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DIVISION II

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STATE OF WASHINGTON
Cowlitz County Superior Court
COA No. ~~43188-2-H~~
No. 09-1-00735-4

DEPUTY

IN THE COURT OF APPEALS, DIVISION II OF THE STATE
OF WASHINGTON

In re the Personal Restraint of

Fred Durgeloh,

Petitioner

PERSONAL RESTRAINT PETITION

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CERTIFICATE OF SERVICE

I, Mitch Harrison, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.
2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.
3. On the date set forth below, I served in the manner noted a true and correct copy of this **Person Restraint Petition** on the following persons in the manner indicated below:

Court of Appeals, Division II Via Court of Appeals, Division I 600 University Street One Union Square Seattle, WA 98109	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email: <input type="checkbox"/> Fax: <input checked="" type="checkbox"/> Hand Delivery on 6/24/2015
Cowlitz County Prosecuting Attorney Hall of Justice 312 SW 1st Ave. Kelso, WA 98626	<input checked="" type="checkbox"/> U.S. Mail on June 29, 2015 <input type="checkbox"/> Email: <input type="checkbox"/> Fax:
Fred C Durgeloh, DOC #356366 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520	<input checked="" type="checkbox"/> U.S. Mail on June 29, 2015 <input type="checkbox"/> Email: <input type="checkbox"/> Fax:

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THE FOREGOING IS TRUE AND CORRECT.

Dated June 29, 2015



Mitch Harrison, ESQ.,
WSBA#43040
Attorney for Appellant

I. STATUS OF THE PETITIONER

On March 2, 2012, Fred Durgeloh was convicted of multiple felonies in Cowlitz County Superior Court, including: Unlawful Possession of a Firearm, Assault in the Second Degree (II Counts), and Felony Harassment (2 Counts).¹ At the time of sentencing, Mr. Durgeloh, who is permanently disabled and bound to a wheelchair, was 60 years old and these were his first felony offenses.² Despite these facts, he was sentenced to 120 months in prison and 18 months of community custody, a sentence he is currently serving as he files the PRP to challenge the constitutionality of his confinement under this cause number.

II. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

The life story of the petitioner, Mr. Fred Durgeloh, is a tragic one, marked by significant medical and mental health issues. As the State's expert would later write, Mr. Durgeloh has "a complicated medical history."³ He has been a wheelchair bound amputee, with a long and documented list of mental and physical medical conditions,

¹ CP 107.

² CP 105.

³ CP 29-31.

including bipolar disorder, diabetes, an infected left testicle,⁴ all of which has made Mr. Durgeloh terminal.⁵

On July 11, 2009, Sandra Uden, Mr. Durgeloh's long-time caretaker and nurse,⁶ noticed that Mr. Durgeloh was acting despondent and worried that he may be suicidal. This incident marked Mr. Durgeloh's breaking point, a culmination of Mr. Durgeloh's struggle with knee surgeries beginning in 2009, when after a fifth knee surgery, he developed MRSA and had to have his leg amputated.⁷ As Mr. Durgeloh would later say, he eventually "lost the battle" to keep his leg.⁸ Mr. Durgeloh's condition got so bad that she called 911 to ask police to assist him because she feared he might kill himself.⁹

Mr. Durgeloh's home is a manufactured home located on a rural farm located at 749 Carnine Road in Cowlitz County.¹⁰ The home is secluded near a wooded area far off from the road, with a sliding glass door on the porch, which functions as the main entrance and exit.¹¹

⁴ CP 101-103.

⁵ RP 384.

⁶ Trial Report of Proceedings (RP) 17.

⁷ CP 29, 101.

⁸ CP 29.

⁹ RP 105-109.

¹⁰ RP 105-109, 156-162.

¹¹ RP 111-114, 156-162.

Initially Cowlitz County Deputies Ryan Cruser and Kimberly Moore responded to the home on a welfare check. Upon arrival, unbeknownst to the two deputies, Mr. Durgeloh's supply of prescribed medications had run out approximately 2-3 days before and neither Mr. Durgeloh, nor his caretaker Ms. Uden had yet replaced them.¹²As a result, Mr. Durgeloh was going through withdrawal and in a state of disorientation when the deputies arrived at his home.

Upon arrival, Deputy Cruser approached the back door to the home and knocked a number of times, but no one responded.¹³After learning that the two cars in the driveway, a truck and a sports car, were Mr. Durgeloh's only vehicles, the Deputies determined that Mr. Durgeloh was probably still home and tried to contact him a second time. At this point the deputies were able to locate Mr. Durgeloh inside the home by looking

¹² RP 238-239, 249-250. In total, Mr. Durgeloh was prescribed a cocktail of medications to manage his diabetes, infections, and the constant pain he suffered after his amputation. The list of medications included:

1. Neurontin 900 mg t.i.d. for pain
2. Cymbalta b.i.d. for depression
3. Lithium for mood stability
4. Metformin and glipizide for diabetes
5. Vieta for diabetes
6. Unknown medication for hypercholesterolemia
7. Baclofen p.r.n. for spasm
8. Oxycodone three tablets per day on a p.r.n. basis, between 16-20 5 mg pills per day
9. Fentanyl patch, changed every 72 hours for pain
10. Lactulose t.i.d. due to elevated serum ammonia levels¹²

¹³ RP 111-114.

through one of the windows. They saw him rolling in his wheelchair towards the door, with a pistol in his lap.¹⁴

Deputy Cruser testified that he yelled out to Mr. Durgeloh through the window ordering him put the gun down.¹⁵ When the defendant did not comply, both deputies retreated to the yard each taking cover behind one of the two vehicles parked in the yard.¹⁶ Eventually, the deputies saw Mr. Durgeloh roll his wheelchair out of his residence and onto the back porch. He then yelled out that that whoever was out there was trespassing and demanded that the trespassers leave.¹⁷

Despite the darkness outside, the light inside the home allowed the deputies to observe Mr. Durgeloh inside and outside his home. The deputies testified that Mr. Durgeloh appeared “very upset” and his behavior was peculiar, as “he kept repeating the same things over and over to us.”¹⁸ The deputies also testified that they saw Mr. Durgeloh pick the gun up from his lap, pull the action back on the pistol, loaded a round in to the chamber, and waive the gun in the air in their direction. They also

¹⁴ RP 115-118, 159-162.

¹⁵ RP 115-118, 159-162.

¹⁶ RP 115-118, 159-162, 238.

¹⁷ RP 119-128, 163-167.

¹⁸ RP 121.

testified that they heard him make threats to kill them if they did not leave.¹⁹

At this point, the two deputies had called for backup and other officers arrived to help calm Mr. Durgeloh down. Captain Corey Huffine, called Mr. Durgeloh and spoke with him briefly, observing that Mr. Durgeloh was having “some sort of issue.”²⁰

The deputies testified that Mr. Durgeloh again pointed the pistol in their directions, though they both agreed that the bright lights on in Mr. Durgeloh’s home would have made it impossible for him to see exactly where either of them were.²¹The deputies then heard Mr. Durgeloh again order them to leave and threatened to kill them if they came to the porch. Mr. Durgeloh then retreated back into the house.²²

Eventually, a SWAT team arrived and surrounded Mr. Durgeloh’s residence.²³ After negotiations over the phone, Mr. Durgeloh left his pistol and ammunition on his bed and rolled his wheelchair out of his

¹⁹ RP 119-128, 163-167.

²⁰ RP 204, 238.

²¹ RP 119-128, 163-167.

²² RP 119-128, 163-167.

²³ RP 127-128, 168-169.

residence.²⁴ The police then placed Mr. Durgeloh under arrest and retrieved the pistol and ammunition from Mr. Durgeloh's bedroom.²⁵

A. The Charges

The State charged Mr. Durgeloh with two counts of Second Degree Assault both alleging firearm enhancements and one count of Second Degree Unlawful Possession of a Firearm.²⁶ On June 9, 2010, the State amended the information to include two counts of Felony Harassment, each carrying firearm enhancements.²⁷

B. The State's Pre-Trial Motion for a Court Ordered Diminished Capacity Evaluation

On September 29, 2009, the trial court signed an order authorizing the Western State hospital to evaluate Mr. Durgeloh's "capacity to form the intent to commit the [charged] crime[s]."²⁸ Interestingly, this motion was not brought by the defendant, or the court, but rather, "the State."²⁹

²⁴ RP 126-128.

²⁵ RP 129-131, 194-201.

²⁶ CP 4-6.

²⁷ CP 24-26. Sometime thereafter, the State offered Mr. Durgeloh a plea bargain for approximately "three or four years," but as defense counsel revealed at sentencing, Mr. Durgeloh rejected that offer because he was diagnosed as terminally ill and did not expect to live that long if sentenced to such a sentence. RP 390.

²⁸ CP 2.

²⁹ CP 12. Pursuant to that order, Mr. Durgeloh was evaluated by Glenn Morrison, DO. His title is listed on the report as "evaluating psychiatrist" for Western State Hospital.

On September 27, 2010, Mr. Durgeloh was finally evaluated at Western State Hospital, based almost entirely on Mr. Durgeloh's own self-reporting, the evaluation was performed.³⁰ The evaluation notes that Mr. Durgeloh was ordered to undergo an evaluation of his capacity to form intent to commit the crime.³¹ At the start of the evaluation, Dr. Morrison informed Mr. Durgeloh that this evaluation was "non-confidential" and that his role was "a neutral evaluator."³²

Initially, the report notes that Mr. Durgeloh has a "complicated medical history," that includes both traumatic physical issues, significant mental health issues, as well as a history of abusing alcohol and prescription pain medications.³³ Despite significant and "complicated history, however, Mr. Morrison only interviewed Mr. Durgeloh for two hours and only reviewed a very limited number of pieces of evidence before reaching to his findings.³⁴ Notably, though mentioned in the report, Mr. Morrison did not attempt to speak with Mr. Durgeloh's normal treating physical, Dr. Hurst, nor did he attempt to get any of Mr.

³⁰ CP 28.

³¹ CP 25.

³² CP 28.

³³ CP 29-31.

³⁴ Those include (1) unnamed "discovery materials," including the statement of probable cause, (2) a NCIC report, (3) "contributing comments from Sandra Martin Uden Mr. Durgeloh's formal night time nurse and current caretaker and companion, and (4) self-reporting from Mr. Durgeloh.

Durgeloh's past medical records pertaining to his "complicated medical history."

Mr. Morrison's report concluded that despite suffering from "disturbed sleep, low energy, decreased appetite, feelings of hopelessness, helplessness, and crying spells,"³⁵ a diagnosis of suffering from a brain disorder known as hepatic encephalopathy.³⁶The report concluded that Mr. Durgeloh was able to understand the charges brought against him.³⁷

The report briefly discusses the medications that Mr. Durgeloh was on "at the time of the evaluation,"³⁸ his noted "history of overuse of prescription pain medications,"³⁹and the fact that Mr. Durgeloh had not taken his prescribed medications for nearly a week leading up to the alleged crimes. Despite these observations, the report makes no effect to

³⁵ CP 33.

³⁶ Hepatic encephalopathy is a disorder which causes lethargy, apathy, disorientation, memory impairment, inappropriate behaviors – extending to somnolence, confusion – and can lead to the victim lapsing into a coma. *See* <http://www.webmd.com/digestive-disorders/hepatic-encephalopathy>.

³⁷ CP 101.

³⁸ CP 30-31: Those medications include:

1. Neurontin 900 mg t.i.d. for pain
2. Cymbalta b.i.d. for depression
3. Lithium for mood stability
4. Metformin and glipizide for diabetes
5. Vieta for diabetes
6. Unknown medication for hypercholesterolemia
7. Baclofen p.r.n. for spasm
8. Oxycodone three tablets per day on a p.r.n. basis, between 16-20 5 mg pills per day
9. Fentanyl patch, changed every 72 hours for pain
10. Lactulose t.i.d. due to elevated serum ammonia levels

³⁹ CP 30.

connect his medications, and the effects of abstaining from using them, at the time the crime was committed.⁴⁰

Without all of these factors, Mr. Morrison concluded that “it appears that [Mr. Durgeloh’s] thoughts did have the qualities of intentionality.”⁴¹

C. Trial Procedure

From the time Mr. Durgeloh was charged, in July 2009 to the time trial began in July 2011, Mr. Durgeloh was granted a number of continuances, totaling over two years, due to his terminal health conditions, bipolar disorder, and scheduled amputation surgeries.⁴² During that time, well before trial began, defense counsel had informed the State he was considering raising diminished capacity as a “potential” defense.⁴³ Yet, once trial came, the State was aware of no efforts by defense counsel to pursue such a defense.

As a result, the State moved in limine to exclude any “argument” or jury instructions relating to a diminished capacity defense.⁴⁴ In making this motion, the State observed that although “the defense had endorsed potentially diminished capacity defense as a defense,” the defense had

⁴⁰ CP 101.

⁴¹ CP 32.

⁴² CP 15-16, 17-18, 19-20, 37-38, 39-40, 41-42.

⁴³ RP 83-84.

⁴⁴ RP 84.

“not obtained a diminished capacity evaluation.” The State argued successfully that the defense lacked “any competent evidence” that would allow the defense to argue that the “defendant’s capacity was diminished.”⁴⁵

When the court asked Mr. Durgeloh’s attorney if there were “any issues related to the diminished capacity defense, counsel replied, “Not that I know of Judge.”⁴⁶ Then, defense counsel elaborated that his trial strategy was “not going to intent or any diminished capacity argument⁴⁷.” Instead, his strategy was to simply call Mr. Durgeloh as a witness and have him “explain, just what he was thinking, how he perceived things, [just] like anybody else.”⁴⁸

Instead of filing a pre-trial motion to suppress, defense counsel filed a “motion in limine” asking the court to exclude “any testimony by police officers concerning the arrest of the Defendant . . . including post-arrest ID, because they arrested him [Mr. Durgeloh] as a result of a Payton v. New York violation.”⁴⁹

D. The Verdicts

⁴⁵ RP 84.

⁴⁶ RP 84.

⁴⁷ RP 84.

⁴⁸ RP 84. Defense counsel eventually conceded that his chosen defense is different or “separate” from the “specific defense” of diminished capacity. RP 84-85.

⁴⁹ RP 67.



The jury convicted Mr. Durgeloh of all charged offenses, including Second Degree Assault (Counts I & II) (Victims Deputy Kimberly Moore & Deputy Ryan Crusier), Second Degree Unlawful Possession of a Firearm (UPFA) (Count III), and Felony Harassment (Counts IV & V). In addition, the jury found that Mr. Durgeloh was armed with a firearm in all counts except Count III.

E. Defense Counsel’s Post-Trial Investigation & Sentencing
a. Defense Motion for a Post-Trial Diminished Capacity Evaluation

On September 15, 2011, at a post-trial hearing, defense counsel asked the court to continue sentencing and to sign an “order authorizing [an] evaluation for competency or capacity for sentencing.”⁵⁰ In requesting the order, defense counsel notes that “I find him very disoriented, but he does try to communicate with me. But I need an actual doctor to be able—somebody that’s an MD, particularly in light of the toxic encephalopathy that he suffering from.”⁵¹

Defense counsel also told the judge that he intended on “sending a lot of medical information to the doctor” for him to consider in drafting his report to the court.⁵² Ultimately, the court signed the order approving

⁵⁰ RP 369.

⁵¹ RP 370.

⁵² RP 373.

the evaluation allowing Mr. Durgeloh submit to another diminished capacity evaluation before proceeding to sentencing.⁵³

b. Dr. Larson's Diminished Capacity Evaluation

On December 9, 2011, Mr. Durgeloh was interviewed by Dr. Jerry Larson, who unlike Mr. Morrison, is a medical doctor.⁵⁴ Dr. Larson conducted a thorough analysis of Mr. Durgeloh's mental and physical health, his medical history, and the circumstances of the crime.

Dr. Larson's interview and evaluation of Mr. Durgeloh appears to be much more thorough than the State's evaluation as performed by Mr. Morrison. Dr. Larson's report suggests that he conducted a more thorough investigation into relevant witness, rather than just relying upon Mr. Durgeloh's self-reporting, as did the State's expert.

Most notably, Dr. Larson's report suggests that he interviewed "Sandra Uden, who cares for him on a near daily basis"⁵⁵ to a much greater extent than the State's expert. That thoroughness appeared to pay off for the defense, as Ms. Uden was able to provide Dr. Larson with "exceptional historical information [about Mr. Durgeloh],"⁵⁶ including

⁵³ CP 97-98.

⁵⁴ CP 99-104 (Post-trial competency evaluation by Dr. Jerry Larson)

⁵⁵ CP 104.

⁵⁶ This is significant because it shows that Ms. Uden, Mr. Durgeloh's caregiver, could readily have provided defense counsel and a pre-trial expert witness with invaluable insight about Mr. Durgeloh's medical constitutions, which was obviously the driving force behind his crimes.

details about Mr. Durgeloh's "frequent . . . mood swings, feelings of hopelessness, confusion, disorientation and at times suicidal ideation," "depression, confusion, and disorientation."⁵⁷ Most notably, Ms. Uden even reported that Mr. Durgeloh "is, at times, confused and belligerent, and at times does not take his medication," and sometimes even "hallucinates, seeing strangers and hearing voices."⁵⁸

Dr. Larson, unlike that of the State's expert, also focused the most likely medical cause of Mr. Durgeloh's erratic and suicidal behavior on the day of the crime: his abrupt and prolonged exposure without any of his prescribed medications. He noted that,

For reasons that neither [Ms. Uden] nor [Mr. Durgeloh] can explain, he stopped taking his medications. . . . [I]t had been several days prior to the alleged event since he had taken his medication. He became depressed, hopeless, and suicidal and armed himself with a handgun. He intended to kill himself. He estimates that it had been a week that he had been off all medications. He was confused. He was obviously depressed. He had consumed no alcohol.⁵⁹

After considering these additional facts, Dr. Larson is able to assign specific diagnoses to several medical conditions that reasonably could have impaired Mr. Durgeloh's ability to think clearly and form the intent to commit the charged crimes:

⁵⁷ CP 102.

⁵⁸ CP 104.

⁵⁹ CP 104.

As I interviewed Sandra she also states, however, that [Mr. Durgeloh] had been taking Oxycodone for pain . . . [and] estimates that he had been taking 16 to 20 [5mg pills] per day. She also believes that he had been off Oxycodone for four or five days, which would, by . . . definition, would result in an opioid withdrawal symptom, worsening his physical and psychological wellbeing. Therefore, at the time of the alleged event he had not been taking lactulose and in all likelihood his ammonia level was elevated. He had not been taking his diabetic medications, therefore, with reasonable medical certainty, his brain was essentially starving from sugar, its only source of fuel. He had been off the antidepressants causing a decrease in serotonin, norepinephrine, and likely dopamine and then was experiencing chronic pain and probable opioid withdrawal.⁶⁰

Given these diagnosis, Dr. Larson concluded, “with reasonable medical certainty”, that Mr. Durgeloh was experiencing “elevated ammonia levels,” his “brain was... starved from sugar, its only source of fuel,” without antidepressants, he experienced a “decrease in serotonin, norepinephrine, and likely dopamine” and to top it off, “chronic pain and probable opioid withdrawal.”⁶¹ “These conditions combined,” he opined, caused Mr. Durgeloh to slip into “depression and suicidal ideation.”⁶²

In the end of his report, Dr. Larson concluded that on the night of the incident, Mr. Durgeloh’s

⁶⁰ CP 104.

⁶¹ CP 102.

⁶² CP 102.

“intent was self-injury and he had no intention of harming others. It is obvious, with reasonable medical certainty, that his behavior was the direct result of mental illness and his declining physical health.”⁶³

c. The Sentencing Hearing

Following an additional set of continuances, due again to Mr. Durgeloh’s health issues, the case finally proceeding to sentencing on March 2, 2012.⁶⁴ Mr. Durgeloh had, before this case, absolutely no felony criminal history.⁶⁵ Nevertheless, his offender score and total sentence were substantially higher than someone who has no felony criminal history. As calculated by the trial court, after adding the mandatory time for all four firearm enhancements, Mr. Durgeloh’s standard range hit 120 months, the statutory maximum for class B felonies.

During sentencing, defense counsel advanced several half-hearted arguments, none of which he supported with and controlling law.

Counsel’s first and primary sentencing argument was that the court should impose an exceptional sentence downward, citing Dr. Larson’s newly obtained report as the factual basis for it, “My opinion and position is that those reports, particularly Dr. Larson’s would support mitigating

⁶³ CP 102.

⁶⁴ 383.

⁶⁵ CP 7.

factor of—and for an exceptional down sentence.”⁶⁶ Based solely upon this report, defense counsel asked the court to impose “one year of house arrest” because it was the sentence he believed was appropriate in the case.⁶⁷

As defense counsel pointed out, there was ample *evidence* to support the exceptional sentence, including Dr. Larson, report, a long list of Mr. Durgeloh’s medical conditions and medications, and the other evidence mentioned throughout the proceedings. Defense counsel also pointed out that Mr. Durgeloh’s medical condition had, since his trial, become so bad that he is now terminal. As defense counsel relayed to the court, “The doctor said he could pass away tomorrow.”⁶⁸

The prosecutor responded that there was “no basis for an exceptional sentence.” Without citing any law, the State suggested that an exceptional sentence only cannot be lawfully applied to the defendant’s medical concerns or his personal situations. The State did agree that he had “a certain degree of empathy for Mr. Durgeloh, but in the laws eyes those are not considered mitigating circumstances. It is, in fact, mandatory

⁶⁶ RP 383.

⁶⁷ RP 383-84.

⁶⁸ RP 384.

as set forth via . . . the Hard Time for Armed Criminals Initiative.”⁶⁹
Ultimately the State recommended a low end sentence.⁷⁰

In reply, defense counsel first responds to the State’s argument by pointing out that Dr. Larson’s report clearly concludes that Mr. Durgeloh’s medical conditions, caused by not taking his medications, is reliable evidence that Mr. Durgeloh’s mental capacity was in fact diminished at the time of the offense.⁷¹ Defense counsel then began to reflect on his decision to not investigate this defense *before trial* and admitted to the court that this decision “may be a good issue on the part of an appellate counsel.”⁷² Tellingly, the defense said nothing more about why he decided to not pursue a diminished capacity defense until after trial.

Very briefly, the parties discussed whether or not Mr. Durgeloh’s crimes should count as one, either under the merger doctrine or as the same criminal conduct. No party, however, including Mr. Durgeloh’s defense attorney, made any attempt to provide the court with case law to

⁶⁹ RP 386.

⁷⁰ RP

⁷¹ RP at 389-90.

⁷² RP at 389-90. (“There was -- we didn’t offer this in the form of a diminished capacity or mental defense. That was the choice that was made by the Defense, and maybe that’s going to be an issue. It may be a good issue on the part of an appellate counsel when Counsel hears this (inaudible) issues on appeal.”)

support this argument.⁷³ As a result, the trial court only summarily dismissed the arguments.

Significantly, defense counsel did not file a sentencing memorandum and failed to cite any legal authority to support his arguments for a lesser sentence. Unsurprisingly, the court dejected every defense argument and imposed a “low end” sentence,” which totaled 120 months, with 18 months community custody.⁷⁴ 98 months of that time a result of the four firearm enhancements added to four of the convictions.⁷⁵

B. DIRECT APPEAL

Mr. Durgeloh filed a timely appeal to this court. In the brief written by his appointed counsel, Mr. Durgeloh advanced three arguments:

- (1) Trial Court violated his right to due process when it accepted a stipulation to a prior offense without his unequivocal oral assent.
- (2) Trial Court denied his right to a fair trial when it refused to give his proposed lesser included instruction on unlawful display of a weapon.
- (3) Trial Court violated RCW 9.94A.701(9) when it imposed a sentence that exceeded the statutory maximum.

This court addressed each of these arguments on their merits and rejected each of them in an unpublished opinion. In his SAG, and in a supplemental SAG, Mr. Durgeloh argued advanced two arguments:

⁷³See RP 388-02.

⁷⁴CP 107, 110-111; RP 369-375, 376-379, 380-382, 383-407.

⁷⁵RP 386.

(1) State failed to present sufficient evidence of second degree assault and unlawful possession.

(2) Police conducted a warrantless search and seizure of his home.

This court addressed the first argument on its merits but rejected it. As for the second argument, pertaining to the suppression issue, this court refused to address the issue because Mr. Durgeloh argued this issue in a supplemental SAG that was filed past the court's deadline and without the court's approval. The court, therefore, did not address the suppression issue on its merits.

III. GROUNDS FOR RELIEF

- C. TRIAL COUNSEL RENDERED DEFICIENT AND PREJUDICIAL PERFORMANCE UNDER *STRICKLAND* WHEN HE FAILED TO RECOGNIZE THE EXCULPATORY VALUE OF THE STATE'S DNA TESTING WHICH DEFENSE COUNSEL INCORRECTLY BELIEVED WAS "INCONCLUSIVE," WHEN IN REALITY, THAT EVIDENCE TENDED TO *EXCLUDE* HIM AS A CONTRIBUTOR TO CRUCIAL DNA EVIDENCE.
- D. COUNSEL'S FAILURE TO CITE ANY LEGAL AUTHORITY TO SUPPORT HIS REQUEST FOR AN EXCEPTIONAL SENTENCE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.
- B. COUNSEL'S FAILURE TO MAKE A MEANINGFUL ARGUMENT, SUPPORTED BY CASE LAW, THAT MR. DURGELOH'S CONVICTIONS WERE THE SAME CRIMINAL CONDUCT WAS INEFFECTIVE ASSISTANCE OF COUNSEL.
- C. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO INVESTIGATE A POTENTIALLY MERITORIOUS MOTION TO SUPPRESS AND FAILED TO FOLLOW PROPER CRIMINAL PROCEDURES TO CHALLENGE EVIDENCE OBTAINED FROM AN UNLAWFUL SEARCH OF THE DEFENDANT'S HOME.

IV. PRP PROCEDURAL ISSUES

A. THE PETITION IS NOT BARRED AS SUCCESSIVE

Several provisions of Washington case law, statutes, and rules bar successive claims under certain circumstances. None of them apply here. This is Mr. Durgeloh's first collateral attack on his conviction in this case, so RAP 16.4(d) does not apply. For the same reasons, RCW 10.73.140, which limits the jurisdiction of the Court of Appeals over some successive petitions, does not apply.⁷⁶

B. THE PETITION IS TIMELY

RCW 10.73.090(1) gives a defendant one year—measured from the date the judgment becomes final—to file a collateral attack on his conviction or sentence.⁷⁷ Here, Mr. Durgeloh's conviction became final when the court of appeals filed its mandate on June 24, 2015. This PRP, filed on the date indicated in the certificate of service, was filed less than one year from that date; this PRP is therefore timely.

C. UNLAWFUL RESTRAINT

A PRP is one way to collaterally attack an unlawful conviction or sentence. To warrant relief, the PRP must show that the petitioner is under "restraint" and such restraint is "unlawful."⁷⁸ Mr. Durgeloh was convicted of Second Degree Assault (2 Counts), Felony Harassment (2 Counts) and

⁷⁶ RCW 10.73.140

⁷⁷ RCW 10.73.090.

⁷⁸ RAP 16.4(a)

Unlawful Possession of a Firearm (UPFA) and sentenced to ten years in prison. Mr. Durgeloh is currently serving that sentence in a prison here in Washington State and is, therefore, clearly under restraint.⁷⁹

Such restraint is unlawful and subject to collateral attack if Mr. Durgeloh can show that his case meets one of the numerous criteria defined in RAP 16.4(c).⁸⁰ Each argument raised below relate to ineffective assistance of trial counsel and are valid basis for relief by a PPR.⁸¹

V. ARGUMENTS FOR RELIEF

A. GENERAL STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL

1. The accused is entitled to the effective assistance of counsel.

A criminal defendant has a state and federal constitutional right to effective assistance of counsel.⁸²

2. Ineffective Assistance Claims are Reviewed de Novo.

A claim that counsel was ineffective is a mixed question of law and fact that we review de novo.⁸³

⁷⁹ RAP 16.4(b). “Restraint” includes current incarceration, collateral consequences of conviction, or any other “disability” caused by the conviction. *In re Martinez*, 171 Wash. 2d 354, 362, 256 P.3d 277, 281 (2011)

⁸⁰ RAP 16.4 (c). This definition includes any conviction or sentence that was “entered,” “obtained,” or “imposed” in violation of the Constitution or any other “laws of the State of Washington.” *Id.*

⁸¹ *In re Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001) (trial counsel’s failure to conduct a reasonable investigation into existing medical and mental conditions was ineffectiveness of counsel);

⁸² *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

⁸³ *Id.* at 698.

3. PRP Standard for Review – Ineffective Assistance of Counsel

To obtain relief on collateral review based on a constitutional error, the petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the error.⁸⁴ But “if a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice.”⁸⁵

4. Standard for Proving Ineffective Assistance of Counsel

“A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct.”⁸⁶ Thus, to prevail on a claim of ineffective assistance of trial counsel, an appellant must show both deficient performance and prejudice.⁸⁷

The first requirement—the performance prong—measures whether defense counsel’s conduct fell within the wide range of competence for a criminal defense attorney. To show deficient performance, the petitioner

⁸⁴*In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671–72, 101 P.3d 1 (2004).

⁸⁵*In re Crace*, 174 Wn.2d 835, 846–47, 280 P.3d 1102 (2012).

⁸⁶*State v. Benn*, 120 Wash.2d 631, 663, 845 P.2d 289 (1993) (emphasis omitted) (citing *Strickland*, 466 U.S. at 687–88).

⁸⁷*Strickland*, 466 U.S. at 687.

must show that defense counsel's conduct, measured by "prevailing professional norms" fell below "an objective standard of reasonableness."⁸⁸ In assessing the merits of ineffective counsel claims, courts look to the totality of counsel's efforts.⁸⁹

The second requirement—the prejudice prong—asks whether, despite the error, the defendant received a fair trial.⁹⁰ To show prejudice, the appellant need not prove that the outcome would have been different but must show only a "reasonable probability"—by less than a more likely than not standard—that, but for counsel's unprofessional errors, the result of the proceedings would have been different.⁹¹

B. TRIAL COUNSEL'S FAILED TO CONDUCT AN INDEPENDENT AND TIMELY INVESTIGATION, WHICH SHOULD HAVE INCLUDED HIRING A MENTAL HEALTH EXPERT BEFORE TRIAL, DESPITE MR. DURGELOH'S OBVIOUS MENTAL AND PHYSICAL CONDITIONS. THESE FAILURES DEPRIVED MR. DURGELOH THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

1. Summary of Argument

Before trial, defense counsel notified the State that it might present a diminished capacity defense at trial. After counsel gave this notice, however, he made significant efforts to investigate Mr. Durgeloh's mental

⁸⁸*Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland*, 466 U.S. at 688-89).

⁸⁹*Gerlaugh v. Stewart*, 129 F.3d 1027, 1036 (9th Cir. 1997).

⁹⁰*Strickland*, 466 U.S. at 694.

⁹¹*Id.*

and physical health conditions, or whether they could have provided a viable defense at trial.

Not until after Mr. Durgeloh was convicted did counsel ask for the court to appointment of an expert to evaluate Mr. Durgeloh to establish a diminished capacity mitigation defense at sentencing. Even then, defense counsel failed to supply the court with any controlling authority that would have allowed the court to impose the requested sentence.

Counsel's decision to abandon the diminish capacity defense, which only would have supported the general denial argued at trial, constitutes both deficient performance and unreasonable under *Strickland*.

2. Deficient Performance.

Effective assistance of counsel requires trial counsel must investigate the case, including potential witnesses, or make a reasonable and informed decision to not investigate.⁹² Whether defense counsel's failure to investigate is deficient performance depends upon "the reasons for the trial lawyer's failure to" investigate.⁹³ In *A.N.J.*, our Supreme Court held that providing "effective assistance of counsel may

⁹²*State v. Jones*, 85236-7, 2015 WL 3646445, at *6 (Wash. June 11, 2015)

⁹³*Id.* (holding that whether counsel's failure to interview lay witnesses was deficient "depends on the reason for the trial lawyer's failure to interview.").

require the assistance of expert witnesses to test and evaluate the evidence against a defendant.”⁹⁴

A failure to reasonably investigate the defendant’s known mental disorders and present a diminished capacity at trial can constitute ineffective assistance of counsel.⁹⁵In *Fedoruk*, for example, the court reversed a murder conviction holding that defense counsel rendered ineffective assistance of counsel where he failed to promptly investigate a plausible mental health defense before trial.⁹⁶

Similarly, in *Brett* (a case cited several times in *Fedoruk*, the Court held that a defense attorney's performance fell below the standard of reasonableness based on several deficiencies, including failure to investigate a mental health defense:

[W]hen counsel knew or had reason to know of a mental defect or illness affecting their client in a possible death penalty case, counsel could and should have: (1) promptly sought the appointment of counsel; (2) presented a mitigation package to the prosecutor before a death penalty notice was filed; (3) promptly investigated relevant mental health issues; (4) sought a timely appointment of investigators; (5) sought a timely appointment of qualified

⁹⁴*State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010). The Supreme Court has held the same, reasoning using an expert may be “the only reasonable and available defense strategy.” *Hinton v. Alabama*, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014) (unreasonable for lawyer to not seek additional funds to hire an expert based upon a misunderstanding of the law)

⁹⁵*See Caro v. Woodford*, 280 F.3d 1247, 1254-56 (9th Cir.2002) (holding that counsel was deficient for failing to consult an expert and present expert testimony about the physiological effect of toxic chemical exposure on defendant's brain);

⁹⁶*State v. Fedoruk*, 184 Wn. App. 866, 879, 339 P.3d 233, 239 (2014)

mental health experts; and (6) adequately prepared for the penalty phase by having relevant mental health issues fully assessed and by retaining, if necessary, qualified mental health experts to testify accordingly.⁹⁷

The Court held that in light of these failures, viewed collectively, Brett had met his burden to show deficient performance. “Counsel did not conduct a reasonable investigation into Brett's medical conditions and the possible mental effects of such severe conditions. Thus, Brett's counsel was unable to make informed decisions about how to best represent him in both the guilt and penalty phases of the trial.”⁹⁸

Here, the record shows that, like in *Brett* and *Fedoruk*, Mr. Durgeloh's trial attorney knew or should have known that Mr. Durgeloh's medical conditions could have aided the defense at trial, but failed “to conduct a reasonable investigation [those] conditions and the possible mental effects of such severe conditions.”⁹⁹

First, Mr. Durgelo's counsel certainly “knew” at least “had reason to know” that a diminished capacity defense was a plausible defense.¹⁰⁰ In fact, well before trial began, defense counsel identified diminished capacity as a possible defense for trial.¹⁰¹ Yet, he apparently decided, for an

⁹⁷*Brett*, 142 Wash.2d at 882.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

apparent reason, to not investigate and present that defense at trial. In making that decision, he ignored several red flags throughout his representation of Mr. Durgeloh, and failed to investigate for mental health evidence or consider introducing evidence on that issue.¹⁰²

Second, defense counsel's decision to not pursue such appointment before trial was unreasonable. When representing an indigent client, counsel has a duty to seek funds to hire an independent expert when that expert is necessary to present a mental health defense.¹⁰³ As the court held in *Brett*, counsel's decision to not seek a medical expert must be based upon an informed decision:

Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert."¹⁰⁴

¹⁰²See *Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008)

¹⁰³*Brett*, 142 Wash.2d at 882. A reasonably competent attorney also knows exactly how to obtain such funds and follows the procedures to request them. In *Hinton*, the Supreme Court held that it was "unreasonable for Hinton's lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at \$1,000." *Hinton*, 134 S. Ct. at 1088.

¹⁰⁴*Brett*, 142 Wash.2d at 881, 16 P.3d 601 (2001); *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir.1999)]; *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) (Sixth Amendment violated where counsel failed to consult proper experts and inform retained experts about defendant's prior brain injuries).

This process requires counsel to conduct a preliminary investigation to determine what sort of experts are required and what information is going to be relevant to that expert's conclusions.¹⁰⁵

In *Brett*, the Court held that it may be unreasonable for defense counsel to not promptly seek the funds necessary to hire a necessary mental health expert.¹⁰⁶ Like in *Brett*, Drugeloh's counsel should have, but failed to "promptly [seek] the appointment of qualified mental health experts."¹⁰⁷ Defense counsel has a duty to *promptly* hire defense experts so that their expertise can be used before and during trial.¹⁰⁸ In fact, even when defense counsel does retain an expert, but waits until days before trial, courts will still find that such delay was deficient.¹⁰⁹ Here, counsel's decision to wait until *after* trial to request for a diminished capacity instruction was unquestionably unreasonable. Though it could have helped him at sentencing, despite counsel's failure to cite legal authority as to why,¹¹⁰ it certainly provided no help to defend him in his trial, which was already complete.

¹⁰⁵*Id.* at 1226.

¹⁰⁶*Brett*, 142 Wash.2d at 882.

¹⁰⁷*Id.*

¹⁰⁸*Bloom v. Calderon*, 132 F.3d at 1276-77.

¹⁰⁹*See id.* at 1276-77 (holding that failure to retain psychiatric expert until days before trial was ineffective).

¹¹⁰*See* argument in Section "A" below.

There is simply no explanation why defense counsel would have waited this long to have Mr. Durgeloh evaluated by an independent defense expert. Before trial, defense counsel informed the State that it might pursue a diminished capacity defense. Yet, on the day of trial, counsel conceded that he could not advance that defense because never had Mr. Durgeloh evaluated by a defense expert.

Washington case law makes it clear that a testifying expert is a necessary to present a mental health defense at trial.¹¹¹ However, despite telling the State that the defense might seek this defense, when the state moved to prohibit the defense at trial, defense counsel offered no reason why it was not presented.

Assuming that counsel was aware that a defense expert was necessary under the law to present the defense, there is still no other explanation, except a lack of due diligent to obtain one, that explains why counsel did not seek an expert.

Public funds are readily available for indigent defendants whenever necessary to present a mental health defense at trial. Using these funds, defense counsel could have had Mr. Durgeloh evaluated by a competent defense expert to see if he qualified to raise the defense.

¹¹¹ *State v. Edmon*, 28 Wn. App. 98, 102, 621 P.2d 1310 (1981) (without first conducting a personal examination and rendering a diagnosis, expert unqualified to testify about diminished capacity).

Moreover, consulting with such an expert, before rejecting a mention health defense, “is especially important” where, as is the case here, “counsel . . . has no knowledge or expertise about the field.”¹¹²

Further, a diminished capacity defense did not conflict with the defense theory, a general denial, counsel ultimately advanced at trial. The defense was not that Mr. Durgeloh was not guilty because he did not possess a firearm, point it in the air, or threatened to kill the officers. In fact, the defense conceded all of these things. Rather, the defense was one that related directly to Mr. Durgeloh’s intent, at the fear of his victims.

A diminished capacity defense was, therefore crucial to the defense because it allows the jury to consider evidence of a “mental illness or disorder” in determining whether the defendant had the capacity to form the intent required to commit the crime.¹¹³ Such evidence allows the defense to challenge the State’s proof with “highly probative [evidence] of the defendant’s mental state” and can be crucial to the defendant’s case.¹¹⁴ As explained by the court of appeals in *Mitchell*, “The jury learns

¹¹²*Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008)

¹¹³*State v. Thomas*, 123 Wn. App. 771, 781, 98 P.3d 1258, 1263 (2004).

¹¹⁴ John Q. La Fond Kimberly, Washington’s Diminished Capacity Defense Under Attack, 13 U. Puget Sound L. Rev. 1, 10 (1989) (citing *States v. Pohlot*, 827 F.2d. 889 (3rd Cir. 1987).

from the expert how the mental mechanism operates, and then applies what it has learned to all the facts introduced at trial.”¹¹⁵

Hiring a defense expert is the therefore first step, and often a necessary step to a competent investigation. Hiring such an expert before trial was, as in *Brett*, essential for defense counsel to be “adequately prepare[d]” by consulting with “qualified mental health experts” and getting them “[ready] to testify.”¹¹⁶ Yet here, without the benefit of a defense expert, defense counsel abandoned his original plan to mount a diminished capacity defense. This decision could not have been reasonable under the facts before counsel when he made that decision.¹¹⁷

Not only should counsel have hired an expert, but he should have, but did not, “promptly investigate [Mr. Durgeloh’s] mental health issues,”¹¹⁸ despite several red flags that would have warranted further investigation. Even apart from obtaining an expert, defense counsel should still look to gather evidence from other sources, by gathering medical records, interviewing potential witnesses, and research the relevant law so the defense pertinent to the defense.

¹¹⁵*State v. Mitchell*, 102 Wn. App. 21, 27-28, 997 P.2d 373, 376-77 (2000)

¹¹⁶*Id.*

¹¹⁷*Loyd v. Whitley*, 977 F.2d 149, 157-58 (5th Cir. 1992) (trial counsel abandoned search for independent psychiatric examination even though he knew it to be an important pursuit).

¹¹⁸*Brett*, 142 Wash.2d at 882.

But here, defense counsel did not appear to get that far. And, although counsel's entire investigation is not part of the record here, the record affirmatively shows that defense counsel failed, at every point, to ensure that Mr. Durgeloh could present a diminished capacity defense at trial. For example, defense counsel made no apparent efforts to ensure that the State's evaluation was complete and thorough. The State's expert report noticeably did not require the expert to interview witnesses or even review Mr. Durgeloh's medical records. Instead, the report appears to be based almost entirely on Mr. Durgeloh's own self-reporting.¹¹⁹ To conduct a thorough investigation, as the Ninth Circuit has held, counsel must provide each expert "with information relevant to the conclusion of [that] expert."¹²⁰

Perhaps most notable is defense counsel's unreasonably related request to the trial court to ask for a second court ordered "capacity evaluation," which counsel only apparently thought of after Mr. Durgeloh was convicted. Mr. Durgeloh's counsel was even more unreasonable in this respect that Brett's counsel, who at least discovered his errors before Brett's trial was over.¹²¹

¹¹⁹ CP 28.

¹²⁰ *Caro*, 165 F.3d at 1226.

¹²¹ *Brett*, 142 Wash.2d at 882. This issue is argued separately and in more detail below.

There is there is simply no reasonable trial tactic that can excuse defense counsel's failure to investigate his client's best possible defense.¹²² Here, the defense strategy, to argue a general denial, was weak, and would have been much stronger if expert testimony supported the defense's argument try to understand and put yourself in the position of what was going on that night, the way Fred saw it and the way Fred heard it."¹²³ Further, medical testimony would have given medically based meaning to counsel's argument that only mentioning briefly that Mr. Durgeloh "hadn't had any medication for three days" before the alleged crimes.¹²⁴ But, without any medical testimony to explain the exact effects this had on Mr. Durgeloh's state of mind, this evidence was practically useless.

Importantly, when the defense informed the State that it might pursue a diminished capacity defense, the State asked the court to have Mr. Durgeloh evaluated to determine whether his capacity was diminished at the time of the offense. The State's expert concluded that Mr.

¹²²*Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) (holding that defense counsel was ineffective for failing to investigate and present his client's best and "most important" defense); *State v. Fedoruk*, 184 Wn. App. 866, 882, 339 P.3d 233, 240 (2014) (holding that "in light of the State's strong circumstantial evidence against Fedoruk, the failure to obtain an independent expert evaluation appears even less reasonable.")

¹²³ RP 327.

¹²⁴ RP 327.

Durgeloh's capacity was not impaired, under these facts, to excuse counsel from investigating the defense.¹²⁵

It is conceivable that counsel read this evaluation and then decided against pursuing the defense any further. If that was in fact the reason, it was unreasonable because defense counsel has a duty to conduct his own independent investigation into the facts. Defense counsel fails in this duty if he relies upon an inaccurate or incomplete physiological report.¹²⁶

Counsel has a duty to ensure their experts reports are accurate by giving them the materials they need to develop, in a timely manner, an accurate picture of the defendant's mental condition.¹²⁷ Without hiring his own expert to evaluate the competing report, counsel cannot simply assume, its accuracy, as counsel may have done here because even counsel's failure to investigate based upon an incomplete physiological report can be unreasonable and deficient.¹²⁸

Finally, the record shows that Mr. Durgeloh's counsel, like Brett's counsel, "failed to adequately prepare for" sentencing.¹²⁹ The decision not

¹²⁵ CP 32.

¹²⁶ *Bloom v. Calderon*, 132 F.3d at 1271-74, 1277 (holding that Sixth Amendment is violated where counsel waited until days before trial to retain psychiatric expert, who produced a "hurried and inaccurate report").

¹²⁷ *Clabourne v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1998);

¹²⁸ *Kenley v. Armontrout*, 937 F.2d 1298, 1305-06, 1308 (8th Cir. 1991) (ineffective to rely on inconclusive and incomplete psychological report as basis to forego further investigation).

¹²⁹ *Id.*

to investigate a particular defense is not reasonable when counsel later presents that same defense, for the same client, in a later proceeding¹³⁰In *Brett*, the court observed that *Brett's* counsel failed “to adequately prepared for the penalty phase by having relevant mental health issues fully assessed and by retaining, if necessary, qualified mental health experts to testify accordingly.”¹³¹ Similarly, here, Mr. Durgeloh’s counsel was also entirely unprepared for sentencing. Even after finally have Mr. Durgeloh’s evaluated by a second expert, counsel failed to use that evaluation in any way that could have resulted in a lower sentence. As argued above, defense counsel filed no sentencing memorandum and was, by all appearance, unprepared for sentencing. Despite this fact, counsel proceeded to make several arguments asking for a sentence below the standard range, but failed to direct the court to any authority that would allow the court to impose one.

In the end, the record shows that defense counsel “did not *choose*, strategically or otherwise, to pursue a “general denial” over a diminished capacity defense. Indeed, a diminished capacity defense, is simply a way to present a general denial defense, but supported with expert medical

¹³⁰*Deutscher v. Whitley*, 884 F.2d 1152, 1160 (9th Cir. 1989)

¹³¹*Id.*

testimony. Instead, counsel “simply abdicated his responsibility to advocate his client's cause.”¹³²

3. Prejudice

Having established deficient performance, Mr. Durgeloh must also “show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”¹³³ “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.”¹³⁴

Here, had defense counsel properly investigated the diminished capacity defense, applied for the appointment of an independent expert *before trial*, and conducted other tasks necessary to investigate the defense, there is at least a reasonable chance that some or even one jurors would have found that Mr. Durgeloh lacked the specific intent to assault or threaten the deputies in this case.

This is not a case where the record lacks proof that an expert would have been able to testify that the defendant lacked the required intent to mount a successful diminished capacity defense. Indeed, counsel

¹³²*Loyd v. Whitley*, 977 F.2d 149, 159 (5th Cir. 1992)

¹³³*Hinton v. Alabama*, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014)

¹³⁴*Id.*

obtained such an expert, who would have testified very well for the defense if he was retained *before trial*.

Further, a diminished capacity defense, would have provided enormous potential benefits the defense if properly investigated and raised at trial. In general, once asserted, the defense allows the jury to consider evidence of a “mental illness or disorder” in determining whether the defendant had the capacity to form the intent required to commit the crime.¹³⁵Such evidence allows the defense to challenge the State’s proof with “highly probative [evidence] of the defendant's mental state” and can be crucial to the defendant's case.¹³⁶As explained in *Mitchell*, “The jury learns from the expert how the mental mechanism operates, and then applies what it has learned to all the facts introduced at trial.”¹³⁷

C. COUNSEL’S FAILURE TO CITE ANY LEGAL AUTHORITY TO SUPPORT HIS REQUEST FOR AN EXCEPTIONAL SENTENCE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

Defense counsel’s primary argument for a sentence below the standard range was based upon Mr. Durgeloh’s “mental state at the time the incident occurred.”¹³⁸ He did not cite any legal authority that would

¹³⁵*State v. Thomas*, 123 Wn. App. 771, 781, 98 P.3d 1258, 1263 (2004).

¹³⁶ John Q. La Fond Kimberly, Washington's Diminished Capacity Defense Under Attack, 13 U. Puget Sound L. Rev. 1, 10 (1989) (citing *States v. Pohlot*, 827 F.2d. 889 (3rd Cir. 1987)).

¹³⁷*State v. Mitchell*, 102 Wn. App. 21, 27-28, 997 P.2d 373, 376-77 (2000), as amended on reconsideration (Apr. 17, 2000)

¹³⁸ RP 389.

have allowed the court to impose such a sentence. The prosecutor responded, also without citing any authority, that Mr. Durgeloh's sentence "is not subject to an exceptional sentence."¹³⁹

Defense counsel's failure to inform the trial court of its sentencing authority may constitute ineffective assistance of counsel.¹⁴⁰In *McGill*, defense counsel failed to apprise the court of its authority to depart from the standard range on grounds the multiple offense policy of the Sentencing Reform Act resulted in an excessive sentence.¹⁴¹ Although there was case law supporting a downward departure in McGill's case, his attorney did not move for an exceptional sentence or cite the relevant authorities that would have supported it.¹⁴²

Division One held that counsel rendered ineffective assistance. Counsel's failure to cite RCW 9.94A.535(1)(g) and certain case law in support of the exceptional sentence was deficient because that failure ultimately prevented the court from exercising its authority under RCW 9.94A.535(1)(g). That failure was prejudicial, thus warranting a new sentencing hearing, because the "the reviewing court [was not] confident

¹³⁹ RP 386.

¹⁴⁰ *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002);

¹⁴¹ *Id.* at 97.

¹⁴² *Id.* at 101-102.

that the trial court would impose the same sentence” after properly exercising its discretion.¹⁴³

Reversal is likewise required here. First, as in *McGill*, the sentencing court erroneously believed that it had no legal basis to impose an exceptional sentence, despite controlling law to the contrary. RCW 9.94A.535(1)(e) allows a sentencing court to impose an exceptional sentence, below the standard range, if the defense can show that “his capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.”¹⁴⁴

Here, defense counsel met that burden. Dr. Larson’s comprehensive diminished capacity evaluation, which was presented as evidence at sentencing, establishes both that Mr. Durgeloh’s mental conditions, as detailed below, significantly impaired his ability to appreciate the wrongfulness of his conduct.

In his report, Dr. Larson provides a laundry list of medical ailments that plagued Mr. Durgeloh on the night he committed the alleged crimes. Dr. Larson concludes in his report, for example, that

¹⁴³ *McGill*, 112 Wn. App. at 100-101.

¹⁴⁴ *See* RCW 9.94A.535(1)(e). This statute specifically excludes the “voluntary use of drugs or alcohol,” *Id.* but as Dr. Larson’s report reveals, Mr. Durgeloh had not consumed any alcohol that day.

at the time of the alleged event he had not been taking lactulose and in all likelihood his ammonia level was elevated. He had not been taking his diabetic medications, therefore, with reasonable medical certainty, his brain was essentially starving from sugar, its only source of fuel. He had been off the antidepressants causing a decrease in serotonin, norepinephrine, and likely dopamine and then was experiencing chronic pain and probable opioid withdrawal.¹⁴⁵

After diagnosing each of these conditions, Dr. Larson ultimately concludes that concludes, at the end of his report, that at the time of the offense, Mr. Durgeloh had absolutely no “intention of harming others” and that “[i] is obvious, with reasonable medical certainty, that his behavior was the direct result of mental illness and his declining physical health.”¹⁴⁶

Second, Mr. Durgeloh’s trial attorney failed to tell the court what controlling law gave it the discretion to impose a sentence below the standard range, just as McGill’s counsel failed to do. In both cases, defense counsel’s clearly failed to investigate the relevant sentencing laws to find viable ways to ask for a significantly reduced sentence under the law.¹⁴⁷

Finally, as in *McGill*, Mr. Durgeloh is entitled to remand for a new sentencing hearing. In *McGill*, the court held that remand for resentencing is required, “unless reviewing court is confident,” based upon the record

¹⁴⁵ CP 104.

¹⁴⁶ CP 102.

¹⁴⁷ *Hinton*, 134 S. Ct. at 1088.

before it, “that the trial court would impose the same sentence” when made aware of the controlling law once remanded.¹²

Here, the Court imposed a sentence within the standard range. Had defense counsel argued for an exceptional sentence downward and the court granted or denied it, on appeal, this court would evaluate that decision using an abuse of discretion standard.¹⁴⁸ However, as in *McGill*, defense counsel did not request an exceptional sentence downward.¹⁴⁹ In *McGill*, the court found that the defendant was prejudiced by his counsel’s failure to not argue for a downward departure when it *could have* resulted in a lower sentence. The court held that under similar case law, the trial court *could have* granted a downward departure, had it known that it was an option.¹⁵⁰

D. COUNSEL’S FAILURE TO MAKE A MEANINGFUL ARGUMENT, SUPPORTED BY CASE LAW, THAT MR. DURGELOH’S CONVICTIONS WERE THE SAME CRIMINAL CONDUCT WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

Two crimes must be counted as one if they “require the same criminal intent, are committed at the same time and place, and involve the same victim.”¹⁵¹ The burden of presenting this argument at sentencing falls

¹⁴⁸ See *State v. Batista*, 116 Wn. 2d 777, 808 P.2d 1141 (1991).

¹⁴⁹ *McGill*, 12 Wn. App. at 95.

¹⁵⁰ See *id.* at 101.

¹⁵¹ RCW 9.94A.589(1)(a).

on the defendant.¹⁵²Once it is made the court must make factual findings, which are reviewed for an abuse of discretion, as well as conclusions of law, which are reviewed de novo.¹⁵³

Normally, if defense counsel does not argue same criminal conduct at sentencing, the argument is waived on appeal.¹⁵⁴Here, trial counsel made a feeble attempt to argue the same criminal conduct, but failed to present the court with any facts or argument to support that argument. This may have constituted waiver. Nevertheless, he can still argue that these failures were the result of ineffective assistance of counsel because such a claim is an error of constitutional magnitude.¹⁵⁵

Defense counsel's failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel.¹⁵⁶To establish this claim, Mr. Durgeloh must show the trial court had the discretion to find that the two crimes were the same criminal conduct under the facts of his case.¹⁵⁷

¹⁵²*State v. Graciano*, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013).

¹⁵³*Id.*

¹⁵⁴*State v. Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013).

¹⁵⁵*Id.*

¹⁵⁶*State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) (“counsel's decision not to argue same criminal conduct as to the rape and kidnapping charges constituted ineffective assistance of counsel”).

¹⁵⁷*See id.*

Here, given the facts of the case, the trial court certainly had the discretion to find that Mr. Durgeloh's convictions were the same criminal conduct. Counsel's inexplicable mistake for not arguing this, and supporting it with the case law below was ineffective assistance of counsel.

Mr. Durgeloh's conduct underlying each of his convictions for assault and harassment clearly occurred at the same time and place. Both crimes occurred at Mr. Durgeloh's home. The assault and harassment convictions took place over a relatively short period of time as Mr. Durgeloh refused to respond to the deputies' repeated requests to speak with him, or come outside of his home. In addition, the two deputies that were the victims of the assault convictions were also clearly the same as those for the harassment victims.

The dispositive real issue here, had counsel attempted to raise it, turns on Mr. Durgeloh's objective intent when he committed these crimes. Whether two crimes are the same criminal conduct usually turns on whether the defendant committed them with the same criminal intent. Importantly, as required here, "is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose

in committing the crime.”¹⁵⁸ Thus, the mens rea of the crime charged is relevant, whether two crimes were committed with the same intent usually turns on the facts of each case.

As the Supreme Court held in *Dunaway*, the court must start by asking whether the defendant's intent, *viewed objectively*, changed from one crime to the other.¹⁵⁹ In that case, for example, the Court found that convictions for kidnapping and robbery were so must be counted as one where the defendant abducted his victim (kidnapping) with the intent to commit robbery, and there was no evidence that his intent changed throughout the course of committing those crimes.¹⁶⁰

Viewing Mr. Durgeloh's intent objectively, the trial court could easily have concluded that Mr. Durgeloh assaulted and harassed the deputies for the same objective purpose: to cause them to victims to fear bodily harm.

First, both crimes required the State to prove very similar criminal intents, both of which focus on Mr. Durgeloh's threatening words and conduct throughout his “standoff” with the deputies. To prove assault, the state had to prove that Mr. Durgeloh assaulted the deputies with a firearm,

¹⁵⁸*State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

¹⁵⁹*Vike*, 125 Wn.2d at 411 (citing *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)).

¹⁶⁰*Dunaway*, 109 Wash.2d at 217, 743 P.2d 1237.

with the intent to create apprehension of bodily harm.¹⁶¹To prove harassment,the State had to prove that he knowingly threatened to kill them, either immediately or in the future.¹⁶²

Indeed, the Supreme Court has held that convictions for harassment and assaultive acts during the same time frame can be the same criminal conduct.¹⁶³ Thus, because these mental elements intersect, the Court must look to whether Mr. Durgeloh's intent, viewed objectively, changed between the harassment and the assault.¹⁶⁴ If the facts support a finding that Mr. Durgeloh had the same criminal intent on each count, then the trial court would have had the discretion to count themone.¹⁶⁵

Second, there was no discernible change in intent between the crimes. In *Anderson*, the court of appeals held that the trial court abused its discretion when it failed to count crimes for escape and first degree assault as one where the defendant assaulted a corrections officer to effectuate his

¹⁶¹*State v. Byrd*, 125 Wn.2d 707, 711, 887 P.2d 396 (1995).

¹⁶² RCW 9A.46.020(1)(a)(i).

¹⁶³*State v. Worl*, 129 Wn.2d 416, 429, 918 P.2d 905, 911 (1996) (holding that a malicious harassment conviction was based on the infliction of the same physical injury that constituted the basis for the crime of attempted murder); *State v. Mandanas*, 168 Wn.2d 84, 87, 228 P.3d 13 (2010) (Court of Appeals determined assault and felony harassment constituted same criminal conduct for sentencing purposes) (citing *State v. Mandanas*, No. 57738-7-1, 2007 WL 1739702 (Div. I, June 18, 2007)).

¹⁶⁴*See, e.g., State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

¹⁶⁵*See State v. Rodriguez*, 61 Wn.App. 812, 816, 812 P.2d 868, *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991).

escape from custody.¹⁶⁶ There, the record “clearly” showed that the defendant committed the assault during the course of his escape, and that no evidence suggested he had abandoned that intent before he assaulted the corrections officer.¹⁶⁷

Similarly, in *Miller*, the defendant tried to steal a firearm from a police officer’s holster by force and assaulted him during the struggle for the firearm.¹⁶⁸ The court held that the defendant’s convictions for third degree assault and attempt to steal a firearm must be counted as one offense. The court observed that assault was “intimately related” to the attempted theft because Miller could not deprive the officer of his holstered weapon without assaulting him.¹⁶⁹

Like in *Miller* and *Anderson*, no evidence suggests that Mr. Durgeloh’s purpose throughout his crimes changed from one crime to another. It was essentially undisputed at trial that Mr. Durgeloh committed both crimes because Mr. Micciche was unstable, irrational and simple did not want the police at home. The prosecutor acknowledge this in his closing argument, but argued that none of these facts were relevant to prove that he committed the charged crimes.

¹⁶⁶*State v. Anderson*, 72 Wash.App. 453, 464, 864 P.2d 1001 (1994).

¹⁶⁷*Id.*

¹⁶⁸*State v. Miller*, 92 Wn. App. 693, 964 P.2d 1196 (1998);

¹⁶⁹*Id.* at 708.

Thus, the evidence clearly suggests that Mr. Durgeloh's convictions for assault and harassment against the same two victims, at the same place, were "committed as part of a scheme or plan" without any evidence to suggest any "substantial change in the nature of [his] criminal objective."¹⁷⁰ Counsel was therefore ineffective for failing to raise this issue.

1. Remedy.

When the trial court abuses its discretion in treating the same criminal conduct as separate crimes, and that abuse of discretion is based upon a factual error, the proper remedy is to remand for resentencing with instructions to treat the convictions as one offense in the offender score.¹⁷¹ Here, however, the record shows that, had counsel made this argument, it would have been an error of law to not find the same criminal conduct, because the undisputed facts from trial show that Mr. Durgeloh had only one criminal objective. Thus, the proper remedy should be remand for sentencing with orders to treat the crimes for assault and harassment as two, not four.

¹⁷⁰*State v. Lewis*, 115 Wash.2d 294, 302, 797 P.2d 1141 (1990); *State v. Boze*, 47 Wash.App. 477, 480, 735 P.2d 696 (1987).

¹⁷¹*Dunaway*, 109 Wn.2d at 217.

E. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO INVESTIGATE A POTENTIALLY MERITORIOUS MOTION TO SUPPRESS AND FAILED TO FOLLOW PROPER CRIMINAL PROCEDURES TO CHALLENGE EVIDENCE OBTAINED FROM AN UNLAWFUL SEARCH OF THE DEFENDANT’S HOME.

The failure to file a motion to suppress physical evidence obtained from an unlawful search can be ineffective assistance of counsel.¹⁷² When “it is difficult to conceive of a legitimate trial strategy or tactical advantage to be gained by not filing a motion to suppress,” as happened here, counsel’s failure to file such a motion is ineffective.

Although this Court must initially presume that the decision to not move to suppress was a reasonable trial tactic, this presumption fails here because defense counsel clearly failed to investigate the merits of this motion before trial had begun. In the discovery, specifically, the statement of probable cause, Cowlitz County Sheriff K. Moore recorded the following observations about the pre-warrant search of the home:

After Durgeloh was placed under arrest,” his “house was cleared by SWAT.” During that search, officers found no one else inside the home, but they did locate a “box of .45 shells that had a few rounds missing from it.” The statement of probable cause also admits that both Deputy Sheridan and Moore eventually seized a “.45 caliber semi-automatic pistol” gun from Mr. Durgeloh’s bed.¹⁷³

¹⁷²*Grumbley v. Burt*, 591 Fed. Appx. 488, 499 (6th Cir. 2015)

¹⁷³ CP 2. Notably, the language used in the statement of probable cause is noticeably vague about exactly when the firearm has taken from the home. For example, the report states that “Upon serving the search warrant, the .45 caliber Ruger semi auto pistol and a partial box of .45 caliber rounds were *entered into evidence.*” *Id.* But

These statements obviously leave it an open question as to when Deputy Moore entered Mr. Durgeloh's home to retrieve the firearm. Instead of investigating this issue before trial and filing a pretrial motion to suppress under CrR 3.5, defense counsel simply "motion in limine" asking the court to exclude "any testimony by police officers concerning the arrest of the Defendant . . . including post-arrest ID, because they arrested him [Mr. Durgeloh] as a result of a Payton v. New York violation."¹⁷⁴

This is not the proper procedure for a motion to suppress physical evidence.¹⁷⁵ Further, this failure to follow procedure, strongly suggests that defense counsel failed to properly investigate this issue before trial. By filing this motion, it appears that counsel did not interview Deputy Moore before trial to find out when she entered the home and when the firearm was in fact seized. Instead, he simply waited until trial, and then, if she testified that she retrieved the gun before the warrant, counsel would then ask the court to suppress it.

Had the defense investigated such a motion, there is at least a reasonable chance that some of the contraband admitted during Mr. Durgeloh's trial, would have been suppressed. As a result, defense

¹⁷⁴ RP 67.

¹⁷⁵ See CrR 3.6.

counsel's failure to investigate such a motion constitutes deficient performance under *Strickland*.

F. REMEDY

This Court has three optional remedies when evaluating a personal restraint petition. It can (1) dismiss the petition if the defendant fails to make a prima facie showing of constitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudicial error.¹⁷⁶

Here, no reference hearing is necessary to decide this case because all the evidence relied upon and needed to prove the arguments lie in the record of Mr. Durgelohs direct appeal. This court should therefore determine that no reference hearing is necessary and grant the relief requested below.

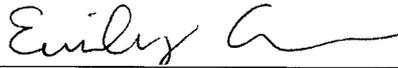
VI. CONCLUSION

For the foregoing reasons, this Court should grant this and petition grant him a new trial, one in which he receives the effective assistance of counsel.

Dated June 24, 2015,

¹⁷⁶*In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Respectfully submitted,



Emily Gause, WSBA #44446
Attorney for Petitioner



Mitch Harrison, WSBA #43040
Attorney for Petitioner

VII. STATEMENT OF FINANCES

Pursuant to RAP 17.7(4), the court of appeals can waive the filing fee if the petitioner is indigent and submits a statement proving that indigency. Here, Mr. Durgeloh is indigent and will submit a statement proving such. Upon receipt of that statement, Mr. Durgeloh asks this court to waive the filing fee in this case.

VII. STATEMENT OF FINANCES

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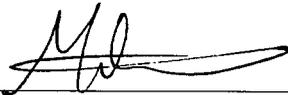
G. OATH

After being first duly sworn on oath, I depose and say that: I am the attorney for petitioner, I have read the petition, know its contents, and believe the petition is true.

FILED
APPEALS DIV 1
COURT OF APPEALS
STATE OF WASHINGTON
2015 JUN 24 PM 1:56

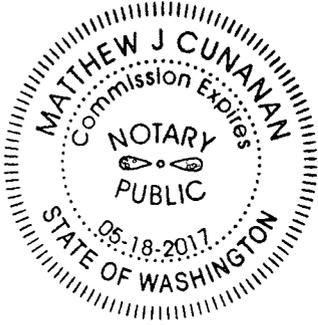
Dated June 24, 2015,

Respectfully submitted,



Mitch Harrison, WSBA #43040
Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me, the undersigned
notary public, on this 24TH day of JUNE, 2015.



Matthew J. Cunanan
Notary Public for Washington

My Commission Expires: 2017

FILED
COURT OF APPEALS
DIVISION II

2015 JUL -9 AM 11:46

STATE OF WASHINGTON
BY  DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

FRED C. DURGELOH,

Appellant.

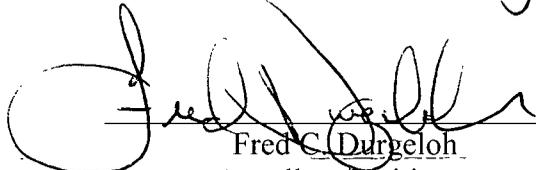
COA # : 43188-2-II

VERIFICATION

I. VERIFICATION

I declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

DATED THIS 3 DAY OF July, 2015.


Fred C. Durgeloh
Appellant/Petitioner