401-02, 406 & n.6 (1991); *Francis v. Franklin*, 471

U.S. 307, 318 (1985).

In this case, the State's efforts to construe the instructions to find the missing *mens rea* amply demonstrate the reasonable likelihood of harm. This Court is not concerned with how lawyers should best understand the instructions. This Court is concerned with how the jurors, who were not lawyers, may reasonably have understood those instructions. An instruction that focuses on conduct manifesting recklessness does not clearly convey the requirement that a defendant must know of and disregard a grave risk of death created and manifested by the conduct. The WPIC was changed because the prior version was inaccurate, not for no real reason as the State's argument implicitly suggests. Because there is a reasonable probability that jurors understood the instructions to require less proof than was constitutionally permitted, reversal is required.

Reversal is Required Because Caldellis Received Ineffective Assistance of Trial and Appellate Counsel

This is not case where there was a change in the law after this case was tried. *Barstad* was decided long before this case was prosecuted. *Barstad* construed what the extreme indifference statute has meant from its inception.

The change to the WPIC does not constitute a change in the law. Instead, the WPIC was altered to conform to the holding in *Barstad*. The amendment of the WPIC certainly should have put appellate counsel on

notice of the instant error. However, even without the amendment to the WPIC, *Barstad* sufficiently demonstrates the error in this case.

In that regard, this case is indistinguishable from *State v. Kyлло*, 166 Wn.2d 856, 216 P.3d 177 (2009). Curiously, the State does not mention *Kyлло*. In that case, like this one, defense counsel proposed a WPIC which failed to accurately state the law—preexisting law that could be found in published cases predating the trial. The Washington Supreme Court reversed, notwithstanding the WPIC, because ““(w)ith proper research, counsel should have determined from RCW 9A.16.020 and these cases that proposing an ‘act on appearances’ instruction using ‘great bodily injury’ was improper despite the term’s appearance in former WPIC 17.04. Failing to research or apply relevant law was deficient performance here because it fell ‘below an objective standard of reasonableness based on consideration of all the circumstances.’” *Kyлло*, 166 Wn.2d at 866.

Trial counsel’s failure to propose an accurate instruction defining the elements of extreme indifference murder in this case is no different than the failure in *Kyлло*. It was easy to discover *Barstad* and compare the elements of the crime described in that opinion with the instruction given. That comparison would have revealed the deficiency in the instructions. In fact, that is exactly what the WPIC committee did when it altered the pattern instruction.

The State also argues that Caldellis is not entitled to the direct appeal standard of review for deficient instructions. To the contrary, this Court must use that standard when evaluating Caldellis' ineffective assistance of appellate counsel claim. The prejudice question in an ineffective assistance of appellate counsel is whether there is a reasonable likelihood of a different outcome (here, reversal), if appellate counsel had raised the adequacy of the instructions. As a result, this Court must apply the direct review standard in order to answer the "reasonable likelihood of a different outcome" question.

There is probably no need for an evidentiary hearing on these claims, both because trial and appellate counsel's failure could not be based on reasonable strategic considerations and because the State does not argue that either trial or appellate counsel could have reasonably decided that there was no problem with instructions which permitted Caldellis' jury to convict him on less evidence than is constitutionally permissible. Instead, the contest is whether the instructions were adequate or not.

To be clear, if this Court remands other claims for an evidentiary hearing it should likewise remand these two claims of ineffectiveness for a hearing, too.

CLAIM No. 4: THE "TO CONVICT" MURDER INSTRUCTION FAILED TO SPECIFY THAT CALDELLIS ACTED WITH EXTREME INDIFFERENCE TO HUMAN LIFE IN GENERAL. INSTEAD, THE INSTRUCTION IMPLIED THAT CALDELLIS WAS GUILTY IF HE ACTED WITH EXTREME INDIFFERENCE ONLY TO THE VICTIM'S LIFE. THIS AMBIGUITY

DENIED CALDELLIS HIS RIGHT TO DUE PROCESS AND A JURY TRIAL ON ALL OF THE ELEMENTS OF THE CRIME.

CLAIM NO. 5: APPELLATE COUNSEL WAS INEFFECTIVE BY FAILING TO ASSIGN ERROR TO THE DEFICIENT JURY INSTRUCTION. IF APPELLATE COUNSEL HAD RAISED THE ISSUE, THERE IS A REASONABLE LIKELIHOOD OF A DIFFERENT OUTCOME ON APPEAL.

CLAIM NO. 6: TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PROPOSE A "TO CONVICT" INSTRUCTION INCLUDING ALL OF THE ELEMENTS OF THE CRIME.

CLAIM NO. 7: PROSECUTORIAL MISCONDUCT DENIED CALDELLIS A FAIR TRIAL WHEN THE PROSECUTOR TOLD JURORS THE INSTRUCTIONS PERMITTED THEM TO CONVICT ON LESS PROOF THAN WAS CONSTITUTIONALLY REQUIRED.

Introduction

The "to convict" instruction only required the State to prove only that Caldellis' action created a grave risk of danger to "human life," which could have been reasonably understood to mean a single person. That person, according to the plain language of the instruction, could have been Jay Clements, who died from the gun fired by Caldellis. In contrast, a defendant's act demonstrates a depraved indifference *only* if it puts the lives of more than one person at risk.

While the prosecutor argued that Caldellis shot into a group of people endangering lives, he alternatively argued that he shot and aimed at one person. The prosecutor argued that Caldellis admitted that he shot at and intending to kill Clements. "Why is he saying 'this' person? Why not 'a' person? He says 'this' person because he knows that Jay Clements was

standing right in front of the muzzle of his gun when he pulled the trigger and killed him.” RP 3187. This argument could have reasonably been understood by jurors to mean that if they found that Caldellis shot directly at Clements intending to kill him he endangered “human life.” While the prosecutor clearly argued an alternate theory of liability that involved endangering multiple lives, he also invited jurors to convict if Caldellis shot the man standing “right in front of the muzzle of his gun” intending to and actually killing him.

The State’s problem with the State’s attempt to save the instruction is that the State asks this Court to construe the instruction with the correct legal standard in mind—not whether there is a reasonable likelihood that lay persons reasonably could have construed the language of the instruction to require only proof of endangering a life. The State’s response also asks this Court to focus exclusively on those arguments where the prosecutor argued that Caldellis’ actions endangered more than one person and to ignore those arguments where the prosecutor invited jurors to convict even if Caldellis’ actions endangered only the deceased victim. Instead, this Court should review the instructions in a common sense manner and should ask whether the prosecutor promoted a theory of liability less than what the law required.

The words “human life” can be singular or plural. However, when used in the plural sense “human life” is an extremely broad term—

encompassing all of humanity. Clearly, Caldellis did not endanger “human life,” meaning all of humanity. In contrast, human “lives” is unmistakably plural—but, expresses the requirement of “more than one” in an understandable and common sense manner in a case where the State’s theory is that Caldellis’ actions endangered several people, not just the deceased victim.

However, where the prosecutor exploits the ambiguity of the instruction by arguing that the easiest way to conviction is to simply decide whether Caldellis intended to kill the victim because the he will have been shown to endanger “human life,” there is an increased likelihood that jurors convicted on less proof than is constitutionally permitted. A prosecutor does not cure this error by arguing that there is *also* proof that a defendant acted to endanger multiple lives. If that were the case, a prosecutor could engage in endless misconduct as long as he made a correct statement of the law from time to time. The law requires more than the State suggests in its response.

In any event, this Court should order a reference hearing on the claim that trial counsel was ineffective. Notwithstanding trial counsel’s declaration stating that he had no tactical reason not to object (to the instruction or the argument), the State contests Caldellis’ extra-record facts. As a result, this Court should order an evidentiary hearing on that claim (No. 6).

CLAIM NO. 8: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OFFER SELF-DEFENSE INSTRUCTIONS ON THE MURDER COUNT

Introduction

A defendant who fears imminent death or serious bodily harm by an unknown assailant acts in self-defense when he fires a weapon into the darkness in the direction of the perceived threat. Recognizing the application of the law of self-defense to the facts of this case, defense counsel sought self-defense instructions for the two assault charges. However, defense counsel inexplicably did not seek a self-defense instruction for the murder count. Counsel sought, but was refused an instruction which included language: “Any motive for the actor’s conduct is a factor to be considered in determining whether conduct manifests extreme indifference to human life.” *Defense Proposed Instruction No. 9*.

In response, the State argues that counsel for Caldellis defended the charge with a claim of accident—that Caldellis claimed he did not intentionally kill Clements. This is, of course, a correct statement.

The legal question then is whether a defendant charged with an extreme indifference murder for shooting into a crowd of people can claim self-defense if he shot into the crowd and toward the place and/or unknown person he feared had a gun and, as a result, reasonably feared imminent death or serious and severe bodily injury. *See* RP 1075, 1095, 1242, 1289.

The statute answers the question above with a “yes.” RCW 9A.16.020; .030. The State argues, however, that self-defense requires a one-to-one relationship between attacker and defender—that a defendant acting in self-defense must intend to justifiably kill the person he is defending against. This is certainly true in an intentional murder case. However, in an extreme indifference case a defendant is justified when he shoots into a crowd if he reasonably believes the crowd is acting in concert and that some unidentifiable person in that crowd has a gun and intends to kill him. Put another way, Caldellis did not need to wait to be able to identify the person in the crowd with the gun and shoot only in that person’s direction as long as he reasonably believed he was shooting to protect himself.

This is not a case where defendant shot into a crowd of people in broad daylight simply to scare them or with grave indifference to the results. Instead, it was dark—too dark to see who in the hostile crowd had a gun. Plus, Caldellis’ acts of firing shots in the air to disperse the crowd did not work. As a result, he reasonably feared death or serious bodily harm and his subsequent actions could be viewed as reasonable self-defense efforts.

The only reason that trial counsel did not seek a self-defense instruction was because he believed it legally did not apply. Given that the application of the self-defense to the facts of this case appears to be the

only dispute, there does not appear to be a need for a hearing on these claims. However, as previously, if this Court disagrees and concludes that additional facts are in dispute a hearing should be held.

Otherwise, this Court should reverse and remand for a new trial.

CLAIM NO. 9: THE TRIAL COURT CONDUCTED A PORTION OF JURY SELECTION PRIVATELY WHEN IT USED A CONFIDENTIAL QUESTIONNAIRE WITHOUT CONDUCTING A HEARING TO DETERMINE WHETHER CLOSURE WAS PROPER.

CLAIM NO. 10: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO EXPLAIN TO MR. CALDELLIS THAT HE HAD THE CONSTITUTIONAL RIGHT TO AN OPEN TRIAL, A RIGHT THAT INCLUDED ALL PORTIONS OF JURY SELECTION. IF CALDELLIS HAD BEEN INFORMED OF HIS CONSTITUTIONAL RIGHT TO AN OPEN AND PUBLIC TRIAL, HE WOULD NOT HAVE WAIVED THAT RIGHT.

These claims should be remanded for an evidentiary hearing. At that hearing, the reference hearing judge should find facts relevant to: (1) whether the general public had access to the questionnaires during jury selection and/or before they were sealed; (2) what Caldellis was told, if anything, about the applicability of the right to an open and public trial to a decision to use non-public questionnaires to conduct part of jury selection; and (3) whether Caldellis would have chosen to waive or assert his right to an open and public trial if he had been properly informed.

Once those findings are entered, Caldellis respectfully requests an opportunity for supplemental briefing as to why reversal is required.

CLAIM 11: THE JUDGE SLEPT THROUGH PORTIONS OF THE TRIAL— A STRUCTURAL ERROR. THIS COURT SHOULD REMAND FOR AN EVIDENTIARY HEARING. IF THE REFERENCE HEARING JUDGE

DETERMINES THE TRIAL JUDGE SLEPT THROUGH ANY PORTION OF TRIAL, REVERSAL IS REQUIRED.

CLAIM 12: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO NOTICE THE JUDGE SLEEPING AND TO MOVE FOR A MISTRIAL.

CLAIM 13: A JUROR ALSO SLEPT THROUGH A MATERIAL PORTION OF TRIAL. THIS COURT SHOULD REMAND THIS CLAIM FOR AN EVIDENTIARY HEARING. IF THE REFERENCE HEARING JUDGE DETERMINES THAT A JUROR SLEPT THROUGH MATERIAL PORTIONS OF TRIAL, REVERSAL IS REQUIRED.

CLAIM 14: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO NOTICE THE SLEEPING JURORS AND TO MOVE FOR A MISTRIAL.

These two claims can only be resolved after an evidentiary hearing.

In the State's *Response*, it presents declarations which contest the salient facts. This Court is not permitted to resolve those disputed facts. Instead, it must remand for an evidentiary hearing.

The Washington Supreme Court set forth the relevant standards in *In re Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992):

As a threshold matter, the petitioner must state in his petition the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. RAP 16.7(a)(2)(i). This does not mean that every set of allegations which is not meritless on its face entitles a petitioner to a reference hearing. Bald assertions and conclusory allegations will not support the holding of a hearing. *See In re Williams*, 111 Wash.2d 353, 364-65, 759 P.2d 436 (1988). Rather, with regard to the required factual statement, the petitioner must state with particularity facts which, if proven, would entitle him to relief.

Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact,

the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

Id. at 885-87.

At that hearing, Caldellis will obviously be expected to prove that a juror or jurors slept and that Caldellis was prejudiced by the jurors' inability to hear certain portions of the trial evidence. *See United States v. Freitag*, 230 F.3d 1019, 1022 (7th Cir.2000).

Mr. Caldellis has set forth facts which make out a *prima facie* claim of error. Additional facts and most importantly resolution of the central disputed facts—did the judge and did certain jurors sleep during portions of trial—will obviously enable this Court to resolve these claims.

When a judge is absent from a portion of trial, the forum is destroyed. It is well settled that a trial judge's presence is necessary "while functional proceedings are in progress." *United States v. Grant*, 52 F.3d 448, 449 (2d Cir.1995). It is not, however, required for "mere symbolic presence during performance of mechanical repetitions." *Id.* at 450. Thus, it is not *per se* error for a trial judge to be absent from the courtroom, for a short period of time, during a portion of the trial not involving the judge's supervisory role. *See eg., Id.* (Judge's brief absence from courtroom during readback to the jury, without more, involves no prejudice and does not constitute error.).

A sleeping judge is an absent judge. Once again, this Court should conduct an evidentiary hearing. That hearing should determine whether the judge slept or closed his eyes to concentrate. If the reference hearing court concludes the judge slept, the court should also determine what was happening in court when he was sleeping.

Caldellis contends, however, that he does not need to show he was prejudiced by the judge's absence. *United States v. Mortimer*, 161 F.3d 240 (3rd Cir.1998) (Trial judge's absence during defense counsel's summation constitutes a structural error because jury may have inferred that defense was not worth listening to thereby prejudicing the defendant).

Once the facts are found, this Court can then apply those facts to the law. At this point, the parties can only argue about what they hope to prove.

CLAIM No. 15: THE PROSECUTOR INVITED JURORS TO INFER GUILT FROM CALDELLIS' FAILURE TO TESTIFY VIOLATING HIS FIFTH AMENDMENT GUARANTEE THAT SILENCE CANNOT BE VIEWED UNFAVORABLY.

CLAIM No. 16: APPELLATE COUNSEL WAS INEFFECTIVE BY NOT ASSIGNING ERROR TO THIS COMMENT.

CLAIM No. 17: TRIAL COUNSEL WAS INEFFECTIVE FOR WITHDRAWING HIS OBJECTION AND SEEKING A MISTRIAL AND, IF THIS COURT CONCLUDES THE PROSECUTOR'S ARGUMENT WAS A FAIR RESPONSE, BECAUSE HE OPENED THE DOOR TO A MAJOR CONSTITUTIONAL VIOLATION.

Mr. Caldellis was entitled to a trial in which his silence would not be used against him. He did not receive such a trial. It does not matter

whether the prosecutor's unfair comments were provoked or not. The question is whether Caldellis' jury was invited to draw a negative inference from his silence. On appeal, the State argues that the trial prosecutor asked jurors to consider that Caldellis did not testify because he had nothing helpful to say. This is another way of saying that Caldellis' testimony would have incriminated him.

Such comments are utterly prohibited because they seek to penalize a defendant for the exercise of a constitutional right. Comments "naturally and necessarily" focus on the defendant's exercise of a constitutional right when they either explicitly or implicitly direct the jury's attention to the defendant's acts which are the result of the defendant's exercise of a constitutional right. *Ramirez*, 49 Wn.App. at 336-37 (State's argument that testify one reason a defendant would not is because the defendant is guilty naturally and necessarily focuses the jury's attention on the defendant's constitutional right to remain silent); *State v. Sargent*, 40 Wn.App. 340, 346-47, 698 P.2d 598 (1985) (State's argument that, if the defendant had known of other possible suspects, the jury would have heard of them directly drew attention to the defendant's failure to testify).

If this Court finds that the prosecutor's remarks constituted a fair response, then this Court should order an evidentiary hearing to determine whether trial counsel's performance was deficient by making arguments which invited such a response. Otherwise, this Court should reverse.

D. CONCLUSION

Based on the above, this Court should remand Caldellis' extra-record claims for an evidentiary hearing. At the conclusion of that hearing, Caldellis will ask this Court to review all of his claims and reverse and remand for a new trial.

DATED this 19th day of September, 2011.

/s/ Jeffrey E. Ellis
Jeffrey E. Ellis #17139

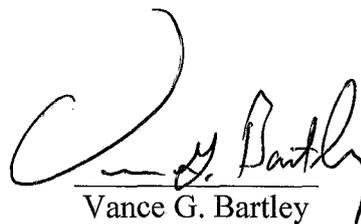
/s/ Renee Alsept
B. Renee Alsept # 20400
Attorneys for Mr. Caldellis
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
(206) 218-7076
JeffreyErwinEllis@gmail.com
ReneeAlsept@gmail.com

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Alsept & Ellis, LLC, certify that on September 19, 2011 I served the parties listed below with a copy of Petitioner's Reply Brief as follows:

Kathleen Webber
Snohomish County Prosecutor
Snohomish County Prosecuting Attorney's Office
3000 Rockefeller Ave.,
Everett, WA 98201

9-19-11 Sea, WA
Date and Place


Vance G. Bartley