

FILED
Court of Appeals
Division II
State of Washington
4/4/2019 11:13 AM
No. 51741-8-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE PERSONAL RESTRAINT PETITION OF:

LIA Y. TRICOMO,

Petitioner.

SUPPLEMENTAL REPLY BRIEF

Judgment in Thurston County Superior Court No. 13-1-00655-7
The Hon. Gary Tabor, Presiding

NEIL M. FOX
Attorney for Petitioner
WSBA No. 15277
2125 Western Ave. Suite 330
Seattle WA 98121

Phone: (206) 728-5440
Fax: (866) 422-0542
Email: nf@neilfoxlaw.com

TABLE OF CONTENTS

	<u>Page</u>
A. <u>ARGUMENT IN REPLY</u>	1
1. <i>Allowing an Amendment in this Case Does Not Interfere with the Finality of Judgments But Rather Furthers the Right of Access to the Courts</i>	1
2. <i>Ms. Tricomo’s Trial Counsel Was Ineffective.</i>	9
B. <u>CONCLUSION</u>	25

Appendices

Appendix A (documents from <i>In re Davis</i>)	1-10
Appendix B (documents from <i>In re Fero</i>)	11-15
Statutory Appendix	16-24
Exhibit 23 (Supplemental Report of Dr. Saint Martin).	25-27
Certificate of Service	28

TABLE OF CASES

Page

Washington Cases

<i>Davis v. Cox</i> , 183 Wn.2d 269, 351 P.3d 862 (2015)	5
<i>Fellows v. Moynihan</i> , 175 Wn.2d 641, 285 P.3d 864 (2012).....	6
<i>In re Pers. Restraint of Addleman</i> , 139 Wn.2d 751, 991 P.2d 1123 (2000)	5
<i>In re Pers. Restraint of Brett</i> , 142 Wn.2d 868,16 P.3d 601 (2001)	17
<i>In re Pers. Restraint of Brown</i> , 143 Wn.2d 431, 21 P.3d 687 (2001)	18,19
<i>In re Pers. Restraint of Davis</i> , 188 Wn.2d 356, 395 P.3d 998 (2017)	1,2,3,4,17
<i>In re Pers. Restraint of Fero</i> , 192 Wn. App. 138, 367 P.3d 588 (2016), <i>aff'd</i> 190 Wn.2d 1, 409 P.3d 214 (2018)	10,11,12
<i>In re Personal Restraint of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1996)	18
<i>In re Pers. Restraint of Runyan</i> , 121 Wn.2d 432, 853 P.2d 424 (1993)...	4
<i>In re Pers. Restraint of Wilson</i> , 169 Wn. App. 379, 279 P.3d 990 (2012)	7
<i>In re Personal Restraint of Yates</i> , 177 Wn.2d 1, 296 P.3d 872 (2013)	18,20
<i>John Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991)	5

<i>Lowy v. PeaceHealth</i> , 174 Wn.2d 769, 280 P.3d 1078 (2012)	5
<i>Persinger v. Rhay</i> , 52 Wn.2d 762, 329 P.2d 191 (1958)	4
<i>Putman v. Wenatchee Valley Medical Center</i> , 166 Wn.2d 974, 216 P.3d 374 (2009)	5
<i>Schroeder v. Weighall</i> , 179 Wn.2d 566, 316 P.3d 482 (2014)	5
<i>State v. Drath</i> , __ Wn.App.2d ___, 431 P.3d 1098 (2018)	25
<i>State v. Gregory</i> , 192 Wn.2d 1, 427 P.3d 621 (2018)	2,18,20
<i>State v. Harper</i> , 64 Wn. App. 283, 823 P.2d 1137 (1992)	11,12
<i>State v. Robinson</i> , 153 Wn.2d 689, 107 P.3d 90 (2005)	6
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	18
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	17
<i>State v. Williams</i> , 149 Wn.2d 143, 65 P.3d 1214 (2003)	23

Federal Cases

<i>Brady v Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)	8
<i>Brown v. Ornoski</i> , 503 F.3d 1006 (9th Cir. 2007)	18,19
<i>Browning v. Baker</i> , 875 F.3d 444 (9th Cir. 2017)	8
<i>Caro v. Calderon</i> , 165 F.3d 1223 (9th Cir. 1999)	18
<i>Christopher v. Harbury</i> , 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)	5

<i>Glover v. United States</i> , 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001)	25
<i>Hirabayashi v. United States</i> , 828 F.2d 591 (9th Cir. 1987)	4
<i>Littlejohn v. Trammell</i> , 704 F.3d 817 (10 th Cir. 2013), <i>after remand</i> <i>sub nom. Littlejohn v. Royal</i> , 875 F.3d 548 (10th Cir. 2017)	14,15,16,18
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).	5
<i>Martinez v. Ryan</i> , 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)	6,7
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)	7,8,9,18,25
<i>Trevino v. Thaler</i> , 569 U.S. 413,133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013).	7
<i>Turner v. Calderon</i> , 281 F.3d 851 (9th Cir. 2002)	18,19
<i>United States v. Kubrick</i> , 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979)	2
<i>United States v. Tucker</i> , 404 U.S. 443, 92 S. Ct. 589, 30 L.Ed.2d 592 (1972)	4
<i>West v. Ryan</i> , 608 F.3d 477 (9th Cir. 2010)	18,19
<i>Statutes, Constitutional Provisions, Rules and Other Authority</i>	
28 U.S.C. § 2244(d)	4
Laws of 1989, ch.395, § 1.	4
RAP 13.5(a)	10
RAP 18.8(b)	11

RCW 4.16.190(2)	5
RCW 9.94A.585(1).....	23,24
RCW 10.73.090	2,3,4,5,6,9,11
RCW 10.73.100	11
U.S. Const. amend. I.....	4
U.S. Const. amend. V	4
U.S. Const. amend. VI	7,8,25
U.S. Const. amend. XIV	4,25
U.S. Const. Article IV, § 2, cl. 1.....	5
Wash. Const. art. I, § 3	5
Wash. Const. art. I, § 4	5
Wash. Const. art. I, § 5	5
Wash. Const. art. I, § 10	5
Wash. Const. art. I, § 12	5
Wash. Const. art. I, § 13	2
Wash. Const. art. I, § 22	7,8,25
Wash. Const. art. IV, § 4.....	2
Wash. Const. art. IV, § 6.....	2

A. ARGUMENT IN REPLY

1. *Allowing an Amendment in this Case Does Not Interfere with the Finality of Judgments But Rather Furthers the Right of Access to the Courts*

The State wants to deny Ms. Tricomo access even to the halls of justice because when she filed a timely *pro se* PRP she did not use the correct words in her pleading. Ms. Tricomo – a prisoner with documented mental health issues – alleged in her *pro se* PRP that her original lawyer (Mr. Patrick O’Connor) was ineffective during the plea stage of the case and that the trial judge improperly did not consider the effect of Paxil when sentencing her. Now, with counsel, Ms. Tricomo raises a more detailed claim, arguing that Mr. O’Connor was ineffective for not consulting a qualified expert who could have explained the role of Paxil on her behavior when she killed the man who abused his position of trust and preyed on her. Because the claims are inter-related and the State was on notice that Ms. Tricomo was collaterally attacking her convictions, the Court should reject the State’s narrow procedural arguments.

The State’s arguments rest primarily on decisions that came out before the Supreme Court’s most recent construction of RCW 10.73.090 in *In re Pers. Restraint of Davis*, 188 Wn.2d 356, 395 P.3d 998 (2017),

abrogated on other grounds in State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). In *Davis*, our Supreme Court clarified that when the Legislature adopted RCW 10.73.090, the statute did not create a mandatory rule that bars consideration of PRPs filed after the one-year time limit, but rather the statute must be viewed through the lens of the inherent power of courts to consider habeas corpus challenges.¹ RCW 10.73.090 was “designed to protect the finality of judgments while permitting consideration of many potentially meritorious collateral challenges.” *Davis*, 188 Wn.2d at 362 n.2.

If the purpose of RCW 10.73.090 is to provide the State some degree of “repose” based on the finality of judgments,² the question is whether barring an amendment of Ms. Tricomo’s *pro se* petition in any way violates what feelings the State may have had that the original judgment was final given the nature of Ms. Tricomo’s timely *pro se* PRP. Notably, in *Davis*, the Court considered Mr. Davis’ arguments on their merits even though *none* of them were actually raised prior to the one-year time limit. Although prior to

¹ Const. art. I, § 13; art. IV, §§ 4, 6.

² Statutes of limitations “are statutes of repose” that “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979). The State raises no such concerns in its response.

the one-year anniversary of the issuance of the mandate, Mr. Davis filed a motion to extend the deadline set out in RCW 10.73.090, not only did the Court not actually grant such a motion before the one year lapsed, but Davis filed nothing substantive before the one-year anniversary. In other words, although the State was on notice that Mr. Davis was likely going to file a PRP of *some* nature, raising *some* issue, Davis actually filed no arguments at all by the one-year deadline. One year after the issuance of the mandate, the State was really in the dark as to the precise nature of the challenges Davis claimed he would make in the future.³ Nonetheless, the Court still addressed the merits of the late-filed arguments.

In contrast, Ms. Tricomo at least filed a handwritten *pro se* PRP before the one-year limit lapsed, a PRP in which she raised a Sixth Amendment issue about the effectiveness of her lawyer and issues about Paxil. At this point, the State was certainly on notice that Ms. Tricomo was contesting both her lawyer's performance and the trial judge's failure to take into account the role of Paxil. The State can hardly claim surprise that, when Ms. Tricomo obtained counsel, Ms. Tricomo would then raise a more calibrated claim of ineffective assistance of counsel and a more focused

³ Portions of the State's briefing and appendices in *Davis* that recount this history are attached in Appendix A.

inquiry into the role that Paxil should have played at sentencing. The State had more notice of Ms. Tricomo's claims in this case than the State had of Mr. Davis' claims which were never filed before the one year lapsed.

The principles behind *Davis* – recognizing the finality of judgments but attempting to address a prisoner's arguments on the merits rather than dismissing them on technical procedural grounds – are not unique. It should be kept in mind that RCW 10.73.090 is of relatively recent vintage. Prior to the adoption of this statute in 1989⁴ and its federal counterpart in 1996,⁵ it was not uncommon for post-conviction petitions to be filed years, if not decades, after convictions.⁶ RCW 10.73.090's time limits, while previously held to be constitutional,⁷ need to be measured against the historic right of access to the courts, grounded in the First Amendment, the Fifth Amendment's and/or the Fourteenth Amendment's Due Process and Equal

⁴ Laws of 1989, ch.395, § 1.

⁵ 28 U.S.C. § 2244(d).

⁶ See, e.g., *United States v. Tucker*, 404 U.S. 443, 444-45 & n.2, 92 S. Ct. 589, 30 L.Ed.2d 592 (1972) (noting collateral attacks on convictions that were filed 20 to 30 years after convictions); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (*coram nobis* writ granted 40 years after conviction); *Persinger v. Rhay*, 52 Wn.2d 762, 329 P.2d 191 (1958) (writ granted in 1958 for conviction from 1953).

⁷ See *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 853 P.2d 424 (1993).

Protection Clauses, Article IV, § 2, cl. 1's Privileges and Immunities Clause and article I, sections 3, 4, 5, 10 and 12 of the Washington Constitution.⁸

As the Supreme Court recounted:

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803). The people have a right of access to courts; indeed, it is “the bedrock foundation upon which rest all the people’s rights and obligations.” *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

Putman v. Wenatchee Valley Medical Center, 166 Wn.2d 974, 979, 216 P.3d 374 (2009).

RCW 10.73.090’s effect is to cut off access to the courts by a specific population that is more in need of judicial protection than most people.⁹ The statute should therefore be viewed with great suspicion and applied sparingly.

⁸ See *Christopher v. Harbury*, 536 U.S. 403, 415 n.12, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002); *Davis v. Cox*, 183 Wn.2d 269, 289-91, 351 P.3d 862 (2015); *Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012); *In re Pers. Restraint of Addleman*, 139 Wn.2d 751, 753-54, 991 P.2d 1123 (2000).

⁹ Only a few years ago, the Supreme Court struck down as a violation of article I, section 12, a special statute of limitation in medical malpractice cases (RCW 4.16.190(2)) that had the potential of burdening a particularly vulnerable minority (children). See *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014).

Moreover, as with any statute in derogation of common law, RCW 10.73.090 should be strictly construed.¹⁰

On the other hand, Washington State routinely denies appointment of counsel to all prisoners on post-conviction cases. Unfortunately, our system requires people with mental health and literacy problems to file post-conviction claims *pro se* before a court will screen the filings for “merit” to see if counsel should be assigned.¹¹ Thus, to deny the amendment in this case essentially gives the State a windfall in a one-sided battle against a powerless individual. While this case obviously does not squarely fall within the rubric of *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), addressing exhaustion of claims and federal habeas petitions, the reasoning of that decision is persuasive:

[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

¹⁰ See *Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012) (“Statutes that create privileges restricting discovery are in derogation of the common law and the policy favoring discovery, and so must be strictly construed.”).

¹¹ See *State v. Robinson*, 153 Wn.2d 689, 107 P.3d 90 (2005).

Martinez, 566 U.S. at 17.¹² Here, given Ms. Tricomo’s *pro se* status (and her undisputed mental health issues), this Court should not apply a technical procedural bar to prevent consideration of a substantial claim of ineffective assistance of counsel simply because Ms. Tricomo lacked counsel at the time she filed the petition.

In any case, while perhaps Ms. Tricomo’s *pro se* petition did not use precise language, she did raise a claim regarding Paxil and sentencing, and the current argument is but just another approach to that same argument.¹³ She also raised a claim that she was denied effective assistance of counsel under the Sixth Amendment and article I, section 22. When determining whether the Sixth Amendment’s right to counsel has been violated, it is important to look at the entire scope of representation. “While an individual claiming IAC ‘must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,’ *Strickland*

¹² See also *Trevino v. Thaler*, 569 U.S. 413, 429, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013) (applying *Martinez* in cases where the “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.”).

¹³ In her motion to file an amended petition, Ms. Tricomo cited to *In re Pers. Restraint of Wilson*, 169 Wn. App. 379, 387, 279 P.3d 990 (2012), where the court held that an ineffectiveness argument raised after the time limit passed was not a new claim, but was part and parcel of a claim regarding jury instructions. The State does not mention or try to distinguish this case.

[*v. Washington*], 466 U.S. [668,] at 690 [104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)], the court considers counsel’s conduct *as a whole* to determine whether it was constitutionally adequate.” *Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017) (emphasis in original). As with claims under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), IAC claims need to be evaluated cumulatively, rather than just on a one-by-one basis. *See Browning*, 875 F.3d at 471 (“The district court distorted this inquiry by separating Browning’s IAC argument into individual ‘claims’ of IAC corresponding to particular instances of Pike’s conduct.”).

Thus, the issues raised by Ms. Tricomo – that Mr. O’Connor was ineffective – require looking at whether his conduct *as a whole* was constitutionally adequate. One must look at the sum total of counsel’s conduct during both the plea negotiation phase of the case and sentencing – both are wrapped up in the mantle of effective representation under the Sixth Amendment and article I, section 22. Thus, Ms. Tricomo’s *pro se* petition’s focus on the plea portion of the case is not mutually exclusive to Mr. O’Connor’s ineffectiveness in a later phase of the case.

Mr. O’Connor was ineffective when he failed to obtain the services of a psychiatrist to evaluate the role of Paxil in this case – at both the plea and

sentencing phases -- but Ms. Tricomo is only alleging *Strickland* prejudice for this claim arising out the sentencing phase. In other words, Mr. O'Connor's failure to investigate the medical causes of Ms. Tricomo's diminished capacity, while falling below an objective standard of reasonableness, may not have caused Ms. Tricomo prejudice during the plea phase, was prejudicial at sentencing.

Accordingly, Ms. Tricomo's *pro se* claims sufficiently put the State on notice that she was challenging both Mr. O'Connor's representation and the role of Paxil on her behavior as a sentencing issue. There is no reason to apply RCW 10.73.090 in the strained and unjust manner proffered by the State, in a manner that would violate the aforementioned constitutional rights. *See supra* pp. 4-5. The Court should grant the motion to amend the timely filed *pro se* PRP and consider both Ms. Tricomo's *pro se* issues and the issues now raised with counsel.

2. Ms. Tricomo's Trial Counsel Was Ineffective

The State does not provide any expert of its own to challenge Dr. Saint Martin's conclusions about the medical effect of Paxil on Ms. Tricomo's behavior. Notably, the State does not provide a declaration from Dr. Delton Young or from Dr. David Dixon regarding their qualifications to

render opinions about medical matters. The State simply argues that, given Dr. Saint Martin’s report, the Court should deny relief outright or remand for a reference hearing. While Ms. Tricomo does not oppose a reference hearing, the Court should reject the State’s argument to dismiss the petition.

In *In re Pers. Restraint of Fero*, 192 Wn. App. 138, 367 P.3d 588 (2016), *aff’d* 190 Wn.2d 1, 409 P.3d 214 (2018),¹⁴ this Court granted relief

¹⁴ In *Fero*, this Court granted relief without a reference hearing based upon newly discovered scientific evidence regarding the “shaken baby syndrome.” The State (arguably belatedly) sought discretionary review in the Supreme Court, but the Supreme Court issued a splintered opinion, with no clear majority on key issues.

Justice Madsen, joined by Justice Wiggins, concluded the State’s motion for discretionary review was not timely and did not reach the merits. *Fero*, 190 Wn.2d at 25-28. Justice González, joined by Justices Yu, Johnson and Owens, concluded that the motion for discretionary review was timely, and substantively rejected Ms. Fero’s arguments about newly discovered evidence. *Fero*, 190 Wn.2d at 3-23. Justice McCloud, joined by Justice Fairhurst, concluded that the defendant presented sufficient newly discovered evidence to obtain a reference hearing, and also concluded that the State’s motion for discretionary review was not timely but still should be considered. *Fero*, 190 Wn.2d at 28-50. Justice Stephens wrote separately to join in Justice González’s opinion regarding the timeliness of the State’s motion, but then joined in Justice McCloud’s opinion to remand the case for a reference hearing. *Fero*, 190 Wn.2d at 25.

This split led Justice Yu to observe, “Unfortunately, this court is unable to come to a holding on this important issue and instead allows an erroneous Court of Appeals decision reversing Fero’s conviction to stand.” *Fero*, 190 Wn.2d at 24 (Yu, J., concurring in part). In other words, this Court’s decision granting Ms. Fero’s PRP is what has precedential value, not the multiple conflicting Supreme Court opinions. In fact, when the State sought appellate costs in *Fero*, the Supreme Court Commissioner ruled that the State was not the prevailing party, and the Supreme Court denied the State’s motion to modify. *See* App. B.

As an aside, Justice McCloud concluded that even though the State’s motion for discretionary review was untimely, because “the State did not realize” the 30-day requirement under RAP 13.5(a), the Court could excuse the missed deadline because such misunderstanding qualified as “extraordinary circumstances and to prevent a

(continued...)

where newly discovered medical evidence showed a “paradigm shift” regarding head injuries in young children. *Fero* was not an ineffective assistance of counsel case, but rather revolved around issues connected to the interaction between the time limit of RCW 10.73.090 and the exception in RCW 10.73.100 for newly discovered evidence. Nonetheless, *Fero* is instructive because the case demonstrates how new experts, with different expertise, can review medical evidence through a different lens, and come to radically different conclusions that justify a court granting post-conviction relief. In Ms. Tricomo’s case, Dr. Saint Martin’s expertise as a medical doctor and psychiatrist led him to different conclusions than the two psychologists relied on by the State and Mr. O’Connor. The “paradigm” that shifted here was to look at the physical effects of a prescribed medication, Paxil, on someone who already had violent proclivities.

This is not a case where the defendant simply hires a new expert to review the same evidence, as in some of the cases relied upon by the State. *See Supp. Response* at 5-6 (citing *State v. Harper*, 64 Wn.App. 283, 293-294, 823 P.2d 1137 (1992)). In *Harper*, this Court held that defense counsel’s

¹⁴ (...continued)
gross miscarriage of justice” under RAP 18.8(b). *Fero*, 190 Wn.2d at 29 n.13 (McCloud J., opinion). Ms. Tricomo should get no less consideration even though the State now claims she missed a deadline.

failure to consult additional experts until he found one that supported his theory “did not fall below the objective standard of reasonableness.” *Id.* at 290. As this Court noted in *Fero*, “The *Harper* court held that the new expert’s opinion did not constitute the requisite ‘material facts not previously presented’ standard because the expert reviewed the same evidence and merely presented a new opinion.” *Fero*, 192 Wn. App. at 165.¹⁵

There was no issue in *Harper* that the first expert lacked sufficient qualifications to render his opinion. *Harper*, 64 Wn. App. at 290 (“Dr. Marra, the expert obtained by Harper’s original counsel and retained by trial counsel, was qualified to evaluate Harper and render an opinion.”). In contrast, there is new evidence that has surfaced of Mr. O’Connor’s ineffectiveness for not retaining a qualified expert to examine the effect of Paxil on Ms. Tricomo’s behavior.

¹⁵ In this case, Dr. Saint Martin in fact had access to evidence that neither Dr. Dixon nor Dr. Young had access to. For instance, both psychologists lacked access to Dhyana Fernandez’s social history that was prepared on the eve of sentencing. CP 152 (dated 1/21/15). The two psychologists completed their reports by August 2014, prior to the guilty plea. CP 60-96. Dr. Saint Martin also had the benefit of the psychiatric evidence from the Department of Corrections – evidence that showed that the psychiatrist employed by DOC to treat Ms. Tricomo advised her not to use Paxil because of the violence had the potential of causing. Ex. 15 at pp. 150-54. This opinion not only confirms Dr. Saint Martin’s own conclusions, but it is the type of evidence that was obviously not available earlier.

Dr. Dixon may be an excellent psychologist who was qualified to render opinions about diminished capacity – what he was retained to do, as the State recognizes.¹⁶ But the issue was not necessarily “diminished capacity.” Rather, the issue is whether there were *medical* and *physical* factors that caused “diminished moral culpability” such that, had they been brought out prior to sentencing, it was reasonably probable that the trial judge would have imposed a lesser sentence.

Here, it is clear that Dr. Dixon did not possess the qualifications to examine the effect of medications on Ms. Tricomo’s behavior. As Dr. Saint Martin states in his latest declaration:

The deleterious side effects of antidepressant medication were not addressed from a medical standpoint by the psychologists because they lacked the expertise to do so. Psychiatry and psychology are not interchangeable disciplines. When a mental illness involves brain physiology and neurochemistry such as schizophrenia, bipolar disorder and major depression, the psychiatrist is the appropriate expert to diagnose the condition, treat it and render opinions regarding the patient's behavior and how it can be altered by medication. Psychologists, on the other hand, have no training in neuroanatomy, neurophysiology and specifically, pharmacology, which is a branch of medicine dealing with the biochemical interactions of medications and the various body systems. The psychologist’s expertise is how individuals

¹⁶ See *Supp. Resp.* at 12 (“Dr. Dixon is extraordinarily qualified to testify regarding diminished capacity, the subject that he was strategically retained to provide information regarding.”).

behave divorced from the underlying neuronal mechanisms responsible for that behavior, and how that behavior can be altered through psychotherapy.

Dr. Dixon's credentials of teaching a psychopharmacology course does not make him an expert in brain physiology and psychoactive medications. When a psychologist assists in teaching a psychopharmacology course in a medical institution, they typically do that with a medical doctor. The psychologist's role is limited to explaining the behavior. The medical doctor instructs students in how medications affect the brain structures and neuronal pathways responsible for that behavior. Thus, a psychologist's participation in a psychopharmacology course generally is confined to explaining psychology and not brain neurobiology and neurophysiology the effects of medications. Furthermore, Dr. Dixon's teaching was at Seattle Pacific University, which is not a medical university. The fact that Dr. Dixon stated in his report that he could not separate the effects of alcohol from paroxetine (Paxil) is further evidence of his lack of expertise in neurophysiology because any psychiatrist could have done so.

Ex. 23 (attached).

Interestingly, the history of one of the main cases relied on by the State, *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013), *after remand sub nom. Littlejohn v. Royal*, 875 F.3d 548 (10th Cir. 2017), supports Ms. Tricomo's position rather than the State's. In this Tenth Circuit capital case, the defense presented mitigation evidence developed by a psychologist, Dr. Wanda Draper, who had a "PhD in development," "a masters of science in child development," and had "done post-doctoral work in genetic

epistemology.” *Littlejohn v. Trammell*, 704 F.3d at 861. Dr. Draper testified about issues in Mr. Littlejohn’s development as a child, including her opinions as to how Littlejohn’s mother’s narcotic use during pregnancy would have impacted him. *Id.* Later, new counsel retained a psychiatrist (Dr. Saint Martin) who opined that Littlejohn’s mother’s drug use during pregnancy would have caused organic brain deficits “in the microscopic structure and neuro-chemical function of the brain that did not merely [involve] sociological or psychological considerations.” *Id.* at 862 (internal quotations omitted).

The Tenth Circuit held that the failure to consult with a proper expert who could have testified about the neurological factors underlying Mr. Littlejohn’s behavior constituted deficient performance:

Dr. Draper did testify regarding the “very significant intrusion,” . . . on fetal development that could have been caused by the drug abuse of Mr. Littlejohn’s mother. This testimony suggested the possibility that Mr. Littlejohn suffered physical brain damage—a possibility that we have noted *supra* that reasonably competent counsel would have investigated. And her testimony bears slight superficial resemblance to some of Dr. Saint Martin’s declaration averments regarding the implications for Mr. Littlejohn of the substance abuse of his mother. However, it is critical to note that Dr. Draper did not offer any opinion regarding whether Mr. Littlejohn in fact suffered pre-natal brain injuries and, indeed, she would not have been equipped to do so. *Dr. Draper was not a psychiatrist—like Dr. Saint Martin—or any*

other type of physician, for that matter. Therefore, she could not offer the jury any reliable and persuasive evidence on the question of whether Mr. Littlejohn suffered from an organic brain injury that could adversely affect his behavior. . . .

. . .

Dr. Draper simply was not equipped by professional training or experience to offer testimony of the kind reflected in Dr. Saint Martin's declaration. As for performance . . . counsel could not reasonably have concluded that Dr. Saint Martin's testimony would be cumulative of Dr. Draper's. Dr. Draper could not have offered expert testimony regarding whether Mr. Littlejohn's deviant behavior was rooted in physiological deficits of his brain (that is, organic brain damage). In other words, Dr. Draper could not have testified regarding a subject that is well-recognized to have powerful mitigative effect, whereas Dr. Saint Martin's declaration makes patent that he was professionally qualified to speak to this subject.

Littlejohn v. Trammell, 704 F.3d at 866-66 & n.25 (emphasis added).

To be sure, after an evidentiary hearing, the district court rejected Dr. Saint Martin's conclusions as a basis for granting relief and the Tenth Circuit upheld this ruling. *Littlejohn v. Royal, supra*. But this history merely shows the necessity of remanding this case for a reference hearing. The *Littlejohn* case history actually confirms the conclusion that a psychologist is not qualified to render opinions about medical matters, which in this case involves the effect of medication on someone's behavior.

The State criticizes Ms. Tricomo's reliance on *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), arguing that the reports of both Dr. Dixon and mitigation investigator Dhyana Fernandez were offered at sentencing. *Supp. Response* at 16. However, the parallel with *Thomas* is that Dr. Dixon never addressed the medical effects of Paxil on Ms. Tricomo's behavior (mistakenly thinking the issue was withdrawal from the medication), and it was only Ms. Fernandez, a mitigation investigator with no medical training, who provided information to the sentencing judge about the link between Paxil and violent behavior. CP 56-57. As in *Thomas*, the trial judge ruled at the sentencing hearing that he was not going to consider that section of Ms. Fernandez's report because of her lack of expertise on the subject. RP (1/28/15) 39. Thus, when the trial judge imposed the high end of the standard range on someone who killed her abuser, the judge lacked information from a qualified expert on a key subject. *Thomas* is on point.

The State also criticizes Ms. Tricomo's brief for relying on death penalty cases:

Tricomo does not offer a single Washington case where a defense attorney's choice of expert during a sentencing hearing, which was not involving the death penalty, was deemed to be deficient performance. *In re Davis*, 188 Wn.2d 356, 395 P.3d 998 (2017), *In re Brett*, 142 Wn.2d 868, 16

P.3d 606 (2001), and *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) were all death penalty cases.

Supp. Response at 15. It is not clear what the point is of this argument. Notably, the State itself relies on capital cases throughout its brief.¹⁷ In any event, capital cases are properly cited because of their focus on sentencing phase ineffectiveness – it was not just the failure to develop psychiatric evidence on issues related to diminished capacity that was ineffective but rather it was ineffective not to obtain a qualified expert to educate the judge about the mitigating role of Paxil at sentencing. Capital cases are therefore appropriately cited.

One capital case that the State relies on is *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 21 P.3d 687 (2001), *abrogated on other grounds in State v. Gregory, supra*, which the State explains as “rejecting a claim of ineffective assistance of counsel during penalty phase of a trial based on hiring a clinical psychologist to testify regarding effect of lithium.” *Supp. Response* at 12. However, Mr. Brown did not actually provide the expert

¹⁷ *Supp. Response* at 7 (citing *Strickland v. Washington, supra, State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997)), *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1996)); *Supp. Response* at 12 (citing *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 21 P.3d 687 (2001)); *Supp. Response* at 14 (citing *In re Personal Restraint of Yates*, 177 Wn.2d 1, 296 P.3d 872 (2013), *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002)); *Supp. Response* at 15 (citing *West v. Ryan*, 608 F.3d 477 (9th Cir. 2010), *Brown v. Ornoski*, 503 F.3d 1006 (9th Cir. 2007)); *Supp. Response* at 20 (citing *Littlejohn v. Royal, supra*)).

opinion of a psychiatrist to show that the psychologist’s testimony was at trial was wrong – Brown simply argued that the credibility of his psychologist witness could have been *bolstered* if the Supreme Court had approved funding for a psychiatrist on collateral review.¹⁸ In contrast, here, not only has Ms. Tricomo provided a psychiatrist’s declaration (which Mr. Brown did not do), but the declaration does not corroborate Dr. Dixon’s report – it criticizes it as being without foundation and expertise, which is a very different point. *Brown* is of limited utility.¹⁹

¹⁸ See *Brown*, 143 Wn.2d at 450 & 456 (“Petitioner cannot establish how additional corroborating testimony would have changed the result of the penalty phase of his trial.” & “At best the testimony of the psychiatrist would have served only to corroborate the testimony of Dr. Maiuro, the psychologist who testified for Petitioner in the penalty phase.”).

¹⁹ Similarly, the capital case, *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002), cited by the State, also involves the alleged failure of defense counsel to hire a medical expert to help *corroborate* the psychologist’s testimony about the effect of PCP. *Id.* at 876 (“The gravamen of Turner’s complaint is not that Dr. Hamm failed to testify about the likely effects of P.C.P. on Turner, but that because he was a general psychologist and not an expert on P.C.P. specifically, a more specialized expert would have been more persuasive.”).

As for the other federal capital cases relied on by the State, they are distinguishable. *West v. Ryan*, 608 F.3d 477 (9th Cir. 2010), involved a tactical decision to use a substance abuse expert where the neuropsychologist who was retained by the defense did not find any cognitive impairment. *Id.* at 486-90. The State cites *Brown v. Ornoski*, 503 F.3d 1006 (9th Cir. 2007), for this proposition: “no showing that neuropsychologist over a psychiatrist would have made a difference.” *Supp. Response* at 15. In fact, that case does not stand for the cited proposition – the defense argued that trial counsel was ineffective for not conducting an adequate background investigation and had “this additional information . . . been presented to a competently trained neuropsychologist (as opposed to a psychiatrist), such an expert could have presented a more compelling case to the jury.” *Id.* at 1013. The case centered not on the choice of

(continued...)

Similarly, another capital case relied on by the State, *In re Personal Restraint of Yates*, 177 Wn.2d 1, 296 P.3d 872 (2013), *abrogated on other grounds in State v. Gregory, supra*, also is distinguishable. The State cites *Yates* for the following proposition: “rejecting a claim of ineffective assistance of counsel that included three new experts stating, in light of the investigation by trial counsel, defendant could not overcome the strong presumption of effective assistance.” *Supp. Response* at 14. However, in *Yates*, defense counsel at trial actually had hired experts of the same type as were hired on collateral review – neuropsychologists and psychiatrists. *Yates*, 177 Wn.2d at 37-38. As the Supreme Court made clear in *Yates*, “*This is not a case in which trial counsel failed to investigate a category of mitigating evidence. . . or failed to take even basic steps to investigate Nor was the expert appointed too late to provide meaningful benefit to the case.*” *Id.* at 39 (emphasis added). In contrast, in Ms. Tricomo’s case, Mr. O’Connor failed to hire the appropriate expert to address an entire category of mitigating evidence – an expert regarding the effect of Paxil on behavior – and instead proffered the report of a non-qualified mitigation investigator on the subject.

¹⁹ (. . .continued)
experts but on the adequacy of the investigation.

The State then concentrates on evidence that Ms. Tricomo was violent before she was prescribed Paxil. *Supp. Response* at 17-19. But Ms. Tricomo's prior assaultive acts and aggression are precisely the reason why Paxil was particularly risky for her. As Dr. Saint Martin initially explained, "[i]n Mr. Tricomo's case, it is medically probable that using paroxetine *accentuated* her impulsive and violent behavior. PRP Ex. 1 at 4 (emphasis added). Dr. Saint Martin expands on this in his new declaration:

The State mis-characterizes Ms. Tricomo's prior suicidal and assaultive behavior, which was a manifestation of her bipolar illness and not goal-directed criminal behavior. The State's interpretation of her violent behavior (most of which was self-directed) removes it from its proper context -- her psychiatric illness. Ms. Tricomo's mental disorder is the cause of her violent behavior. About half of the individuals with have childhood histories of bipolar disorder report a history of emotional abuse, child physical or sexual abuse. These factors are present in Ms. Tricomo's history. Additionally, individuals who have bipolar disorder respond to psychological stress by manifesting agitation and impulsive behavior that typically leads to violence. Their aggression and violence is unplanned and spontaneous in response to perceived threats or stressful situations. Their violence is not premeditated as the State contends. Since bipolar disorder is a cyclical and relapsing condition, it is expected that Ms. Tricomo would have prior instances of agitation, impulsivity and violence directed at herself or others. . . .

. . .

Paxil aggravated Ms. Tricomo's agitation and impulsivity in a manner that cannot be explained by her concurrent ingestion

of alcohol or explained by her prior history of violence. The fact that Ms. Tricomo had a history of violent behavior, most of which was self-directed and complained of violent thoughts, should have been a warning sign to the psychiatrist that antidepressants could escalate the behaviors.

Ex. 23.

This is not a case where Ms. Tricomo had never committed any violent act in the past and was prescribed Paxil, which then changed her behavior. Rather, this is case where Ms. Tricomo's mental illness already had caused her to engage in impulsive acts of violence (often self-directed), and the Paxil therefore accentuated her violent behavior when she was sexually abused by her former therapist. The existence of a history of violence meant that Ms. Tricomo's care providers should have used more care to monitor Ms. Tricomo's behavior after being prescribed the medication. Thus, Ms. Tricomo's prior history of violence is actually mitigating, not aggravating.

The State also argues that information about Paxil was already before the sentencing court and thus "Dr. Saint Martin's report would have added very little to the sentencing hearing and would not have affected the result." *Supp. Response* at 20. This conclusion ignores the fact that the trial judge first struck from the record Ms. Fernandez's information about the effect of

Paxil on behavior, and then concluded that Ms. Tricomo's mental health issues were "self-created." RP (1/28/15) 93. Yet, being prescribed a medication by a doctor after a suicide attempt that accentuates violent behavior is not a "self-created" mental health condition and a psychiatrist could have explained this concept to the judge. As for the information about Paxil in the reports from Dr. Young and Dr. Dixon, neither of them looked at the effect of Paxil as a medical cause of violence, with Dr. Dixon mistakenly looking at whether *withdrawal* from Paxil would have an impact on diminished capacity, CP 78, and Dr. Young concluding only "[i]t is possible that the medication generated aversive side effects (e.g., feeling 'nothing'). CP 94.

The State next argues "the length of a criminal sentence imposed by a superior court is not subject to appellate review," as long as the sentence is within the standard range." *Supp. Response* at 22 (citing *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003); RCW 9.94A.585(1)). In *Williams*, the Court actually upheld the State's right to appeal, not the setting of a sentence within the standard range, but the legal issue of the legality of giving retroactive effect to amendments to the DOSA statute's eligibility requirements. *Williams*, 149 Wn.2d at 147. Similarly, here, Ms. Tricomo is

not appealing the decision to give her the high end of the standard range. Rather, she is raising a separate issue, not in a direct appeal, but in a PRP – ineffective assistance of counsel for not retaining a psychiatrist to render an opinion about the medical effects of a prescribed drug on behavior. RCW 9.94A.585(1) is not a bar to consideration of this issue.

According to the State, the trial judge acknowledged that “[t]here are issues about taking anti-depressant drugs, Paxil, and this may somehow have affected your view of life.” RP (1/28/15) 93 (quoted at *Supp. Response* at 23).²⁰ The issue, though, is not whether Paxil affected Ms. Tricomo’s “view of life.” The issue is whether there was a medical explanation for why Ms. Tricomo ended up killing her abuser and whether there was a reasonable probability that such an explanation that, if explained by a qualified expert,

²⁰ The trial judge made this statement shortly after he acknowledged that Ms. Tricomo had “mental issues,” although he believed some of those were “self-created,” mentioning Ms. Tricomo’s alcohol abuse as an example. RP (1/28/15) 93. There is very little similarity between someone’s alcohol abuse and a drug prescribed at a hospital to someone who just tried to commit suicide. Putting aside issues about whether someone suffering from alcoholism is in fact in control of their actions, certainly the decision to take a prescribed medication after a suicide attempt does not fall into the category of some “life choice.” In fact, given Ms. Tricomo’s history of involuntary commitments, if Ms. Tricomo had refused to take the prescribed medications, there is a good chance she would have been committed civilly. Her decision to take a prescribed medication, that turned out to cause her to act violently against someone who was sexually abusing her, should not be placed in the same category as a “choice” to drink alcohol.

would have led the trial judge to impose even one day less in prison than the top end of the standard range.

Even such minimal impact on a judge's sentencing decision has Sixth Amendment significance.²¹ Unless the trial judge's mind was already made up to punish Ms. Tricomo without regard to the evidence, certainly had Mr. O'Connor presented medical evidence about how Paxil impacted Ms. Tricomo's behavior, the *Strickland* standard can be met. Ms. Tricomo's right to effective assistance of counsel under the Sixth and Fourteenth Amendments and article I, section 22, was violated.

B. CONCLUSION

The Court should grant the motion to amend, remand for a reference hearing and grant relief.

DATED this 4th day of April 2019.

Respectfully submitted,

s/ Neil M. Fox

WSBA No. 15277

Attorney for Petitioner

²¹ See *Glover v. United States*, 531 U.S. 198, 203, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001) ("Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance."). Accord: *State v. Drath*, ___ Wn.App.2d ___, 431 P.3d 1098, 1105 (2018) (citing *Glover* with approval).

APPENDIX A

NO. 89590-2

**SUPREME COURT OF THE
STATE OF WASHINGTON**

**IN RE THE PERSONAL RESTRAINT PETITION
OF
CECIL DAVIS**

**Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming**

No. 97-1-00432-4

RESPONSE TO PERSONAL RESTRAINT PETITION

**MARK LINDQUIST
Prosecuting Attorney**

**By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811**

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION.

1. Should this court dismiss the untimely petition in its entirety as it is, at best, a mixed petition?
2. Should petitioner's ineffective assistance of counsel claims be dismissed when they are not supported by competent evidence?

B. STATEMENT OF THE CASE.

Petitioner Cecil Davis was found guilty of aggravated murder in the first degree, and a jury returned a verdict for death. *See, State v. Davis*, 175 Wn.2d 287, 300, 290 P.3d 43 (2012). On direct appeal this Court upheld his conviction and sentence, but Davis later received collateral relief and was given a new sentencing hearing. *Id.* The second penalty phase jury also returned a verdict for death. *Id.* Davis again appealed and his sentence was affirmed on direct review. *Id.* The mandate on this direct review issued on October 11, 2013. *See Appendix A.*

By order of this Court dated November 26, 2013, petitioner was appointed counsel and the due date for the filing of the petition was set for 180 days later. Appendix A. Petitioner's counsel sought a stay of execution. Respondent did not object to the stay, but asked that the court

include a termination date for the stay of October 12, 2014, if defendant had not filed a timely petition by October 11, 2014. On December 12, this Court granted the stay of execution, but included an automatic termination clause as requested by respondent. Appendix B

On September 5, 2014, petitioner's counsel filed a motion for extension of deadlines, seeking a six month extension of time for filing Davis's personal restraint petition, until approximately April 11, 2015. Shortly after filing this request, petitioner's counsel called counsel for respondent to ask whether there would be an objection to the request for extension. *See* Appendix C. Respondent's counsel indicated that as petitioner was seeking an extension beyond the one year statute of limitation and the court did not have the ability to extend that time limit, she could not agree with the requested extension. *Id.* On September 26, 2014, respondent filed an objection to the motion for extension of time with the court, again laying out its concern that the court did not have the authority to extend the statute of limitations found in RCW 10.73.090. Appendix E. On September 29, 2015, the Supreme Court Clerk noted receipt of the objection, but placed it in the file without action. The court indicated that its order did not address "the tolling or waiver of any statute of limitations, nor did it address any provisions of RCW 10.73" Appendix D. The Clerk indicated that its grant of the requested extension was

without prejudice to the respondent to re-raise any argument contained in the objection if it was warranted after reviewing the personal restraint petition. *Id.*

On April 13, 2015, petitioner filed his personal restraint petition raising three issues: 1) whether the recent decision in *Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) expands the scope of evidence that a trial court must allow when a defendant, who has received a death verdict, asserts an intellectual disability that would preclude imposition of a death sentence; 2) whether a defendant's intellectual disability is a fact question that must be determined by a jury; and 3) whether Davis received ineffective assistance of trial counsel because his attorney a) did not explore Davis's drug usage within the year prior to the murder and its impact, in combination with his diabetes, on Davis's mental state, and b) did not take steps to ensure the small amount of relevant evidence that could be testified to by Davis's aunts was presented in an admissible manner. Petitioner's claims that the petition was timely filed will be addressed below.

D. CONCLUSION.

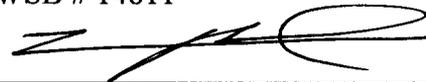
Under this court's jurisprudence, the court may not waive compliance with RCW 10.73.090 through RAP 18.8. Petitioner has filed an untimely petition, which is at best a mixed petition that must be summarily dismissed. Petitioner has failed to show that *any* of the issues raised in his untimely petition fall within an exception to the statutory time bar, much less that *all* of them do. Additionally, petitioner's ineffective assistance of counsel claim is unsupported by competent evidence and should be dismissed on that basis as well.

DATED: August 12, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811



JASON RUYF
Deputy Prosecuting Attorney
WSB #38725

Certificate of Service:

The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/12/15 Therese
Date Signature

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT
PETITION OF:

NO. 89590-2

DECLARATION OF KATHLEEN
PROCTOR

CECIL E. DAVIS,

Petitioner.

I, Kathleen Proctor, declare under penalty of perjury under the laws of the State of Washington, the following is true and correct:

1. I am the supervising attorney for the Appellate Unit of the Pierce County Prosecutor's Office. I am one of the two attorneys assigned to handle the response in the above captioned case.

2. On September 5, 2014, our office received the petitioner's motion for extension of deadlines which sought a six month extension to file the personal restraint petition in the above case. I would have reviewed this document within a few days of its receipt. When I did review it, I recall being concerned that Mr. Davis's attorneys appeared

1 to be anticipating filing his petition after the one year statute of limitations in RCW
2 10.73.090 would expire.

3 A few days after that, I received a call from one of his attorneys, Paula Olsen; she
4 asked if I would be objecting to their request for an extension of time. I stated that there
5 was a statute of limitations problem and that the court could not extend the deadline for
6 filing a timely petition beyond the one year mark. I directed counsel's attention to RCW
7 10.73.090 and indicated that I could not agree with their request. This phone conversation
8 occurred while there was still a little less than one month left in which to file a timely
9 petition.
10

11 3. After a few days, when I did not see any indication that opposing counsel was
12 going to withdraw their request for an extension, I prepared a written objection to their
13 motion and filed it with the court on September 26, 2014. The Court had ruled on the
14 motion the day before, but I had not seen the court's order prior to my filing the objection.

15 4. At no time did I make any representations to opposing counsel that compliance
16 with RCW 10.73.090 was optional or discretionary. For example, when the petitioner
17 sought a stay of execution back in December of 2013, I did not object, but requested that
18 any order of stay terminate automatically if petitioner did not file a timely petition. The
19 court's order included this termination clause. All of my actions in this case have been
20
21
22
23
24
25

1 consistent with the intention to assert procedural defenses for any non-compliance with the
2 statutory time bar.

3 Dated: August 12, 2015.

4 Signed at Tacoma, WA.

5 
6 KATHLEEN PROCTOR

7 Certificate of Service:
8 The undersigned certifies that on this day she delivered by U.S. mail
9 and or ABC-LMI delivery to the attorney of record for the appellant and
10 appellant c/o his attorney true and correct copies of the document to which
11 this certificate is attached. This statement is certified to be true and correct
12 under penalty of perjury of the laws of the State of Washington. Signed at
13 Tacoma, Washington, on the date below.

10 Date Signature _____

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

to file

THE SUPREME COURT
STATE OF WASHINGTON

RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY



TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov
Appellate Division
COPY RECEIVED

September 29, 2014

LETTER SENT BY E-MAIL ONLY

SEP 29 2014

PIERCE COUNTY
PROSECUTING ATTORNEY

Roger A. Hunko
Attorney at Law
926 Sidney Avenue
Port Orchard, WA 98366-4222

Mark Evans Lindquist
Kathleen Proctor
Pierce County Prosecutor's Office
930 Tacoma Avenue S., Room 946
Tacoma, WA 98402-2102

Paula Tuckfield Olson
Law Office of Paula T. Olson
1008 S. Yakima Avenue, Suite 100
Tacoma, WA 98405

Re: Supreme Court No. 89590-2 - In re the Personal Restraint Petition of Cecil E. Davis

Counsel:

The Respondent's "OBJECTION TO MOTION FOR EXTENSION OF TIME TO FILE PERSONAL RESTRAINT PETITION" (objection) was received and filed on September 26, 2014. The objection has been placed in the file without further action because this Court on September 25, 2014, entered an order granting the motion for extension of time.

I note that this Court's order dated September 25, 2014, only addressed the modification of the schedule for filing of the personal restraint petition and extension of the previously entered stay. The order did not address, nor did it purport to address, the tolling or waiver of any statute of limitations, nor did it address any of the provisions of RCW 10.73. Therefore, the determination not to take further action on the Respondent's objection at this time is without prejudice to the Respondent raising any of the arguments contained in the objection in the Respondent response to the yet to be filed personal restraint petition, if after reviewing the personal restraint petition, the Respondent believes such is warranted.

Sincerely,

Ronald R. Carpenter
Supreme Court Clerk

RRC:mt



APPENDIX B

03

FILED
MAR 13 2018
WASHINGTON STATE
SUPREME COURT

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of:

Heidi Charlene Fero,

Respondent,

**CLERK'S RULING
ON COSTS**

Supreme Court
No. 92975-1

Court of Appeals
No. 46310-5-II

Clark County Superior
Court No. 02-1-01117-9

The Court filed an opinion in this case on February 1, 2018. The State filed a cost bill on February 12, 2018, which requested an award of \$422.00 for costs. On February 21, 2018, counsel for Respondent Heidi Charlene Fero filed an "OBJECTION TO COST BILL", which argues that Fero, not the State, is the prevailing party in this matter. On February 27, 2018, the State filed "PETITIONER'S RESPONSE TO RESPONDENT'S OBJECTION TO COST BILL." On March 2, 2018, Respondent Fero filed her "MOTION TO STRIKE PETITIONER'S RESPONSE TO RESPONDENT'S OBJECTION TO COST BILL."

Fero's motion to strike argues that the State's response to the objection to the cost bill should be stricken because the Rules of Appellate Procedure do not allow a party to respond to an objection to a cost bill. Although the rules do not specifically allow for the filing of a response, in the circumstances of this case, I find it was appropriate for the State to have an

opportunity to address Fero's argument that the State was not the prevailing party. Therefore, the motion to strike is denied. Of note, the motion to strike includes a reply to the State's response. Such a reply is also not specifically allowed by the rules but I have also considered it in making this ruling.

RAP 14.2 provides that the clerk "will award costs to the party that substantially prevails on review..." In this case, the Court of Appeals decision granted Fero's personal restraint petition and remanded the case for a new trial. Upon review of that decision, the Supreme Court filed an opinion that included a lead opinion authored by Justice González and signed by Justices Johnson, Owens and Yu. The lead opinion found that the State's motion for discretionary review was timely filed and that Fero's personal restraint petition should be dismissed. Justice Yu also filed a separate opinion that concurred with the lead opinion and disagreed with the dissent by Justice Gordon McCloud. Justice Stephens filed an opinion that concurred with the lead opinion's determination that the State's motion for discretionary review was timely, but as to the merits of the petition, joined Justice Gordon McCloud's dissenting opinion. Justice Madsen's dissent found the State's motion for discretionary review was untimely and therefore did not address the other issues raised in the case. Justice Wiggins signed Justice Madsen's dissent. Justice Gordon McCloud's dissenting opinion concluded that the Court of Appeals decision should be reversed and the case remanded to the superior court for a reference hearing. Chief Justice Fairhurst signed Justice Gordon McCloud's opinion.

The State's cost bill contains no argument about which party substantially prevailed. The objection filed by Fero argues that the State was not the prevailing party because a majority of the justices did not agree on the disposition of the petition. The State's response to Fero's objection argues that two justices, Justice Madsen and Justice Wiggins, abstained from deciding

the main issue in the case and therefore the lead opinion signed by four justices was the majority opinion, having captured four out of the seven votes on the main issue.

The State's contention that only seven justices participated in deciding this case and therefore four would be a majority is simply without merit. Clearly, all nine justices heard the oral argument on this case and all nine justices participated in deciding the case. Therefore, five votes are required for a majority opinion.

After review of the opinions, I come to the same conclusion as Fero. Four justices held that the Court of Appeals should be reversed and the personal restraint petition dismissed, but there were not five votes for this decision. As referenced in Justice Yu's concurrence on page 3, because there was not a majority that voted to reverse the Court of Appeals, the Court of Appeals opinion reversing Fero's conviction stands. (In my view, the State's attempt to argue that Justice Yu meant something different in her comment on page 3 is a stretch at best.) Therefore, I find that the State was not the substantially prevailing party in this case and the request for costs is denied.

A person aggrieved by this ruling may file a motion to modify the ruling within 30 days of the date of this ruling. See RAP 17.7.

Dated at Olympia, Washington, this 13th day of March, 2018.



SUSAN L. CARLSON
Clerk of the Supreme Court
State of Washington

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of:)	No. 92975-1
)	
HEIDI CHARLENE FERRO,)	ORDER
)	
Respondent.)	Court of Appeals
)	No. 46310-5-II
_____)	

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered this matter at its May 1, 2018, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the State's motion to modify the Clerk's ruling on costs is denied.

DATED at Olympia, Washington, this 2nd day of May, 2018.

For the Court



CHIEF JUSTICE

STATUTORY APPENDIX

28 U.S.C. § 2244(d) provides:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.’

RAP 13.5(a) provides:

(a) How To Seek Review. A party seeking review by the Supreme Court of an interlocutory decision of the Court of Appeals must file a motion for discretionary

review in the Supreme Court and a copy in the Court of Appeals within 30 days after the decision is filed.

RAP 18.8(b) provides:

(b) Restriction on Extension of Time. The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

RCW 4.16.190(2) provides:

(2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350.

RCW 9.94A.585(1) provides:

(1) A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed. For purposes of this section, a sentence imposed on a first-time offender under RCW 9.94A.650 shall also be deemed to be within the standard sentence range for the offense and shall not be appealed.

RCW 10.73.090 provides:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more

than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.100 provides:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in 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; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Article IV, § 2, cl. 1 provides:

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Wash. Const. art. I, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 4, provides:

The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

Wash. Const. art. I, § 5, provides:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Wash. Const. art. I, § 10, provides:

Justice in all cases shall be administered openly, and without unnecessary delay

Wash. Const. art. I, § 12, provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. I, § 13, provides:

The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety requires it.

Wash. Const. art. 1, § 22 (Amendment 10) provides in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him,

to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases

Wash. Const. art. IV, § 4, provides:

The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars (\$200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

Wash. Const. art. IV, § 6, provides:

Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars

or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days

MANUEL SAINT MARTIN, M.D., J.D. NEUROBEHAVIORAL MEDICINE AND LAW



DIPLOMATE, AMERICAN BOARD OF
PSYCHIATRY AND NEUROLOGY

8616 La Tijera Blvd., Suite 400
Los Angeles CA 90045
Voice: (310) 641-7311
Fax: (310) 641-2501

115-10 Queens Blvd.
Forest Hills, NY 11375
Voice: (310) 641-7311
Fax: (310) 641-2501

Correspondence:
PO Box 882228
Los Angeles CA 90009
Email: manuel.saintmartin@gmail.com

April 4, 2019

Neil M. Fox,
Attorney at Law
Law Office of Neil Fox, PLLC
2125 Western Ave. Suite 330
Seattle WA 98121

PSYCHIATRIC SUPPLEMENTAL REPORT:

State of Washington v Lia Yera Tricomo
Case No.: 13-1-00655-7

Dear Mr. Fox;

I reviewed the state's brief contending that psychiatric expertise was not required. The State mis-characterizes Ms. Tricomo's prior suicidal and assaultive behavior, which was a manifestation of her bipolar illness and not goal-directed criminal behavior. The State's interpretation of her violent behavior (most of which was self-directed) removes it from its proper context—her psychiatric illness. Ms. Tricomo's mental disorder is the cause of her violent behavior. About half of the individuals with have childhood histories of bipolar disorder report a history of emotional abuse, child physical or sexual abuse. These factors are present in Ms. Tricomo's history. Additionally, individuals who have bipolar disorder respond to psychological stress by manifesting agitation and impulsive behavior that typically leads to violence. Their aggression and violence is unplanned and spontaneous in response to perceived threats or stressful situations. Their violence is not premeditated as the State contends. Since bipolar disorder is a cyclical and relapsing condition, it is expected that Ms. Tricomo would have prior instances of agitation, impulsivity and violence directed at herself or others.

My medical opinion, which is based on all the information available and knowledge of the side effects of antidepressants gained from actually treating patients, the scientific literature and two decades of teaching psychiatry is that Paxil contributed to Ms Tricomo's violent behavior leading to Mr. Alkin's death and the role of the medication was not adequately considered by the psychologists who evaluated her in connection with her trial. Paxil aggravated Ms. Tricomo's agitation and impulsivity in a manner that cannot be explained by her concurrent ingestion of al-



cohol or explained by her prior history of violence. The fact that Ms. Tricomo had a history of violent behavior, most of which was self-directed and complained of violent thoughts, should have been a warning sign to the psychiatrist that antidepressants could escalate the behaviors.

The deleterious side effects of antidepressant medication were not addressed from a medical standpoint by the psychologists because they lacked the expertise to do so. Psychiatry and psychology are not interchangeable disciplines. When a mental illness involves brain physiology and neurochemistry such as schizophrenia, bipolar disorder and major depression, the psychiatrist is the appropriate expert to diagnose the condition, treat it and render opinions regarding the patient's behavior and how it can be altered by medication. Psychologists, on the other hand, have no training in neuroanatomy, neurophysiology and specifically, pharmacology, which is a branch of medicine dealing with the biochemical interactions of medications and the various body systems. The psychologist's expertise is how individuals behave divorced from the underlying neuronal mechanisms responsible for that behavior, and how that behavior can be altered through psychotherapy.

Dr. Dixon's credentials of teaching a psychopharmacology course does not make him an expert in brain physiology and psychoactive medications. When a psychologist assists in teaching a psychopharmacology course in a medical institution, they typically do that with a medical doctor. The psychologist's role is limited to explaining the behavior. The medical doctor instructs students in how medications affect the brain structures and neuronal pathways responsible for that behavior. Thus, a psychologist's participation in a psychopharmacology course generally is confined to explaining psychology and not brain neurobiology and neurophysiology the effects of medications. Furthermore, Dr. Dixon's teaching was at Seattle Pacific University, which is not a medical university. The fact that Dr. Dixon stated in his report that he could not separate the effects of alcohol from paroxetine (Paxil) is further evidence of his lack of expertise in neurophysiology because any psychiatrist could have done so.

"I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct."

 MD, JD

Dated this 4th day of April 2019, at Los Angeles, California"

LAW OFFICE OF NEIL FOX PLLC

April 04, 2019 - 11:13 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51741-8
Appellate Court Case Title: In re the Personal Restraint Petition of Lia Yera Tricomo
Superior Court Case Number: 13-1-00655-7

The following documents have been uploaded:

- 517418_Briefs_20190404111155D2303074_5959.pdf
This File Contains:
Briefs - Petitioners Reply
The Original File Name was Supplemental Reply 040419 Final.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- jacksoj@co.thurston.wa.us

Comments:

Sender Name: Neil Fox - Email: nf@neilfoxlaw.com
Address:
2125 WESTERN AVE STE 330
SEATTLE, WA, 98121-3573
Phone: 206-728-5440

Note: The Filing Id is 20190404111155D2303074