APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH MILLER, Plaintiff-Appellant, v. ROBERT FERGUSON, Washington State Attorney General, Respondent-Appellee.	No. 19-35032 D.C. No. 2:18-cv-00530-RSM Western District of Washington, Seattle ORDER (Filed Apr. 26, 2019)

Before: O'SCANNLAIN and GOULD, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because the underlying 28 U.S.C. § 2254 petition fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When . . . the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

Honorable Martinez-Donohue

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENNETH MILLER, Petitioner, v. ROBERT FERGUSON, Washington State Attorney General, Respondent.	NO. 2:18-cv-0530-RSM-JPD NOTICE OF APPEAL (Filed Jan. 14, 2019)

Notice is hereby given that KENNETH MILLER, Petitioner, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the *Order Adopting Report and Recommendation in Part and Dismissing Federal Habeas Corpus Action*, entered by the District Court on December 17, 2018, and from the *Judgment in a Civil Case* entered on January 10, 2019.

DATED this 14th day of January, 2019.

s/ James E. Lobsenz
James E. Lobsenz WSBA #8787
Attorneys for Petitioner
CARNEY BADLEY
SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Phone: (206) 622-8020
Facsimile: (206) 467-8215

[Certificate Of Service Omitted]

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENNETH MILLER, Petitioner, v. ROBERT FERGUSON, Washington State Attorney General, Respondent.	CASE NO. C18-530RSM ORDER ADOPTING REPORT AND RECOMMENDATION IN PART AND DISMISSING FEDERAL HABEAS CORPUS ACTION (Filed Dec. 17, 2018)

Petitioner, proceeding under 28 U.S.C. § 2254, seeks to challenge his state court conviction on the basis of ineffective assistance of counsel. Dkts. #1 and #2. The Honorable James P. Donohue, United States Magistrate Judge, thoroughly considered the Petition and determined that this Court did not have subject matter jurisdiction and accordingly recommended that Petitioner's action be dismissed. Dkt. #13. Petitioner has filed Objections to the Report and Recommendation. Dkt. #15. Having reviewed the Objections and the rest of the record, the Court adopts the Report and Recommendation in part and dismisses the Petition.

Petitioner was previously convicted of a felony offense in a Washington State court and under Washington State law. Petitioner believes that his trial counsel was ineffective and that he was denied his Sixth Amendment right to counsel. Dkt. #1 at ¶ 5.1.

Petitioner seeks relief on that basis. However, at Petitioner's request, the parties have not briefed the substantive issue and instead have addressed whether Petitioner is "in custody" such that the Court has jurisdiction under 28 U.S.C. § 2254.

By the time the Petition was filed, Petitioner had already served his jail sentence and his term of community custody. Dkt. #1 at ¶ 9.1. Thus, Petitioner concedes that he is not in the physical custody of the State. *Id.* However, as a consequence of Petitioner's conviction, he may not lawfully own, possess, or have a firearm under his control. REV. CODE WASH. § 9.41.040(1). Petitioner maintains that this restriction on his Constitutional right is a "serious disability which suffices to constitute 'custody' for habeas corpus purposes." Dkt. #1 at ¶ 9.2.

As set forth in the Report and Recommendation, no legal authority establishes that a restriction on the possession of firearms places a person "in custody" for the purpose of habeas corpus petitions. Certain restraints upon the "liberty to do those things which in this country free [people] are entitled to do," can constitute custody for purposes of habeas relief. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). But within the Ninth Circuit, "[t]he precedents that have found a restraint on liberty [to constitute "custody"] rely heavily on the notion of a physical sense of liberty—that is, whether the legal disability in question somehow limits the putative habeas petitioner's movement." Dkt. #13 at 6 (quoting *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998)).

Petitioner's Objections[1] retrace many of the same arguments he has previously advanced, while adding little. On the whole, Petitioner's arguments stretch the precedent upon which they rely beyond recognition. For instance, Petitioner argues that the Report and Recommendation adopts an overly rigid distinction between direct and collateral consequences of a conviction and that such an approach has been rejected by the Supreme Court. Dkt. #15 at 4-5 (relying on *Padilla v. Kentucky*, 559 U.S. 356 (2010)). But *Padilla*'s consideration of direct and collateral consequences was in a markedly different context and is inapplicable. The Court does not understand Petitioner's argument to be that his counsel was ineffective by failing to inform Petitioner of the effect a conviction would have on his right to bear arms. This presents but one instance of Petitioner's arguments that, while convincingly made, lack an adequate legal basis. In sum, Petitioner's Objections do not establish any factual or legal errors in the Report and Recommendation. Under the prevailing law and for the reasons aptly articulated in the Report and Recommendation, Petitioner is not "in custody" and therefore cannot pursue this Petition.

The Court does diverge from the Report and Recommendation in one regard. The Court does not believe that a certificate of appealability should issue. In a habeas proceeding under 28 U.S.C. § 2254, a

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[1] Petitioner's Objections are over-length under Local Civil Rule 72. Accordingly, the Court need not consider pages filed in excess of the applicable limit. Even so, nothing therein would alter the Court's decision.

certificate of appealability should issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). A substantial showing requires that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir. 2009). Where a petition is dismissed on procedural grounds, the petitioner must also show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As established in the Report and Recommendation, Petitioner is clearly not in custody for purposes of § 2254 and the Court finds that reasonable jurists would not find such a procedural ruling debatable. Accordingly, the Court will not grant a certificate of appealability.

Having reviewed the Petition for a Writ of Habeas Corpus, Petitioner's Brief in Support, Respondent's Answer, Petitioner's Response, the Report and Recommendation, Petitioner's Objections, Respondent's Response to Objections, and the remainder of the record, the Court hereby finds and ORDERS:

1. The Report and Recommendation (Dkt. #13) is ADOPTED IN PART.
2. The Petition for a Writ of Habeas Corpus (Dkt. #1), and this action, are DISMISSED with prejudice.
3. A certificate of appealability is DENIED.

4. The CLERK IS DIRECTED to send a copy of this Order to the parties and to Magistrate Judge James P. Donohue.

5. This matter is CLOSED.

DATED this 17 day of December 2018.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENNETH MILLER, Petitioner, v. ROBERT FERGUSON, Respondent.	Case No. C18-530-RSM-JPD REPORT AND RECOMMENDATION (Filed Aug. 14, 2018)

I. INTRODUCTION

Petitioner Kenneth Miller proceeds through counsel in this 28 U.S.C. § 2254 habeas corpus action challenging a 2012 King County Superior Court felony conviction for Assault 2. As his sole ground for relief, he asserts that his trial counsel was ineffective. Dkt. 1 at 4. The parties have not briefed the merits of petitioner's claim, however, because the Court must first decide whether it has subject matter jurisdiction over the habeas petition. *See id.* (petitioner's request that the Court decide subject matter jurisdiction before the parties brief the merits). Habeas relief is available only to a petitioner who is "in custody" pursuant to the state court judgement he is challenging. 28 U.S.C. § 2254(a). Petitioner has fully served his six-month jail sentence and his 12-month term of community custody. Dkt. 1 at 7. Nevertheless, he argues that he is "in custody" for purposes of § 2254 because he continues to suffer a serious disability as a result of his 2012 conviction,

namely that state law prohibits him from possessing a firearm, which deprives him of his Second Amendment right to bear arms. *See* Dkt. 2. This is an issue that has not been decided by the Supreme Court or Ninth Circuit.

Respondent Robert Ferguson, Washington State Attorney General, filed an answer in which he argues that the Court does not have subject matter jurisdiction over the petition and that he is not a proper respondent to the action. Dkt. 8. Petitioner filed a reply. Dkt. 12.

Having considered the parties' submissions, the balance of the record, and the governing law, the Court recommends that the action be DISMISSED without prejudice for lack of subject matter jurisdiction and that a certificate of appealability be GRANTED as to the issue of subject matter jurisdiction. Because the Court concludes that it does not have subject matter jurisdiction, it does not consider respondent's argument that he is not a proper respondent.

II. BACKGROUND

A. Facts

In March 2012, a King County Superior Court judge sentenced petitioner, who had been convicted of Assault 2 by a jury, to six months confinement and 12 months community custody. Dkt. 4 at 12, 17. With credit for time served, petitioner had satisfied the jail

term by the date of sentencing. *Id.* at 17. The term of community custody expired 12 months later in 2013.

Although petitioner is no longer incarcerated or on community custody, his conviction disqualifies him from lawfully owning, possessing, or having any firearm under his control. *See* RCW 9.41.010(3)(a) (Assault 2 is a "crime of violence"); RCW 9.41.010(23) (a "crime of violence" is a "serious offense"); RCW 9.41.040(1) ("A person . . . is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having been previously convicted . . . of any serious offense. . . ."). As a result of this prohibition, petitioner had to get rid of a gun that his grandfather had given him when he was a young man, and his wife is unable to keep a firearm in their home for her protection. Dkt. 2 at 24.

B. Procedural History

Petitioner's attempts to overturn his conviction on direct appeal and through a personal restraint petition were fruitless. *See* Dkt. 11 at Exs. 1-21. He timely filed this federal habeas action after properly exhausting his state remedies, as required by the federal habeas statute. *See* Dkt. 8 at 3 (respondent's brief conceding that petitioner properly exhausted his ground for relief).

III. DISCUSSION

Petitioner bears the burden of establishing that he is "in custody" within the meaning of § 2254. *See Maleng v. Cook*, 490 U.S. 488, 490 (1989) (per curiam) (habeas statute's "in custody" requirement is jurisdictional); *Ashoff v. City of Ukiah*, 130 F.3d 409, 410 (9th Cir. 1997) (petitioner must establish subject matter jurisdiction). "[H]abeas has not been restricted to situations in which the applicant is in actual, physical custody." *Jones v. Cunningham*, 371 U.S. 236, 239 (1963). Conditions that "significantly restrain [a] petitioner's liberty to do those things which in this country free [people] are entitled to do," are "enough to invoke the help of the Great Writ." *Id.* at 243; *see also Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) ("The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for *severe restraints on liberty*.") (emphasis added).

Courts have found the "in custody" requirement satisfied where a petitioner is on parole, *Jones*, 371 U.S. at 243, or probation, *Chaker v. Grogan*, 428 F.3d 1215, 1219 (9th Cir. 2005); a noncitizen seeks to enter the United States, *Jones*, 371 U.S. at 243 (collecting cases); a person challenges his induction into the military, *id*.; a convict is released on his or her own recognizance pending execution of the sentence, *Hensley*, 411 U.S. at 351; a petitioner has been ordered to attend a 14-hour alcohol rehabilitation program, *Dow v. Cir. Court of the First Cir.*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam), or complete community service, *Barry v. Bergen*

Cnty. Probation Dep't, 128 F.3d 152, 161 (3rd Cir. 1997) (500 hours of community service); *Nowakowski v. New*, 835 F.3d 210, 217 (2d Cir. 2016) (1 day community service); and a Native American is stripped of tribal membership and "banished" from a reservation, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879 (2d Cir. 1996).[1]

By contrast, "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." *Maleng*, 490 U.S. at 492; *see also Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998). "Some of the typical collateral consequences of a conviction include the inability to vote, engage in certain businesses, hold public office, or serve as a juror." *Williamson*, 151 F.3d at 1183 (citing *Maleng*, 490 U.S. at 491); *see also Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987) (holding that revocation of medical license is collateral consequence); *Ginsberg v. Abrams*, 702 F.2d 48, 49 (2d Cir. 1983) (per curiam) (holding that judge's removal from bench, loss of right to practice law, and disqualification from licensure as a real estate agent are collateral consequences). Courts

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[1] Petitioner also cites *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969), which held that the court had subject matter jurisdiction over a habeas action challenging a tribal court's imposition of fines and temporary revocation of a tribal member's fishing license. *Settler*, however, is no longer good *law*. *Moore v. Nelson*, 270 F.3d 789, 791-92 (9th Cir. 2001) (explaining that *Settler* was abrogated by more recent Supreme Court authority).

also recognize that fines, sex offender registration requirements, suspension of driving privileges, and "enhancement of subsequent sentences on the basis of prior convictions" are collateral consequences. *E.g.*, *Maleng*, 490 U.S. at 492 (holding that use of conviction to enhance length of sentence imposed for subsequent conviction is collateral consequence); *Williamson*, 151 F.3d at 1183-84 (collecting cases holding that fines are collateral consequences; holding that sex offender registration is collateral consequence); *Harts v. Indiana*, 732 F.2d 95, 96 (7th Cir. 1984) (per curiam) (holding that one-year suspension of driving privileges is collateral consequence).

With respect to the specific disability at issue in this case—loss of the right to possess a firearm—the only circuit court to address the issue held that it is a collateral consequence, not a significant restraint on liberty. *Harvey v. South Dakota*, 526 F.2d 840, 841 (8th Cir. 1975) (per curiam); *see also Watson v. Coakley*, No. 11-11697, 2011 WL 6046529, at *1 (D. Mass. Dec. 2, 2011) (loss of right to possess firearm insufficient to establish "custody"); *People ex rel. Sherman v. People of State of Ill.*, No. 03-385, 2006 WL 200189, at *1-*2 (N.D. Ill. Jan. 19, 2006) (same). The First and Ninth Circuits have both endorsed this conclusion in dicta. *Williamson*, 151 F.3d at 1184 ("registration and notification provisions are more analogous to a loss of the right to vote or own firearms, or the loss of a professional license, rather than probation or parole"); *Lefkowitz*, 816 F.3d at 20 ("Government regulation, in the nature of the imposition of civil disabilities—say, loss of voting

rights or disqualification from obtaining a gun permit—often follows a defendant long after his sentence has been served [and are collateral consequences].").

Petitioner asserts several reasons why this Court should reach a different conclusion, none of which the Court finds persuasive. First, he argues that the circuit court cases addressing gun restrictions were decided before the Supreme Court announced that the Second Amendment right to keep and bear arms for self-defense is an individual right that applies to the States. *See District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (Second Amendment rights are individual rights); *McDonald v. Chicago*, 561 U.S. 742, 750 (2010) (Second Amendment rights are fully applicable to the States through the Fourteenth Amendment). Petitioner notes that the Supreme Court has recognized that the right to keep and bear arms is "deeply rooted in this Nation's history and tradition," *McDonald*, 561 U.S. at 768 (quoted source omitted), and "among those fundamental rights necessary to our system of ordered liberty," *id.* at 778. He also cites Supreme Court authority recognizing that the right of self-defense is central to the Second Amendment and that a prohibition on handgun possession in one's home is a "severe restriction." *Heller*, 554 U.S. at 628-29; *see also Caetano v. Mass.*, 136 S. Ct. 1027, 1033 (2016) (per curiam) (Alito, J., concurring) (referring to "fundamental right of self-defense"). According to petitioner, the firearm prohibition "significantly restrain[s]" his "liberty to do those things which in this country free [people] are

entitled to do," *Jones*, 371 U.S. at 243, and therefore he is "in custody" within the meaning of § 2254. Dkt. 2 at 16.

Petitioner relies on an understanding of "liberty" that is tied to fundamental constitutional rights, specifically the Second Amendment right to keep and bear arms. But courts that have applied "liberty" as the Supreme Court used that term in *Jones* have not adopted such a definition. As the Ninth Circuit has explained:

> The precedents that have found a restraint on liberty rely heavily on the notion of a *physical sense of liberty*—that is, whether the legal disability in question somehow limits the putative habeas petitioner's *movement.* The Supreme Court justified extending habeas corpus to [noncitizens] denied entry into the United States by explaining the denial of entry as an impingement on movement. *Jones*, 371 U.S. at 239, 83 S. Ct. 373. And the Court relied on a similar rationale to explain why a parolee or a convict released on his own recognizance is "in custody." *Id.* at 243, 83 S. Ct. 373; *Hensley*, 411 U.S. at 351, 93 S. Ct. 1571. This circuit similarly explained that mandatory attendance at an alcohol rehabilitation program satisfies the "in custody" requirement because it requires the petitioner's "physical presence at a particular place." *Dow*, 995 F.2d at 923.

Williamson, 151 F.3d at 1183 (emphases and alteration added). Unlike the cases that have found the "in custody" requirement satisfied, Washington's firearm prohibition

does not restrain petitioner's physical liberty. "[T]he law neither targets [petitioner's] movement in order to impose special requirements, nor does it demand his physical presence at any time or place." *Id.* at 1184. As such, finding that petitioner is "in custody" would improperly extend the scope of habeas jurisdiction beyond the bounds established by the Supreme Court and federal circuit courts.

Second, petitioner seeks to distinguish the instant case from those involving collateral consequences by arguing that habeas actions involve restrictions on liberty, whereas the collateral consequences cases involve restrictions on property. Dkt. 12 at 4-5. Again, petitioner relies on an understanding of "liberty" that is not reflected in the caselaw, as discussed above. Moreover, the right to vote has been described as "one of the most fundamental and cherished liberties in our democratic system of government," *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Kennedy, J., concurring), and yet post-conviction restrictions on that right are collateral consequences to the conviction, not significant restrictions on liberty within the meaning of § 2254, *Williamson*, 151 F.3d at 1183. Furthermore, prohibitions on the possession of firearms by felons are regulatory measures. *See Heller*, 554 U.S. at 626-27, 627 n.26. The Ninth Circuit has noted that when a state law is "regulatory and not punitive," it bolsters the conclusion that the effects of such laws are collateral consequences, and not restraints on liberty. *Williamson*, 151 F.3d at 1184.

Third, although petitioner recognizes that the right to bear arms is not absolute, *Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited. . . . [N]othing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons. . . ."), he argues:

> If the legal justification for denying a person his or her fundamental right to keep a firearm for the core lawful purpose of self-defense is that the person has been convicted of a felony, then the firearm prohibition is invalid if the felony conviction is invalid. If a State obtains a felony conviction by means of some other unconstitutional action—such as denying the defendant's Sixth Amendment right to a jury trial, or to the assistance of counsel—then no lawful basis exists for abridging the convicted person's Second Amendment right to bear arms. In this situation, if habeas corpus review of the constitutionality of the conviction is not available, then one constitutional violation will simply lead automatically to a second constitutional violation. It cannot be that a convicted state court defendant can be denied federal court review of an unconstitutional conviction because the only *remaining* restriction on his liberty is the continuing violation of *another* one of his federal constitutional rights.

Dkt. 2 at 15 (emphases in original); *see also* Dkt. 12 at 10. Petitioner goes on to assert that it is illogical to allow defendants who receive longer sentences for more serious crimes to access the Great Writ but to prohibit

those who receive shorter sentences, like him, from challenging their convictions in federal court. Dkt. 2 at 15-16.

In essence, petitioner asserts that it would be unfair for the Court to deprive him of the opportunity to challenge his state conviction in federal court. In *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969), the Ninth Circuit relied on similar reasoning when it concluded that it had jurisdiction over the petitioner's 28 U.S.C. § 2241 habeas challenge to a tribal court's imposition of fines and temporary revocation of his fishing license: "The availability of habeas corpus appears particularly appropriate where the petitioner, although not held presently in physical custody, has no other procedural recourse for effective judicial review of the constitutional issues he raises." *Id.* at 490. As the Ninth Circuit more recently explained, however, *Settler*'s "interventionist reasoning was not unusual at the time" but is no longer good law. *Moore v. Nelson*, 270 F.3d 789, 791-92 (9th Cir. 2001). Specifically, the *Moore* court explained that *Settler*'s reasoning is inconsistent with the Supreme Court's decision in *Hensley*, which reiterated that to be "in custody," a petitioner must suffer a severe restraint on physical liberty. *Id.* Indeed, the relevant question here is whether Washington's firearm prohibition is a "restraint on liberty" within the meaning of the caselaw, or a "collateral consequence" of a conviction. As discussed above, courts rely on "a physical sense of liberty," *Williamson*, 151 F.3d at 1183, and have not expanded the definition of liberty in this context to other constitutional rights.

Finally, petitioner attempts to equate § 2254's "in custody" requirement with Washington law that requires someone who wants to challenge his conviction in a personal restraint petition to be under some form of "restraint." Dkt. 2 at 6. In fact, the two requirements are distinct. *Compare* Wash. RAP 16.4(b) ("A Petitioner is under a "restraint" if the Petitioner . . . is under *some other disability resulting from a judgment or sentence in a criminal case.*") (emphasis added), *with Hensley*, 411 U.S. at 351 ("The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for *severe restraints on liberty*.") (emphasis added). Accordingly, the Washington courts' decision to hear his personal restraint petition does not mean that he is "in custody" for purposes of this case.

In sum, petitioner has not established that he is "in custody" within the meaning of § 2254, and his federal habeas petition should be denied without prejudice for lack of jurisdiction.

IV. CERTIFICATE OF APPEALABILITY

A petitioner seeking post-conviction relief under § 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability from a district or circuit judge. A certificate of appealability may issue only where a petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard "by demonstrating that

jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Because the Ninth Circuit has not addressed the jurisdictional issue raised in this case, the Court concludes that a certificate of appealability should be granted as to the question of subject matter jurisdiction.

V. CONCLUSION

The Court recommends that this action be DISMISSED without prejudice for lack of subject matter jurisdiction. The Court further recommends that a certificate of appealability be GRANTED as to the question of subject matter jurisdiction. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit by no later than **September 4, 2018**. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motion calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14)** days after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **September 7, 2018**.

This Report and Recommendation is not an appealable order. Thus, a notice of appeal seeking review

in the Court of Appeals for the Ninth Circuit should not be filed until the assigned District Judge acts on this Report and Recommendation.

Dated this 14th day of August, 2018.

/s/ James P. Donohue
JAMES P. DONOHUE
United States
Magistrate Judge

APPENDIX E

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, Vs. KENNETH FRANKLIN MILLER Defendant,	No. 09-1-07196-5 SEA **JUDGMENT AND SENTENCE FELONY (FJS)** (Filed Mar. 30, 2012)

I. HEARING

1.1 The defendant, the defendant's lawyer, LENELL NUSSBAUM, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____
_____
_____

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 **CURRENT OFFENSE(S):** The defendant was found guilty on 03/22/2012 by jury verdict of:

Count No. I Crime: ASSAULT IN THE SECOND DEGREE
RCW 9A.36.021(1)(a) Crime Code 01018
Date of Crime 11/06/2009 Incident No. _____

Count No. ___ Crime: _____
RCW _____ Crime Code _____
Date of Crime _____ Incident No. _____

Count No. ___ Crime: _____
RCW _____ Crime Code _____
Date of Crime _____ Incident No. _____

Count No. ___ Crime: _____
RCW _____ Crime Code _____
Date of Crime _____ Incident No. _____

[ ] Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):

(a) [ ] While armed with a **firearm** in count(s) ___ RCW 9.94A.533(3).
(b) [ ] While armed with a **deadly weapon** other than a firearm in count(s) ___ RCW 9.94A.533(4).
(c) [ ] With a **sexual motivation** in count(s) ___ RCW 9.94A.835.
(d) [ ] A V.U.C.S.A. offense committed in a **protected zone** in count(s) ___ RCW 69.50.435.
(e) [ ] **Vehicular homicide** [ ] Violent traffic offense [ ] DUI [ ] Reckless [ ] Disregard
(f) [ ] **Vehicular homicide** by DUI with ___ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).

(g) [ ] **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.

(h) [ ] **Domestic violence** as defined in RCW 10.99.020 was pled and proved for count(s) ___ _____

(i) [ ] Current offenses **encompassing the same criminal conduct** in this cause are count(s) _____ RCW 9.94A.589(1)(a)

(j) [ ] **Aggravating circumstances** as to count(s) _____: _____

2.2 **OTHER CURRENT CONVICTION(S)**: Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

_____

2.3 **CRIMINAL HISTORY**: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

[ ] Criminal history is attached in **Appendix B**.

[ ] One point added for offense(s) committed while under community placement for count(s) _____

2.4 **SENTENCING DATA:**

Sentencing Data	**Offender Score**	**Seriousness Level**	**Standard Range**
Count I	0	IV	3 TO 9
Count			
Count			
Count			

Enhancement	Total Standard Range	Maximum Term
	3 TO 9 MONTHS	10 YEARS AND/ OR $20,000

[ ] Additional current offense sentencing data is attached in **Appendix C**.

2.5 **EXCEPTIONAL SENTENCE:**

[ ] Findings of Fact and Conclusion of Law as to sentence above the standard range:

Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) _____.

Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) _____. [ ] The court would impose the same sentence on the basis of any one of the aggravating circumstances.

[ ] An exceptional. sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

[ ] An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

The State [ ] did [ ] did not recommend a similar sentence (RCW 9.94A.480(4)).

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

[ ] The Court DISMISSES Count(s) _____.

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 **RESTITUTION AND VICTIM ASSESSMENT:**

[ ] Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E**.

[ ] Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached Appendix E.

[✓] Restitution to be determined at future restitution hearing on (Date) _____ at _____m.
[✓] Date to be set.

[✓] Defendant waives presence at future restitution hearing(s).

[ ] Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of $500.

4.2 **OTHER FINANCIAL OBLIGATIONS:** Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

(a) [✓] $1066.38, Court costs (RCW 9.94A.030, RCW 10.01.160); [ ] Court costs are waived;

(b) [ ] $100 DNA collection fee (RCW 43.43.7541) (mandatory for crimes committed after 7/1/02);

(c) [ ] $___, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); [ ] Recoupment is waived;

(d) [ ] $___, Fine; [ ] $1,000, Fine for VUCSA; [ ] $2,000, Fine for subsequent VUCSA (RCW 69.50.430); [ ] VUCSA fine waived;

(e) [ ] $___, King County Interlocal Drug Fund (RCW 9.94A.030); [ ] Drug Fund payment is waived;

(f) [ ] $___, $100 State Crime Laboratory Fee (RCW 43.43.690); [ ] Laboratory fee waived;

(g) [ ] $___, Incarceration costs (RCW 9.94A.760(2));
[ ] Incarceration costs waived;

(h) [ ] $___, Other costs for _____

4.3 **PAYMENT SCHEDULE:** Defendant's **TOTAL FINANCIAL OBLIGATION** is $1,666.38. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: [ ] Not less than $_____ per month; [✓] On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

[✓] Court Clerk's trust fees are waived.

[✓] Interest is waived except with respect to restitution.

4.4 **CONFINEMENT ONE YEAR OR LESS:** Defendant shall serve a term of confinement as follows, commencing; [ ] immediately; [ ] (Date): N/A by ___a.m./p.m.:

6 months/days on count I; ___ months/days on count ___; ___ months/day on count ___

This term shall be served: N/A

[ ] in the King County **Jail** or if applicable under RCW 9.94A.190(3) in the Department of Corrections.

[ ] in King County **Work/Education Release** (W/ER) subject to conditions of conduct ordered this date.

[ ] Defendant shall report to and participate in Enhanced CCAP if not working while in W/ER.

[ ] in King County **Electronic Home Detention** (EHD) subject to conditions of conduct ordered this date.

[ ] **For any burglary**, before entering EHD, 21 days must be successfully completed in W/ER.

[ ] The terms in Count(s) No. _____ are consecutive/ concurrent.

This sentence shall run [ ] CONSECUTIVE [ ] CONCURRENT to the sentence(s) in cause _____

_____

The sentence(s) herein shall run [ ] CONSECUTIVE [ ] CONCURRENT to any other term previously imposed and not referenced in this order.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): [ ] ____ day(s) or [ ] days determined by the King County jail.

* [✓] Jail term is satisfied; defendant shall be released under this cause.

[ ] Credit is given for days determined by the King County Jail to have been served in the King County Supervised Community Option (Enhanced CCAP) solely under this cause number.

[ ] The court authorizes earned early release credit consistent with the local correctional facility standards for days spent in Enhanced CCAP.

ALTERNATIVE CONVERSION (RCW 9.94A.680): _____ days of confinement are hereby converted to:

[ ] _____ days/hours **community restitution** (for nonviolent offenses only), to be completed by _____, 20 ___ [ ] under the supervision of the Department of Corrections; or if the defendant is not supervised by DOC, monitored by [ ] Helping Hands Program [ ] this court.

[ ] A review hearing is set on _____, 20___ at ____a.m./p.m. in this courtroom.

[ ] _____ days in **Enhanced CCAP** (for non-violent, non-sex offenses only) subject to conditions of conduct ordered this date.

[ ] Alternative conversion **was not used because of:** [ ] criminal history, [ ] failure(s) to appear,

[ ] Other: _____

4.5 [✓] **COMMUNITY CUSTODY** is ordered for a period of 12 months. The defendant shall report to the Department of Corrections within 72 hours of this date or of his/her release if now in custody; shall comply with all the rules, regulations and conditions of the Department for supervision of offenders (RCW 9.94A.704); shall comply with all affirmative acts required to monitor compliance; shall not possess any firearms or ammunition; and shall otherwise comply with terms set forth in this sentence.

[ ] **Appendix H, Additional Conditions** is attached and incorporated.

4.6 [✓] **NO CONTACT:** For the maximum term of 10 years, defendant shall have no contact with Randall Rasan.

4.7 **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in **Appendix G**. [not necessary if already completed]

[ ] **HIV TESTING:** For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in **Appendix G.**

4.8 [ ] **OFF-LIMITS ORDER:** (known drug trafficker) **Appendix I** is an off limits order that is part of and incorporated by reference into this Judgment and Sentence.

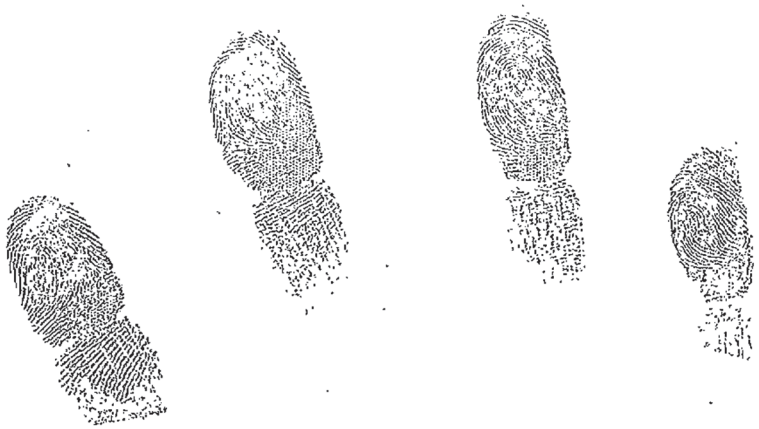
Date: 3/30/12

/s/ MS
JUDGE
Print Name: Mariane C. Spearman

Presented by:	Approved as to form:
/s/ Jim Ferrell	/s/ Lenell Nussbaum
Deputy Prosecuting Attorney WSBA# 24314	Attorney for Defendant, WSBA# 11140
Print Name: Jim Ferrell	Print Name: Lenell Nussbaum

App. 35

FINGERPRINTS



BEST AVAILABLE IMAGE POSSIBLE

RIGHT HAND
FINGERPRINTS OF:

KENNETH FRANKLIN MILLER

DEFENDANT'S SIGNATURE: /s/ Kenneth F. Miller

DEFENDANT'S ADDRESS: 3714 140th Ave SE
Bellevue WA 98006

DATED: 3/30/12

ATTESTED BY:
BARBARA MINER,
SUPERIOR COURT CLERK

MS
JUDGE, KING COUNTY
SUPERIOR COURT

By: /s/ Andre Jones
DEPUTY CLERK

Mariane C. Spearman

CERTIFICATE	OFFENDER IDENTIFICATION
I, _____, CLERK OF THIS COURT, CERTIFY THAT THE ABOVE IS A TRUE COPY OF THE JUDGEMENT AND SENTENCE IN THIS ACTION ON RECORD IN MY OFFICE DATED: _____	S.I.D. NO. DOB: JANUARY 29, 1963 SEX: M RACE: W

_____
CLERK

BY: _____
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KENNETH FRANKLIN MILLER Defendant,	No. 09-1-07196-5 SEA APPENDIX G ORDER FOR BIOLOGICAL TESTING AND COUNSELING

(1) **DNA IDENTIFICATION (RCW 43.43.754):**

The Court orders the defendant to cooperate with the King County Department of Adult Detention,

King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) ☐ **HIV TESTING AND COUNSELING (RCW 70.24.340):**

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 3/30/12 /s/ MS

JUDGE, King County
Superior Court

Mariane C. Spearman

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KENNETH FRANKLIN MILLER Defendant,	No. 09-1-07196-5 SEA JUDGMENT AND SENTENCE APPENDIX H COMMUNITY CUSTODY

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

1) Report to and be available for contact with the assigned community corrections officer as directed;

2) Work at Department of Corrections-approved education, employment, and/or community restitution;

3) Not possess, or consume controlled substances except pursuant to lawfully issued prescriptions;

4) Pay supervision fees as determined by the Department of Corrections;

5) Receive prior approval for living arrangements and residence location; and

6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706)

7) Notify community corrections officer of any change in address or employment;

8) Upon request of the Department of Corrections, notify the Dept Intent of court-ordered treatment;

9) Remain within geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

~~[ ] The defendant shall not consume any alcohol.~~

[✓] Defendant shall have no contact with: Randall Rasan.

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____
_____

[ ] The defendant shall participate in the following crime-related treatment or counseling services: __
_____

[ ] The defendant shall comply with the following crime-related prohibitions: _____
_____

[ ] _____

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition.

Date: 3/30/12 /s/ MS
JUDGE

Mariane C. Spearman

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENNETH MILLER, Petitioner, vs. ROBERT FERGUSON, Washington State Attorney General, Respondent.	NO. PETITION FOR A WRIT OF HABEAS CORPUS (Filed Apr. 10, 2019)

Petitioner, Kenneth Miller, by and through his attorney James E. Lobsenz, avers as follows:

I. PARTIES

1.1. Kenneth Miller, Petitioner, a resident of King County, Washington, was convicted of Assault in the Second Degree in a jury trial and a judgment of conviction was entered on that verdict in the King County Superior Court.

1.2. Respondent, Robert Ferguson, is the Attorney General of the State of Washington, and as such is charged with the responsibility of enforcing all Washington laws.

II. JURISDICTION

2.1 The United States District Court has jurisdiction over this petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2254 and 1331. Petitioner contends that he is "in custody" for purposes of federal court habeas corpus jurisdiction because he is subject to a severe restraint on his individual liberty by reason of a disability which flows directly from his conviction.

2.2 Pursuant to RCW 9.41.040 and a judgment of the King County Superior Court, a Washington state court, Petitioner is prohibited from possessing a firearm and thus he is deprived of his Second Amendment right to bear arms. Petitioner maintains that this is a serious disability which suffices to constitute "custody" for habeas corpus purposes. Petitioner further maintains that the judgment entered against him was obtained in violation of his rights under the United States Constitution.

III. VENUE

3.1 Venue is proper in the United States District Court for the Western District of Washington because petitioner's convictions were obtained in the King County Superior Court in Seattle, Washington. *See* 28 U.S.C. § 2241(d).

IV. PROCEDURAL HISTORY

4.1 Petitioner was charged in King County Superior Court with one count of Assault in the Second

Degree. The case was tried to a jury, and the jury returned a general verdict finding him guilty as charged. (Appendix A).

4.2 On March 30, 2012, the Superior Court sentenced Miller to serve six months in jail. (Appendix B). Miller appealed to the Washington Court of Appeals.

4.3 Division One of the Washington Court of Appeals affirmed his conviction in an unpublished opinion issued on February 9, 2015. (Appendix C).

4.4. Miller sought discretionary review of that decision and the Washington Supreme Court denied his Petition for Review on July 8, 2015. (Appendix D).

4.5. The Washington Court of Appeals issued a mandate on September 4, 2015. (Appendix E).

4.6 Miller did not petition the United States Supreme Court for a writ of certiorari to review the decision of the Washington Court of Appeals. The last day on which he could have filed a petition for a writ of certiorari was October 6, 2015.

4.7 Pursuant to 28 U.S.C. §2244(d)(1)(A), the one year period for filing a petition for a writ of habeas corpus in federal court began on October 7, 2015.

4.8 On August 23, 2016, 322 days after the start of the federal one year period, Miller filed a Personal Restraint Petition (a "PRP") in the Washington Court of Appeals. Pursuant to 28 U.S.C. §2244(d)(2), because this was a properly filed state post-conviction petition,

the filing of this PRP stopped the running of the one year period for filing a federal habeas corpus petition.

4.9 When Miller's PRP was filed on August 23, 2016, there were 43 days remaining on the federal one year clock for filing a habeas corpus petition.

4.10 On August 23, 2017, Miller's PRP was dismissed by the Acting Chief Judge of the Washington Court of Appeals. (Appendix F).

4.11 On September 21, 2017, Miller filed a timely motion for discretionary review of that dismissal order in the Washington Supreme Court.

4.12 On December 15, 2017, a Commissioner of the Washington Supreme Court denied Miller's motion for discretionary review.

4.13 On January 12, 2018, Miller filed a timely motion to modify the ruling of the Supreme Court Commissioner.

4.14 On March 7, 2018, the justices of the Washington Supreme Court denied Miller's motion to modify the ruling of its Commissioner. This ruling ended the tolling period provided by 28 U.S.C. §2244(d)(2) by ending the time period during which a properly filed state court post-conviction petition was pending in the state courts. As of March 8, 2018, the remaining 43 days on the federal one year clock began to run again. The last day upon which Miller can file a timely federal habeas corpus petition is April 20, 2018.

V. GROUNDS FOR RELIEF

5.1 Petitioner submits that his conviction is contrary to the Constitution of the United States because his trial attorney provided ineffective assistance of counsel and thus denied Petitioner Miller his rights under the Sixth Amendment to the U.S. Constitution.

VI. OPERATIVE FACTS

6.1 In the Washington State Court of Appeals and in the Washington State Supreme Court, Petitioner rested his claim of ineffective assistance of counsel on the following undisputed facts.

a. Miller's trial counsel failed to object to the trial court's jury instruction No. 8 on the ground that it included reference to a "fracture of a body part" as one of the alternate ways in which the prosecution could prove that a "substantial bodily injury" was inflicted on the alleged victim.

b. Miller's trial counsel failed to object to the admissibility of Dr. Craig Pratt's testimony that although he could not recall whether he ever saw any fracture on a CT-scan, and although there was nothing in his chart notes to indicate that he ever saw a fracture in the CT-scan, his naked eye visual observation that the nose was displaced to the left "would suggest a fracture" of the nose. Dr. Pratt was never asked if he could say, with reasonable medical certainty, that in his opinion the victim's nose was fractured, and Miller's trial

counsel never objected to him testifying without first providing such a foundation.

c. His trial counsel failed to object to the admissibility of Dr. Lori Anderton's [sic] that although the CT-scan of the victim's face "said no facial fractures seen," the fact that the victim's nose was seen to be "crooked," and the fact that his nose was swollen with bleeding on the inside, when he was examined, "would suggest" that his nose was broken. Dr. Anderton was never asked if she held the opinion, with reasonable medical certainty, that the victim's nose was fractured, and trial counsel never objected to her testifying without first providing such a foundation.

6.2. Petitioner submits that each individual act of deficient conduct caused prejudice, and, in the alternative, that prejudice resulted from the cumulative effect of his trial counsel's multiple deficiencies. *See, e.g.*, *Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995); *Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005).

VII. EXHAUSTION

7.1 Consistent with 28 U.S.C. § 2254(b), all grounds for relief raised in this Petition for Writ of Habeas Corpus have been raised before the Washington Court of Appeals and the Washington Supreme Court. *See In re Personal Restraint of Kenneth Miller*, COA No. 75687-7-I and Washington Supreme Court No. 95021-1-I.

VIII. EVIDENTIARY HEARING

8.1 Petitioner's trial counsel executed a declaration, which was filed in the Washington Court of Appeals, wherein she acknowledges that her representation of Miller at trial was deficient conduct and that she had no strategic reason for her failure to take several actions. *Declaration of Lenell Nussbaum*, ¶¶ 12-13, 20-23 (copy attached as Appendix G). There are no factual disputes regarding the thinking of Petitioner's trial counsel and it is undisputed that trial counsel never thought of making the objections or taking the actions which Petitioner asserts she should have made and taken.

8.2 The Washington Court of Appeals made no ruling regarding the deficient conduct prong of the *Strickland* test for ineffective assistance. The state court relied solely upon the prejudice prong of the *Strickland* test as a basis for rejecting Petitioner's claim of ineffective assistance.

8.3 The state court made no findings of fact in the personal restraint petition proceeding. Since there are no state court findings of fact, there are no fact findings that are binding on this court pursuant to 28 U.S.C. § 2254(d). And since there are no disputed facts, only disputed legal conclusions, Petitioner believes there is no need for this Court to hold an evidentiary hearing.

IX. ISSUE OF "CUSTODY" FOR PURPOSES OF HABEAS CORPUS

9.1 Petitioner has already served his six month jail sentence and is no longer on probation. Thus, the usual form of "custody" that a state court convict asserts for purposes of federal habeas corpus review of his conviction is absent in this case.

9.2 However, by reason of RCW 9.41.040 (copy attached as Appendix H) and his conviction for a crime that is classified as a "serious offense," under Washington State law Petitioner is prohibited from possessing a firearm. He may not even keep a firearm in his home for the protection of himself and his wife. Thus, Petitioner has been and continues to be deprived of his Second Amendment right to bear arms. Petitioner maintains that this is a serious disability which suffices to constitute "custody" for habeas corpus purposes.

9.3 So far as Petitioner is aware, there is no case law, either in this Circuit or in any other Circuit, which directly addresses the legal question of whether deprivation of the Second Amendment right to bear arms is a severe enough restriction on individual liberty so as to constitute "custody" for purposes of federal court jurisdiction over a petition for a writ of habeas corpus. Petitioner believes that this is an issue of first impression.

9.4 Petitioner seeks bifurcation of the legal issues before this Court. Petitioner asks this Court to consider and decide the issue of "custody" first, and

then a second stage of the litigation of this case, to consider the merits of Petitioner's claim that his Sixth Amendment right to effective assistance of counsel was violated, and that the Washington Court of Appeals determination of his Sixth Amendment claim is contrary to clearly U.S. Supreme Court precedent, an unreasonable application of settled Supreme Court precedent, (or both).

9.5 Petitioner submits that a bifurcated approach to the legal issues in this case may prove to be more cost efficient for the parties and a more sensible use of judicial resources for this Court. Ultimately, if this Court agrees with Petitioner that the restriction on his right to possess a firearm is a sufficiently severe restriction on his liberty so as to constitute "custody" for habeas corpus purposes, then this Court will have to move to the next stage and decide the legal issues relevant to the merits of Petitioner's Sixth Amendment claim. If, however, this Court does not accept Petitioner's contention that such a restriction on liberty constitutes "custody" for habeas corpus purposes, then it will not need to consider and decide the merits of his Sixth Amendment claim. If this Court makes the latter decision, then Petitioner can keep the cost of this litigation down, and this Court can conserve judicial resources.

X. RELIEF REQUESTED

Wherefore Petitioner Miller prays that this Court:

10.1 Require Respondent to file an answer to this petition in the form prescribed by Rule 5 of the Rules Governing § 2254 Cases in the United States District Court, identifying all state proceedings conducted in Petitioner's case, and specifically admitting or denying the allegations set forth in this Petition.

10.2 Permit Petitioner to respond to any affirmative defenses that may be raised by Respondent in his Answer.

10.3 Set a briefing schedule for consideration of the preliminary legal question of whether the restriction on Petitioner's right to possess a firearm constitutes "custody" for purposes of federal habeas corpus review of a state court conviction. Petitioner's opening brief on the issue of custody accompanies this Petition. Therefore, Petitioner asks the Court to set a schedule for the submission of the State's response and for Petitioner's reply brief on this issue only.

10.4 Assuming this Court accepts Petitioner's contention that the restriction in his right to possess a firearm satisfied the definition of "custody" for habeas corpus purposes, Petitioner asks the Court to set a schedule for a second round of briefing in which the parties are to address the merits of Petitioner's Sixth Amendment claim of ineffective assistance of counsel.

10.5 Issue a writ of habeas corpus, vacate Petitioner's convictions, enter an order granting a new

trial, or in the alternative, directing Respondent to release the petitioner from custody in the event the State declines to retry the case.

10.6 Grant such other relief as the court may deem appropriate and just.

DATED this 10th day of April, 2018.

By *s/ James E. Lobsenz*
James E. Lobsenz WSBA #8787
Attorneys for Petitioner
CARNEY BADLEY
SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Phone: (206) 622-8020
Facsimile: (206) 467-8215
lobsenze@carneylaw.com

DECLARATION OF PETITIONER

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 9th day of April 2018.

/s/ Kenneth Miller
Kenneth Miller
Petitioner

APPENDIX G

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Personal Restraint of KENNETH MILLER, Petitioner,	NO. DECLARATION OF KENNETH MILLER

I, Kenneth Miller, do hereby declare under penalty of perjury under the laws of the State of Washington, that the following facts are true and correct:

1. I am the Petitioner in this case. I have personal knowledge of the facts set forth here.

2. A jury found me guilty of Assault 2 and the Honorable Marianne Spearman sentenced me on March 30, 2012. I was sentenced to serve six months in jail.

3. I have completed my jail sentence, and I have paid the restitution. I am still making monthly payments to pay off the court costs which Judge Spearman imposed.

4. However, I continue to suffer from disabilities caused by my conviction for Assault 2.

5. Because Assault 2 is a "crime of violence" and a "serious offense," I am prohibited from owning or possessing a firearm. If I were to possess a firearm I would commit the felony offense of unlawful possession of a firearm.

6. I will be eligible to petition the Superior Court for restoration of my right to bear arms if I remain crime free when five years have elapsed, that time period has not yet elapsed and thus I cannot petition for restoration of my gun rights at the present time.

7. Before I was convicted I owned and possessed a gun that my grandfather gave me when I was a young man. But because of my conviction I had to get rid of it. My wife would like to keep a firearm in the house since she was the victim of a violent crime. But because I cannot have a gun under my control, my wife cannot keep a firearm in our house either.

8. Accordingly, due to my conviction for Assault 2 I am under a disability which deprives me of my Second Amendment and my state constitutional rights to bear arms.

9. My Assault 2 conviction has also made it very difficult for me to obtain employment. Since my conviction in 2012, I have applied for several jobs but no one wants to hire a person with a felony conviction for Assault 2. For example, in July of last year I was offered a job to work as a Quality engineer. (See letter of July 23, 2015, copy attached). I accepted the job, but three days before I was to report for my first day of work, the employer notified me that they were rescinding the job offer because they determined they could not employ a person like me with a conviction for Assault 2.

10. Accordingly, due to my conviction for Assault 2 I am under a disability which routinely makes it impossible for me to secure positions of employment.

DATED this 18th day of August, 2016.

/s/ Kenneth Miller
Kenneth Miller
Petitioner

[Certificate Of Service Omitted]

APPENDIX H

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Personal Restraint of KENNETH MILLER, Petitioner,	NO. DECLARATION OF LENELL NUSSBAUM

I, Lenell Nussbaum, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I have personal knowledge of the facts set forth here.

2. I represented Petitioner Kenneth Miller in a jury trial held before the Honorable Marianne Spearman in King County Cause No. 09-1-07196-5 SEA. Miller was accused of Assault 2 for intentionally assaulting Randall Rasar and thereby recklessly inflicting substantial bodily harm upon him. This trial was held in March of 2012 and the jury found Miller guilty as charged.

3. RCW 9A.04.110(4)(b) defines the element of "substantial bodily harm." It gives three alternative definitions: (1) temporary but substantial disfigurement, (2) temporary but substantial loss or impairment of the function of any bodily part or organ, and (3) a fracture of any bodily part. In Miller's case, the prosecution maintained that the injury that Miller inflicted upon Rasar satisfied all three alternative types

of substantial bodily harm. The prosecution specifically argued that the injury to Rasar's nose, inflicted by Miller, constituted a fracture of a bodily part.

4. The jury returned a general verdict finding Miller guilty. (Copy attached as Appendix A.) The general verdict did not specify which type, or types, of substantial bodily harm the jury had found. No special verdict was submitted to the jury for its consideration. Thus there is no way of knowing whether any juror relied upon the fracture-of-any-bodily-part alternative, or whether all twelve jurors agreed that at least one of the two other alternative types of substantial bodily harm had been proved beyond a reasonable doubt.

5. Miller appealed his conviction to Division One of the Washington Court of Appeals and I represented him in that direct appeal as well. The Court of Appeals affirmed his conviction in an unpublished opinion issued on February 9, 2015.

6. Miller sought discretionary review of the Court of Appeals' decision from the Washington Supreme Court and the Supreme Court denied his Petition for Review on July 8, 2015. I also represented Miller in that Petition for Review proceeding. The Court of Appeals issued its mandate on September 4, 2015.

7. At trial, right after the prosecution rested, I moved to dismiss the case. I argued there was no evidence that the injury inflicted constituted a fracture of a bodily part. (See RP 288-89, attached as Appendix B.) Drs. Anderton and Pratt testified for the prosecution.

8. Although Dr. Anderton used the phrase "clinical fracture," she used that phrase to describe an injury that doctors treat in the same manner regardless of whether there actually is a fracture. RP 215. Dr. Anderton testified that Rasar's nose was crooked, and that that was an indication that "suggested" that his nose was fractured. RP 213. She also testified that a CT scan did *not* show any fracture of any facial bone. RP 214. She testified that "it doesn't matter whether or not the radiologist saw any broken bones in the nose because regardless of what you see on x-rays the treatment is the same." RP 214. Because the medical treatment is the same whether or not there is a broken bone, she referred to Rasar's nose as "clinically fractured." RP 215.

9. Initially Dr. Pratt testified that he saw a CT Scan that showed a fracture. RP 228. But on cross-examination he immediately reversed that testimony; he said that if he had testified that he saw a CT-scan then he had made a mistake. RP 246. He then proceeded to testify that he never indicated that he saw a fracture and that he could not say whether he ever saw a fracture. RP 247, 259. He did testify that Rasar's nose was not in the right position because it was "moved over to the left, which would suggest a fracture." RP 228.

10. I argued to the trial judge that "the State has failed to prove or present any evidence from which a jury could find beyond a reasonable doubt that there was in fact a fracture of any bodily part." RP 289.

11. The trial judge denied my motion to dismiss the case. I see now that in her ruling she never addressed the question of whether there was evidence of a fracture. Instead, the trial judge ruled that there was sufficient evidence of disfigurement and of impairment of bodily function, the other two types of substantial bodily harm. The trial judge declined to dismiss the charge of Assault 2. RP 289.

12. At the conclusion of the trial when the judge asked the parties for their exceptions to the Court's jury instructions, I did not take any exception to Instruction No. 8. (Copy attached as Appendix C.) Instruction No. 8 stated:

> Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss of [sic] impairment of the function of any bodily part or organ, ***or that causes a fracture of any bodily part***.

(Emphasis added).

13. I had no strategic reason for failing to object to Instruction No. 8. Such an exception would have been consistent with my earlier argument in support of my motion to dismiss when the State rested. I should have objected to the language addressing a fracture in the instruction. Failing to do so was deficient performance.

14. If I had taken exception to Instruction No. 8 on this ground, I believe it is very likely that Judge

Spearman would have revised Instruction No. 8 by eliminating the reference to the fracture alternative.

15. In closing argument the prosecutor argued that the State had proved all three alternative types of substantial bodily harm, and he specifically argued that the State had proved that Miller inflicted a fracture.

16. I did not ask the trial judge to submit a special verdict to the jury which would direct the jurors to disclose which of the three alternative types of substantial bodily harm they found; whether they unanimously found any particular alternative; and whether any juror found only the fracture alternative.

17. I had no strategic reason for failing to propose and request such a special verdict.

18. I am generally familiar with the legal principle that "if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." I understand this principle is enunciated in *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994). Under these circumstances there is a violation of the state constitutional right to a unanimous jury verdict. A claim of a violation of this right can be raised for the first time on appeal. *State v. Watkins*, 136 Wn. App. 240, 244-45, 148 P.3d 1112 (2006); *State v. Bobenhouse*, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009).

19. In Miller's direct appeal I failed to raise the claim that his case falls within the rule of *Ortega-Martinez* and that Miller's right to a unanimous jury verdict was violated because the evidence was legally insufficient to support the fracture alternative and the jurors' general verdict makes it impossible to know whether one or more jurors relied solely on this alternative as the basis for his or her verdict. I had no strategic reason for failing to raise this issue. I simply never thought of it. This failure was deficient performance.

20. I am generally familiar with the rule that in order to be admissible, the opinion of a medical doctor must be an opinion which the doctor holds with a reasonable degree of medical certainty. I know that reasonable degree of medical certainty means that the doctor believes that her opinion more likely than not is correct. I understand that a physician's testimony that fails to meet this standard is inadmissible because it constitutes mere conjecture.

21. I did not object to the admissibility of the testimony of either Dr. Anderton or Dr. Pratt regarding the presence of a fracture on the grounds that neither one had testified that they could say with a reasonable degree of medical certainty that Miller had inflicted an actual fracture. They both testified that there were indications that "suggested" that Rasar had a fracture, but neither one testified that it was more probable than not that he had an actual fracture.

22. I had no strategic reason for failing to make this objection and for failing to raise this issue in the trial court. I believe this failure to object was deficient performance.

23. If I had objected on this ground I believe the trial judge would have sustained my objection and thus neither doctor would have been allowed to testify that what they saw "suggested" that there was an actual fracture of a bodily part.

DATED this 10th day of August, 2016.

/s/ Lenell Nussbaum
Lenell Nussbaum,
WSBA #11140

[Certificate Of Service Omitted]