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Court of Appeals  
Division II  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIV-II

IN RE THE PERSONAL	)	NO. 51741-8-II
RESTRAINT PETITION OF	)	
	)	SUPPLEMENTAL
	)	RESPONSE TO
	)	PERSONAL RESTRAINT
LIA Y. TRICOMO,	)	PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Joseph J.A. Jackson, Deputy Prosecuting Attorney, and files its supplemental response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

The basis for current restrictions on liberty that were contained in the State's original Response to Personal Restraint Petition remain the same.

II. STATEMENT OF PROCEEDINGS

For purposes of this supplemental response, the State will rely on the Statement of Proceedings contained in the State's original Response to Personal Restraint Petition filed in this Court on April 13,

2018, with additions as necessarily included in the arguments below.

### III. RESPONSE TO ISSUES RAISED

1. The newly raised issue in Tricomo's Amended Personal Restraint Petition is not sufficiently related to the issues that were originally raised, and is therefore time-barred pursuant to RCW 10.73.090.

In her original personal restraint petition, Tricomo argued that her counsel provided ineffective assistance in obtaining a guilty plea and argued that the trial court erred by not considering the role of her prescribed medications. Personal Restraint Petition at 2. The Amended Personal Restraint Petition alleges that counsel was ineffective during the sentencing hearing by not obtaining a specific expert regarding the effects of Paxil.

RCW 10.73.090(1) provides that no collateral attack on a conviction may be brought more than one year after the judgment becomes final, providing that the judgment is valid on its face and rendered by a court of competent jurisdiction. RCW 10.73.090(3) defines "final":

- (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.

The time bar is mandatory, unless one of the exceptions in RCW 10.73.100 applies. In re the Pers. Restraint of Bonds, 165 Wn.2d 135, 140, 196 P.3d 672 (2008). RCW 10.73.100 provides a list of six exceptions to the one-year time limit.

(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 1, 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 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.

This list is both exclusive and mandatory. State v. Wade, 133 Wn. App. 855, 870, 138 P.3d 168 (2006). RAP 16.8(e) states “The appellate court may allow a petition to be amended. All amendments raising new grounds are subject to the time limitation provided in RCW 10.73.090 and 10.73.100.” “Under the rules, a petitioner can amend an initial PRP and raise new grounds for relief, without requesting a formal amendment, as long as the brief is timely filed and the new issue is adequately raised.” In re Pers. Restraint of Rhem, 188 Wn.2d 321, 327, 394 P.3d 367 (2017). In that case, the State Supreme Court rejected an issue raised in a reply brief alleging ineffective assistance of counsel on appeal where the timely opening brief argued ineffective assistance of counsel at the trial level. Id. at 326-327, 330.

Tricomo argues that her motions for extension of time should constitute acquiescence to an extension of time for the newly raised issue, citing to 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, the petitioner filed a motion

to extend the filing of his opening brief which the State did not oppose. Id. at 362. The State then objected to the timeliness of the issues raised and the Court found that the Court granting the extension for filing the opening brief extended the time bar. Id. at 362, n. 2.

The situation before this Court is different. Tricomo filed her opening brief. When she obtained an attorney, her attorney filed a motion to stay consideration of her personal restraint petition “to review the pleadings in the case, to file a reply brief, and to investigate and file an amended petition, if need be.” Petitioner’s Motion to Stay, July 25, 2018. The State did not oppose the motion. There was no reason to believe that new grounds would be raised.

In a footnote to her Amended Petition, Tricomo asserts that the newly asserted argument that the proper expert was not hired is “newly discovered” and properly is a ground for relief under RAP 16.4(c)(3). Amended Petition at 35, n.21. That is not the case. A newly obtained expert opinion based on the same evidence does not constitute newly discovered evidence even if it presents a different opinion, and is therefore not a ground for relief under RAP 16.4(c)(3).

State v. Harper, 64 Wn.App. 283, 293-294, 823 P.2d 1137 (1992). Such an opinion is likewise insufficient to avoid the time-bar pursuant to RCW 10.73.100(1). *See generally*, In re Pers. Restraint of Stenson, 153 Wn.2d 137 (2004)(To be newly discovered, evidence must not have been discoverable before the proceeding by the exercise of due diligence).

Tricomo's direct appeal became final with the issuance of the mandate on January 5, 2017. State's Response to Personal Restraint Petition, at Appendix 4. Therefore, she had until January 5, 2018, to raise any new issues. The time limit for newly raised issues expired before Tricomo's attorney asked to stay consideration of the petition. An amended PRP does not relate back to the original filing and any amendment or new claim must be timely raised. In re Pers. Restraint of Haghighi, 178 Wn.2d 435, 446, 309 P.3d 459 (2013). Here, Tricomo's new issue is not part and parcel to her original claims. The new issue raises for the first time, a claim of ineffective assistance of counsel during sentencing. It is time-barred and should not be considered by this Court.

2. If the Court considers the newly raised issue, Tricomo fails to demonstrate that her counsel provided ineffective assistance during her sentencing hearing.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant must overcome the presumption of

effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

“The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). There are “countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” Strickland, 466 U.S. at 689. Counsel has the latitude to “formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.” Harrington v. Richter, 131 S. Ct. 770, 789, 178 L. Ed. 2d 624 (2011).

Tricomo’s attorney, Patrick O’Connor, did consult an expert regarding diminished capacity. Exhibits to Amended Petition, at 180. Mr. O’Connor referred Ms. Tricomo to Dr. David Dixon, who prepared a lengthy report opining that Tricomo did suffer from mental states

contributing to her Diminished Capacity at the time of her crimes. CP 60-80. Use of Paxil was just one of four factors that Dr. Dixon indicated would contribute to Tricomo's "failure to accurately assess reality." CP 78. The State's expert, Dr. Delton Young included in his report that Tricomo attributed her demons to being on Paxil, which O'Connor presented to the trial court. CP 88. Dr. Young stated, "it is possible that the medication generated aversive side effects (e.g. feeling 'nothing'), but it is more likely that the psychotic symptoms stemmed from alcohol abuse in a psychologically vulnerable individual." CP 94.

Mr. O'Connor also submitted a mitigation report prepared by Dhyana Fernandez which included a brief list of sources which describe the potential effects of Paxil, in conjunction with a reiteration of Tricomo's statement that she felt like a loaded gun. CP 56-57. The State objected to the mitigation report. CP 131-33; 01/28/25 RP 30-34. The trial court ruled that it would consider all the background information contained in the mitigation report, but not the section regarding Paxil because Fernandez had no expertise in that subject and did nothing but provide a list of articles which she suggested

might be relevant. 01/28/15 RP 39.

During the sentencing hearing, O'Connor argued for the trial court to impose the low end of the standard range, stating, "I firmly believe that this would not have happened if it was not for her mental illness, the alcohol, and the dynamics of that relationship." 01/28/15 RP 81.<sup>1</sup> O'Connor argued the mitigating circumstances that the doctors had provided, stating, "even in a case where the physical acts were as horrific as they were in this case, and they were, but the law says even in those cases the Court can consider such mitigating circumstances, such mitigating circumstances as two subject matter experts have provided to the Court." 01/28/15 RP 83. O'Connor went on,

"there is no dispute that Lia's mental health was compromised, Your Honor; that her compulsion, although insufficient to constitute a complete defense, significantly affected her conduct. That's the law. That her capacity to appreciate the wrongfulness of her conduct to conform her conduct to the requirements of the law was significantly impaired."

01/28/15 RP 84.

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<sup>1</sup> The Statement of Defendant on Plea of Guilty allowed the defense to argue for a lesser sentence. CP 30. The State's sentencing memorandum indicated that the defense was free to argue for the low end of the standard range. CP 128. It is clear that O'Connor requested the low end and did not request a downward exceptional sentence.

Tricomo now argues that O'Connor should have consulted a psychiatrist instead of a psychologist. The touchstone for ineffective assistance of counsel is not whether the reviewing court agrees with counsel's approach. In re Pers. Restraint of Luj, 188 Wn.2d 525, 553, 397 P.3d 90 (2017). "Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. O'Connor's strategic purpose in retaining Dr. Dixon was to explore whether Ms. Tricomo had a viable diminished capacity for trial. Exhibits to Amended Petition, at 180. O'Connor justifiably relied upon the opinions of both Dr. Dixon and Dr. Young when making his recommendations regarding the appropriate sentence. *Id.* at 181.

The strategic purpose of hiring Fernandez was made clear in the defense sentencing memorandum, where O'Connor indicated "evidence of Ms. Tricomo's life, her background, her mental health issues prior to and on the day of the incident, and other such information provides the Court with the necessary information to rule on in sentencing Ms. Tricomo." CP 43. Fernandez's report provided a detailed history of Tricomo's life for the trial court to consider. CP 50-58. The fact that the trial court excluded consideration of

Fernandez's inclusion of information regarding Paxil was of little consequence to O'Connor's purpose in including her report. She offered no opinions regarding Paxil or its effect on Tricomo. That was not the purpose of her report.

O'Connor consulted with Dr. Dixon to obtain a forensic psychological evaluation. CP 60. A qualified psychologist may testify about the effects of medication. In re Pers. Restraint of Brown, 143 Wn.2d 431, 450, 21 P.3d 687 (2001)(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). Like the doctor in Brown, Dr. Dixon is extraordinarily qualified to testify regarding diminished capacity, the subject that he was strategically retained to provide information regarding. According to the curriculum vitae offered as an exhibit to Tricomo's Amended Petition, Dr. Dixon has a Ph.D. in clinical psychology and a certificate of proficiency in treatment of alcohol and other psychoactive substance use disorders; has been deemed an expert in court more than 800 times; has engaged in practice in general and medical psychology; has several publications regarding diminished capacity and forensic psychology;

and previously taught psycho-pharmacology at Seattle Pacific University. Exhibit 17 to Amended Petition at 161-164. He was a well-qualified choice for a defense expert.

The State's expert, Dr. Young was equally qualified, having been a clinical assistant professor at the Department of Psychiatry and Behavioral Sciences at the University of Washington School of Medicine and a clinical instructor in psychology at Harvard Medical School; having engaged in professional training and public speaking in Risk Assessment and Violence in Psychiatric Patients; having a publication regarding *A Clinician's Guide to Psychiatric Diagnosis*, in the American Journal of Psychotherapy; and being affiliated with the American Academy of Forensic Psychology. Exhibit 18 to Amended Petition at 169-173.

It cannot be said that O'Connor's performance, relying on the opinions of these experts during Tricomo's sentencing hearing, constituted deficient performance of counsel. O'Connor negotiated a favorable resolution for Tricomo, strategically argued for the low end of the standard range, and zealously advocated for a mitigated sentence. The argument Tricomo now makes is essentially the

distorting effect of hindsight that the Strickland Court warned against. Strickland, 466 U.S. at 694-695. Tricomo has not overcome the strong presumption that O'Connor's performance fell within the wide range of reasonable professional assistance which would be considered sound trial strategy. Id.

The only distinction in the record between the opinions of Dr. Dixon and Dr. Young and that of Dr. Saint Martin is Saint Martin's assertion that he "reviewed Dr. Dixon's and Dr. Young's resumes and neither have experience in the behavioral effects of psychiatric medications (also known as psychopharmacology)." Exhibit 1 to Amended Petition at 3. This assertion is belied by the record and is legally insufficient to demonstrate deficient performance. See In re Pers. Restraint of Yates, 177 Wn.2d 1, 39, 296 P.3d 872 (2013)(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); Turner v. Calderon, 281 F.3d 851, 875-876 (9<sup>th</sup> Cir. 2002)(rejecting ineffective assistance of counsel claim where defense counsel selected a psychologist rather than a PCP expert

when there was no showing that the psychologist was unqualified to answer PCP questions); West v. Ryan, 608 F.3d 477, 489-90 (9<sup>th</sup> Cir. 2010)(no ineffectiveness in use of substance abuse expert rather than a mental health expert); Brown v. Ornoski, 503 F.3d 1006, 1013-14 (9<sup>th</sup> Cir. 2007)(no showing that neuropsychologist over a psychiatrist would have made a difference). Dr. Dixon's resume indicates that he actually taught psycho-pharmacology at Seattle Pacific University. As in Yates, Tricomo's attorney conducted an appropriate investigation and retained appropriate experts.

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 (9<sup>th</sup> Cir. 1999) were all death penalty cases. The rest of the Washington cases cited all involved alleged deficiencies at trial. State v. Fedoruk, 184 Wn.App. 866, 339 P.3d 233 (2014) (involved failure to offer insanity or diminished capacity at trial); State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015)(failure to

interview easily identifiable witnesses prior to trial constituted deficient performance); State v. Maurice, 79 Wn.App.544, 903 P.2d 514 (1995)(defense attorney ineffective for failing to have mechanic inspect vehicle prior to trial in vehicular homicide case where defendant claimed mechanical failure); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)(failure to discover that “expert” was only a trainee with minimal experience before calling her as a witness at trial was deficient performance).

Tricomo argues that Thomas is nearly directly on-point with this case; however, that is simply incorrect. In Thomas, the defense attorney called a witness as an expert on alcohol blackouts, only to discover during trial that the “expert” was actually an alcohol counselor trainee. 109 Wn.2d at 230-231. The Court found that counsel’s performance was deficient because the record reflected that no investigation was made into the expert’s qualifications, and “some minimal investigation into qualifications is required.” Id. at 232. This case is easily distinguishable. First, the reports of Dr. Dixon and Ms. Fernandez were offered as evidence in mitigation during a sentencing hearing. This is a far cry from having a witness on the stand during

trial with no qualifications. Second, the record demonstrates that Dr. Dixon is highly qualified, as is Ms. Fernandez in the field of background mitigation reports. There can be no valid argument here that Mr. O'Connor failed to conduct a minimal investigation in the experts' qualifications.

Even if Tricomo were able to meet her heavy burden of demonstrating deficient performance, she cannot demonstrate prejudice. Dr. Saint Martin's report is conclusory at best. His conclusion that paroxetine (Paxil) was responsible for Tricomo's aggressive and violent behavior is unsupported by the record and would not have changed the outcome of the proceedings. Exhibit 1 to Amended Petition at 3. The conclusion ignores the fact that Tricomo had assaultive history prior to being prescribed Paxil. Exhibit 9 to Amended Petition at 81, 82; CP 8, 67. The Behavioral Health Resources (BHR) records indicate that she was reporting a fear that she would hurt a male relation in January of 2013, two months before the records indicate that she was prescribed Paxil, on March 25, 2013. Exhibit 11 to Amended Petition at 102; Exhibit 9 to Amended Petition at 75-97. She reported that she had been struggling lately

“with a guy who reported that she had assaulted him by going too far when they were doing sex play,” during her visit to Providence Hospital which resulted in her prescription. Exhibit 9 to Amended Petition at 80.

During an appointment with BHR on January 18, 2013, Tricomo reported that she wanted “anger management,” had urges to hurt others, and stated “nobody likes me because of my violent temper.” Exhibit 9 to Amended Petition at 103. A report from her primary clinician, Lyn Hertz, stated that Tricomo reported “I need help with Anger Management; I really need to learn to control my anger. It gets me in a lot of trouble,” on January 24, 2013. *Id.* at 104. Hertz discussed “using alternatives to her violent anger,” with Tricomo on February 14, 2013. *Id.* at 107. The record clearly demonstrates that Tricomo had anger control issues and violent tendencies without the use of Paxil.

Dr. Saint Martin’s conclusion that there is a “stronger causal link in the records between her psychiatric condition and paroxetine use than there is for alcohol and marijuana causing violent behavior” is likewise unsupported by the record. Exhibit 1 to Amended Petition

at 4. As stated above, Tricomo had violent tendencies and anger issues without Paxil.

When describing her mental health history to Dr. Dixon, Tricomo said, "Under periods of great stress I lose it, I'm out of control, and feel like an animal." CP 64. Tricomo reported that she began drinking at age 12 and would drink to blackout. CP 67. On the day of her crimes, Tricomo reported drinking Vodka and beer, stating, "we had drunk a lot of vodka." CP 68. It would seem impossible to separate the alcohol from her medications, even the Department of Corrections records which Tricomo argues support her position indicate, "it is hard to know if without alcohol the paroxetine would have the same effect." Exhibit 15 to Amended Petition at 149.

The report of Dr. Saint Martin adds very little to the information that was before the trial court. Dr. Dixon indicated that "use of and withdrawal from Paxil" may have diminished her ability to form intent. CP 78. Dr. Young indicated that Tricomo's behavior was affected by two conditions, "chronic and sever borderline personality disorder and heavy alcohol abuse." CP 94. Dr. Young discussed Tricomo's belief that Paxil contributed to her offenses, stating, "it is possible that the

medication generated aversive side effects (e.g. feeling 'nothing') but it is more likely that the psychotic symptoms stemmed from alcohol abuse in a psychologically vulnerable individual.” CP 94. The trial court was aware that Paxil may have had an effect on Tricomo. Even if credible, Dr. Saint Martin’s report would have added very little to the sentencing hearing and would not have affected the result.

In Littlejohn v. Royal, 875 F.3d 548, 553-554 (10<sup>th</sup> Cir. 2017); *cert. denied*, 139 S.Ct. 102, 202 L.Ed.2d 65 (2018), the 10<sup>th</sup> Circuit of the Federal Court of Appeals considered a declaration from Dr. Saint Martin regarding “neuro-developmental deficits” in an ineffective assistance of counsel argument based on failing to investigate and present a mitigation theory of organic brain damage. The Court remanded the matter for a reference hearing at the District Court and the District Court generally reasoned that “Dr. Saint Martin’s declaration was “not all that it appeared to be.” *Id.* at 557. Ultimately, the 10<sup>th</sup> Circuit denied the claim of ineffective assistance of counsel finding that the petitioner had failed to demonstrate prejudice, stating,

“although Dr. Saint Martin’s initial declaration created a significant impression that Mr. Littlejohn may have been prejudiced by [defense counsel’s] failure to investigate and present evidence...the testimony he provided consisted of only two commonly diagnosed conditions.”

Id. at 563-564.

Much like the report in that case, the report of Dr. Saint Martin in this matter, at first glance, may appear to be more than it actually is. When looked at closely, the report does little other than relay the information that was in Dr. Dixon and Dr. Young's reports which were considered by the trial court. To the extent that Dr. Saint Martin makes conclusions, those conclusions are unsupported by the overall record of the case.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). The record here indicates that Tricomo has failed to meet her heavy burden of demonstrating that her counsel's performance was deficient and cannot demonstrate prejudice because Dr. Saint Martin's report does not significantly add to the reports of Dr. Dixon and Dr. Young, and his conclusions are belied by the record.

Additionally, Tricomo cannot demonstrate prejudice because

she requested a sentence within the standard range, and received a sentence within the standard range. As a general rule, “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. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003); RCW 9.94A.585(1). There is absolutely no basis to conclude that the outcome of the proceedings would have been different if information from Dr. Saint Martin’s report had been provided.

At sentencing, the trial court recognized that this case was a tragedy both for the victim’s family and for Ms. Tricomo and her family. 1/28/15 RP 88. The trial court noted,

“I have a lot of information in this case, some of it’s been mentioned here today, some of it has not been discussed in detail. I have the probable cause statement. I have statements regarding what Ms. Tricomo told people in a mental health evaluation situation. I have mentioned earlier that I have two reports from Western State Hospital. I have reports from forensic psychologists. It’s clear that there was some disagreement among the experts that was taken into account at the time that this plea agreement was made. The issue before me today is not whether or not Ms. Tricomo had the ability to form a specific intent to kill. That’s been established by her pleading guilty to this charge.”

1/28/15 RP 91-92.

The trial court acknowledged, "There are issues about taking anti-depressant drugs, Paxil, and this may somehow have affected your view of life." 1/28/15 RP 93. Immediately thereafter, the trial court discussed the "terribly gruesome" facts from the case before stating, "Folks, there are lots of other factors that I've considered," and then imposed the high end sentence. 1/28/15 RP 93-94, 95. There is no likelihood that the trial court's sentence would have been outside the standard range or any lower if Dr. Saint Martin's report had been before the Court.

The facts of this case were horrific. Tricomo's defense counsel competently negotiated a proper resolution on her behalf, and adequately argued mitigating circumstances at sentencing on her behalf. On this record, Tricomo can demonstrate neither deficient performance nor prejudice. Her claim of ineffective assistance of counsel must fail.

3. If this Court finds that Tricomo has made a prima facie showing of ineffective assistance of counsel, the matter should be referred to the Superior Court to determine the credibility of the information Tricomo has provided.

Under RCW 16.11(a) this Court may transfer a PRP to the Superior Court for a reference hearing if a petitioner makes a least a

prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record. In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983); In re Rice, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). For all of the reasons stated above, Tricomo has failed to make a prima facie showing of actual prejudice.

If this Court disagrees with the State's contention, the appropriate course would be to set a reference hearing to determine the credibility of Dr. Saint Martin's report. As pointed out above, his conclusions are not supported by the record, and the general premise that the psychologists are not qualified to testify regarding Paxil are contradicted by their resumes. In the event that this Court were to find that a prima facie showing has been made, further factual development would be necessary to determine the credibility of Tricomo's claims.

#### IV. CONCLUSION

This brief is intended to supplement the original Brief of Respondent and only addresses the issues raised in the Tricomo's Amended Petition. The newly raised issue, ineffective assistance of counsel at sentencing, is time barred and should not be considered by

this Court. If this Court does consider the issue, Tricomo has failed to make a prima facie showing of either deficient performance or prejudice as required for a showing of ineffective assistance of counsel. This personal restraint petition should be dismissed. If the Court disagrees and finds that a prima facie showing has been made, the appropriate action would be to set a reference hearing to determine the validity of Tricomo's assertions.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of February, 2019.

JON TUNHEIM  
Prosecuting Attorney



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Joseph J.A. Jackson, WSBA #37306  
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Response to Personal Restraint Petition on the date below as follows:

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

Dated this 27<sup>th</sup> day of February, 2019, at Olympia, Washington.

  
\_\_\_\_\_  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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**Transmittal Information**

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