No. 85131-0

WIGGINS, J. (concurring)—I agree with the majority that Hoyt Crace has not established prejudice sufficient to support his claim of ineffective assistance of counsel. However, I would stop there. Having resolved the case, I would not go on to create dicta by opining on subjects not necessary to decide Crace's petition. Indeed, the majority opinion resolves the case in two pages, rendering the previous eight pages of analysis unnecessary. *See* majority at 13-15. In my view, we should wait to address the "double prejudice" question for a case that actually raises it—a case in which a petitioner has not met the "actual and substantial prejudice" burden but has met the prejudice standard from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If that case exists, it should be there that we resolve this issue, not in a case where the petitioner has not made the showing required by *Strickland*.

Further, we cannot logically equate *Strickland*'s prejudice requirement with a petitioner's burden on collateral attack. *Strickland* requires the petitioner to show a reasonable probability that the outcome of the trial would have been different but for the error, 466 U.S. at 693, while the actual and substantial prejudice standard requires that it be "more likely than not." *In re Pers. Restraint of Hagler*, 97 Wn.2d

818, 826, 650 P.2d 1103 (1982). These are simply different standards. I cannot agree that "reasonable probability" implies "more likely than not" any more than "more likely than not" implies "clear, cogent, and convincing evidence" or "beyond a reasonable doubt." The lower standard does not imply the higher no matter what logic appears in between.

I concur with the majority in result only.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR: