No. _____

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

MATHEW MOI,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The State sought to try Mathew Moi jointly for the crimes of murder and possession of a firearm as a felon based on the same incident, the shooting death of Keith McGowan. Moi sought to sever the offenses for trial, and then exercised his right under the Washington rules of criminal procedure to waive his right to a jury trial as to the firearm charge. The jury was unable to reach a verdict on the murder charge, and the trial court subsequently acquitted Moi of the firearm charge. A second jury was convened and convicted Moi of murder. The Washington Supreme Court reversed the murder conviction, finding that principles of collateral estoppel precluded the State from relitigating the murder charge in light of the trial court's acquittal on the firearm charge. The question presented is:

Whether a defendant should be precluded from invoking collateral estoppel principles embodied in the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments when the State has sought to join related offenses together to be presented to a single factfinder, and the defendant chooses to have the charges severed and presented to different factfinders, resulting in the factfinders reaching different results.

PARTIES TO THE PROCEEDING

The petitioner is the State of Washington. The respondent is Mathew Wilson Moi.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner the State of Washington respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.

OPINIONS BELOW

The opinion of the Washington Supreme Court (App. 1-14) is reported at 360 P.3d 811 (Wa. 2015).

The decision of the Washington Court of Appeals (App. 15-25) is unreported.

JURISDICTION

The judgment of the Washington Supreme Court was entered on October 29, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) allowing review of final judgments rendered by the highest court of a state where a right is claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall be subject for the same offence to be twice put in jeopardy of life or limb."

U.S. Const. amend. V

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

U.S. Const. amend. XIV

STATEMENT

A. Facts of the Case.

On October 19, 2004, 23-year-old Keith McGowan, a member of the Hoover Crips street gang, was shot and killed at close range as he answered the door of his apartment. App. 2. Mathew Moi was seen in the apartment building immediately prior to the murder. App. 2. Mathew Moi admitted to being present at the murder. App. 9. Mathew Moi told his girlfriend the next day that he had killed someone. App. 2. The gun that killed McGowan was recovered from a storm drain after a friend of Moi's showed police where the friend had hidden it. App. 2. For the first time at trial, Moi claimed that someone else named

"Jason" shot McGowan as he answered the door. App. 9.

B. Proceedings in the State Trial Court.

The State of Washington charged Mathew Moi with two crimes under Washington law: murder in the first degree while armed with a firearm, and unlawful possession of a firearm in the first degree. App. 3. The two charges were closely related. Both were based on the allegation that Moi fatally shot Keith McGowan on October 19, 2004, and that on that date, as a convicted felon, Moi was prohibited from possessing a firearm. App. 3. The two crimes were charged in a single charging document under a single cause number. App. 3.

After the trial began, but before the jury was selected, Moi moved to sever the charges. App. 3. The State objected, arguing that the two crimes involved the same evidence and that severance was not warranted under Washington law.[1] App. 3. In response,

[1] Moi moved for severance because he did not want to the jury to learn of his prior conviction. The State argued against severance because the State did not want "to present the exact same case a second time." App. 3. In arguing against severance, the State merely noted that the defendant had the option under Washington rules of procedure to waive his right to a jury determination as to the firearm charge so that the two charges could be adjudicated at the same time but to separate fact-finders. The State had no legal basis to object to such a waiver, and it was clearly the defendant's decision whether or not to do so.

Moi waived his right to a jury trial as to the firearm charge only. App. 3. Pursuant to the Washington Criminal Rules for Superior Court, the State need not consent to a waiver of jury. Washington CrR 6.1(a). The trial court allowed the waiver. App. 3. Thus, the murder charge was submitted to the jury and the firearm charge was submitted to the trial court. App. 3. However, the jury and the trial court heard the evidence regarding the two charges simultaneously in the same proceeding. App. 3. The jury was unable to reach a unanimous verdict as to the murder charge and the trial court declared a mistrial. App. 3. As to the firearm charge, the trial court acquitted Moi, stating in its oral findings that the State had failed to prove beyond a reasonable doubt that Moi was the person who shot McGowan. App. 3.

A second trial as to the murder charge commenced without objection, and the second jury returned a verdict of guilty as to murder in the first degree while armed with a firearm. App. 4.

C. Proceedings in the Washington Appellate Courts.

The murder conviction was affirmed on direct appeal in an unpublished decision by the Washington Court of Appeals, Division 1, on December 5, 2011. On direct appeal, Moi did not argue that the murder conviction was barred by double jeopardy or that there was insufficient evidence to support the murder conviction.

Moi filed a timely collateral attack of his conviction in state court (termed a "personal restraint petition" in Washington), contending that the conviction violated his right against double jeopardy. App. 15. The Washington Court of Appeals, Division 1, dismissed Moi's petition in an unpublished order. App. 25. The Washington Supreme Court granted review of that dismissal, and concluded that collateral estoppel principles embodied in the Double Jeopardy Clauses of the Fifth and Fourteenth Amendments barred the State from retrying Moi on the charge of murder after the trial court had acquitted him of the firearm charge. App. 14-15. The state supreme court found that the trial court's acquittal on the firearm charge was a final judgment on the merits involving the same parties, and that the issue decided by the acquittal was identical to the issue to be decided as to the murder charge. App. 6-7. The court rejected the State's argument that the fact that the defendant sought severance of the charges, and chose to have the two charges submitted to separate factfinders, should preclude application of collateral estoppel. App. 7-9. The Court held that the State was collaterally estopped from submitting the murder charge to a second jury. App. 13-14. The court remanded the case to the trial court for vacation of the murder conviction on double jeopardy grounds. App. 14.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition and reverse because the Washington Supreme Court erroneously applied collateral estoppel principles where the defendant, not the State, was responsible for creating successive prosecutions. A criminal defendant cannot rely on collateral estoppel principles to bar a prosecution where the State joined related offenses and never contemplated more than one trial of the offenses and the defendant is responsible for insisting on separate factfinders. The Washington Supreme Court's application of collateral estoppel principles in this context allows the defendant to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution, rather than as a shield against State overreaching.

A. This Court has held that a defendant who seeks and obtains severance of charges cannot later claim that multiple prosecutions of those charges violate the Double Jeopardy Clause.

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause applies to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). This Court has explained that the Double Jeopardy Clause affords three basic protections:

> [It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

This Court has held that a defendant who is responsible for successive prosecutions is not entitled to subsequently assert any right he might have had under the Double Jeopardy Clause against consecutive trials. In *Jeffers v. United States*, 432 U.S. 137, 139 (1977), the defendant was alleged to be the head of a "highly sophisticated narcotics distribution network." A federal grand jury returned two indictments against him: one for conspiring to distribute heroin and cocaine under 21 U.S.C. § 846, and one for conducting a continuing criminal enterprise to violate drug laws under 21 U.S.C. § 848. *Id.* at 140-41. After the indictments were returned, the Government filed a motion to join the offenses. *Id.* at 142. Jeffers objected to joinder, and the motion to join the offenses was denied. *Id.* at 142-43. Jeffers was convicted in a first trial of conspiracy, and then subsequently convicted in a second trial of engaging in a continuing criminal enterprise. *Id.* at 143-45.

On appeal, Jeffers argued that he should not have been tried for the greater offense in the second trial after being found guilty of the lesser offense in the first trial. *Id.* at 146-47. This Court agreed that conspiracy under 21 U.S.C. § 846 was a lesser

included offense of engaging in a continuing criminal enterprise under 21 U.S.C. § 848. *Id.* at 150. However, this Court held that a defendant cannot prevail on a claim that the Double Jeopardy Clause prohibited trial on the greater offense after conviction of the lesser offense if "the defendant expressly asks for separate trials on the greater and lesser offenses." *Id.* at 152. Because Jeffers was responsible for the successive prosecutions, "his action deprived him of any right that he might have had against consecutive trials." *Id.* at 154. In other words, a defendant cannot complain of successive prosecutions under the Double Jeopardy Clause when it is the defendant, not the State, who has sought and obtained successive prosecutions.

In *Ohio v. Johnson*, 467 U.S. 493 (1984), this Court again held that a defendant should not be allowed to create a double jeopardy claim with his own strategic choices. In that case, the defendant was indicted in state court for murder, involuntary manslaughter, aggravated robbery and grand theft. *Id.* at 494. At his arraignment, Johnson offered to plead guilty to the charges of involuntary manslaughter and grand theft while pleading not guilty to murder and aggravated robbery. *Id.* at 495. Over the State's objection, the trial court accepted the guilty pleas and sentenced Johnson. *Id.* Johnson moved to dismiss the remaining charges on double jeopardy grounds. *Id.* The trial court granted the motion, and the trial court was affirmed by the Supreme Court of Ohio. *Id.*

This Court held that double jeopardy principles did not bar prosecution for murder and aggravated robbery because there was no governmental overreaching and Johnson, not the State, was responsible for the separate disposition of the charges. This Court explained:

> We think this is an even clearer case than *Jeffers v. United States*, where we rejected a defendant's claim of double jeopardy based upon a guilty verdict in the first of two successive prosecutions, when the defendant had been responsible for insisting that there be separate rather than consolidated trials. Here respondent's efforts were directed to separate disposition of counts in the same indictment where no more than one trial of the offenses charged was ever contemplated. Notwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges.

Id. at 502. *Jeffers* and *Johnson* establish that when the State seeks to prosecute multiple offenses in a single proceeding, and successive prosecutions are necessitated by the defendant's own strategic choices made for his benefit, rather than State overreaching, Double Jeopardy principles should not apply.

B. The courts are divided on whether collateral estoppel can be invoked by defendants who have sought and obtained severance of charges.

The Fifth Amendment guarantee against double jeopardy incorporates the doctrine of collateral estoppel. In *Ashe v. Swenson*, 397 U.S. 436, 442 (1970), this Court held that collateral estoppel applies to criminal convictions such that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." In deciding whether an issue of ultimate fact has been determined by a general jury verdict, the court is required to examine the record, including pleadings, the evidence and the charges, and determine whether a rational jury could have based the acquittal upon an issue other than that which the defendant seeks to foreclose from relitigation. *Id.* at 444. The burden is on the defendant to demonstrate that the issue was actually decided in the first proceeding. *Dowling v. United States*, 493 U.S. 342, 349 (1990).

Courts around the nation are split on what effect the seeking of severance has on collateral estoppel claims. Some courts have found that a defendant who successfully seeks and obtains severance of charges cannot invoke collateral estoppel principles. *United States v. Blyden*, 964 F.2d 1375, 1379 (3d Cir.1992) (agreeing that "where the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral

estoppel as a bar against the government any more than they may plead double jeopardy" (citation and internal quotation marks omitted)); *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 225-27 (4th Cir.1988) ("Where, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy."); *State v. Chenique-Puey*, 145 N.J. 334, 678 A.2d 694, 698-99 (1996) ("A defendant who moves to sever the trial of a charge of contempt of a domestic violence restraining order from the trial of an underlying offense should be precluded from then asserting double jeopardy or collateral estoppel bars to the subsequent prosecution."). *Currier v. Commonwealth*, 65 Va. App. 605, ___ S.E.2d ___ (2015) (declining to extend *Ashe* and apply collateral estoppel principles where "a trial proceeds on a charge that was severed from a combined original group of charges and the charge was severed with the defendant's consent and for his benefit").

This view is supported by *Jeffers* and *Johnson.* A defendant's choice to sever charges should preclude application of double jeopardy and collateral estoppel principles. For example, in *Currier v. Commonwealth*, *supra*, 65 Va. App. at 607, Currier was charged with burglary, larceny and possession of a firearm as a convicted felon. The defense and prosecution agreed to sever the firearm charge from the burglary and larceny charges. *Id.* at 608. A jury acquitted the

defendant of burglary and larceny. *Id.* Currier was then convicted by a second jury of the firearm charge. *Id.*

The Virginia court refused to apply collateral estoppel because "this scenario does not bring into play the concern that lies at the heart of the Double Jeopardy Clause: the avoidance of prosecutorial oppression and overreaching through successive trials." *Id.* at 609. The court noted that the charges were brought by a single grand jury, and would have been heard in a single proceeding if severance had not been granted to avoid undue prejudice to the defendant. *Id.* The court reasoned that collateral estoppel applies to prevent prosecutorial abuse and overreaching. *Id.* at 611. This concern is not present when separate trials are undertaken with the defendant's consent and for his benefit. *Id.* at 613. As this Court noted in a footnote addressing collateral estoppel principles in *Ohio v. Johnson*, " . . . where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." 467 U.S. at 500 n.9.

Other courts, like the Washington Supreme Court, have held that a defendant who strategically seeks and obtains severance may still invoke collateral estoppel. *Joya v. United States*, 53 A.3d 309, 315-19 (D.C. 2012) (holding that collateral estoppel may bar a retrial even where charges were severed at the defendant's request); *Gragg v. State*, 429 So.2d 1204, 1208 (Fla.1983) (finding that a defendant's severance

motion does not waive his right to assert the bar of collateral estoppel); *State v. Butler*, 505 N.W.2d 806, 807-10 (Iowa 1993) (applying collateral estoppel to bar a separate trial that the defendant had moved to sever).

These courts apply collateral estoppel principles even though the abuses that the Double Jeopardy clause was intended to prevent are simply not present. These courts are ignoring the principle set forth in *Jeffers* and *Johnson.* A defendant should not be able to claim double jeopardy protections through the application of collateral estoppel when the State has sought to try related offenses in a single proceeding and severance of the charges is obtained with the defendant's consent and for his benefit.

C. The Washington Supreme Court decision contravenes this Court's double jeopardy jurisprudence.

Applying *Ashe v. Swenson* to the present case, the Washington Supreme Court held that the trial court's acquittal of Moi on the firearm charge collaterally estopped the State from retrying Moi on the murder charge. The Washington Supreme Court refused to factor in Moi's decision to seek severance of the charges, and submit the murder charge and the firearm charge to separate factfinders. However, Moi's strategic decision to sever the charges should have constitutional significance.

In rejecting the State's argument that Moi's decision to submit the charges to separate factfinders should preclude application of collateral estoppel principles, the Washington Supreme Court concluded, "Moi did nothing wrong by seeking severance." App. 7. However, the question is not whether Moi committed a "wrong" by waiving his right to a jury determination of the firearm charge. Rather, the question is whether Moi can be permitted to prevent the State from presenting related charges to a single factfinder in a single proceeding, and then claim double jeopardy protections when the different factfinders reach different conclusions. In other words, should a defendant be allowed to benefit from double jeopardy protections through application of the collateral estoppel doctrine when it is he, not the State, who has created the need for successive prosecutions?

As explained above, this Court's decisions in *Jeffers* and *Johnson* suggest the answer is no. This Court has recognized the "interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Yeager v. United States*, 557 U.S. 110, 118 (2009) (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)).

The Washington Supreme Court's decision allows Moi to strategically prevent the State from having one complete opportunity to convict Moi of murder under the guise of double jeopardy protections. The State charged the two crimes together in a single charging document and sought to try them together in a single trial before a single factfinder. There has

been no State overreaching. Moi sought severance and obtained the functional equivalent of severance by waiving jury as to one of the charges, resulting in different factfinders reaching different conclusions. Having sought the functional equivalent of separate proceedings for his own benefit, Moi should not be allowed to assert collateral estoppel principles to bar the State from completing its prosecution.

Yeager v. United States, *supra*, does not require the application of collateral estoppel in this case. In *Yeager*, the defendant was indicted for securities fraud, conspiracy, insider trading and money laundering. 557 U.S. at 113-14. In all, there were 165 counts, all of which were tried together in a single proceeding before a single jury. *Id.* at 114. The jury acquitted on some counts, but failed to reach a verdict on other counts, and a mistrial was declared as to those counts. *Id.* at 115. Yeager sought to preclude the government from retrying him on the counts for which the jury had hung, asserting collateral estoppel. *Id.* at 115. This Court relied on *Ashe* in holding that the government should be precluded from relitigating any issue that was necessarily decided by the jury's acquittal in the retrial. *Id.* at 122-23. This Court remanded to the lower court to engage in the fact-intensive analysis of whether the jury necessarily resolved in Yeager's favor an issue of ultimate fact that the government needed to prove to convict him of the remaining counts. *Id.* at 125-26.

Yeager does not answer the question presented here because Yeager did not seek severance, nor did

he make any strategic decisions that increased the chances of inconsistent results. As the Virginia court concluded in *Currier*, *supra*, 65 Va. App. at 613, *Yeager* does not address the question of whether collateral estoppel applies when charges are severed for the defendant's benefit and with his consent. *Id.* Moi's strategic decision to have separate factfinders should preclude the application of collateral estoppel principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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360 P.3d 811
Supreme Court of Washington,
En Banc.

In the Matter of the Personal Restraint
of Mathew Wilson MOI, Petitioner.

No. 89706-9.

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Argued Sept. 8, 2015.

|

Decided Oct. 29, 2015.

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Opinion

GONZÁLEZ, J.

¶ 1 It is a bedrock principle of constitutional law that "[n]o person shall . . . be twice put in jeopardy for the same offense." WASH. CONST. art. I, § 9. In 2006, Mathew Moi was tried for the murder of Keith McGowan and for unlawful possession of the gun that killed McGowan. No physical evidence tied Moi to the gun, and perhaps because of that the jury was unable to reach a verdict on the murder charge. Based on the same evidence, Moi was acquitted of

unlawful possession of the gun. On its second try, the State secured a murder conviction, still arguing that McGowan was killed with the gun Moi was acquitted of possessing. The State concedes that the same issue of ultimate fact was decided in both trials but argues it would be unjust to apply double jeopardy against it because it was surprised by Moi's testimony in the first trial that someone else shot McGowan and because Moi had moved to sever the two charges. Given the State's concession, we grant the personal restraint petition.

FACTS

¶ 2 On October 19, 2004, someone shot and killed McGowan when he went to his front door. Suspicion soon fell on Moi. Based on witness testimony that placed Moi at the scene and an ex-girlfriend's statement that Moi told her he had killed someone that night, Moi was charged with murder. Moi admitted he was there when McGowan was shot but denied being the shooter.

¶ 3 The State's crime lab later determined that McGowan was killed by a gun recovered from a nearby storm drain. No fingerprints or other direct physical evidence linked the gun to Moi, but the State offered testimony that suggested Moi had entrusted the gun to friends who had tossed it into the storm drain.

¶ 4 Moi had prior juvenile convictions for second degree robbery and thus was not permitted to

possess firearms. *See* RCW 9.41.040. Shortly before the first trial, the State added a charge of unlawful possession of a firearm based on the same constellation of facts alleged in the murder charge. Moi moved to sever the two charges to shield the jury in the murder case from the potential prejudicial effect of knowing he had been convicted of second degree robbery as a juvenile. The State opposed severance, arguing that severing the charges "would require the State to present the exact same case a second time." Verbatim Report of Proceedings (VRP) (Oct. 24, 2006) at 236. The State suggested, among other things, that Moi waive his right to a jury trial and have the firearm charge tried to the bench at the same time the murder charge was tried to a jury. Ultimately, the parties agreed to do that.

¶ 5 After 10 days of testimony and 13 hours of deliberation, the first jury was unable to reach a verdict and the judge declared a mistrial. *State v. Moi*, noted at 165 Wash.App. 1006, 2011 WL 6825264, at *1. The trial judge delayed ruling on the unlawful possession charge to allow briefing on the possible double jeopardy implications and to allow the parties to have plea discussions. The parties were unable to reach a plea agreement but agreed the judge should reach judgment on the unlawful possession charge based on the evidence already presented. After asking a few questions, the judge concluded the State had not carried its burden of proof and acquitted Moi of the charge.

¶ 6 Moi was tried again for murder in 2007. The case was assigned to a different judge, who allowed the State to present motive evidence the first judge had excluded. The second jury returned a guilty verdict. Moi's direct appeal, which did not raise a double jeopardy challenge, was unsuccessful. *Id.* Moi, pro se, filed this timely personal restraint petition, arguing that double jeopardy did not allow him to be tried for murder with a gun he had been acquitted of possessing. We granted review and assigned counsel. *In re Pers. Restraint of Moi*, 182 Wash.2d 1015, 344 P.3d 688 (2015).

ANALYSIS

¶ 7 "No person shall . . . be twice put in jeopardy for the same offense." WASH. CONST. art. I, § 9; U.S. CONST. amend. V. Our two constitutions provide the same protection against double jeopardy. *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 815, 100 P.3d 291 (2004) (citing *State v. Gocken*, 127 Wash.2d 95, 100, 896 P.2d 1267 (1995)). We generally review double jeopardy challenges de novo, but as the party asserting collateral estoppel, Moi bears the burden of proof. *State v. Freeman*, 153 Wash.2d 765, 770, 108 P.3d 753 (2005) (citing *State v. Johnston*, 100 Wash.App. 126, 137, 996 P.2d 629 (2000)); *State v. Williams*, 132 Wash.2d 248, 254, 937 P.2d 1052 (1997) (citing *McDaniels v. Carlson*, 108 Wash.2d 299, 303, 738 P.2d 254 (1987)). As this is a personal restraint petition alleging constitutional error, Moi bears the burden of showing actual and substantial prejudice,

which he satisfies if he shows double jeopardy is violated. *In re Pers. Restraint of Orange*, 152 Wash.2d at 804, 822, 100 P.3d 291 (citing *In re Pers. Restraint of Lile*, 100 Wash.2d 224, 225, 668 P.2d 581 (1983)).

¶ 8 Among many other things, "the Double Jeopardy Clause incorporates the doctrine of collateral estoppel." *Dowling v. United States*, 493 U.S. 342, 347, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (citing *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)). Under the collateral estoppel doctrine, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit," including a criminal prosecution. *Ashe*, 397 U.S. at 443, 90 S.Ct. 1189. The *Ashe* case is illustrative. Several masked men had robbed a six-player poker game. *Id.* at 437, 90 S.Ct. 1189. Ashe was initially charged with robbing just one of the players. *Id.* at 438, 90 S.Ct. 1189. After the jury acquitted Ashe of robbing that player, the State charged him with robbing another, "frankly conced[ing] that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution." *Id.* at 439, 447, 90 S.Ct. 1189. The Supreme Court reviewed the evidence presented, concluded that "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers," and held that double jeopardy barred the subsequent prosecution. *Id.* at 445, 90 S.Ct. 1189. The issue of ultimate fact in that case was whether Ashe had robbed the poker game, not which player he had

robbed. *Id.* at 446, 90 S.Ct. 1189 ("[T]he name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers."). Once acquitted, the State could not "constitutionally hale him before a new jury to litigate that issue again." *Id.*

¶ 9 Following *Ashe*, Moi argues that the State was collaterally estopped from prosecuting him for murder in 2007 when the State's theory of the case was that he shot the victim with a gun he was acquitted of possessing in 2006. Pet'r's Suppl. Br. at 11 (citing *Ashe*, 397 U.S. at 446, 90 S.Ct. 1189). Collateral estoppel in Washington has four elements that the party asserting it (here Moi) must establish:

> "(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice."

Williams, 132 Wash.2d at 254, 937 P.2d 1052 (quoting *State v. Cleveland*, 58 Wash.App. 634, 639, 794 P.2d 546 (1990)).[1] Here, the State concedes that Moi has

[1] We stated the elements slightly differently in *State v. Tili*, 148 Wash.2d 350, 361, 60 P.3d 1192 (2003) (citing *Rains v. State*, 100 Wash.2d 660, 665, 674 P.2d 165 (1983)). The parties do not argue that the differences are material to this case.

met the first three elements. Wash. Supreme Court oral argument, *In re Pers. Restraint of Moi*, No. 89706-9 (Sept. 8, 2015), at 15 min., 52 sec. through 17 min., 7 sec.[2] Thus, the only question is whether application of the doctrine will not work an injustice. *Williams,* 132 Wash.2d at 254, 937 P.2d 1052 (quoting *Cleveland*, 58 Wash.App. at 639, 794 P.2d 546).

¶ 10 First, the State argues that applying collateral estoppel would work an injustice because Moi created the situation by moving to sever the murder and unlawful possession charges in his first trial. Suppl. Br. of Resp't at 17-18 (citing *Jeffers v. United States*, 432 U.S. 137, 154, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); *Ohio v. Johnson*, 467 U.S. 493, 502, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984)); Wash. Supreme Court oral argument, *supra*, at approximately 20 min.; VRP (Oct. 24, 2006) at 239, 241. We find this unpersuasive.

¶ 11 Moi did nothing wrong by seeking severance. The probative value of Moi's juvenile criminal history to the murder charge was slight, and its potential prejudicial effect on the jury was great. *See generally State v. Gunderson*, 181 Wash.2d 916, 923, 337 P.3d 1090 (2014); *State v. Smith*, 106 Wash.2d

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[2] Http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2015090006. The State disputed whether the ultimate issues decided were identical in its brief to this court but conceded that element at oral argument. Wash. Supreme Court oral argument, *supra*, at approximately 17 min., 12 sec.; Suppl. Br. of Resp't at 15-16.

772, 779-80, 725 P.2d 951 (1986). Nor did he do anything wrong by acceding to the State's suggestion that he waive his right to a jury on the unlawful possession charge and have it tried to the bench. Neither of the cases the State cites suggest otherwise. In *Jeffers*, the court held that it would not apply the "same evidence" rule from *Blockburger* to cases where the defendant successfully opposes the government's attempt to try charges together. 432 U.S. at 139, 144, 153-54, 97 S.Ct. 2207 (citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). Moi's motion to sever was unsuccessful, and his counsel, as a second best option, acceded to the State's proposal that the unlawful possession charge be tried to the bench. VRP (Oct. 24, 2006) at 242-43. Further, the ultimate question in *Jeffers* was which double jeopardy test applied, not whether it would be inequitable to apply collateral estoppel. *See Jeffers*, 432 U.S. at 139, 144, 97 S.Ct. 2207. In *Johnson,* the defendant was indicted on charges of murder, aggravated robbery, involuntary manslaughter, and grand theft in the killing of and theft from one victim. 467 U.S. at 494-95, 104 S.Ct. 2536. At arraignment, and over the State's objection, Johnson pleaded guilty to the lesser charges and sought to dismiss the greater ones as barred by double jeopardy. *Id.* at 494, 104 S.Ct. 2536. The Supreme Court rejected the argument because the State had not had its "one full and fair opportunity to convict those who have violated its laws." *Id.* at 502, 104 S.Ct. 2536 (citing *Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). While the court might have been

disinclined to reward the defendants' clever pleading in both cases, neither analysis turned on that fact. In both cases, the decision turned on whether a particular double jeopardy analysis applied under the facts.

¶ 12 Second, the State argues that application of the doctrine would work an injustice because Moi himself deprived it of a full and fair opportunity to present its case. Suppl. Br. of Resp't at 19 (citing *Standefer v. United States*, 447 U.S. 10, 22, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980)); *see* VRP (Nov. 15, 2006) at 66, 109. *Standefer* observed that "in a criminal case, the Government is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." 447 U.S. at 22, 100 S.Ct. 1999 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 325, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)). For the first time during his 2006 trial testimony, Moi stopped blaming one unknown man for having shot McGowan and instead testified that someone he knew named Jason[3] had committed the murder. Since, the State contends, it did not know about Jason prior to the first trial, it was deprived of a full and fair opportunity to investigate or rebut Moi's testimony.

¶ 13 But it could not have come as a surprise to the State that Moi was blaming someone else for the shooting. Moi did that from his first conversation with police. The State had ample opportunity to cross-examine Moi on why he did not point his finger at

[3] Moi was uncertain of Jason's last name.

Jason before. While more opportunity to investigate this new suspect would doubtlessly have been helpful to the State, it is a far cry from the situation in *Standefer*, where the question was whether the defendant, the head of Gulf Oil Corporation's tax department, could be convicted of aiding and abetting a United States Internal Revenue Service (IRS) agent in receiving unlawful compensation (in the form of vacations paid for by the corporation) after the IRS agent had been acquitted of wrongdoing. 447 U.S. at 11-12, 100 S.Ct. 1999. The United States Supreme Court declined to extend nonmutual collateral estoppel to the case for many reasons, including "the simple, if discomforting, reality that 'different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.'" *Standefer*, 447 U.S. at 25, 100 S.Ct. 1999 (quoting *Roth v. United States*, 354 U.S. 476, 492 n. 30, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)). But while juries may reach different results, we are faced here with the fact that Moi was acquitted in 2006 of possessing the gun that killed McGowan. We do not find the State's argument that Moi deprived it of a full and fair opportunity to prosecute him persuasive.

¶ 14 Here, the parties did have a full criminal trial where, at the suggestion of the State, the trial judge decided one of the charges. In *Thompson v. Department of Licensing*, we observed that "our case law on this injustice element is most firmly rooted in procedural unfairness." 138 Wash.2d 783, 795, 982 P.2d 601 (1999). "'Washington courts look to whether

the parties to the earlier proceeding received a full and fair hearing on the issue in question.'" *Id.* at 795-96, 982 P.2d 601 (quoting *In re Marriage of Murphy*, 90 Wash.App. 488, 498, 952 P.2d 624 (1998)). Given this full trial; given the fact that in essence, the State was able to treat its first unsuccessful 2006 prosecution as a "dry run" for its successful 2007 prosecution, *contra Ashe*, 397 U.S. at 447, 90 S.Ct. 1189; and given the State's concession that the same issue of ultimate fact was decided in both trials, we find application of collateral estoppel does not work an injustice.

¶ 15 Our decision is bolstered by a recent Pennsylvania Supreme Court opinion that found collateral estoppel barred retrial in a factually similar situation. *See Commonwealth v. States*, 595 Pa. 453, 938 A.2d 1016 (2007). There, the defendant, Lawrence States, was the only survivor of a single car accident that killed two people. *Id.* at 456, 938 A.2d 1016. States was charged with several crimes related to driving under the influence, driving without a license, and causing the deaths. *Id.* Two of the charges were for "Accidents Involving Death or Personal Injury While Not Properly Licensed." *Id.* Like Moi, States moved to sever the latter charges since they would expose the jury to a prejudicial fact: in States's case, the fact he did not have a valid license at the time of the accident. *Id.* As happened here, the parties agreed to try that charge to the bench simultaneously to a jury trial on the remaining charges. *Id.* After the jury deadlocked, the trial court acquitted States of Accidents Involving Death or Personal

Injury While Not Properly Licensed on the grounds that it was not convinced beyond a reasonable doubt that States was the driver of the vehicle – a fact critical to all of the charges States faced. *Id.* at 457, 938 A.2d 1016. The Pennsylvania Supreme Court found the State was collaterally estopped from retrying States on the remaining charges. *Id.* at 456, 938 A.2d 1016.

¶ 16 Also bolstering our conclusion is a recent Ninth Circuit opinion, *Wilkinson v. Gingrich*, 800 F.3d 1062 (9th Cir.2015).[4] Wilkinson had been charged

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[4] The relevant collateral estoppel test used in Pennsylvania and the Ninth Circuit differs from our own. Those courts engage in the following inquires:

> "1) an identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine;
>
> "2) an examination of the record of the prior case to decide whether the issue was 'litigated' in the first case; and
>
> "3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case."

States, 595 Pa. at 460, 938 A.2d 1016 (quoting *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988)). This test is more favorable to the defendant, as it does not require the court to consider whether application of the doctrine will work an injustice. *See Williams*, 132 Wash.2d at 254, 937 P.2d 1052. Since the parties do not address the differences between the two tests, this case does not give us an apt opportunity to explore them. However, we are not unmindful that should we find for the State, Moi might well be entitled to habeas relief under this test. *See Wilkinson*, 800 F.3d 1062; *see also Crace v. Herzog*, 798

(Continued on following page)

with speeding. *Id.* at 1064-65. He was acquitted after testifying that he was not the driver. *Id.* at 1064-66. While there was no transcript of the trial, it appears Wilkinson inculpated an English cousin with a name similar to his own. *Id.* at 1065-67. After an investigation, the State of California successfully charged Wilkinson with perjury for falsely testifying in his speeding trial. *Id.* at 1065-66. Applying the same collateral estoppel test as the Pennsylvania court, the Ninth Circuit invalidated Wilkinson's perjury conviction. *Id.* at 1067-68. The Ninth Circuit found that "[t]he issue in the first case (whether Wilkinson was the driver) and the issue in the second case (whether Wilkinson was telling the truth when he denied being the driver) are both 'sufficiently similar' and 'sufficiently material' for collateral estoppel and the Double Jeopardy Clause to apply." *Id.* at 1068-69. "A factfinder's determination that the government failed to carry its burden on an issue in the first proceeding has preclusive effect in a subsequent proceeding raising that same issue, provided that both proceedings are governed by the same standard of proof." *Id.* at 1069-70 (citing *Charles v. Hickman*, 228 F.3d 981, 985-86 (9th Cir.2000)). In Pennsylvania and California, as here, the State had its full and fair opportunity to present its case. It did not prevail. Double jeopardy prevents it from placing the defendant in

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F.3d 840, 843, 846 (9th Cir.2015) (disapproving of *In re Personal Restraint of Crace*, 174 Wash.2d 835, 847, 280 P.3d 1102 (2012) and *State v. Grier*, 171 Wash.2d 17, 246 P.3d 1260 (2011)).

jeopardy again. Moi has met his burden of showing actual and substantial prejudice following from this constitutional error.[5]

CONCLUSION

¶ 17 We grant the personal restraint petition and remand to the trial court for further proceedings consistent with this opinion.

WE CONCUR: MADSEN, Chief Justice, JOHNSON, OWENS, FAIRHURST, STEPHENS, WIGGINS, GORDON McCLOUD, YU, Justices.

[5] Since Moi has prevailed on this issue, we do not address the remaining grounds raised in his personal restraint petition.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

IN THE MATTER OF THE PERSONAL RESTRAINT OF: MATTHEW WILSON MOI, Petitioner.	No. 70180-1-I ORDER DISMISSING PERSONAL RESTRAINT PETITIONER

Matthew Moi filed a personal restraint petition challenging his conviction by a jury of first degree murder in King County Superior Court Cause No. 04-1-08866-2 KNT. Moi raises several claims of error: (1) that his right to a public trial was violated when the trial court questioned an empaneled juror in private; (2) that he was denied notice of the charges against him because the State did not file a new charging document after his first trial ended in a mistrial; (3) that the evidence was insufficient to sustain his conviction; (4) that he was subjected to double jeopardy; (5) that the prosecutor committed misconduct; (6) that trial counsel was ineffective; and (7) that appellate counsel was ineffective. To prevail on a personal restraint petition, the petitioner bears the burden of demonstrating either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that inherently results in a "complete miscarriage of justice." *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Because Moi fails to meet this burden, his petition is dismissed.

In 2004, the State charged Moi with one count of first degree murder while armed with a firearm and first degree unlawful possession of a firearm for the shooting death of Keith McGowan. In 2006, the murder charge proceeded to a jury trial but Moi stipulated to a bench trial on the firearm charge. The jury was unable to reach a verdict on the murder charge and a mistrial was declared. The trial court acquitted Moi of the firearm charge, concluding that the State failed to prove beyond a reasonable doubt that Moi was the shooter in the murder. In 2007, Moi was retried and convicted of the murder charge.

1. Courtroom Closure

During the retrial, Juror 8 sent a note to the trial court requesting to be relieved from jury duty due to a financial hardship. Out of the presence of the jury, the trial court notified the parties of Juror 8's concern, and stated that he was disinclined to grant her request. The trial court stated, "I do want to talk to her and just let her know, again, why we can't do this. I think it would be better to do it outside the presence of everyone else. Do you guys want to be here when I do that or should I just talk to her at break?" Defense counsel agreed with the trial court's suggestion. During the lunch break, the trial court spoke with Juror 8. After the parties returned to the courtroom but before the jury entered, the trial court stated, "And just before you leave, let me tell you that I did talk to Juror No. 8, and I did tell her that we were

sympathetic but there was really nothing we could do."[1]

Moi contends that the trial court's discussion with Juror 8 outside the presence of the parties without a *Bone-Club*[2] hearing constituted a violation of his right to a public trial and the public's right to open court records, constituting structural error requiring reversal of his convictions. The right of a criminal defendant to a public trial is guaranteed by both the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution. Additionally, article 1, section 10 of the Washington Constitution guarantees the public's open access to judicial proceedings. The court may close a portion of a trial to the public only if the court openly engages in the five-part balancing test stated in *Bone-Club*.[3] "[U]nless the trial court considers the *Bone-Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial [on direct

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[1] Juror 8 was later excused due to illness and did not deliberate.

[2] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995)

[3] The five factors are: (1) the proponent of closure must make a showing of compelling need, (2) any person present when the motion is made must be given an opportunity to object, (3) the means of curtailing open access must be the least restrictive means available for protecting the threatened interests, (4) the court must weigh the competing interests of the public and of the closure, and (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wn.2d at 258-59.

appeal]." *State v. Wise*, 176 Wn.2d 1, 14, 288 P.3d 1113 (2012). A closure of a trial "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

Here, Moi does not demonstrate that there was a closure triggering the requirements of *Bone-Club*. From the record it appears as though the trial court's intention was to speak with Juror 8 in the courtroom during the lunch break. The parties agreed that they did not wish to be present, but nothing in the record indicates that the courtroom was closed or the public was excluded during the trial court's discussion with Juror 8. Without an affirmative showing that the courtroom was closed, Moi cannot obtain relief on a public trial violation claim in a personal restraint petition.

2. Failure to File New Charging Document

Moi claims that he was denied his right to a fair trial when the State did not file a new charging document after his first trial ended in a mistrial. Citing *State v. Corrado*, 78 Wn. App. 612, 898 P.2d 860 (1995), *abrogated on other grounds by State v. Franks*, 105 Wn. App. 950, 22 P.3d 269 (2001), he claims that this error divested the trial court of subject matter jurisdiction. In *Corrado*, the State moved to dismiss the charges without prejudice when a material witness could not be located, but later re-arraigned the defendant without filing a new

charging document. Because the dismissal terminated the proceedings against the defendant, the trial court had no subject matter jurisdiction until a new charging document was filed. But a mistrial does not terminate the proceedings such that filing of a new charging document is necessary. Rather, the effect of a mistrial is to return the defendant to the same position he was in before the trial. *State v. Mayovsky*, 25 Wn. App. 155, 157, 605 P.2d 793 (1980). Because Moi does not cite to any authority supporting his claim that a mistrial divests a trial court of subject matter jurisdiction absent the filing of a new charging document, his claim fails.

Moi further claims that the State's failure to file a new charging document denied him the opportunity to be informed of the charges against him because the State changed its theory of the case following the mistrial to emphasize the victim's gang affiliation. But the purpose of the charging document is to notify the defendant of the charges against him, not outline the State's theory of the case. *See*, *e.g.*, *State y. Hennessy*, 114 Wn. 351, 358, 195 P. 211 (1921). Moreover, the certification of probable cause attached to the charging document fully outlined the State's theory that Moi killed McGowan because McGowan was a member of the Hoover Crips gang and Moi believed that his mother and best friend had been targeted for violence by the gang.

3. Sufficiency of the Evidence/Double Jeopardy/ Collateral Estoppel

Moi argues that the State's evidence was insufficient to support a conviction for first degree murder with a firearm enhancement because the trial court had previously acquitted him of the charge of first degree unlawful possession of a firearm. In other words, argues Moi, he cannot be found guilty of shooting McGowan when he had already been found not guilty of possessing the murder weapon. But "[w]here the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count."[4] *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988). Moi does not argue that the State did not carry this burden of proof in his second trial. As a result, sufficient evidence supported the verdict.

In a related argument, Moi argues that he was subjected to double jeopardy when the State charged him with first degree murder with a firearm enhancement after the trial court acquitted him on the

[4] Though Moi appears to claim that the jury's finding that he was armed with a firearm was inconsistent with the trial court's acquittal, the Washington Supreme Court has held that it is "no less problematic to second-guess the jury when a general verdict conflicts with a special verdict than when two general verdicts conflict." *State v. McNeal*, 145 Wn.2d 352, 359, 37 P.3d 280 (2002).

separate firearm charge. The double jeopardy clauses of the United States and Washington Constitutions prohibit multiple punishments for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9; *State v. Parmelee*, 108 Wn. App. 702, 708, 710, 32 P.3d 1029 (2001). But if the legislature has clearly authorized cumulative punishments for the same conduct in a single proceeding, double jeopardy is not violated. *State v. Kelley*, 168 Wn.2d 72, 77, 226 P.3d 773 (2010). Washington courts have repeatedly held that the imposition of firearm enhancements do not violate double jeopardy based on clear legislative intent. *State v. Nguyen*, 134 Wn. App. 863, 866-68, 142 P.3d 1117 (2006) (holding the legislative intent in adopting the firearm enhancement statute and in mandating additional punishment for the use of a firearm is "unmistakable.") The fact that both the crime of unlawful possession of a firearm and the firearm enhancement to the murder charge required the State to prove that Moi possessed a firearm does not make the two offenses the same, and double jeopardy was not violated.

Finally, Moi argues that the State should have been collaterally estopped from arguing that he committed the murder with a firearm when the trial court previously entered findings of fact that the State failed to prove the firearm charge beyond a reasonable doubt. Collateral estoppel applies in criminal cases if the following criteria are met: (1) the issue in the prior adjudication must be identical to the issue currently presented for review; (2) the prior

adjudication must be a final judgment on the merits; (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. *State v. Harrison*, 148 Wn.2d 550, 561, bi P.-id 1104 (2003). "Collateral estoppel, however, does not bar the later use of evidence merely because it relates to alleged criminal conduct for which a defendant has previously been acquitted." *State v. McPhee*, 156 Wn. App. 44, 57, 230 P.3d 284 (2010) (citing *State v. Eggleston*, 164 Wn.2d 61, 71, 187 P.3d 233 (2008)). As a result, the State was not barred from arguing in the second trial that Moi was armed with a firearm.

4. Prosecutorial Misconduct

Moi claims that the deputy prosecutor committed misconduct in closing argument by improperly vouching for the credibility of the State's witnesses and casting doubts on Moi's credibility. To prevail on a claim of prosecutorial misconduct, Moi must show both improper conduct and prejudicial effect. *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 717 (2000). Where, as here, the defendant failed to object, move for mistrial, or request a curative instruction, review is only appropriate if the prosecutorial misconduct is "so flagrant and ill intentioned" that no curative instruction could have obviated the prejudice engendered by the misconduct. *State v. Emery*, 174 Wn.2d 742, 761-62, 278 P.3d 653 (2012).

It is misconduct for a deputy prosecutor to express a personal opinion about a witness's credibility. *State v. Reed*, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984). But "there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case." *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Here, the deputy prosecutor did not express a personal opinion that the State's witnesses were telling the truth and Moi was not. Rather, the deputy prosecutor instructed the jury that, in determining whether a witness was credible, they should analyze whether that witness's statements were consistent with those of other witnesses or whether the witness appeared to have a difficult time remembering his version of events. The closing argument made by the State was not improper.

5. Ineffective Assistance of Counsel

Moi contends that trial counsel was ineffective for: (1) failing to "demand the nature of the charges the State was required to refile against Mr. Moi," (2) failing to object to the State's closing argument; and (3) failing to introduce evidence of Moi's acquittal of the possession charge. To establish ineffective assistance, Moi must show that trial counsel's performance was deficient and that prejudice resulted from the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Counsel's performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Moi also bears the burden of rebutting the strong presumption that counsel's representation was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Moi does not demonstrate that trial counsel's performance was deficient. As discussed above, the State was not required to file a new charging document after the mistrial, the State's closing argument did not constitute misconduct, and the State was not collaterally estopped from introducing evidence to support the firearm enhancement in the retrial. As a result, it was reasonable, for trial counsel not to object on these grounds. Because trial counsel's performance was not deficient, there is no need to analyze whether Moi was prejudiced.

Moi further claims that appellate counsel was ineffective for failing to raise on direct appeal the issues he raises in this petition. Because none of the issues raised by Moi have merit, appellate counsel was not ineffective for failing to raise them on direct appeal.

In his reply brief, Moi raised additional claims for the first time, including: (1) that the trial court

erred in admitting gang evidence to establish motive; (2) that the trial court violated the Code of Judicial Conduct in meeting with Juror 8; and (3) that trial counsel was ineffective for failing to object to the trial court's meeting with Juror 8 and failing to seek a bill of particulars.[5] The State moved to strike these claims. This court will not consider claims raised for the first time in a reply brief. *In re Pers. Restraint of Peterson*, 99 Wn. App. 673, 681, 995 P.2d 83 (2000). Thus, these claims were not considered.

Because Moi has not demonstrated that he is entitled to relief by means of a personal restraint petition, now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 5th day of December, 2011.

/s/ [Illegible]
Acting Chief Judge

[5] Moi also appears to argue in his reply that the State was obligated to file a new charging document following the mistrial because the State added a gang aggravator under RCW 9.94A.535(3)(aa) (providing that an exceptional sentence may be imposed if "the defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang . . . "). But a review of Moi's judgment and sentence shows that Moi received a standard range sentence plus 60 months for the firearm enhancement; Moi's sentence was not aggravated under RCW 9.94A.535(3)(aa).