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STATE OF WASHINGTON

BY



ATTORNEY

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

IN RE: THE PERSONAL RESTRAINT PETITION OF  
MICHAEL RHEM, PETITIONER

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie Arend

No. 99-1-04722-4

**SECOND SUPPLEMENTAL BRIEF**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court find that several recent cases regarding improperly closed courtrooms are not controlling as they all arise from direct appeals while the case before the court is on collateral review?
2. Should this court find that on collateral review a claim of improper courtroom closure must be limited to a claim of the defendant's right to a public proceeding which has been properly preserved in the trial court and shown to be actually prejudicial?
3. Should this court find that under Washington law there has always been an increased burden on a petitioner seeking relief by way of collateral attack as compared to the burden of a defendant raising the same issue on direct review?

B. STATEMENT OF THE CASE.

The facts have been set forth in the State's initial response to the personal restraint petition and in the first supplemental brief.

C. ARGUMENT.

1. PETITIONER'S CASE DIFFERS FROM THE DECISIONS IN **PRESLEY, PAUMIER, AND BOWEN**, AS ALL OF THOSE WERE CASES ON DIRECT APPEAL; AS THIS IS A COLLATERAL ATTACK, THE SCOPE OF THE CONSTITUTIONAL RIGHTS AT ISSUE IS LIMITED TO THOSE BELONGING TO THE DEFENDANT AND HE MUST SHOW 1) ERROR, 2) PRESERVATION OF THE ERROR, AND 3) ACTUAL PREJUDICE BEFORE HE IS ENTITLED TO RELIEF.

Criminal defendants and the public have a right to a public criminal trial. *Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 721, \_\_\_ L. Ed. 2d \_\_\_ (2010). The Sixth Amendment to the United States Constitution, and article I, section 22 of the Washington Constitution, both protect a defendant's right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004); *Waller v. Georgia*, 467 U.S. 39, 44-45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). The public's right to a public trial is protected by the first amendment, and article I, § 10 of the Washington Constitution. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); *Press-Enterprise v. Superior Court of California*, 464 U.S. 501, 509-10, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) ("*Press-Enterprise I*"); *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 59-

60, 615 P.2d 440 (1980); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).

This court has asked for additional briefing, discussing its recent decisions in *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (2010), and *State v. Bowen*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2010)(2010 WL 2817197)(Case No. 39096-5-II, issued July 20, 2010). In both cases, this court relied upon the recent United States Supreme Court decision of *Presley v. Georgia*, *supra*; consequently, it is relevant to start the analysis with an examination of that case.

In *Presley v. Georgia* the United State's Supreme Court held for the first time that a defendant's Sixth Amendment right to a public trial extends to the voir dire of prospective jurors. *Presley*, 130 S. Ct. at 723-24 (noting previous cases concerning voir dire had addressed the public's right under the first amendment). In *Presley*, the trial court excluded spectators from courtroom during voir dire. A relative of the defendant was present, but was told by the court to leave the courtroom and to vacate that floor of the courthouse, and to come back when the trial began. *Id.* at 722. Defense counsel objected to the exclusion of the public and asked the court for some accommodation for the relative; the court refused to accommodate, and indicated that the relative could return once the trial started. *Id.* In a motion for new trial, Presley renewed his objection to the

exclusion of the public from voir dire and presented evidence that the entire venire could have been seated in a manner that would have left room for public spectators; the motion was denied. *Id.* On appellate review, the Georgia Supreme Court affirmed, rejecting Presley's contention that the trial court was required to consider any alternatives prior to closing the courtroom. *Id.* The United States Supreme Court reversed, finding that prior to closing a courtroom to the public, a trial court must consider alternatives to closure and articulate the overriding interest likely to be prejudiced absent the closure of voir dire. *Id.* at 725.

The facts of *Presley* show that both the defendant's right and the public's right to a public trial were asserted in the trial court so that both these claims were preserved for appellate review. *See also, Paumier*, 155 Wn. App. at 688-689 (Quinn-Brintnall, J. dissenting)(noting that in *Presley* there was an objection on both grounds -the defendant's and the public right to an open trial - lodged in the trial court). In this respect, the facts of *Presley* were similar to those in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984), the first case to expand the defendant's right to a public trial beyond the actual proof at trial and the first to treat a violation of the defendant's right to a public trial as structural error. 467 U.S. at 47-50.

In *Waller*, there was a full closure of the courtroom during a pre-trial suppression hearing lasting seven days; this closure was over the defendant's objection. Waller pursued his claim of improper closure on direct review, but was unsuccessful in the Georgia Supreme Court; the United States Supreme Court granted certiorari and reversed, holding that the defendant's Sixth Amendment right to a public trial extends to a suppression hearing, and that the trial court had failed to make the necessary showing to justify closure. 467 U.S. at 43-47. In deciding what the appropriate remedy was for this violation, the Supreme Court agreed with lower federal courts that the defendant should not be required to show specific prejudice in order to obtain relief, treating it as structural error, but declined to find that a new trial was the appropriate remedy under the circumstances of that case. 467 U.S. at 49. The court remanded for a new suppression hearing, noting that if essentially the same evidence is suppressed, the new trial would be a windfall and not in the public interest. *Id.*

In *Bowen, supra*, this court reversed two convictions, finding that the trial court violated the defendant's right to a public trial for conducting some questioning of juror's on sensitive issues in the judge's chambers. The trial court in *Bowen* had asked whether either side had any objections

to the proposed in chamber's questioning, and both prosecution and defense stated that they had none. Nevertheless, because the trial court had first suggested the procedure, and because defense counsel did not actively participate in the in chambers voir dire (the trial judge asked all of the questions in chambers), this court found that under *Strode*<sup>1</sup>, Bowen could not be found to have waived his objection.

In *Paumier*, this court, in a split decision, reversed for an open courtroom violation because the trial court engaged in private questioning with several jurors in the judge's chambers, finding that the trial court had closed the proceedings without undergoing the analysis required by *Presley*. *Paumier*, 155 Wn. App. at 683-686. The majority opinion seems to find that there was a violation of the public's right to trial although *Presley* was decided on the basis of the defendant's right to trial. There was a dissent in *Paumier*. The dissent did not find *Presley* controlling as in that case, there was a clear objection by the defendant and by a member of the public to the trial court's decision to exclude the public from voir dire, whereas *Paumier* had failed to timely object and preserve the closed courtroom issue for review. The dissent could find no constitutional authority to support the principle that a closed courtroom claim could be raised even if there had been no timely objection in the trial court.

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<sup>1</sup> *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009)

There appears to be ample support for the conclusion that an objection must be lodged in the trial court to preserve the issue. For example, in *Press-Enterprise v. Superior Court of California*, 464 U.S. 501, 509-10, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (“*Press-Enterprise I*”), the Supreme Court held that the public had a First Amendment right to open court proceedings. The criminal trial at issue in *Press Enterprise I* was a murder/rape case where the jury returned a death verdict for Albert Green Brown; the media had been excluded from six weeks of voir dire proceedings and sought a writ of mandamus against the trial court judge. 464 U.S. at 503-505. At trial, Mr. Brown advocated for the exclusion of the public. While the media was successful at obtaining the writ of mandamus, Mr. Brown’s conviction and death sentence, however, were never reversed for a violation of the public’s right to an open courtroom. *See Brown v. Ornoski*, 503 F.3d 1006, 1008-1010 (9th Cir, 2007)(noting procedural history of case and denying writ of habeas corpus.); *see* argument, *infra*, for additional authority.

*Presley, Waller*, and this court’s decisions in *Paumier* and *Bowen* all involve cases that were on direct review. The case currently before this court is on collateral review, necessitating inquiry as to whether that alters the standard of review applicable to such claims. Generally, Washington case law indicates that it is not appropriate to carry over standards

applicable to direct review, and apply them in a collateral attack proceeding. *In re Mercer*, 108 Wn.2d 714, 718 21, 741 P.2d 559 (1987)(rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions); *In Re: Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982).

- a. Under RCW 7.36.130, which is more expansive than the state constitution, this court does not have jurisdiction to grant collateral relief for a violation of the public's right to open court rooms.

RCW 7.36.130 is a statute placing strict limitations on the writ of habeas corpus. It is derived from a statute passed by the first legislature of Washington Territory, and as originally enacted stated:

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, discussed below, 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 the courts, but 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 added). 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). While expanding the scope of the statutory right to habeas corpus, the amendment had no expansive effect on 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). Notably, this legislative 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 someone else's constitutional rights. *See* RCW 7.36.130. To the contrary, the Legislature has 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).

RCW 7.36.130 sets out the substantive law regarding the scope of review for habeas corpus petitions filed in a Washington court, irrespective of which court the petition is filed. In other words, in Washington, no relief may be given in a personal restraint petition or habeas corpus petition for the violation of another's constitutional rights.

Moreover, aside from the statutory limits on collateral review, a defendant does not have standing to assert the rights – constitutional or otherwise – of others. *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); *see also, Paumier*, 155 Wn. App. at 690(Quinn-Brintnall, J. dissenting)

To the extent that petitioner is contending that he is entitled to have his conviction set aside due to a violation of the public's First Amendment rights, or its right under Const. art. I, § 10, right to open justice, these arguments and claims must be summarily dismissed. The court does not have the constitutional power to grant collateral relief to a petitioner who alleges the violations of someone else's rights, and the Legislature has not expanded the right of habeas corpus to violations of the constitutional rights of others. This means that petitioner may not assert a violation of the public's right to open justice under Const. art. I, §10, or to public trials under the First Amendment.

b. Petitioner Is Not Entitled To Relief Because He Has Not Shown Constitutional Error Or That it caused Him Actual and Substantial Prejudice.

Under controlling Washington law, a petitioner must show both constitutional error and actual prejudice to obtain collateral relief, including those stemming from a defendant's right to public trial. The Washington Supreme Court addressed a closed court room claim in a collateral attack in *In Re Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004).

The trial court in *Orange* decided to close the courtroom to spectators during voir dire. As the defendant in *Presley* did, Orange asked that the trial court to accommodate his family so that they could stay in the courtroom during voir dire. 152 Wn.2d at 801-02. The court denied the request and ruled that no spectators – including the defendant’s and victim’s family members who were present- would be allowed to be in the courtroom during voir dire. The trial court did not make any findings regarding its closure of the courtroom. Orange appealed his subsequent convictions, but his appellate counsel did not raise the closed courtroom issue on direct review. His convictions were affirmed by the Court of Appeals and the Supreme Court denied review. *State v. Orange*, 140 Wn.2d 1015, 5 P.3d 9 (2000). In a timely filed personal restraint petition, Orange reasserted that his right to a public trial had been violated by the trial court’s closure of the courtroom during voir dire, and claimed that he had received ineffective assistance of appellate counsel as this claim had not been pursued on direct appeal. The Supreme Court agreed that Orange’s right to a public trial had been violated as the courtroom had been subject to a full, temporary closure without the trial court’s engaging in the required analysis under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). *Orange*, 152 Wn.2d at 806-813. The court found that:

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

*Orange*, 152 at 814(citations omitted) (emphasis added). It is important to note that the court in *Orange* applied the standards of review applicable to collateral attacks, requiring the petitioner to show not only an error of constitutional magnitude, but also that the error worked to his actual and substantial prejudice. *See Orange*, 152 Wn.2d at 804-05. The Court again rejected the concept that errors that are per se prejudicial on direct appeal will also be presumed prejudicial in collateral review. *Id.* at 804, citing *In re PRP of St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). In *Orange*, the prejudice shown was that flowing from *appellate counsel's* failure to pursue a meritorious constitutional claim which had been preserved in the trial court, and which would have entitled Orange to a new trial had it been raised on appeal. The court did not refer to the prejudice to his right to a public trial that flowed from the closed courtroom as the proof of prejudice, but the loss of the "structural error" standard that would have been applicable had the issue been raised on

direct review. Thus, Orange established that he had preserved his claim in the trial court and that his appellate attorney's deficient performance in failing to pursue a meritorious claim has caused him actual and substantial prejudice.

The Respondent in the case before the court can find no Washington Supreme Court or United States Supreme Court case where collateral relief has been granted for a violation of a criminal defendant's right to a public trial without: a showing of: 1) the claim having been preserved in some way in the trial court; and, 2) actual prejudice.

The decision in *Orange* is consistent with authority from other jurisdictions that treat closed courtroom violations raised on collateral review under a different standard than the structural error analysis applicable to direct review cases. Several jurisdictions have held that the *Waller* standard finding the improper closing of a courtroom to be structural error requiring reversal is only applicable if the defendant properly objected at trial and raised the issue on direct appeal. *Purvis v. Crosby*, 451 F.3d 734, 740-741(11th Cir.2006); *State v. Butterfield*, 784 P.2d 153, 156-157 (Utah 1989); *Reid v. State*, 286 Ga. 484, 488, 690 S.E.2d 177 (Ga. 2010). The Eleventh Circuit found that structural error is presumed when there is a full closure and the defendant properly preserves the issue at trial and presents it on direct appeal; under these circumstances

a criminal defendant is not required to establish that he was specifically prejudiced by the closure. *Purvis*, 451 F.3d at 740, citing *Waller*, 467 U.S. at 49-50 & n. 9, 104 S. Ct. at 2217 & n. 9 (1984). But unlike *Waller*, *Purvis* was raising his claim of a closed courtroom for the first time in a habeas petition, citing ineffective assistance of trial counsel for failing to object. The court stated:

It is one thing to recognize that structural errors and defects obviate any requirement that prejudice be shown on direct appeal and rule out an application of the harmless error rule in that context. It is another matter entirely to say that they vitiate the prejudice requirement for an ineffective assistance claim.

*Purvis*, 451 F.3d at 740. The Eleventh Circuit went on to conclude that as this claim did not fall under the type of Sixth Amendment claims where prejudice was presumed, such as a complete denial of counsel or being represented by an attorney with an actual conflict. Consequently, the petitioner was required to show prejudice to succeed on his ineffective assistance of counsel claim. In so holding, the Eleventh Circuit relied upon the decisions in *Davis v. United States*, 411 U.S. 233, 93 S. Ct. 1577, 36 L. Ed. 2d 216, (1973), and *Francis v. Henderson*, 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976). In *Davis*, the Supreme Court held that a federal prisoner who had failed to raise a timely challenge in the trial court to the allegedly unconstitutional composition of the grand jury that

indicted him, could not attack the grand jury's composition in an action for collateral relief. In *Francis*, 425 U.S. 536, 96 S. Ct.1708 (1976), the Supreme Court held that a state prisoner who had failed to make a timely challenge under state law to the allegedly unconstitutional composition of the grand jury that indicted him could not bring that challenge in a federal habeas corpus proceeding. These cases are important because the Supreme Court considers racial discrimination in the selection of a grand jury to be structural error when it is timely challenged and pursued on direct appeal. *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (granting federal habeas relief to defendant who timely challenged racial discrimination in selection of grand jury in trial court and pursued issue on appeal in state courts).

The case currently before the court is distinguishable from *Presley*, *Waller*, *Bowen*, and *Paumier* in that it is before the court on collateral review. It is distinguishable from *Presley*, *Waller*, and *Orange* in that petitioner has not clearly shown that an error occurred or any objection to the challenged closure was preserved in the trial court.

In regards to the instant case, the State disputes that petitioner has met his burden of showing that constitutional error occurred. As argued in the State's earlier briefing, to determine if a courtroom is closed, a reviewing court looks to the plain language of the closure request and order. *In re Orange*, 152 Wn.2d at 808 ("Looking solely at the transcript

of the trial court's ruling..., the court ordered a permanent, full closure of voir dire"). In both *Orange* and *Brightman*, the plain language of the trial courts' rulings imposed a complete closure of the courtrooms by excluding all spectators and family members. *See also, State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006), (courtroom cleared and closed for a pretrial motion by the co-defendant at the co-defendant's counsel request). For there to be a denial of a defendant's Sixth Amendment right to a public trial, there must be some affirmative act by the trial court meant to exclude persons from the courtroom. *United States v. Al-Smadi*, 15 F.3d 153, 155 (10th Cir. 1994); *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003)(limited seating in courtroom does not constitute a closure). As the record in this case does not support a finding that the court ordered a closure of the court room, but only a temporary clearing, defendant has failed to meet his burden. As argued in the earlier briefing, the record affirmatively shows that members of the public were present during voir dire, and that the trial court was determined to keep the courtroom open. RP 150-161. In a collateral proceeding, inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. *In re Hagler*, 97 Wn.2d at 825-26. The inference that must be drawn in this case, is that the trial court did not close the courtroom

Nor can petitioner show that he preserved his claim in the trial court as he did not object to the temporary clearing. The fact that petitioner's trial attorney objected to the State's motion to exclude minors

from the courtroom on the basis that trials were public showed his awareness of this issue. RP 74. This indicates that petitioner's attorney did not view the clearing of the courtroom as being a closure as he did not object. RP 75. Defendant did not preserve a claim in the trial court that his right to a public trial was being violated. Therefore, he has failed to show that he can raise this claim on collateral attack.

Finally, petitioner has not made any showing of actual prejudice. In a collateral action, the petitioner has the duty of showing constitutional error, and that such error was actually prejudicial. As noted above, the rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. *In re Mercer*, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987); *Hagler*, 97 Wn.2d at 825. Unlike the petitioner in *Orange* who could show that his appellate counsel's deficient performance had caused him actual prejudice, by losing the "structural error" standard of review applicable to direct review, petitioner in this case has made no showing of any actual prejudice that calls into doubt the outcome of his trial.

2. THE WASHINGTON SUPREME COURT REQUIRES A PETITIONER TO SHOW ACTUAL AND SUBSTANTIAL PREJUDICE BEFORE COLLATERAL RELIEF CAN BE GIVEN: THIS INCLUDES MOST CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

It is a long standing principle in Washington law that a “personal restraint petition is not to operate as a substitute for a direct appeal”. *In re Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). The Washington Supreme Court acknowledged that at one point it had suggested in dicta that “constitutional errors which can never be considered harmless on direct appeal will also be presumed prejudicial for the purposes of personal restraint petitions.” *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992), citing *In re Boone*, 103 Wn.2d 224, 233, 691 P.2d 964 (1984). But on reflection it rejected such a proposition:

We have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders. Therefore, we decline to adopt any rule which would categorically equate per se prejudice on collateral review with per se prejudice on direct review. Although some errors which result in per se prejudice on direct review will also be per se prejudicial on collateral attack, the interests of finality of litigation demand that a higher standard be satisfied in a collateral proceeding.

*St. Pierre*, 118 Wn.2d at 329 (internal citation omitted). A petitioner who cannot rely on a per se rule “must show the error worked to his actual and substantial prejudice in order to prevail.” *Id.* at 329. A petitioner who cannot establish actual and substantial prejudice is not entitled to collateral relief. *Id.* at 330-331. That a petitioner seeking collateral relief must show actual and substantial prejudice is a long standing principle that has been oft repeated by the Washington Supreme Court. *In re Davis*, 142 Wn.2d 165, 170-171, 12 P.3d 603 (2000), citing *In re Personal Restraint of Benn*, 134 Wn.2d 868, 884-85, 952 P.2d 116 (1998) (citing *In re Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992); *In re Personal Restraint of Hews*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983); *In re Personal Restraint of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990)). This is a burden applicable to all requests for collateral relief, regardless of the issue raised.

With the exception of those few claims where the per se rule carries over to collateral review, any decision granting collateral relief when the petitioner has done nothing more that make the same showing required of a defendant on direct review must be viewed as incorrect. Such a decision flies in the face of the long standing principles cited above, and fails to maintain the distinctions between collateral attacks and direct appeals.

Division Two of the Court of Appeals has acknowledged this distinction. *In re Personal Restraint of Davis*, 151 Wn. App. 331, 211 P.3d 1055 (2009):

In a PRP, a petitioner claiming ineffective assistance of appellate counsel for failing to raise a constitutional error or fundamental defect at trial must show that he was actually and substantially prejudiced by the error and that the legal issue, here ineffective assistance of Davis's trial counsel, has merit. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 777, 100 P.3d 279 (2004). By claiming ineffective assistance of appellate, as well as trial, counsel, Davis seeks to lower the standard of prejudice in a collateral attack necessary to prove that his trial counsel provided constitutionally deficient assistance. We hold that to prevail in this PRP, Davis must prove that he was actually and substantially prejudiced by his trial counsel's representation. This holding is consistent with the standard applied by our Supreme Court for many years. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000); *In re Benn*, 134 Wn.2d 868, 952 P.2d 116. In light of his and his appellate counsel's full and competent exercise of Davis's direct appeal rights, Davis's attempt to circumvent the "actual and substantial prejudice standard" applicable to errors asserted via collateral attack by also asserting an ineffective assistance of appellate counsel argument is unpersuasive.

Accordingly, we apply the actual and substantial prejudice standard to the claims raised in the timely filed portion of Davis's petition.

*Davis*, 151 Wn. App. at 337. Recently, Division Two, in a split decision, retreated from this decision holding that as far as an ineffective assistance of counsel claim is concerned, once a petitioner makes the same showing a

defendant would have to make in a direct appeal under the *Strickland* standard, then he is entitled to collateral relief. *In re Personal Restraint of Crace*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2010)(Case No. 37806-0, issued July 28, 2010). The State submits that the *Crace* decision is in error, and that the court should return to the correct rule of law cited in its earlier *Davis* decision. The *Crace* decision substitutes the *Strickland* standard to assess ineffective assistance of counsel for the overriding standard applicable to all collateral attacks. The two standards should not be conflated into a single standard.

In support of this argument, the State points the court to the Supreme Court's decision in *In re Personal Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004), which involved a collateral attack filed in a death penalty case that raised 15 various claims of ineffective assistance of counsel. The court noted that the "per se" rule of prejudice was limited to a few types of ineffective assistance of counsel claims where there was, essentially, a complete denial of counsel. *Davis*, 152 Wn.2d at 674. "Apart from circumstances of this nature and magnitude, the [United State's] Supreme Court has said 'there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.'" *Davis*, 152 Wn.2d at 675, citing *United States v. Cronin*, 466 U.S. 648, 659 n. 26, 104 S. Ct. 2039, 80 L.Ed.2d at 657 (1984). In a footnote, the majority in *Davis* comments on an argument made in the dissenting

opinion which endorsed adoption of a per se rule for ineffective assistance of counsel, when there was a failure to object to the defendant being shackled; the footnote states:

The dissent by Justice Sanders urges this court to adopt a per se rule for ineffective assistance of counsel on the issue of shackling despite our jurisprudence to the contrary on shackling. *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001); *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999). *The dissent also ignores the higher standard for collateral attack in PRP litigation.*

*Davis*, 152, at 674 n34 (emphasis added). It is clear from the Supreme Court's decisions in *Davis* and *Orange*, discussed *supra*, that the per se rule of prejudice is not applicable to claims of ineffective assistance of counsel regarding closed courtrooms and that, further, before collateral relief may be given for a claim of ineffective assistance, the petitioner must meet his heightened burden to show that he was actually and substantially prejudiced by his attorney's deficient performance. In the case now before the court, petitioner has not made any showing how any specific errors of counsel undermined the reliability of the finding of guilt in his case. As such, he is not entitled to collateral relief.

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D. CONCLUSION.

For all the reasons set forth in the State's briefing in this case, the State asks this Court to dismiss the petition.

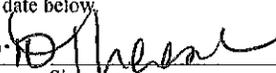
DATED: August 16, 2010.

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Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/16/10   
Date Signature