No. 84929-3

WIGGINS, J. (dissenting)—Eight years ago, Patrick Morris was convicted of two counts of first degree sexual molestation and one count of first degree rape of his daughter, A.W. A.W. was five years old when she disclosed the abuse to her mother and stepfather. At trial, Morris never objected to the trial court's decision to conduct partial voir dire of 14 venirepersons in chambers instead of in open court. On appeal, Morris never raised the partial voir dire in chambers as an error. Neither Morris nor the lead opinion can articulate any prejudice that resulted from this brief chambers voir dire. And yet, eight years later, the lead opinion overturns Morris's conviction and orders a new trial, subjecting this now-older but still-young girl to endure again the ordeal of testifying about this intensely private and hurtful experience.

We must never shrink from ordering a new trial when a defendant has been prejudiced by the violation of fundamental constitutional rights. Conversely, if a defendant cannot show prejudice from the violation of a constitutional right, we should not order a new trial. This is such a case and I therefore dissent.

In *State v. Wise*, No. 82802-4 (Wash. Nov. 21, 2012) and *State v. Paumier*, No. 84585-9 (Wash. Nov. 21, 2012), a majority of this court held that in-chambers

voir dire without a *Bone-Club* analysis is reversible error on direct appeal. But it is a completely different question whether the same error requires us to grant relief in a personal restraint petition (PRP). Our PRP procedures reflect a crucial and enduring belief in the importance of finality, recognizing that collateral relief degrades the prominence of the trial and sometimes costs society the right to punish admitted offenders. It is for this very reason that we require personal restraint petitioners to demonstrate prejudice as a prerequisite to relief. This burden exists as a matter of PRP procedure in all cases, regardless of the nature of the underlying error alleged by the petitioner.

The lead opinion would discard this burden entirely for public trial errors, ignoring the unique procedural situation of a PRP and treating the public trial right as a trump card annulling the principles of finality long enshrined in our PRP procedures. Indeed, the lead opinion's extension of *In re Personal Restraint Petition of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), to this case (and seemingly to *any* public trial violation) collapses the distinction between direct and collateral review for these cases by equating the two as long as the defendant says the magic words: ineffective assistance of appellate counsel. This not only strains our notions of what is fair in the criminal justice system but ignores our decision in *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992), which says that even a presumptively prejudicial error will not necessarily be treated as such on collateral review. It also invites an onslaught of PRPs from petitioners like

Morris who can identify anything in their trial record that could conceivably be labeled a violation of the right to a public trial. Until Morris can demonstrate some prejudice to the outcome of his case, I would deny collateral relief. On the other issues before the court in this case, I agree with the lead opinion.

I. A new trial should not be automatic when a public trial violation is raised for the first time on collateral review

Ordinarily, when a personal restraint petitioner alleges a constitutional violation, the petitioner must "satisfy [the] threshold burden of demonstrating actual and substantial prejudice." *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). We have held in our public trial cases that, on direct appeal, violations of the public trial right are presumed prejudicial. *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009) (plurality opinion); *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006). If this case were before us on direct review, those cases would be relevant. But we have never held that the presumption of prejudice that attaches on direct appeal eliminates the petitioner's wholly separate burden to show prejudice on collateral review. In fact, in *St. Pierre*, we held that errors that are presumed prejudicial on direct appeal will not necessarily be presumed prejudicial on collateral review. 118 Wn.2d at 328-29. We held that a "higher standard" must be met before a presumption of prejudice attaches on collateral review. *Id.* at 329. Specifically, to meet this higher standard, a constitutional violation must give rise to a "conclusive presumption of prejudice." *Id.* at 328.

This reflects the fact that collateral review is not a substitute for direct appeal. An error that justifies reversal on direct review will not necessarily justify reversal on collateral attack. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). This proposition is universally accepted both in Washington and in the federal courts. *See id.* at 824 ("'The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.'" (quoting *United States v. Addonizio*, 442 U.S. 178, 184, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979))); *Brecht v. Abrahamson*, 507 U.S. 619, 633, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) ("The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence."). The reasons for this difference are equally well recognized: "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs and they require that collateral relief be limited in state as well as federal courts." *Hagler*, 97 Wn.2d at 824 (citing *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)).

We reaffirmed these necessary limits in *St. Pierre*. 118 Wn.2d at 328-29. There, we held that the "higher standard" on collateral review is met, in the absence of an actual showing of prejudice, only where, in light of the essential purpose of the constitutional right at issue, a violation of the right would necessarily prejudice the defendant. *See id.*; *see also In re Pers. Restraint of Delgado*, 160

Wn. App. 898, 910, 251 P.3d 899 (2011) ("Where the essential purpose of a constitutional protection can be satisfied in a collateral proceeding without a per se prejudice rule, such a rule should not be adopted." (citing *St. Pierre*, 118 Wn.2d at 328-29)). Thus, where the petitioner has not made the required showing of prejudice, we must analyze the error at issue under this standard. In *St. Pierre*, the right at issue was a criminal defendant's right to be apprised with reasonable certainty of the charges against him. *St. Pierre*, 118 Wn.2d at 329. A violation of that right is presumed prejudicial on direct appeal, but *St. Pierre* held that it would not be on collateral review. The court reasoned that the essential purpose of this right is to provide notice, and a defendant's right to notice is not necessarily prejudiced by a defective charging document. On the other hand, *St. Pierre* cited several cases in which there *would* be a conclusive presumption of prejudice. *See In re Pers. Restraint of Richardson*, 100 Wn.2d 669, 679, 675 P.2d 209 (1983) (court's failure to inquire about a conflict of interest arising from joint representation gave rise to a conclusive presumption of prejudice); *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88-89, 660 P.2d 263 (1983) (invalid guilty plea automatically gave rise to a prima facie showing of prejudice). In these cases, the defendant was necessarily prejudiced by a constitutional violation in light of the essential purpose of the right at stake.

But the same is not true of in-chambers voir dire of 14 potential jurors. The purpose of the public trial right is to ensure a fair trial, to remind the officers of the

court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir.1996) (citing *Waller v. Georgia*, 467 U.S. 39, 46-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984))). None of these goals is necessarily jeopardized when counsel questions a handful of potential jurors in chambers in an attempt to encourage them to be more forthcoming about sensitive topics. This is particularly true where, as here, the defendant appeared to approve of the tactic and wanted to benefit from increased candor—Morris waived his right to be present during the questioning because he thought jurors would be more forthcoming in his absence. The defendant certainly *may* be prejudiced by in-chambers voir dire, but such prejudice is not "conclusive," nor should it be presumed. To conclude otherwise ignores the differences between direct and collateral review.

Like every other personal restraint petitioner, Morris is required to make a threshold showing of actual and substantial prejudice. Since he has not done so, we should deny relief.

II. This case is factually different from *Orange* and the result in that case does not require a new trial here

By extending *Orange* beyond its facts, the lead opinion equates direct and collateral review for any petitioner claiming a public trial violation as long as they remember to say "ineffective assistance of appellate counsel." This is not only overly simplistic, it is wrong under the law and virtually guarantees a flood of public

trial PRPs.

Instead, we should recognize the reality of the situation, which is that this case is factually different from *Orange* and not controlled by that case. In *Orange*, we found that appellate counsel's failure to raise a public trial issue was ineffective assistance of appellate counsel. In that case, ineffective assistance of counsel was clear from the facts. Here it is not. To show ineffective assistance of appellate counsel, under the test set forth in *Strickland v. Washington*, the defendant has the burden to show (1) that counsel's performance was deficient, meaning it "fell below an objective standard of reasonableness" based on consideration of all the circumstances and (2) resulting prejudice, meaning that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 687-88, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Smith v. Murray*, 477 U.S. 527, 535-36, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986) (applying *Strickland* test to ineffective assistance of appellate counsel). There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A "'fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *State v. Grier*, 171 Wn.2d 17,

34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

In *Orange*, counsel's performance was deficient because it fell below an objective standard of reasonableness. Counsel failed to raise a public trial issue that was conspicuous in the record and that was developed at trial. The trial judge in that case closed the courtroom for between two and four days of voir dire over the objection of the defendant's family, who wished to observe the entire trial. *Orange*, 152 Wn.2d at 801-03. Defense counsel pursued the issue and objected on the record. *Id.* On appeal, appellate counsel did not raise the public trial right violation even though it was conspicuous in the record and raising it would have resulted in a new trial. Moreover, counsel did not raise the public trial issue even though it was well established at the time of the appeal that the public trial right extended to the closure at issue, a total closure of voir dire. *See id.* at 804-05 (citing *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). Based on these facts, we held that failing to raise the public trial issue constituted ineffective assistance of appellate counsel. *Id.* at 814. And indeed, under those circumstances, appellate counsel should have known to pursue the issue and would have been remiss in making a conscious decision not to pursue it.

Morris's case is different. First, the public trial violation was not conspicuous in the record. There was no objection at trial to in-chambers voir dire, unlike the contemporaneous objection in *Orange*, and the issue was in no way developed

below. In fact, the opposite is true: the conduct of Morris and his attorney suggests that both approved of the closure and sought to benefit by it. Morris agreed to waive his right to be present during in-chambers questioning because he thought jurors would be more forthcoming if he were not in the room. Unlike *Orange*, it is not clear under these facts that counsel would be deficient in failing to develop the issue on appeal. Second, and perhaps more importantly, it was not at all clear at the time of Morris's appeal that the public trial issue would be a winning issue on appeal or that it should even be pursued. It may seem clear with the benefit of hindsight after *Strode*, 167 Wn.2d 222, but before *Strode* this court had never held that partial chambers voir dire would violate the public trial right. Morris's appeal was decided four years before *Strode*, so it is unlikely that Morris's appellate counsel was constitutionally deficient for failing to raise and develop what may have been a novel legal argument at the time. This is especially true in light of the fact that in-chambers voir dire appeared to be a common practice before *Strode*. *See* Lauren A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?*, 3 Rutgers J.L. & Urb. Pol'y 287, 311 (2006) (The author surveyed 18 federal judges. "Virtually all" of them allowed potential jurors to answer intrusive or embarrassing questions "privately at the bench or in chambers, with only the judge, the court reporter, and the opposing counsel present."). Morris's attorney either decided not to raise the public trial issue in this case as a strategic matter or else he did not

notice it because it was not conspicuous in the record and the case law was undeveloped. Either way, his performance was not deficient. We do not require appellate counsel to be perfect. Nor do we require appellate counsel to raise every nonfrivolous claim on appeal. Instead, we seek to eliminate hindsight bias by employing a presumption that counsel's performance was not deficient.

III. Conclusion

The right to a public trial is not a magic wand granting new trials to all who would wield it. Openness is a crucially important value in our criminal justice system, but so is finality. It does not serve the interests of justice to reopen this long-decided case, requiring a young girl to relive old traumas, and granting a windfall new trial to a man convicted of sexually molesting his daughter. We require personal restraint petitioners to show actual and substantial prejudice because we value finality and seek to avoid outcomes of this nature. Morris should be required to meet that burden just like every other personal restraint petitioner.

I respectfully dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:
Justice James M. Johnson

Justice Charles W. Johnson