No. 19-7426

In the Supreme Court of the United States

JOSEPH NJUNGUNA NJONGE,

PETITIONER,

v.

RON HAYNES, SUPERINTENDENT,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, as a matter of federal law, Njonge can show a violation of the Sixth Amendment right to a public trial where he never invoked the right during the allegedly closed proceeding.

2. Whether 28 U.S.C. § 2254(d) bars relief because the Washington Supreme Court did not unreasonably apply clearly established federal law, or unreasonably determine a factual issue, when concluding that the record on direct appeal did not prove an actual closure of the courtroom, and the record on collateral review did not prove prejudice.

3. Whether the Ninth Circuit correctly denied relief because the alleged closure, which occurred during the first morning of jury selection when the judge considered jurors' scheduling conflicts and excusals for "hardship" reasons, amounted at most to a trivial closing.

PARTIES

The petitioner is Joseph Njunguna Njonge. The respondent is Ron Haynes, the Superintendent of the Stafford Creek Corrections Center. Mr. Haynes is the successor in office to Margaret Gilbert, the former Superintendent identified as the respondent in the petition for a writ of certiorari. Mr. Haynes is substituted pursuant to Rule 35.3.

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INTRODUCTION

Joseph Njonge murdered a 75-year-old woman to cover up his criminal activity. There is no doubt about Njonge's guilt, and he raises no challenge to the sufficiency of the evidence or the substantive portions of the trial court proceedings. Instead, Njonge seeks to set aside his state court conviction based solely upon an alleged closure of the courtroom during the morning of the first day of jury selection. The Ninth Circuit rejected the claim after concluding that any closure was trivial, and Njonge asks this Court to review the triviality rule. But Njonge's claim fails for a number of reasons apart from triviality, including that he never invoked the public trial right during the allegedly closed proceeding and the state court decision he asks this Court to invalidate did not rely on the triviality rule. In any event, Njonge's claim of disagreement in the lower courts is incorrect, as the cases he cites simply involve courts applying the public trial right to different factual scenarios. All of these reasons make this an inappropriate case for review.

First and foremost, Njonge never invoked the right to a public trial. Like many other constitutional rights, a defendant must timely invoke the right to a public trial to show a constitutional error. Here, Njonge never invoked the public trial right because he never objected or otherwise complained to the trial judge that the court proceedings excluded the public. Thus, this case presents no opportunity for the Court to assess the triviality rule.

Similarly, this case presents no opportunity for the Court to assess the validity of the triviality rule because the Washington courts reasonably adjudicated Njonge's

claim without relying on the triviality rule, precluding relief under 28 U.S.C. § 2254(d). On direct review, as a result of Njonge not objecting at trial or otherwise developing the factual record regarding the alleged closure, the record on appeal did not show that the trial court proceedings actually excluded members of the public. The Washington Supreme Court thus reasonably determined that the record did not support his claim because the record did not prove a closure had occurred. When Njonge raised the claim again on collateral review, the Washington Supreme Court again reasonably denied relief. This time, without deciding whether a closure had actually occurred, the Washington Supreme Court reasonably concluded that Njonge did not show the prejudice necessary to obtain relief on collateral review. Neither decision was based upon an unreasonable determination of the facts or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d) thus bars relief regardless of whether federal law authorizes a triviality exception.

Finally, Njonge does not show an actual conflict warranting this Court's review. The lower courts that have actually reached the issue consistently agree that the triviality rule may apply to public trial claims. The cases he cites to support his claim that some courts have "rejected" the triviality exception simply show that courts have declined to apply it in certain circumstances. He thus simply seeks factbound error correction. The Court should deny certiorari.

STATEMENT

A. Njonge Murdered a 75-Year-Old Woman to Hide his Crimes

On March 18, 2008, 75-year-old Jane Britt visited her husband, Frank, at the nursing home where Njonge worked as a nursing assistant and cared for Mr. Britt. *State v. Njonge*, No. 63869-6-I, 2015 WL 158896, at *1 (Wash. Ct. App. Jan. 12, 2015) (unpublished). The next day, police found her body locked in the trunk of her car. *Id.* Investigators found the wheelchair Mrs. Britt normally stored in the trunk in a wooded area near the nursing home, along with her garage door opener. Mrs. Britt had been struck in the head and strangled, and her neck was broken. *Id.* Mrs. Britt also had injuries to her face, knees, hands, and wrists, and her fingernails were bloody, broken, and torn. *Id.*

DNA evidence found under Mrs. Britt's fingernails matched Njonge's DNA. *Njonge,* 2015 WL 158896, at *1. The evidence also showed that Njonge had a motive to kill Mrs. Britt. *Id.* at *2. Njonge knew that, shortly before the murder, Mrs. Britt had complained to the nursing home management about the care of her husband's teeth. *Id.* Forensic evidence also showed that someone had forged a nomination form, purportedly signed by Mrs. Britt, which led to Njonge winning an employee recognition award. *Id.* Police also found Mr. Britt's Costco card in Njonge's wallet upon his arrest. *Id.* Njonge admitted that he had taken the Costco card without permission, and he had attempted to use the card. *Id.* The prosecution charged Njonge with murder in the first degree, but the jury convicted him of the lesser-included offense of murder in the second degree. *Id.*

B. Njonge did not Object to the Alleged Closure of the Courtroom

During a pretrial discussion on a motion to exclude witnesses, the prosecutor asked the judge if a witness, who was a member of Mrs. Britt's family, could remain in the courtroom during jury selection. *State v. Njonge*, 181 Wash. 2d 546, 549, 334 P.3d 1068 (2014). The judge disallowed the prosecutor's request because of the limited space in the courtroom, and because it would be unfair for a witness to sit before potential jurors during voir dire. *Id.* The judge noted, "'the jurors will be seeing that face throughout the entire process and maybe making some connections with that person when the person gets on the stand. I don't think it's fair; so, I am not going to allow it.'" *Id.*

The judge then explained how he intended to conduct jury selection given the limited space and the large number of potential jurors. *Njonge*, 181 Wash. 2d at 550. The judge indicated that he would have jurors sit throughout the courtroom, that the court reporter would move from the usual position, and that it would be an awkward "'jury selection in the round process . . . .'" *Id.* At the end of the day, the judge addressed the public observers in the courtroom, telling them there would be limited space the next day. *Id.* The judge said: "'Just let me say for the people who are observing. You are certainly welcome to observe. Tomorrow when we have the jury selection, there will not be room for all of you.'" *Id.* The judge indicated that staff would ask the fire marshal about accommodating additional seating in the entry hall if possible. *Id.* But the judge admitted, "[t]he chance of all you being able to be here and observe are slim to none during the jury selection process." *Id.*

Jury selection began the next day. *Njonge*, 181 Wash. 2d at 550. The transcript contains no mention about the presence or absence of spectators in the courtroom. *Id.* After the venire entered the courtroom, the judge welcomed the prospective jurors and explained the importance and role of the jury. *Id.* The prospective jurors were sworn in and the judge then conducted the hardship excusal process where jurors with hardships (such as work, school, or medical conditions) were excused. *Id.* at 551. One juror claimed a hardship not only because he ran a shoe business, but also because "I lived in Indonesia for a couple of years and that society in dealing with persecution and the suppression of women and this whole situation, this whole case is going to be very disturbing for me." Pet. App. 13a-14a. The juror made no mention of the defendant's religion or background, Pet. App. 13a-14a, and nothing in the transcript or record indicates that any of the jurors knew Njonge's religious background or national origin at the time of the comment. After hearing more hardship excusal requests, the court recessed for lunch. Pet. App. 13a.

Upon reconvening for the afternoon session, the prosecutor asked whether some of the victim's family members who were not witnesses could obtain seats in the courtroom. *Njonge*, 181 Wash. 2d at 551. The judge agreed the family members could take some of the seats in the second row of benches. *Id.* Aside from a discussion about excluding a television crew from voir dire, no further discussions about the presence or absence of the public occurred on the record. *Id.* at 551-52. As the state appellate courts noted: "'The record does not show any observer being asked to leave the courtroom or any objection to the voir dire procedure by either the parties or any

observers. The court clerk's minutes reflect no order relating to a closure.'" *Njonge*, 181 Wash. 2d at at 552.

C. On Direct Review, the Washington Supreme Court Determined that the Record on Appeal did not Prove a Closure of the Courtroom

Njonge appealed from his conviction to the Washington Court of Appeals. For the first time, Njonge alleged on appeal that the trial judge had violated the right to a public trial by closing the courtroom during the first morning of jury selection. The Washington Court of Appeals agreed with Njonge and reversed his conviction. *State v. Njonge*, 161 Wash. App. 568, 255 P.3d 753 (2011).

The Washington Supreme Court reversed, noting that "[a] defendant asserting violation of his public trial rights must show that a closure occurred." *Njonge*, 181 Wash. 2d at 556. The court concluded that the record on appeal did not prove that the judge had closed the courtroom to the entire public. *Id.* "On this record, there is no conclusive showing that spectators were totally excluded from the juror excusals." *Id.* The Washington Supreme Court declined to presume from the silent record that the judge had actually closed the courtroom to the public. *Id.*

The Washington Supreme Court carefully reviewed the transcript and concluded that a fair reading did not show that the judge had fully closed the courtroom: "In speaking to the observers about space limitations, the trial court explained that everyone was welcome to watch but that there might not be seats for everyone who wanted to observe." *Njonge*, 181 Wash. 2d at 557. The Washington Supreme Court noted the judge had said: "'Tomorrow when we have the jury selection, there will not be room for *all* of you. . . . The chance of *all* you being able to

be here and observe are slim to none during the jury selection process.'" *Njonge*, 181 Wash. 2d at 557 (alteration in original). The Washington Supreme Court concluded: "This discussion does not demonstrate that *no* observers were going to be allowed in the courtroom during the first stages of voir dire." *Id.* At most, the record showed that not all members of the public could attend due to space limitations in the courtroom. *Id.*

The Washington Supreme Court concluded "that the record does not show the court closed the courtroom to the public during voir dire. Consequently, Njonge has not established a public trial violation." *Njonge*, 181 Wash. 2d at 558. The Washington Supreme Court remanded the matter to the Washington Court of Appeals for further proceedings. *Id.* at 561. This Court denied Njonge's petition for a writ of certiorari on December 15, 2014. *Njonge v. Washington*, 574 U.S. 1065 (2014).

The Washington Court of Appeals subsequently rejected Njonge's remaining claims and affirmed the conviction. *Njonge*, 2015 WL 158896, at *1. Njonge sought review by the Washington Supreme Court. The Washington Supreme Court denied review without comment on June 3, 2015. *State v. Njonge*, 183 Wash. 2d 1004 (2015).

D. On Collateral Review, the Washington Supreme Court Determined that the Record did not Prove Prejudice

Njonge then filed a post-conviction motion for relief in the superior court, again raising the public trial claim and this time presenting declarations from people allegedly excluded from the courtroom in an attempt to prove a closure had occurred. Njonge also alleged that his defense attorney provided ineffective assistance of counsel by not objecting to the allegedly closed proceeding. The superior

court transferred to the Washington Court of Appeals for consideration as a personal restraint petition. The Washington Court of Appeals rejected Njonge's claims and dismissed his personal restraint petition in an unpublished order. Without deciding the factual issue of whether the judge had actually closed the courtroom, the Commissioner of the Washington Supreme Court denied review because Njonge did not show the necessary prejudice. BIO App. 4a.

The Commissioner first noted that Njonge had presented on collateral review the declarations of his sister and a friend. BIO App. 2a. The Commissioner then noted it was questionable whether the particular portion of jury selection, which concerned excusals of jurors due to hardship, even implicated the constitutional right to a public trial. BIO App. 3a. Without deciding whether the public trial right applied to the particular proceeding, and without deciding whether the judge had closed the courtroom, the Commissioner concluded that Njonge did not demonstrate the prejudice necessary to obtain collateral relief. BIO App. 4a. The Commissioner concluded that Njonge could not obtain relief because he did not show prejudice. BIO App. 5a. The Commissioner also rejected Njonge's separate claim of ineffective assistance of counsel, finding that Njonge failed to prove counsel's allegedly deficient representation prejudiced the defense. BIO App. 5a.

E. The District Court Denied Njonge's Habeas Corpus Petition

Njonge then filed his current habeas corpus petition, raising his public trial claim, as well as a claim of ineffective assistance of counsel and a third claim regarding the media that is not relevant to the current proceeding. The magistrate

judge issued a report and recommendation, recommending that the district court grant relief on the public trial claim. Respondent objected to the report and recommendation. Respondent argued that Njonge could not show a constitutional error because he never invoked the right to a public trial during the allegedly closed proceeding and, alternatively, that Njonge could not obtain relief because the state court adjudication of the claim was not unreasonable. The district court rejected the report and recommendation, denied all three claims, and dismissed the petition. Pet. App. 11a-35a.

In resolving the public trial claim, the district court first concluded that the Washington Supreme Court's adjudication was contrary to this Court's precedent. Despite the holding of this Court in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), the district court concluded that the Washington Supreme Court reached a decision contrary to clearly established federal law by requiring Njonge to show prejudice in order to obtain relief on collateral review. Pet. App. 23a-25a. The district court decided that *Weaver* did not apply for two reasons. First, the district court ruled that it could not apply *Weaver* in evaluating the state court adjudication because this Court issued *Weaver* after the state court decision on the claim. Pet. App. 24a n.1 (citing *Greene v. Fisher*, 565 U.S. 34, 38 (2011)). Second, the district court decided that *Weaver* applied only to claims of ineffective assistance of counsel, not to the substantive public trial claim underlying the claim of ineffective assistance of counsel. Pet. App. 25a.

Having concluded that Njonge satisfied 28 U.S.C. § 2254(d), the district court then reviewed the claim de novo. The district court determined that Njonge was not entitled to relief because, having failed to object to the closure at trial, he could pursue only a claim of ineffective assistance of counsel. Pet. App. 25a-28a. The court concluded "that based upon the lack of objection to any closure at trial, Petitioner's public trial right claim is barred as an independent claim, and must be pursued via a claim of ineffective assistance of counsel for the failure to make that objection." Pet. App. 28a. The court also rejected Njonge's two other claims. Pet. App. 28a-35a. The district court granted a certificate of appealability limited to the public trial claim.

F. Without Reaching the Numerous Reasons Why Njonge Cannot Obtain Relief on his Public Trial Claim, the Ninth Circuit Affirmed the Denial of Relief Because Any Closure was Trivial

Njonge appealed to the Ninth Circuit from the district court's judgment denying his public trial claim. In response, Respondent again argued that Njonge could not show a constitutional violation because he had not properly invoked the public trial right at trial. Alternatively, Respondent argued that 28 U.S.C. § 2254(d) barred relief because the state court adjudication of the claim was neither an unreasonable application of clearly established federal law nor based upon an unreasonable determination of the facts.

Without deciding Respondent's contentions, and without deciding whether a closure to the public even occurred, the Ninth Circuit affirmed the denial of relief after concluding that any closure was trivial. Pet. App. 1a-9a. Applying circuit

precedent, the panel majority concluded that Njonge could not show a constitutional error because the closure, if any, occurred only when the judge addressed hardship excusals and scheduling commitments of prospective jurors. Pet. App. 3a (citing *United States v. Ivester*, 316 F.3d 955 (9th Cir. 2003); *United States v. Rivera*, 682 F.3d 1223 (9th Cir. 2012)). The Ninth Circuit concluded that such "routine jury administrative matters" that have no bearing on guilt or innocence did not implicate the right to a public trial. Pet. App. 3a. Judge Kleinfeld dissented, concluding that the proceeding was not trivial. Pet. App. 5a-9a. Neither the majority nor the dissent addressed whether Njonge properly invoked the public trial right or whether the state court adjudication was unreasonable. Pet. App. 1a-9a. The Ninth Circuit subsequently denied Njonge's petition for panel rehearing and for rehearing en banc. Pet. App. 10a.

REASONS FOR DENYING THE WRIT

A. This is not an Appropriate Case to Determine the Legitimacy of the Triviality Standard Because Njonge, Having Failed to Invoke the Right to a Public Trial, Cannot Show a Constitutional Violation

Njonge asks this Court to decide whether the triviality rule should apply to his claim that the judge closed the courtroom during the first morning of jury selection. However, Njonge never invoked the right to a public trial during the allegedly closed proceeding. Having failed to invoke the right at trial, Njonge cannot show a constitutional error entitling him to relief. Because Njonge cannot obtain relief in this case even if there is no triviality exception, this case presents no opportunity for the Court to address the propriety of the triviality exception.

This Court has repeatedly held that a defendant must timely invoke many rights in order to show a constitutional violation. *See, e.g.*, *Peretz v. United States*, 501 U.S. 923, 936 (1991) (right to Article III Judge); *United States v. Gagnon*, 470 U.S. 522, 528 (1985) (right to be present at trial); *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010) (rights during custodial interrogation); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3 (2009) (right of confrontation); *Faretta v. California*, 422 U.S. 806 (1975) (right of self-representation). Unless the right is invoked, it is waived, and there has been no violation. *See, e.g.*, *Peretz*, 501 U.S. at 936 (citing many examples of rights that can be waived, including the right to public trial).

Like these other rights, the defendant must invoke the public trial right in order to show constitutional error. In *Levine v. United States*, 362 U.S. 610 (1960), the Court considered whether a criminal contempt proceeding violated the due process right to a public trial where Levine "never specifically made objection to the continuing so-called 'secrecy' of the proceedings or requested that the judge open the courtroom . . . ." *Id.* at 617. The Court stated, "[h]ad petitioner requested, and the court denied his wish, that the courtroom be opened to the public before the final stage of these proceedings we would have a different case." *Id.* at 618. However, Levine never requested an open court proceeding during the contempt proceeding. *Id.* Consequently, Levine could not show a constitutional error. *Id.* at 619-20. There simply was no constitutional violation "without a request having been made to the trial judge to open the courtroom[.]" *Id.* at 619.

Although *Levine* involved the public trial right under the Due Process Clause, this Court has repeatedly cited it as a public trial case, including in Sixth Amendment cases. *See, e.g.*, *Peretz*, 501 U.S. at 936 (citing *Levine* for the proposition that "failure to object to closing of courtroom is waiver of right to public trial"); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (citing *Levine*); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in judgment) (citing *Levine* for the proposition that if a defendant does not assert "the Sixth Amendment right to a trial that is 'public' . . . in a timely fashion, he is foreclosed"); *see also, e.g.*, *United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006) (citing *Levine* for same point).

In sharp contrast to *Levine*, the Court's opinions finding a violation of the Sixth Amendment right to a public trial all involved cases where the defendant invoked the right at the time of the alleged closure. For example, in *Waller* the Court declared, "we hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors." *Waller*, 467 U.S. at 47. In *Presley*, the Court expressly noted the case involved the exclusion of spectators over the objection of the defendant. *Presley v. Georgia*, 558 U.S. 209, 210 (2010). Even *Press-Enterprise* involved a timely objection to the closure of the proceedings. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 503-04 (1984). Justice Stevens noted that it would have been a different case if the claim were one brought by the defendant under the Sixth Amendment and the defendant had not objected to the closed proceeding. *Press-Enterprise*, 464 U.S. at 518 n.5 (Stevens, J., concurring).

Simply put, this Court's precedent requires that the defendant invoke the public trial right at the time of the allegedly closed proceeding in order to demonstrate a constitutional error. The absence of an objection by the defendant at trial "significantly changes the constitutional analysis." *Peretz*, 501 U.S. at 932 (magistrate judge presiding over voir dire not constitutional error absent objection). When a defendant objects to a closed proceeding, "the trial court can either order the courtroom open or explain the reasons for keeping it closed[.]" *Weaver*, 137 S. Ct. at 1912. However, when the defendant fails to object, the trial judge is deprived of the opportunity to cure the alleged violation. *Id.* Consequently, when a defendant fails to invoke the right to a public trial during the closed proceeding, the defendant cannot later obtain relief based upon a claim of structural error as could have an objecting defendant. *Id.* at 1912-14. Instead, the defendant may only pursue a claim that counsel was ineffective for not objecting. *Id.*

Here, Njonge never invoked the right to a public trial during the allegedly closed proceeding. Njonge never complained to the judge about an exclusion of the public during the first morning of jury selection. Njonge never provided the judge with the opportunity to indicate on the record whether an exclusion had actually occurred, and he never provided the judge with the opportunity to correct the alleged error. Having failed to invoke the right in the trial court, as a matter of federal law Njonge cannot now show a violation of the constitutional right to a public

trial. Rather, Njonge may only proceed with a claim of ineffective assistance of counsel; a claim that Njonge raised in the district court but did not pursue on appeal.[1]

Njonge may try to confuse the issue, as he did in the courts below, by claiming that Respondent is asserting a procedural default under state law. However, Respondent is not arguing that Njonge's failure to object was a state law procedural default that prevents the federal courts from reaching the merits of the claim. Rather, Respondent argues that the claim fails on the merits as a matter of federal law because Njonge never invoked the right at trial.

The analysis is similar to a claim asserting a violation of the right to self-representation. To invoke that right under *Faretta*, 422 U.S. 806, the defendant must request self-representation. If the defendant does not make such a request, the defendant cannot show a constitutional error. In such a case, the claim does not fail because of a procedural default under state law; rather, it fails on the merits as a matter of federal law because the defendant did not invoke the right. Similarly, if a defendant never invokes the public trial right during an allegedly closed proceeding, the defendant cannot show a constitutional error. The claim fails on the merits. Here, Njonge failed to invoke the right to a public trial during the allegedly closed

[1] Njonge may argue that he did not knowingly waive the public trial right. However, like many other rights, the forfeiture of the right to a public trial may be made by counsel, or even by silence, without a defendant expressly waiving the right. *See, e.g.*, *Gagnon*, 470 U.S. at 528-29 (right to be present); *Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (same). Njonge may also argue that *Weaver* allows him to pursue the public trial claim despite not invoking the right because he raised the claim on direct appeal, while the defendant in *Weaver* failed to invoke the right both at trial and on direct appeal. *See Weaver*, 137 S. Ct. at 1905. But the fact that the defendant in *Weaver* failed to invoke the right until collateral review does not invalidate the rule in *Levine*. Rather, *Weaver* is consistent with *Levine*'s rule that a defendant must object at trial to pursue a public trial claim. If the defendant does not object at trial, the only course for obtaining relief is through a claim that counsel provided ineffective assistance by not objecting to the closed proceeding.

proceeding. Njonge thus cannot obtain relief on the public trial claim. Since Njonge cannot obtain relief, this case provides no opportunity for the Court to address the legitimacy of the triviality rule.

B. This Case Presents No Opportunity to Review the Legitimacy of the Triviality Rule Because Njonge Cannot Obtain Habeas Corpus Relief under 28 U.S.C. § 2254(d) In Any Event

On direct review, the Washington Supreme Court denied Njonge's public trial claim after determining that the record on appeal did not prove the judge had actually closed the courtroom to the public. On collateral review, the state court denied relief after determining that Njonge could not prove prejudice from the alleged closure. The state court decision on direct appeal did not rest upon an unreasonable determination of the facts, and the decision on collateral review was not contrary to or an unreasonable application of clearly established federal law. Because 28 U.S.C. § 2254(d) precludes any grant of relief, this is not the proper case for the Court to review the legitimacy of the triviality rule.

1. 28 U.S.C. § 2254(d) Imposes a Highly Deferential Standard of Review of the State Court Adjudication

The Antiterrorism and Effective Death Penalty Act (AEDPA) expressly limits the power of the federal courts to grant habeas relief to prisoners confined under a state court judgment and sentence. 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 399 (2000); *Harrington v. Richter*, 562 U.S. 86, 97 (2011). The federal courts may no longer grant the writ simply because the court concludes in its independent judgment that a constitutional error has occurred. *Williams*, 529 U.S. at 411. Instead, the statute creates "an independent, high standard to be met before a federal court

may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007).

The Court's review under AEDPA does not focus on whether a constitutional error occurred. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). Nor does the Court consider whether the state court decision was erroneous. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). Rather, the Court considers the reasonableness of the state court decision. Under the statute, "a federal court may grant habeas relief on a claim 'adjudicated on the merits' in state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)). To constitute an unreasonable application of clearly established federal law, the state court must have reached a legal conclusion opposite to that reached by this Court, or the court must have unreasonably applied the holdings of the Court to the facts of the case. *Williams*, 529 U.S. at 405.

Under this highly deferential standard, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. In other words, the petitioner bears the heavy burden of showing

"there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

The statutory phrase "clearly established federal law" limits review "to the holdings, as opposed to the dicta" of this Court's decisions. *Williams*, 529 U.S. at 412. A highly generalized principle derived from this Court's opinions does not constitute clearly established federal law. *Lopez v. Smith*, 574 U.S. 1, 6 (2014) ("We have before cautioned the lower courts . . . against 'framing our precedents at such a high level of generality.'" (quoting *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam))). Implications that purportedly flow from a holding are similarly insufficient to create clearly established federal law. *See, e.g.*, *Glebe v. Frost*, 574 U.S. 21, 23-25 (2014) (the holding that a complete denial of closing argument was structural error did not clearly establish that a lesser restriction was also structural error); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (the opinion establishing a right to self-representation did not clearly establish that a pro se defendant has a right to a law library).

An adjudication is not unreasonable simply because the state court did not extend precedent in a manner not yet done by this Court. *Frost*, 574 U.S. at 23-25. If this Court has not addressed the issue in a holding, the rule is not clearly established, and the state court decision cannot be an unreasonable application of clearly established federal law. *Carey v. Musladin*, 549 U.S. 70 (2006). "'[I]f a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition

the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 572 U.S. 415, 426 (2014).

AEDPA also limits the factual scope of review "to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The Court may grant relief if the state court adjudication "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). It is not sufficient that the Court disagree with the outcome of the state court's factual determinations. *Rice v. Collins*, 546 U.S. 333, 341-42 (2006). Instead, to be an unreasonable determination of the facts, the evidence must be "too powerful to conclude anything but" the contrary of that reached by the state court. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005).

2. The State Court Reasonably Rejected the Public Trial Claim on Direct Review Because the Record on Appeal did not Prove the Judge Had Closed the Courtroom to the Public

The Washington Supreme Court rejected Njonge's claim on direct review not based on any triviality exception, but rather because Njonge failed to prove that a courtroom closure had occurred at all. This was a reasonable conclusion based on the

record before the court, and there is no basis to disturb this conclusion even if no triviality exception exists.

This Court has never suggested that a public trial violation can be shown based merely on the possibility that a courtroom closure may have occurred. Instead, it has found violations only where the defendant demonstrated that the courtroom was actually closed. *See Waller*, 467 U.S. at 42-43 (judge closed the entirety of a several day suppression hearing); *Presley*, 558 U.S. at 210 (judge closed the entire jury selection process). Thus, if the petitioner fails to prove an actual closure of the courtroom, the petitioner has not shown a violation of the right to a public trial. Here, the Washington Supreme Court reasonably concluded on direct review that the record on appeal did not prove the judge had closed the courtroom to the public.

As noted above, Njonge raised the public trial claim for the first time on direct review. Njonge never objected to a closure at trial. Consequently, Njonge had not developed a record to prove that the judge had actually closed the courtroom to the public. The Washington Supreme Court noted that the day prior to jury selection, the judge commented to the public spectators that the courtroom would be crowded, that people were "'certainly welcome to observe,'" and that "'there will not be room for all of you.'" *Njonge*, 181 Wash. 2d at 550. The Washington Supreme Court also noted that when jury selection began the next day, the record on appeal contained no mention about the presence or absence of spectators in the courtroom. *Id.* The court noted that the record on appeal showed no objection to a closure, no order of closure by the judge, and no evidence that the judge excluded spectators from the

proceedings. *Njonge*, 181 Wash. 2d at 552. "On this record, there is no conclusive showing that spectators were totally excluded from the juror excusals. We cannot presume the existence of facts to which the record is silent." *Id.* at 556.

The Washington Supreme Court found the transcript showed only that the courtroom was crowded, and that as a result not all members of the public were able to attend the proceedings. *Njonge*, 181 Wash. 2d at 557 ("A fair reading of the transcript does not lend itself to such certainty" that the judge had closed the courtroom to all members of the public.) The court noted that "the trial court explained that everyone was welcome to watch but that there might not be seats for everyone who wanted to observe." *Id.* While the judge said the public was welcome, the judge added, "'there will not be room for *all* of you,'" and "'[t]he chance of *all* of you being able to be here and observe are slim to none during the jury selection process.'" *Id.* The transcripts also showed that the judge clearly intended to keep the courtroom open to the public, for example when the judge stated that challenges for cause and peremptory challenges would be done in "open court," noting that a "basic foundation of our system of justice, is that our courtrooms are open." BIO App. 7a.

In the Washington Supreme Court, Njonge relied on the prosecutor's brief comment that some of Mrs. Britt's family members wished to sit in the courtroom after the first morning session of voir dire. *Njonge*, 181 Wash. 2d at 551. However, because the judge had previously excluded a family member who was a witness, the statement could have simply meant that the other family members were confused as to whether the ruling also excluded them. Similarly, the statement could have meant

that some members of the family were unable to find seats in the morning due to overcrowding. The prosecutor's statement did not mean that the judge had excluded the entire public from voir dire. *Njonge*, 181 Wash. 2d at 557.

In short, the Washington Supreme Court reasonably refused to presume from a silent record that the judge had actually closed the courtroom in violation of the right to a public trial. Under 28 U.S.C. § 2254(d), there is no basis for this Court to disturb that conclusion even if no triviality exception exists.

3. The State Court Reasonably Denied the Public Trial Claim on Collateral Review Because Njonge did not Show Prejudice

This Court has issued very few opinions governing the right to a public trial, and even fewer addressing how a claim should be resolved on collateral review. Both *Waller* and *Presley* involved claims raised on direct review after an objection at trial. *Waller*, 467 U.S. at 43; *Presley*, 558 U.S. at 209. The only opinion by this Court addressing the standard of prejudice on collateral review of a public trial claim is *Weaver*, where the Court held that a petitioner must prove prejudice in order to prevail on a claim that counsel provided ineffective assistance by not objecting to a closed proceeding. *Weaver*, 137 S. Ct. at 1910-13. *Weaver* did not directly address the standard for prejudice for an underlying public trial claim, but *Weaver* at the very least suggests the petitioner would have to show prejudice to obtain relief on such a claim. Regardless, since this Court has not held whether a petitioner pursuing a public trial claim on collateral review must prove prejudice, the state court decision that Njonge must show prejudice to obtain relief on collateral review cannot be contrary to or an unreasonable application of clearly established federal law.

Frost demonstrates this point. In that case, the trial judge had erred by restricting a part of defense counsel's closing argument, but the Washington Supreme Court found the error to be harmless. *Frost*, 574 U.S. at 22-23. Relying on the holding in *Herring v. New York*, 422 U.S. 853 (1975), that a complete denial of closing argument was structural error, the Ninth Circuit concluded that the state court adjudication applying a harmless error standard was contrary to clearly established federal law. *Frost*, 574 U.S. at 23. This Court determined that the Ninth Circuit's "decision cannot stand." *Id.* Because this Court itself had not extended *Herring*'s structural error standard to lesser restrictions on closing argument, the Court concluded that the state court was not required to extend *Herring* in such a manner. *Id.* at 24. Rather, the state court could reasonably require Frost to show how the error prejudiced his defense. *Id.* The state court decision to apply a harmless error standard was not contrary to or an unreasonable application of clearly established federal law. *Id.*

As in *Frost*, because this Court has not determined that the structural error rule must apply when reviewing a public trial claim on collateral review, the Washington Supreme Court did not have to apply a structural error rule. Rather, as in *Frost*, the state court could reasonably require Njonge to prove prejudice. Given the lack of precedent by this Court on the issue, the state court adjudication cannot be contrary to or an unreasonable application of clearly established federal law.

Moreover, although *Weaver* was issued after the state collateral review decision, it supports the state court's decision that Njonge must prove prejudice to

obtain relief on collateral review. *Weaver* expressly recognized an important difference between raising a pubic trial claim on direct review and collateral review. *Weaver*, 137 S. Ct. at 1907-13. The Court also recognized that while a public trial violation is structural error, that label does not always mean that the error rendered the proceedings fundamentally unfair. *Id.* at 1907-10. On the contrary, closure may at times actually benefit the defendant. The Court then recognized several reasons for requiring the defendant to show prejudice to obtain collateral relief. *Id.* at 1910-13. Raising the claim on collateral review, without objection at trial, deprives the judge of the opportunity to correct the error. *Id.* at 1910. The judge does not have the opportunity either to open the courtroom or to state the reasons justifying the closure. *Id.* at 1912. Also, when relief is granted on direct review, "there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost." *Id.* at 1912. When the claim is pursued on collateral review, "the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases." *Id.* Thus, "[t]he finality interest is more at risk . . . ." *Id.* These differences warrant a different standard of prejudice for evaluating a public trial violation when the claim is pursued on collateral review. *Id.*

In short, *Weaver* held that a petitioner seeking collateral relief for a public trial violation, albeit as a claim of ineffective assistance of counsel, must show prejudice. *Weaver* supports the Washington Supreme Court's decision that Njonge must prove

prejudice to obtain collateral relief. The state court decision was not contrary to or an unreasonable application of clearly established federal law.

Nor was the state court decision that Njonge could show no prejudice based upon an unreasonable determination of the facts. The state court correctly noted that the allegedly closed proceeding involved hardship excusals. BIO App. 4a. The court noted that Njonge only speculated that one potential juror mistakenly thought Njonge was a Muslim. BIO App. 4a. The juror, who the judge later excused in the afternoon session, expressed concern about persecution and oppression of women in Indonesia. *See supra* p. 9. The state court found that despite Njonge's speculation that the presence of his family and supporters would have ameliorated the juror's concerns, "the juror was questioned substantively and extensively in the afternoon voir dire session, which Mr. Njonge's supporters attended." BIO App. 4a. The state court noted that the judge excused the juror with the agreement of both parties. BIO App. 4a. Based on the record, the Washington Supreme Court reasonably concluded that Njonge cannot show prejudice.

In the absence of contrary precedent from this Court, the Washington Supreme Court's decision that Njonge had to prove prejudice to obtain relief on collateral review cannot be an unreasonable application of clearly established federal law. Njonge is thus not entitled to relief under 28 U.S.C. § 2254(d) regardless of the legitimacy of the triviality rule.

C. Njonge does not Show an Actual Conflict in the Lower Court Decisions Warranting Review by this Court

Even if Njonge could overcome these insurmountable vehicle problems, he fails to show a conflict with this Court's cases or a "'real and embarrassing'" conflict among the Circuit courts that would merit the Court's review. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)). The cases he cites never reject (or in many cases even discuss) the idea that a *de minimis* or trivial closure does not violate the right to public trial. Rather, those cases, at most, determined that a closure occurred during a substantively material proceeding and thus was not *de minimis*. Even the dissenting judge in the Ninth Circuit's decision below did not dispute the legitimacy of the triviality rule. Rather, Judge Kleinfeld disputed whether the closure at issue was trivial. Pet. App. 5a. Njonge does not show a conflict warranting review.

Although this Court has held that conducting extensive, critical stages of a trial court proceeding outside the presence of the public over the defendant's objection violates the Sixth Amendment, the Court has never held that a *de minimis* or trivial closure violates the right. *Waller* involved the complete closure of the courtroom for the entirety of a several day suppression hearing, and *Presley* involved a similar closure of the courtroom during the entire jury selection process. *Waller*, 467 U.S. at 42-43; *Presley*, 558 U.S. at 210. Neither case involved the type of closure that allegedly occurred here—one morning session where the judge addressed juror scheduling and hardship excusals and the defendant never objected. No decision by this Court holds

that such a limited closure (assuming it occurred) violates the Sixth Amendment right to a public trial.

While the Court has not directly addressed the issue of trivial closures in a holding, the Court has suggested that certain non-critical proceedings do not necessarily implicate the defendant's right to a public trial. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring) (recognizing that a judge need not allow the public into conferences at sidebar or in chambers); *Waller*, 467 U.S. at 48-49 (noting an in camera hearing to view the 2.5 hour video may have been a valid alternative to closing the courtroom for an entire seven-day suppression hearing); *Weaver*, 137 S. Ct. at 1906 (noting the state court finding that Weaver had demonstrated a public trial violation because "the closure was neither *de minimis* nor trivial . . . .").

The public trial right serves to protect the defendant in proceedings where the result would materially change the outcome of the criminal trial. *Waller*, 467 U.S. at 50 ("A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties."); *Estes v. Texas*, 381 U.S. 532, 538-39 (1965) (explaining that the purpose of the right is "to guarantee that the accused would be fairly dealt with and not unjustly condemned"). However, "not every public-trial violation will in fact lead to a fundamentally unfair trial." *Weaver*, 137 S. Ct. at 1911. On the contrary, the Court has recognized the defense may not object to, or may even desire, certain proceedings occurring outside the public's

view since the particular closure may actually benefit the defendant. *Weaver*, 137 S. Ct. at 1910-13. The Court's precedent allows the rule that a trivial closure, during a proceeding that did not materially affect the position of the parties, does not violate the right to public trial. In short, nothing in this Court's precedent precludes the rule applied by the Ninth Circuit.

In an attempt to show a conflict among the Circuits, Njonge first cites the Eighth Circuit's decisions in *United States v. Thompson*, 713 F.3d 388 (8th Cir. 2013), and *United States v. Thunder*, 438 F.3d 866 (8th Cir. 2006). However, neither *Thompson* nor *Thunder* questioned the legitimacy of the triviality rule or even mentioned it. Rather, *Thompson* held that the public trial right extends to sentencing hearings, recognized that some closures may be total or partial, and held that under the facts of the case, the district court's limited closure of the sentencing hearing did not violate the public trial right. *Thompson*, 713 F.3d at 394-96. *Thunder* held that the total closure of the courtroom over the defendant's objection during the victims' testimony, obviously a non-trivial proceeding, violated the right to a public trial. *Thunder*, 438 F.3d at 867-68. While both *Thompson* and *Thunder* referred to "total" closures versus "partial" closures, the courts' language addressed situations involving a complete exclusion of the public (a "total" closure) versus the exclusion of only certain members of the public (a "partial" closure). *Thompson*, 713 F.3d at 395; *Thunder*, 438 F.3d at 868. Nothing in *Thompson* or *Thunder* discussed trivial versus material closures or questioned the legitimacy of the triviality rule.

Njonge next cites to *Judd v. Haley*, 250 F.3d 1308 (11th Cir. 2001), and *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984), but again neither rejects or even discusses the triviality rule. Like the Eighth Circuit in *Thunder*, the Eleventh Circuit in *Judd* simply held that the "total" closure of the courtroom to the public during the victim's testimony and over the defendant's objection violated the Sixth Amendment, but this was obviously a "material" proceeding. *Judd*, 250 F.3d at 1315-16. *Douglas*, by contrast, found that a "partial" closure during one witness's testimony did not violate the Sixth Amendment because some members of the public still viewed the proceeding. *Douglas*, 739 F.2d at 532-33. Neither *Judd* nor *Douglas* questions the legitimacy of the triviality rule or conflicts with the Ninth Circuit's decision below.

Njonge next cites to First Circuit cases, but he again fails to show an actual conflict. Contrary to Njonge's suggestion, the First Circuit did not reject the triviality rule in *United States v. Agosto-Vega*, 617 F.3d 541 (1st Cir. 2010). Rather, the First Circuit declined to consider the issue. In that case, as in *Presley*, the trial judge had closed the courtroom to the public for the entire jury selection process over the defendant's objection. *Agosto-Vega*, 617 F.3d at 544. Because the closure clearly was not trivial, the First Circuit ruled, "we need not consider whether, as the government contends, there may be circumstances where a courtroom closure is so trivial that it does not require a new trial." *Id.* at 548. A decision not reaching the triviality issue is not a rejection of the rule, and it does not conflict the Ninth Circuit's decision here.

Nor did the First Circuit reject the triviality rule in *Owens v. United States*, 483 F.3d 48 (1st Cir. 2007), *abrogated by Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). Rather, the First Circuit determined only that the triviality rule did not apply under the facts of the particular case. *Id.* at 63 ("However, this was not a mere fifteen or twenty-minute closure; rather, Owens' trial was allegedly closed to the public for an entire day while jury selection proceeded."). Determining that a particular closure was not trivial does not reject the triviality rule. *Owens* does not conflict with the Ninth Circuit's decision.

Njonge also does not show a conflict with state court case law. Contrary to Njonge's argument, the Washington Supreme Court expressly agreed that conducting hardship excusals of jurors outside the presence of the public does not necessarily violate the public trial right. In *State v. Russell*, 183 Wash. 2d 720, 357 P.3d 38 (2015), the Washington Supreme Court recognized that while the public trial right applies to jury selection proceedings, the term "jury selection" encompasses more than simply voir dire, and "the mere label of 'jury selection' does not mean the public trial right is automatically implicated." *Id.* at 730. "The public trial right is not implicated by preliminary excusals for statutory reasons (including hardship) based on juror questionnaires." *Id.* The court then recognized that excusing a juror due to a hardship (such as an illness or scheduling conflict) is qualitatively different than excusing a juror for bias. *Id.*; *see also State v. Love*, 183 Wash. 2d 598, 606, 354 P.3d 841 (2015) (distinguishing hardship excusals from a peremptory or cause challenge). After

Russell, the court reaffirmed this rule in *State v. Schierman*, 192 Wash. 2d 577, 607-08, 438 P.3d 1063 (2018), holding that the hardship excusal portion of jury selection differed fundamentally from peremptory or cause challenges so that the closure of such a proceeding does not implicate the public trial right.

Njonge's citation to *Ex parte Easterwood*, 980 So. 2d 367, 376 (Ala. 2007), similarly fails to show a conflict. Like the federal court decisions in *Douglas*, *Judd*, and *Thunder*, the Alabama state court decision in *Easterwood* did not involve a trivial closure. Instead, like the federal cases, *Easterwood* involved the closure of the courtroom during crucial testimony against the defendant. *Ex parte Easterwood*, 980 So. 2d at 376. Like the federal cases, *Easterwood* discussed the difference between a "total" closure (excluding all of the public) and a "partial" closure (exclusion of some members of the public), not between material and "trivial" closures. *Id.* The *Easterwood* decision does not show a true conflict with the Ninth Circuit decision.

Finally, the Colorado cases cited by Njonge show the Colorado Supreme Court has not yet decided the issue; the cases do not show a conflict. Pet. at 15.

Thus, Njonge does not show an actual conflict on the legitimacy of the triviality rule. The remaining cases he cites actually support application of a triviality rule. *See* Pet. at 16-21 (citing cases that agree with the Ninth Circuit rule). At most, Njonge shows that the lower courts might differ on what, factually, constitutes a trivial proceeding, not on whether the triviality rule is valid. The lower courts that have actually addressed the triviality issue have reached a conclusion consistent with the Ninth Circuit's rule that a trivial closure does not violate the public trial right. Njonge

does not show a conflict necessitating review; instead, he essentially asks this Court to correct the allegedly erroneous application of the rule in his case, not a proper basis for asking this Court to grant certiorari.

In sum, the rule applied by the Ninth Circuit is consistent with other lower court opinions and with this Court's precedent. Njonge does not demonstrate a conflict necessitating review by this Court.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

RESPECTFULLY SUBMITTED.

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June 15, 2020

APPENDIX

APPENDIX

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: JOSEPH NJUGUNA NJONGE, Petitioner.	NO. 93546-7 RULING DENYING REVIEW

Joseph Njonge was convicted of second degree murder. Division One of the Court of Appeals reversed the conviction on direct appeal on the basis that the trial court violated Mr. Njonge's right to a public trial. This court reversed the Court of Appeals on that issue and remanded to that court for consideration of unaddressed issues. *See State v. Njonge*, 181 Wn.2d 546, 334 P.3d 1068 (2014). On remand the Court of Appeals affirmed the judgment and sentence, issuing its mandate on July 15, 2015. Mr. Njonge then timely filed a motion in the superior court to vacate the judgment and sentence, which was transferred to the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2). Finding no arguable basis for relief, the acting chief judge dismissed the petition as frivolous under RAP 16.11(b). Mr. Njonge now seeks this court's discretionary review. RAP 16.14(c).

To obtain review in this court, Mr. Njonge must demonstrate that the Court of Appeals decision conflicts with a decision of this court or another Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(l), (b). And as a personal restraint petitioner challenging his judgment and sentence, Mr. Njonge must show that a constitutional error occurred that resulted in actual and substantial prejudice

or that a nonconstitutional error occurred that resulted in a complete miscarriage of justice. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014). If he fails to present an arguable basis for collateral relief in law or fact given the constraints of the personal restraint petition procedure, his collateral challenge must be dismissed as frivolous under RAP 16.11(b). *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

Mr. Njonge again contends that the trial court violated his right to a public trial. But this court rejected this argument on the merits on direct appeal. Mr. Njonge thus may not renew this issue in a personal restraint petition unless the interests of justice require reconsideration of the issue. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). The interests of justice may be served if there has been an intervening change in the law or some other justification for not making a crucial argument on direct appeal. *Id.* But a petitioner may not create a new issue by modifying a previously asserted issue with new facts and legal theories. *Id.*; *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994).

Here, Mr. Njonge elaborates on his public trial claim by way of declarations submitted by him, his sister Ann Njonge, and his friend Evelyn Thuo. This is evidence that arguably was not available for inclusion in the record on direct appeal. *See State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995) (claims depending on facts outside record should be brought by personal restraint petition). This is an important distinction in light of this court's determination on direct appeal that the record on appeal did not show that the courtroom was closed in violation of the right to a public

trial. *Njonge*, 181 Wn.2d at 556-58. Mr. Njonge is seemingly trying to rectify that evidentiary flaw by way of his collateral challenge.

Mr. Njonge specifically claims that members of his family and friends were unable to enter the crowded courtroom on the morning of June 3, 2009. At that time, the trial court considered hardship excusals among the entire jury venire. Substantive jury voir dire occurred during the afternoon session. Mr. Njonge does not assert his supporters were unable to attend the afternoon session.

Assuming Mr. Njonge's factual allegations are true (which I need not decide), it is questionable whether lack of access to the courtroom during preliminary excusals for hardship implicates the right to a public trial. *See State v. Russell*, 183 Wn.2d 720, 730-31, 357 P.3d 38 (2015) (work sessions where the trial judge, counsel, and defendant met in jury room to go over jury questionnaires for potential hardship excusals did not implicate right to public trial); *State v. Wilson*, 174 Wn. App. 328, 342, 298 P.3d 148 (2013), *review denied*, 184 Wn.2d 1026 (2016) (hardship excusals historically do not implicate public trial right). But even if limited public access to the preliminary hardship excusal phase implicated Mr. Njonge's right to a public trial, he is now asserting the violation as a freestanding claim on collateral review. He therefore must establish that any violation prejudiced him. *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 122-23, 340 P.3d 810 (2014) (lead op. of C. Johnson, J.; concurring op. of Madsen, C.J.); *see also In re Pers. Restraint of Speight*, 182 Wn.2d 103, 107-08, 340 P.3d 207 (2014) (lead op. of C. Johnson, J.; concurring op. of Madsen, C.J.).

Mr. Njonge fails to show any prejudice. As indicated, the concerned session involved hardship excusals. At best, Mr. Njonge speculates that one prospective juror, who was eventually excused, might have mistakenly thought Mr. Njonge was a Muslim. During the morning session, that juror volunteered that he or she lived for a couple of years in Indonesia and that Mr. Njonge's case was disturbing in light of the persecution and oppression of women the juror had perceived in that country. Mr. Njonge speculates that if his supporters had been in the courtroom, this juror would have understood that Mr. Njonge and his supporters were not Muslim, ameliorating the juror's concerns. He also speculates the juror would have been seated on the jury had his family members been present. But the juror was questioned substantively and extensively in the afternoon voir dire session, which Mr. Njonge's supporters attended. The juror was excused with the agreement of both parties. Mr. Njonge cannot show prejudice under these facts.

Mr. Njonge also argues that defense counsel was ineffective in failing to object to the alleged closure, thus resulting in an inadequate record on direct appeal. To establish ineffective assistance of trial counsel, Mr. Njonge must show that counsel's failure to object fell below an objective standard of reasonableness and that, but for counsel's error, there is a reasonable probability the outcome would have been different. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012); *McFarland*, 127 Wn.2d at 334-35. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Crace*, 174 Wn.2d at 840. Counsel's performance is presumed to be competent, and Mr. Njonge bears the burden of

showing that there was no conceivable legitimate tactical reason for counsel's failure to object. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Mr. Njonge's ineffectiveness claim is unpersuasive. Assuming counsel should have objected, Mr. Njonge fails to show any reasonable probability that the ultimate outcome would have been different. And as the Court of Appeals noted, appellate counsel raised and briefed the public trial issue on direct appeal. Mr. Njonge's claim that had trial counsel objected a more useful record would have been preserved for direct appeal is speculative.

In sum, because Mr. Njonge failed to present an arguable basis for collateral relief in law or fact given the constraints of the personal restraint petition procedure, the acting chief judge properly dismissed his collateral challenge as frivolous under RAP 16.11(b). *Khan*, 184 Wn.2d at 686-87.

The motion for discretionary review is denied.

s/ Narda Pierce
COMMISSIONER

April *5th*, 2017

Okay. And challenges, I prefer all of my challenges to be done in open court. It is part of our process. I never yet had a juror feel so insulted that it has affected their ability, or the ability of some of the jurors to be fair.

Challenges for cause you can make at any time. If there is a challenge for cause, I will always offer the other side the opportunity to ask follow-up questions. I may also ask follow-up questions since ultimately it is my decision as to whether to excuse a juror for cause.

If you are uncomfortable making a challenge for cause in the presence of their fellow jurors, and this has occasionally come up when it would be embarrassing to challenge a juror. You have someone who had a disability, and it was clear that they could not participate in the trial, but we didn't want to raise that in front of everybody else.

You can always ask for a side bar, and we can address it at side bar.

Peremptory challenges we can do in open court. As you see, when we do peremptory challenges, when we do challenges for cause, they will be released to go back downstairs, before you start peremptory challenges, I will fill up the seats in the box so you

morning. This afternoon we will probably have some TV cameras. The TV cameras will not ever focus on you; so don't worry about that.

But they are entitled to be here. We have an open system of justice. That's another basic foundation of our system of justice, is that our courtrooms are open. And so we certainly allow the media to come in. But it puts an extra burden on you, doesn't it? Because that means you probably shouldn't be watching the news tonight, because we don't want you to hear anything about this case on the news.

We just want you to make your decision based on the evidence that is presented in this courtroom. So, please be extra careful when you go home tonight or in the evening that you don't inadvertently watch anything on the news that might come on about this case. Remember, the fact that you're going to base your decision on the ones you believe have been proved in this Court based on the evidence, not on anything that is said outside of this courtroom, okay?

Okay. I did mention that you are going to be allowed to take notes. I think some of you have been on juries before, and I don't know if you were allowed to take notes. We do allow jurors to take notes now, which makes a whole let of sense, doesn't it?