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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

NO. _____

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

In the Matter of the Personal Restraint of: ROBERT GROTT, Petitioner.	PERSONAL RESTRAINT PETITION

A. STATUS OF PETITIONER

I, Robert Grott, DOC #399611, apply for relief from confinement. I am now in custody serving a sentence upon conviction of a crime. I am now in custody pursuant to a judgment and sentence entered in Pierce County Superior Court, Cause #16-1-00509-0, at which I was convicted following a jury trial on: 4/25/2017 of the charges of secong degree murder, seven counts of first degree assault, and eight firearm enhamcements. On 5/26/2017, the Honorable Judge Brian Chushcoff imposed sentence upon me of 50 years, 3 months in prison. My lawyer at trial was Michael Franz of Seattle.

I did appeal from the decision of the trial court. I filed a direct appeal with this Court, case

#50415-4-II. My lawyer on appeal was Lisa Ellner. After my appeal was granted by this Court, the Washington Surpeme Court granted review and remanded the case back to this Court on February 2, 2020 (case #97183-8).. This Court finally denied my appeal on November 3, 2020, and no petition for review was filed after the the decision following remand. The final Mandate was issued in this appeal on November 3, 2020.

Since my conviction and appeal, I have filed no other challenges to my conviction and sentence other than written above.

B. GROUNDS FOR RELIEF

1. STATEMENT OF THE FACTS[1]

In August 2015, Petitioner Grott's handgun was stolen, and Grott believed Julian Thomas had stolen it. On October 31, 2015, Grott and Thomas had an argument which ended with Thomas shooting Grott's front door nearly hitting Grott in the head. Thomas continued to threaten to kill Grott in the subsequent months. After the October 31, 2015 shooting, Grott experienced a significant increase in anxiety and

f.n. 1: For a full recitation of the facts, see this Court's decision in #50415-4-II.

exhibited a heightened level of vigilance, often inspecting his house for potential threats. He also started carrying a gun. Grott became isolated and paranoid and confided in a family member that he was hurting and afraid of someone. He said his life was in danger.

The Shooting

On February 1, 2016, Grott saw Thomas parked in an AM/PM parking lot, where Thomas was in his car talking to a friend named Petra Smith. Grott, who was lawfully carrying his firearm, began firing his weapon toward Thomas, and continued to fire as he walked closer. Grott fired 48 rounds, killing Thomas who was facing Grott at the time of the shooting. In the course of the shooting, bullets from Grott's gun shattered the window of the AM/PM. Thomas died at the scene, but no one else was injured. Police officers found a firearm under Thomas's body.

The State charged Grott with first degree murder for the killing of Thomas, and seven counts of first degree assault of the bystanders of the shooting. Each charge also carried an allegation that Grott was armed with a firearm.

The Trial

At trial, Grott presented two affirmative

defenses: diminished capacity based on post-traumatic stress disorder (PTSD), and self-defense. Grott presented Dr. Kevin Moore as an expert witness in support of his diminished capacity defense. Grott did not testify.

Dr. Moore, a psychiatrist and retired military, has several years of experience treating marines and combat veterans. Grott had enlisted in the Marines and was deployed to Afghanistan, and was honorably discharged in 2012. Grott's family had reported that Grott had "changed" after being in Afghanistan. Dr. Moore examined Grott, who made statements about the shooting of Thomas. Dr. Moore diagnosed Grott with PTSD. The court and counsel conducted voir dire of Dr. Moore prior to his testimony to discuss his opinions and his report.

The State moved to exclude Dr. Moore's testimony that Grott told him that Grott and Thomas "locked eyes" before the shooting, holding that the statements were hearsay. This statement was crucial to Grott's self-defense claim. Dr. Moore's report described the claim as follows:

> When Grott "locked eyes" with Thomas on February 1, 2016, Grott was fearful that Thomas was going to kill him as he had repeatedly threatened.

> After three months of repeated homicidal threats by Thomas, [Grott] reacted in self-defense by unholstering his handgun when [Thomas] was bent over in an apparent move to retrieve something from his car. Trained as a Marine, Grott drew and fired the pistol he carried. The pistol was registered, and he had obtained a permit for concealed carry after he became increasingly concerned for his safety and that of his family.

Clerk's Paper's (CP) at 749. The State sought to prevent Grott from admitting his own statements through Dr. Moore, arguing that it would have no opportunity to cross-examine him on the subject, and that Grott could then use those admitted statements as support for his self-defense claim. Grott argued that this statement was admissible because it was reasonably pertinent to Dr. Moore's diagnosis of PTSD under Evidence Rule (ER) 803(a)(4).

After extensive discussion, the trial court ruled that Dr. Moore could not testify to Grott's statement that he and Thomas had locked eyes immediately before the shooting, concluding that it was hearsay. The trial court permitted Dr. Moore to testify to Grott's "other statements of patient history" because they were "reasonably pertinent for diagnosis and treatment." 15 Verbatim Report of Proceedings (VRP) at 1876-77. The trial court ruled

that Dr. Moore could testify about the history Grott provided, as well as his evaluation, his diagnosis of Grott, and his opinions. The trial court noted that Dr. Moore "certainly can say that somebody in Grott's circumstances would see as threatening some things that [other people] might not see as threatening." 15 VRP at 1867.

Dr. Moore testified that Grott discussed his childhood, military service, experiences after the military, issues with Thomas, the incident of October 31, 2015, the events between October 31, 2015 and February 1, 2016, and the incident on February 1. Dr. Moore testified that PTSD would likely result in someone over-perceiving or focusing on potential threats in the environment, affecting how they interpret others' actions. When asked about Grott's understanding of the risk of harm on February 1, Dr. Moore testified, "I don't think that Mr. Grott felt that he had any other alternative but to defend himself. 15 VRP at 1965. Dr. Moore testified that Grott's ability to form any intent or premeditate was impaired. Id., also VRP 2043-44.

Over thirty witnesses testified about the shooting, the subsequent investigation, and Grott's history. All but one victim of the first degree assault testified.

After deliberations, the jury convicted Grott of second degree murder, seven counts of first degree assault, and eight firearm enhancements. The trial court sentenced Grott to just more than 50 years in prison.[2]

2. BASIS FOR RELIEF

Petitioner Grott's is under restraint and that restraint is unlawful under RAP 16.4(c)(2), which reads:

> The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state of local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.

3. OTHER REMEDIES INADEQAUTE

This petition is the best way I know how to get the relief I want an no other way will work as well because the direct appeal process is complete and this is the only other avenue of relief available to me.

4. ARGUMENT

This petition raises 5 separate grounds for relief, each of which violated Petitioner's rights under both the state and federal constitutions.

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f.n. 2: Additional facts related to specific grounds in this PRP will be recited in those grounds.

GROUND ONE

THE STATE KNOWINGLY PRESENTED FALSE TESTOMONY TO THE JURY RESULTING IN GROTT'S CONVICTION IN VIOLATION OF GROTT'S DUE PROCESS RIGHTS

At root is how can a defendant possibly enjoy the right to a fair trial when the state is willing to present (or fails to correct) lies told by its own witness, and then vouches for and relied on that witness's supposed honesty in its closing?

The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. In re Winship, 397 U.S. 358, 90 S.Ct. 1065, 25 L. Ed. 2d. 368 (1970).

In Mooney v. Holohan, 294 U.S. 103, 55, S.Ct. 340, 79 L. Ed. 791 (1935), the court held that due process requires a prosecutor to alert the court and defendant when the prosecution knows or should know that a government witness is presenting false testimony, and if a conviction results, the conviction must be set aside if there is a reasonable likelihood that the false testimony affected the jury's verdict. As the court stated in Mooney, the requirement of due process "cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in

truth is but a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

A state violates the Fourteenth Amendment's due process guarantee when it knowingly presents or fails to correct false testimony in a criminal proceeding. Napue v. Illinois, 360 U.S. 269, 79 S.Ct. 1173; see also Lambert v. Blackwell, 387 F.3d 210. 212 (3d Cir. 2004); Giglio, 405 U.S. 153, 92 S.Ct. 763.

To prevail on a Giglio claim, a petitioner must prove (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony, and (2) such testimony was material, i.e., that there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

A. MS. SMITH'S TESTIMONY

"A lie is a lie, no matter the subject, if it is in any way relevant to the case the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." People v. Savvides, 1 N.Y. 2d 554, 154 N.Y.S. 885, 136 NE 2d 853, 854-55 (1956).

Here the state presented material evidence to the jury from Petra Smith, knowing she would testify

falsely. Smith had just given four different accounts to four different officers and investigators in regards to what took place on February 1, 2016. Also, the state knew Smith had been receiving multiple threats on her life and that the front door to her house had been kicked in; and she was accused of setting up the deceased, Mr. Thomas, up to be killed, and that due to these actions Smith was afraid for her life and had to move out of the state. The state also knew Smith was getting high prior to the shooting.

Smith stated she had "known [Thomas] since we were kids" (VRP 763-64), and then reiterated it (VRP 831). She then said they were at the AM/PM getting high after the situation with her baby's father (VRP 769, 785, 831). Then the shooting started at which Thomas was killed.

The inconsistencies and lies begin when she states that after the shooting at Mr. Valentine's home, that Thomas had called her. VRP 763-65. Smith reiterates this statement during cross-examination. VRP 822-23. The story then changes during cross when defense counsel gives Smith defense exhibit 128 (VRP 822), which is a transcribed copy of her interview with Detective Nasworthy. There we learn that it was Smith who called Thomas, not to "smoke and hang out,"

but to let Valentine know she has a friend. VRP 826. Smith then states that the first time she saw Grott was five minutes after they arrived at the AM/PM. Smith states, "I had seen Grott roll up to the bus stop on his skate board. I did not realize that is was Grott until I had seen the picture of him from behind. It hit the news. But I had seen him -- about <u>five minutes</u> after we arrived at the store. I had seen him <u>roll up on his skate board</u>. I watched -- I didn't pay him any attention because I didn't know who he was, but <u>I had seen him roll up</u> because he also --as he stood at the bus stop, he was acting as though he was on some type of drug. <u>He was taking his jacket off</u>. Like, i could see him in the street acting --like, by the sidewalk, <u>acting weird</u>, but I didn't pay him any attention because I don't know the man. If I don't know you, it's none of my business." VRP at 793 (emphases added).

Smith reiterates this statement on multiple occasions (VRP 793-95), and again on cross-examination (VRP 827). Smith came up with the story about Grott pacing back and forth at the bus stop and mentioned for the first time when being interviewed by defense counsel on November 30, 2016 -- approximately nine to

ten months after the shooting. VRP 837-38. Prior to this statement, Smith gave various accounts to the police less than a week after the shooting. In a taped interview with Det. Nasworthy, Smith was asked when she first saw Grott. Smith replied that she watched the shooter walk up from the open park area:

> Q: So probably five minutes would have gone by from the first time that you saw Mr. Grott until the time the shooting started?
>
> A: No. It was about ten minutes. It was about almost ten minutes because he got -- I got on the phone directly after I got there. That was the first time that I did -- I had seen him ride his skate board up to the bus stop when we first pulled in.
>
> Q: Okay, if you would -- on that transcript --
>
> A: Yes, sir.
>
> Q: You had on page 536 down towards the bottom of the page --
>
> A: I told you that I watched him walk up.
>
> Q: The officer -- or Detective Nasworthy was asking you about when you first saw Mr. Grott?

A: Yes, sir.

Q: And you told him that you watched the shooter walk up from the open park area, correct?

A: Yes, sir.

Q: And you indicated that you just thought that he was walking into the parking lot to go to the store, correct?

A: I mean, I figured.

Q: I mean, that's what you said on this day, correct?

A: I didn't know what he was doing. I just know that he walked --

Q: I'm only asking what you told Det. Nasworthy on this day.

A: Where is that in here? Can you tell me the page, what line and what number?

Q: 536, at the bottom of the page, starting with the portion where it says, "I watched the shooter walk up ..."

A: Yes, sir. I stated the basic -- okay. I don't get where -- I don't get it.

Q: So you said you thought that he was just walking in the parking lot to go to the store, correct?

A: I said I thought maybe he was just walking into the parking lot to go to the store. I didn't think anything of it. Those were my exact words in the transcript.

Q: Okay.

A: I did watch him get off the skate board and walk up to the bus stop from the open park area.

Q: On this day you never told Det. Nasworthy that you saw [Grott] take his jacket off and pace back and forth, correct?

A: Yes, sir, I never said anything to him. I didn't even want to talk to the police. I didn't want to come down there. I sat on the floor in the corner if you watch the video that they recorded of me, and I shook for about 45 minutes. That is what shock kind of does to you.

Q: I'm just asking what you told Det. Nasworthy that day.

A: Okay.

Q: You didn't say anything about Mr. Grott walking back and forth, correct?

A: I didn't think anything of it.

Q: That is a yes or no answer.

A: No, sir, not that I can see you asked.

Q: Alright. You didn't want to talk to the police that day, is that right?

A: Yes, sir.

Q: But you talked to Officer Strain at the scene, correct?

A: Yes, sir. Is that the female officer who put me in the car?

Q: Right.

A: Okay.

Q: You did talk to Det. Hayes?

A: Yes, sir.

Q: You did a recorded statement with Det. Nasworthy?

A: Yes, Sir.,

Q: A few days later you talked to an officer about the Warner Street incident, correct?

A: Yes, sir.

Q: So that's four different officers that you gave statements to essentially?

A: Yes, sir.

Q: Now when you arrived at the AM/PM, you

said that you got out of the car, Jay was out of the car, and you both were standing between the two cars, correct?

A: Yes, sir.

Q: And you both smoked a blunt together, correct?

A: A half of one.

VRP 828-31 (emphases added).

Ms. Smith, as explained by defense counsel, had given a statement to Officer Strain , the first officer she talked with. Counsel said "Her explanation of what happened is that Mr. Thomas was in the passenger seat and that she had come up to the AM/PM, saw him there and started chatting with him. It's a completely different scenario than what she is saying today." VRP 810.

Smith also testified that she was getting threats from various people on Facebook and Snapchat. People were saying Smith set up Thomas to be killed. Smith stated she was terrified. VRP 816-19. During cross-examination, Smith testified she had her door kicked in, and that she was forced to move to Oregon due to the threats. Smith had told a 911 operator that people were looking for her and she was afraid to go outside, and that she was getting messages and

pictures, and that people were trying to get her to point out the shooter. VRP 819-20.

After knowing all of this, the state still chose to use Smith as a witness, presumably because they needed her lies to help them deprive Grott of his liberty under the cover of law. Smith's false testimony allowed the state to request and obtain a first aggressor instruction, impacting Grott's self-defense argument. Courts have routinely observed that a first aggressor instruction "impacts a defendant's claim of self-defense." State v. Riley, 137 Wn.2d at 910, n.2. Also, Smith's statements were being used as material evidence to prove Grott had premeditated the intent to kill Thomas.

B. THE STATE KNEW SMITH GAVE MULTIPLE VERSIONS OF THE FEB. 1, 2016 SHOOTING AND THE EVENTS THAT PRECEDED IT.

"The [Supreme] Court has consistently held that a conviction obtained by the use of perjured testimony is fundamentally unfair and must be set aside if there is any likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L. Ed. 2d 392 (1976); holding modified by United States v. Bagley, ___ U.S. 667, 105 S.Ct. 3375, 87 L. Ed. 2d. 481 (1985).

Here, the prosecutor admitted that he knew that a significant detail had been changed in Smith's interviews. Yet, he still allowed her to testify as if it were the truth of the matter. The prosecutor then went on to argue that Smith would testify differently if she was "trying to favor, you know, Mr. Thomas over Mr. Grott ... she's not doing that." VRP 815.

Consider The following colloquy took place outside the presence of the jury:

> MR. WILLIAMS (Prosecutor): It strikes me as very thin because you have an individual was interviewed four times: Once for maybe a minute after the shooting by a first responder who took very little and did very little questioning, and then a second detective who is interviewing her about an hour-and-a-half after the shooting, and then a taped statement that follows that within hours of the shooting. She is not interviewed again until defense interviews.

The individual in this statement is Ms. Smith.

Mr. Williams then states:

> "<u>I agree there is a change</u> in this detail about seeing the shooter pacing down the sidewalk before the shooting. I agree that is a significant detail that only came out in a defense interview of her. That is the extent of what the court has heard from her."

VRP 814-15 (emphasis added).

The record confirms that the prosecutor knew that Smith had changed details about Grott pacing back and forth before the shooting, which was revealed prior to trial in a defense interview. But the prosecutor still allowed Smith to testify falsely concerning this important fact. Smith's false account about Grott's actions created a false inference of premeditation and intent on Grott's behalf.

When given the chance to correct Smith's false testimony -- on the record and in front of the jury -- the prosecutor declined to do so:

> THE COURT: Redirect.
>
> MR. WILLIAMS: The state has no further questions.
>
> THE COURT; Okay, Mrs. Smith, you are excused. Next witness, Mr. Williams.

VRP 839. These facts demonstrate that (1) Smith committed perjury, (2) The state knew or should have known the testimony was false, (3) The false testimony was not corrected, and (4) There is a reasonable likelihood that the false testimony could have affected the judgment of the jury.

Grott was actually and substantially prejudiced by the State's presentation of Smith's perjured testimony. Grott was denied a fair trial

when the State violated Grott's due process rights by knowingly allowing Ms. Smith to testify falsely to the very point as to whether Grott formed the premediatation and intent prior to the shooting. To be sure, the State needed Smith to testify as she did to rebut Grott's claim of self-defense. Thus, the State conspired to deprive Grott of his liberty by depriving him of a fair trial by presenting and suborning false and prejured testimony, knowingly and intentionally. The State was further aware that Smith was compromised as a witness due to being threatened and in fear for her life, but chose to use her anyway in its zest to convict Grott by any means.

For these reasons, Grott humbly requests all of his convictions be reversed and this case remanded for further proceedings.

GROUND TWO

THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING STATEMENT GROTT MADE TO DR. MOORE WHICH WERE NECESSARY TO GROTT'S DIAGNOSIS AND TREATMENT UNDER ER 803(A)(4), BUT WERE ADMISSIBLE UNDER ERs 702 AND 703.

When a defendant argues that an evidentiary ruling violated his constitutional right to present a defense, courts apply a two-step analysis to determine if error occurred and if that error

deprived that defendant of the right to present a defense. State v. Arndt, 194 Wn.2d 784, 797, 45 P.3d 696 (2013). In reviewing a trial court's evidentiary ruling for an abuse of discretion, a reviewing court defers to the trial court's evidentiary ruling unless "no reasonable person would take the view adopted by the trial court." State v. Clark, 187 Wn.2d 641, 648, 389 P.3d 462 (2012).

Whether a defendant was deprived of his right to present a defense is reviewed de novo. Clark, 187 Wn.2d at 649. The right to present a defense is enmeshed in both our state and federal constitutions. U.S. Const. Amend. VI; Wash. Const. Art. 1, § 22; State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). But that right is not absolute. The state's interest in excluding evidence must be balanced against the defendant's need for the information sought to be admitted. Arndt, 194 Wn.2d at 812. Evidentiary "rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purpose they are designed to serve.'" U.S. v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L. Ed. 413 (quoting Rour v.

Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L. Ed. 2d. 37 (1987)).

A. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING GROTT'S STATEMENTS TO DR. MOORE.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

All relevant evidence is admissible; evidence which is not relevant is not admissible. Relevance may be limited by constitutional requirement, statute, or court rule. ER 402.

The admissibility of evidence lies within the sound discretion of the trial court and will not be reversed unless the trial court abused its discretion -- which occurs when no reasonable person could take the view adopted by the trial court.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, an expert witness may testify in the form of an opinion or otherwise. ER 702.

And finally, ER 703 and 703:3, expert witnesses may also testify to facts reasonably relied upon by experts in a particular field that

inform their opinion even though the facts or data itself may not be otherwise admissible as evidence. Experts are allowed to express an opinion based on material that would be otherwise objectionable under another court rule.

"Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged." State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

Here, part of Grott's defense was his inability to form the requisite intent due to PTSD. Both first- and second-degree murder require either "premeditated intent" or the "intent to cause the death of another person." RCW 9A.32.030(1)(a). The state bears the burden of proving the defendant possessed the requisite mental state to commit the crime charged beyond a reasonable doubt. State v. James, 47 Wn. App. 605, 609, 736 P.2d 700 (1987). When specific intent or knowledge is an element of the crime charged, a defendant is entitled to present evidence showing an inability to form the specific intent or knowledge at the time of the crime. State v. Edmon, 28 Wn. App. 98, 102-04, 621 P.2d 136, rev. denied, 95 Wn.2d 1019 (1981); State

v. Martin, 14 Wn. App. 74, 75, 538 P.2d 875 (1975), rev. denied, 86 Wn.2d 1009 (1976).

WPIC 16.02 provides that it is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in the instruction:

> 3) The slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the person, taking into consideration all of the facts and circumstances as they appeared to him at the time of and prior to the incident.

(Emphasis added).

The trial court clearly abused its discretion here by excluding Grott's statements to Dr. Moore, which were covered under the medical diagnosis excpetions provided in ER 401, 402, 702, and 703. That Dr. Moore did in fact rely on Grott's account of the shooting to make his medical diagnosis is not in dispute. Thus, the trial court's exclusion of Grott's statements removed a key issue of fact from the jury's consideration by not allowing Grott to present his theory of the case, i.e., that he did not have the requisite intent to commit the crime.

Dr. Moore diagnosed Grott with PTSD on March 17, 2017, after meeting with Grott for a six-hour clinical interview. Prior to this meeting, Dr.

Moore met with Grott's family and friends, and reviewed another evaluation from Dr. Manly --another psychologist who met with Grott if the fall of 2016. In addition, Dr. Moore reviewed the case evidence and the crime scene reconstruction reports. At trial, Dr. Moore testified that he relied on all of this information, including Grott's account of the events of Feb. 1, 2016, to make his opinion and diagnosis:

> Q (by defense counsel): Is it important to the evaluation process for you to discuss these subject areas with Rob that we talked about?
>
> A (by Dr. Moore): Yes, I mean, to have complete information, these are included.
>
> Q: Alright, and would that discussion be necessary to ensure an accurate and reliable diagnosis?
>
> A: Yes.
>
> Q: Would that discussion be necessary for you to reach any opinion regarding [Mr. Grott's] mental state?
>
> A: Yes, I think it would all be required.

VRP 1928.

The standard for admissibility of expert testimony under ER 702 required that Dr. Moore should have been allowed to testify regarding Grott's diminished capacity. See also ER 703. What Grott told Dr. Moore during his six-hour examination was clearly necessary to medical diagnosis and treatment and relevant to what took place just prior to the shooting on Feb. 1 when Grott and Thomas "locked eyes." See State v. Bottrell, 103 Wn. App. 760, 14, P.3d 164 (2000) (regarding State's request for limiting instruction at VRP 1850-89).

The essential feature of PTSD is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threats to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close association: American Psychiatric Association.

Ordinarily, persons with PTSD are in contact

with reality and do not display any symptoms of psychosis such as hallucinations or delusions. PTSD is essentially an anxiety disorder. However, some patients, especially those who are subsequently subjected to extreme stress, develop a transient dissociative reaction with episodes of depersonalization or derealization. Most of the time, these feelings of unreality pass without incident, but occasionally criminal behavior will erupt. The question of criminal responsibility therefore, is pertinent since a person's cognitive or volitional state may be impaired during a dissociative reaction. Chester B. Scrigner, M.D., Post-Traumatic Stress Disorder: Diagnosis, Treatment and Legal Issues, 245 (2d Ed 1988).

Our courts have recognized that PTSD is regarded in the scientific and psychiatric communities as able to affect the intent of an actor resulting in diminished capacity. See, e.g., State v. Jones, 121 Wn.2d 220, 233-36, 850 P.2d 495 (1993).

Here, again, the trial court disallowed Grott's statement to Dr. Moore from the jury's consideration. But under the evidence rules noted above and the applicable law, Grott's statements

were admissible and should have been allowed in support of Grott's claim of self-defense. The statement in question, again, goes directly to the heart of Grott's defense, i.e, whether he formed the requsite intent for second-degree murder.

In limiting Grott's otherwise admissible medical statements to Dr. Moore, the trial court prevented the jury from being able to consider all of the facts and circumstances as they appeared to Grott at the time of and prior to the shooting. If the jury had been allowed to hear this evidence, the results of the trial could have and likely would have been different. The jury likely would have understood that Grott had reason to believe he was in imminent threat of death and did not just shoot at a man who was not looking at him. Nor did he shoot at an unarmed man hugging a girl while sitting in a car.

By excluding relevant evidence, as defined by ER 401, 402, 702, and 703, the trial court actually and substantially prejudiced Grott and his ability to present a defense. "The medical examiner testified that based on Thomas's wounds, he must have been directly facing Grott, rather than lying on the car floor, at some point during the

shooting." State v. Grott, #97183-8 (Supreme Court opinion) at 6. The medical examiner's testimony corroborates Grott's account of what occurred and render Dr. Moore's expert testimony on the subject not hearsay. If Dr. Moore had been allowed to testify about Grott and Thomas locking eyes, it would have bolstered the medical examiner's finding of facts. As previously mentioned, Dr. Moore relied on these facts to form his medical and expert opinions: When Grott and Thomas "locked eyes" it triggered Grott's PTSD which simultaneously set in motion psychologial impulses which resulted in Grott's eventual response to the circumstances. This would have clearly negated the intent necessary to convict Grott of either first- or second-degree murder.

Because the trial court abused its discretion in limiting Dr. Moore's testimony under ER 803, Grott was improperly denied his right to present his theory of the case under ER 702 and 703. Preventing Grott from presenting a full defense deprived him of a fair trial and he suffered actual and substantial prejudice. Grott respectfully requests reversal of his convictions and remand for a new trial.

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/ / /

GROUND THREE

THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE WHEN THE JUDGE OMITTED THE WORD "KILL" FROM JURY INSTRUCTION NO. 39 (WPIC 16.04 -- FIRST AGGRESSOR INSTRUCTION) RENDERING THE INSTRUCTION CONSTITUTIONALLY DEFECTIVE

The 14th Amendment to the United States Constitution, and Article 1, Section 22 of the Washington Constitution both guarantee a defendant the right to a fair trial. In re Glassman, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). The court stated the due process clause protects the accused against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 28 L. Ed. 2d. 368 (1970).

"An impermissible comment (on the evidence) is one which conveys to the jury a judge's personal attitudes towards the merits of the case or allows the jury to infer what the judge said or did not say that the judge personally believed the testimony in question." State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991) (emphasis added). When a jury instruction removes a disputed issue of fact from the jury's consideration, it is an improper comment on the evidence. State v. Becker, 132 Wn.2d 59, 68, 935 P.2d 132 (1997).

Judges are not permitted to charge juries with respect to matters of fact or comment on them, but are only supposed to delcare what the law is. "Since a comment on the evidence violates a constitutional prohibition, a failure to object or move for a mistrial does not forclose [a defendant] from raising the issue on appeal." State v. Lampshire, 24 Wn.2d 888, 893, 447 P.2d 727 (1968).

Here, the trial court changed the legislature's intent when it removed the word "kill" from the First Aggressor Instruction, WPIC 16.04:

> "No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon [] another person. Therefore, if you find beyond a reasonable doubt that the defendant's act and conduct provoked or commenced the fight, then self-defense is not available as a defense to murder, manslaughter, or assault."

CP at 1035.

WPIC 16.04 does contain similar language but provides two bracketed means or elements that must exist to properly apply a First Aggressor Instruction. In bracket one [kill]; in bracket two [use, offer, or attempt to use force against another person]. The legislature clearly intended one of these bracketed terms be included in the First Aggressor Instruction.

The word "kill" was included in the State's proposed First Aggressor Instruction. CP at 929. No objection was made to this instruction. Nor does the record demonstrate any reason for omitting the word "kill" from the State's proposed First Aggressor Instruction.

In omitting the word "kill," the trial court unfairly and adversely affected Grott's defense. The omission also likely misled the jury. As has been recognized, a First Aggressor Instruction "impacts a defendant's claim of self-defense." State v. Riley, 137 Wn.2d 910 n.2, 976 P.2d 624 (1999). The omission of the word "kill" from the First Aggressor Instruction here relieved the state of its burden to disprove self-defense and misled the jury by not informing them of applicable law. Id. at 909-10.

Jury instructions are only sufficient if they allow both parties to argue their theory of the case; and are not considered misleading when read as a whole properly inform the jury of applicable law. State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1226 (2011). This jury instruction violated Grott's right to due process and to a fair trial, which actually and substantially prejudiced him.

The judge's removal of the word "kill" from the

State's proposed First Aggressor Instrcution rendered the jury instructions defective in their entirety. This error is structural and never harmless. State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (unless the instructional error is trivial, formal, or merely academic, or in no way affected the outcome of the case, reversal is automatic).

The State's case here was built on the premise that Grott was the first aggresssor, based on the testimony of Ms. Smith. VRP 757-839. The State asked for a First Aggressor Instruction and presented one to the trial court for use. But when the trial court presented it to the jury it had been changed to omit the word "kill." The only reason one can presume the court did this was the judge's personal opinion of Ms. Smith's testimony. This constitutes an impermissible comment on the evidence -- bolstering Smith's credibility to the jury, and allowing the State to convict Grott without satisfying their burden of proof.

For this reason as well, Grott respectfully requests reversal of his convictions and remand for a new trial.

GROUND FOUR

GROTT'S DEFENSE COUNSEL PROVIDED HIM INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees a defendant in a criminal proceeding the right to the assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 2d. 799 (1963). The right is only fulfilled, however, if defendant's lawyer provides effective assistance. Strickland v. Washington.* The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment. Access to counsel's skill and knowledge is necessary to afford defendants the ample opportunity to meet the case of the prosecution, as they are entitiled. Id.

While counsel is presumed effective, this presumption can be overcome if it is established that (1) Defense counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

A claim of deficient performance can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by

* 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d. 624 (1989).

demonstrating that "there is no conceivable, legitimate tactic explaining counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

Trial strategies and tactics are thus not immune from attack on grounds of ineffective assistance of counsel. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Oretga, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L. Ed. 2d. 985 (2000).

Prejudice is established if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceedings would have been different." State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

Here, Grott raises four separate instances which, separately or in combination with each other, rendered his counsel's performance deficient and which undoubtedly affected the outcome of his case.

/ / /

/ / /

a. GROTT'S TRIAL COUNSEL FAILED TO OBJECT TO THE ERRONEOUS FIRST AGGRESSOR INSTRUCTION, AND HIS APPELLATE COUNSEL FAILED TO RAISE THE ISSUE ON APPEAL.

The merits of the first aggressor instruction error was fully argued in the previous Ground for Relief and will not be reargued here, but should be considered as if it were.

Had trial counsel objected to the erroneous instruction, the trial court may have explained its mistake and corrected it, allowing the jury to properly apply the law to the evidence admitted at trial. This easily could have led the jury to conclude that Grott was, in fact not the first aggressor and that he did not "kill" Thomas after provoking a belligerent response. Trial counsel's failure to object to the erroneous jury instruction constitutes ineffective assistance because the instruction misstated a critical issue before the jury and no trial tactic or strategy justified counsel's failure.

The State was thus relieved of its burden of proving a key element in this case and Grott was actually and substantially prejudiced by it. Grott's lawyer had no excuse for failing to object to the incorrectly-worded instruction, rendering his

representation of Grott deficient, as it fell below any objective standard of reasonableness.

In addition, Grott's appellate counsel failed to raise this issue in his direct appeal. This was also defective performance. The due process clause of the Fourteenth Amendment, as well as the Sixth Amendment extend the right of effective assistance of counsel to direct appeals as a matter of course. Evitts v, Lucey, 469 U.S. 392, 105 S.Ct. 830, 83 L. Ed. 2d. 821 (1985).

By failing to raise this issue on direct appeal, Grott's appellate counsel deprived Grott of the more favorable standard of review available on direct appeals as opposed to personal restraint petitions -- where petitioner must show "actual and substantial prejudice." In Grott's decision in this case from the Washington Supreme Court, that Court acknowledged that the word "kill" was included in the State's proposed First Aggressor Instruction (CP at 929). "However, it was omitted from the court's instruction to the jury." State v. Grott, #97183-8 at 1035. "The record does not indicate the reason for the omission." Id. The Court then went on to, in effect, describe how Grott's appeal lawyer was ineffective: "Grott does

not contend that the omission rendered the instruction defective, or that his trial counsel was ineffective for failing to object to it. Therefore, we leave it to the Court of Appeals on remand the question of whether and how this issue should be addressed." Id., footnote 1.

Grott now raises both of those issues. Trial counsel should have objected and appellate counsel failed to raise the issue on appeal. This has actually and substantially prejudiced Grott. Had appellate counsel's performance not been deficient, Grott's convictions may well have already been reversed years ago. Because there was no legitimate reason for counsel's failure, and because Grott has been actually and substantially, prejudiced, this Court must reverse and remand for a new trial.

b. GROTT'S APPELLATE COUNSEL ALSO FAILED TO RAISE THE ISSUE OF THE ADMISSIBILITY OF DR. MOORE'S TESTIMONY UNDER ER 702 AND 703.

Again, the merits of the underlying issue here was fully argued in Ground One of this petition, and will not be reargued, but should be considered as if it were. To recap, Grott's trial counsel failed to seek to admit Dr. Moore's expert testimony under ERs 401, 402, 702 and 703.

Trial counsel instead opted to argue that Dr. Moore's testimony was admissible under ER 803(A)(4). Appellate counsel, in turn, failed to properly raise & argue this issue on direct appeal. Both trial and appellate counsel in this case were ineffective and had either recognized their error the outcome of this case -- whether at trial or on appeal -- may well have been different.

First, trial counsel here never established how Grott's statement to Dr. Moore about Grott and Thomas "locking eyes" was necessary and pertinent to Dr. Moore's diagnosis and treatment. See Court of Appeals Opinion, State v. Grott at 17.

On appeal, Grott's appellate counsel failed to raise the argument and failed to recognize how Grott's statement was relevant to his defense of diminished capacity and lack of intent. In either case, effective counsel would have not failed to so act, and in neither case was the failure a "tactical" decision or "strategy."

For the reasons stated in Ground One of this petition, the merits of the underlying issue should have been obvious and apparent to any effective counselor. Appellate counsel's failure to research and apply the evidentiary rules to Grott's direct

appeal, actually and substantially prejudiced Grott by denying him the right to the more favorable standard of review in a direct appeal when compared to a collateral attack, and has violated his Sixth Amendment right to effective assistance of appellate counsel.

c. APPELLATE COUNSEL WAS INEFFECTIVE BY ARGUING THAT HOUSTON-SCONIERS APPLIED TO GROTT

Grott was 29 years old at the time of this incident, yet on appeal counsel argued that Houston-Sconiers applied to him. This was incompetent representation.

Houston-Sconiers is a case about juveniles being sentenced as adults. Yet appellate counsel cited this case in support of her argument that the trial court erred by refusing to impose concurrent firearm enhacements based on diminished capacity. She also argued that the trial court misunderstood its authority to impose such a sentence, but failed to cite to the record or provide any explanation of the trial court's alleged error.

No competent attorney would have argued as such, and Grott has suffered actual and substantial prejudice as a result. Had appellate counsel properly raised and argued the issue, the outcome of the appeal would have been different.

d. APPELLATE COUNSEL WAS INEFFECTIVE BY ARGUING THAT ACTUS REA WAS A NECESSARY ELEMENT.

Grott's appellate counsel argued on direct appeal that the State failed to prove the actus rea. But the state is not required to prove actus rea; the state's burden in a murder case is mens rea.

The authority cited by appellate counsel was State v. Eaton, 168 Wn.2d 476, 229 P.3d 209 (2010). But Eaton does not hold the state to a burden the actus reas as an element of the crime.

The state's burden in a second degree murder case is the defendant's mental state at the time of the alleged crime. State v. James, 47 Wn. App. 605, 609, 736 P.2d 700 (1987).

No competent appellate counsel would even attempt to make the argument counsel made here, showing extreme incompetence and ignorance of the law.

e. CUMULATIVE INEFFECTIVE ASSISTANCE ERROR

Because of both trial and appellate counsels' multiple errors, incompetence, and failures individually, when taken as a whole the cumulative effect of these mistakes definitely caused Grott to suffer actual and substantial prejudice.

This Court is permitted to consider each error and failure in and of itself, but may also consider the cumulative effect of counsel's numerous errors when determining if a defendant's right to effective assistance of counsel was violated.

Based on the argument made, Grott asks this Court to find the cumulative effect of counsels' many errors deprived him of the right to a fair trial and a fair appeal, and asks that the case be reversed and remanded for a new trial.

GROUND FIVE

THE STATE FAILED TO MEET ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT THAT GROTT HAD THE REQUISITE MENTAL STATE TO CONSTITUTE THE CRIME CHARGED.

The due process clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. Winship, 397 U.S. at 358. In such a challenge to the sufficiency of the evidence the question is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2731,

61 L. Ed. 2d. 560 (1974); State v. Green, 99 Wn.2d 216, 616 P.2d 628 (1980). The defendant also admits to the truth of the State's evidence and all reasonable inferences that can be drawn from it. State v. Thomas, 150 Wn.2d 821, 824, 83 P.3d 970 (2004). Reviewing courts also "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." Id. at 874-75.

To establish a diminished capacity defense "a defendant must produce expert testimony demonstrating that a mental disorder not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 925, 16 P.3d 626 (2001); quoting State v. Ellis, 136 Wn.2d 498, 521, p63 P.2d 842 (1998). Washington courts have held that proof of a mental disorder, standing alone, is not enough to raise the inference that diminished capacity exists. Atsbeha, 142 Wn.2d at 921. Instead, the evidence must "logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the requisite specific intent to commit the crime charged." Id.

Washington law has also acknowledged that PTSD is recognized within the scientific and psychiatric communities as able to affect the ability of the actor to form the intent to commit a crime, resulting in diminished capacity. State v. Jones, 121 Wn.2d 220, 233-36, 850 P.2d 495 (1993).

Grott was diagnosed with PTSD by Dr. Moore -- a retired military pschchiatrist with several years of experience treating marines and combat veterans. Both the court and counsel conducted voir dire of Dr. Moore prior to his testimony, questioning him on his opinions and his report. Dr. Moore testified that Grott suffers from PTSD and that it affected his ability to form the specific intent, and resulted in the reasonable belief that Grott needed to act in self defense. In his expert opinion, Dr. Moore was clear that Grott's PTSD would impair his ability to form or premeditate intent. VRP 2030-31 and 2043-44 (emphasis added).

> Q (BY COUNSEL): Okay, but the ability -- when you are talking about premeditation, the ability to form premeditated criminal intent, would be more specific intent?
>
> A (BY DR. MOORE): ...I feel premeditation requires more than simply general and --

(OPPOSING COUNSEL): Objection.

(THE COURT): I will permit the answer to continue.

(DR. MOORE): My understanding is specific intent has certain elements that must be met. Again these are legal terms that I do the best that I can to translate with my medical terms, but it would require very clear ideas about what is specified, these things that are required to have a certain state of mind.

Q (BY COUNSEL): PTSD can affect the ability to form that type of intent, correct?

A: I think most definitely.

Q: And it can affect the belief that one has in the need for self defense?

A: Most definitely.

VRP 2030-31. Other relevant questions on this topic further solidifies the point:

Q (BR MR. FRANS): When I ask this question, I'm prefacing it with some of the testimony that you have already provided about the discussion that you had with [Mr. Grott], particularly

> getting into your impressions regarding his mental state and what he was thinking at the time. Given that, under these circumstances, do you believe that he had the ability to form premeditated criminal intent?
>
> A: In my opinion, his ability to <u>form</u> or premeditate was impaired. I hope this answers it.
>
> Q: It does. VRP 2043-44.

A psychologist, Dr. Manley, also diagnosed Grott with PTSD following ten hours of interviews with Grott during which time Dr. Manly administered a structured PTSD evaluation entitled "C.A.P.S." Dr. Manley did not testify at trial.

This clearly establishes that Grott had PTSD, and was entitled to a diminished capacity defense. It also proves that his ability to form the intent necessary to commit the crimes charged was impaired, and the evidence can be logically and reasonably connected between the requisite inability to form intent to commit the charged crime.

Second degree murder requires the "intent to cause the death of another person." And the State bears the burden of proving beyond a reasonable

doubt that the defendant had the requisite mental state for the crime charged. James, 47 Wn. App. at 609. When specific intent or knowledge is an element of the crime charged a defendant is entitled to present evidence showing an inability to form that specific intent or knowledge. State v. Edmon, 28 Wn. App. 98, 102-04, 621 P.2d 1310, rev. denied, 95 Wn.2d 1019 (1981); State v. Martin, 14 Wn. App. 74, 75, 530 P.2d 873 (1975), rev. denied, 86 Wn.2d 1009 (1976).

Here, Grott's defense at trial was that diminished capacity due to PTSD impaired his ability to form the required intent to commit the crime charged. Thereafter, the State is required to disprove that defense beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 689, 95 S.Ct. 1881, 44 L. Ed. 2d. 508 (1975). The evidence presented at trial in this case to disprove diminished capacity was insufficient, as the State did not meet its burden beyond a reasonable doubt.

On December 1, 2016, Grott was admitted to Western State Hospital for a 15-day competency assessment conducted by Dr. Hendrickson. On cross-examination, Dr. Hendrickson testified as follows:

Q: Sometime between Mr. Grott's admission and your interview, this psychological assessment would have been done, is that right?

A: This is done typically at the time of admission.

Q: I'm sorry. I failed to identify that. That is -- I just handed you what has been marked exhibit 200. On the front --

THE COURT: What is that form, again?

COUNSEL: That is a psychological assessment.

THE COURT: Thank you.

Q: On the front, the first full paragraph talks about reasons for hospitalization, is that right?

A: Yes.

Q: Looking down towards the bottom of that first paragraph this document claims that the superior court had reason to question the capability of Mr. Grott to understand the charges against him, correct?

A: That's what it says.

VRP 2186. Also see:

Q: All right, And on page 5 of 6, there is actually a treatment recommendation, correct?

A: Yes.

Q: It talks about things like increasing reality -- based on thoughts and reducing paranoid delusions and things of that nature?

A: Yes.

Q: And then it talks about the focus being to restore competency to stand trial?

VRP 2192-93. In direct, Dr. Hendrickson states:

A: Well, it depends on the severity of the crime. If it is a misdemeanor, they have an initial 15 days to become competent. If it's a psychotic condition, it is not likely. If it is a felony -- a lesser serious felony, it is 45 days for the initial period. If it is a serious felony, it is 90 days for the initial period for treatment.

VRP 2138.

Upon arrival to Western State, Grott was seen in intake by a psychiatrist, Dr. Karnick. Within twenty minutes, he diagnosed Grott with adjustment disorder -- accorging to Dr. Hendrickson. VRP 2182; Defense Exhibit 197. There was no initial plan for care, and no plan for psychological testing. VRP 2181.

> Q: There was no plan to administer any psychological testing to Mr. Grott?
>
> A: The admitting psychiatrist wouldn't administer any psychological testing.
>
> Q: That would be your job, right?
>
> A: Well, it would probably be the job of the treating team, which includes psychological folks, associates or somebody.

VRP 2181-82.

Exhibit No. 198: Under risk and potential triggers. PTSD is listed but not circled, indicating that whoever filled out the form didn't know Mr. Grott had been previously diagnosed by Dr. Manley before entering Western State.

Dr. Hendirckson testified outside the presence of the jury that part of the assessment was written by an assigned social worker not trained in

forensics. He testified he suspected that the social worker did not know why Grott was there and likely she did not read the court order that placed him there. VRP 2191.

Based off the above, observing staff at Western State believed Grott was there for a competency review, which staff stated was normal because 90 percent of their caseloads are competency reviews. VRP 2174. The fact that Grott was there for only 15 days (the standard stay for a competency review), versus the 45 days for felonies, or the 90 days for "serious" felonies, supported their belief Grott was there for a competency review. VRP 2138-39. Dr. Hendrickson also testified that "if they are there for competency, he does not interact with them at all except at the time of the interview then they will review them for competency, toward the end of the 15-day period. VRP 2136-37. This was the exact process Grott went through at Western State. Id.

Dr. Hendirckson, the state's expert witness with 13 years experience, testified that 90 percent of his cases are competency reviews, and he had seen less than a dozen PTSD cases in that time. Dr. Hendrickson diagnosed Grott with adjustment

disorder and cannabis-use disorder. On December 12, 2016, Dr. Hendrickson and an assistant interviewed Grott. During the interview Dr. Hendrickson used a "semi-structured" approach. VRP 2196. But a structured interview, such as C.A.P.S. (which was used by Dr. Manley to diagnose Grott with PTSD) is considered the most reliable way to diagnose PTSD. VRP 2196.

As Dr. Hendrickson testified during cross-examination:

> Q: You were aware that Dr. Manley had used a structured interview when he diagnosed Mr. Grott with PTSD, correct?
>
> A: I remember that he used the -- he gave him the MMPI and the PAI. The MMPI is the Minnesota Multiphasic Personality Inventory.
>
> Q: He used C.A.P.S.?
>
> A: And he used C.A.P.S. for the diagnosis for Post Traumatic Stress, yes.
>
> Q: C.A.P.S. is a structured interview that is endorsed by the V.A., correct?
>
> A: I wouldn't be surprised if it is endorsed by the V.A. It is a

> structured [test] that calls for subjective responses from the patient.
>
> Q: You didn't use any structured interview tools, right?
>
> A: No. My protocol for doing evaluations is to use a semi-structured approach where I have questions that remind me of where I want to go and questions that get more of an unstructured response from the respondent.

VRP 2195.

Dr. Hendrickson also stated he spent less than two hours talking to Grott, during which time Grott exhibited no symptoms of PTSD. In fact, between the two psychiatrists at Western State, they spent less than two hours total interviewing Grott. VRP 2198. He also testified that "staff observed [Grott] on the ward while he was there" and that "they are trained to make these observations and report symptoms or lack of symptoms," indicating that he relied on staff members to draw his opinions, diagnoses, and conclusions. Dr. Hendrickson neither collected nor viewed any collateral information from or about Grott, such as

from friends, family, or those who served with Grott in the Marine Corps. Dr. Hendrickson stated that he considered Dr. Manley's report to be collateral information. VRP 2199. Other than Dr. Manley's report, all of the information reviewed and used by Dr. Hendrickson in his report, diagnosis, and opinion was provided to him by the prosecutor. VRP 2198-99.

> Q: Between you and Dr. Kornick, grand total, less than two hours, right?
>
> A (By Dr. Hendrickson): I would say in excess of two hours, but certainly not more than that. Two and a half maybe.
>
> Q: And the only collateral material that you reviewed for that purpose is what was provided to you by the prosecutor's office?
>
> A: No. I also considered the report by Dr. Manley as being collateral information. I considered all of his reported conversations with various collateral sources.
>
> Q: Did you ask Mr. Grott any questions about responses that he gave during Dr. Manley's report?

A: I considered and thought Dr. Manley did a good job in asking questions about historical information and other information, so there was no need to reask those questions.

Q: You did your own interview with him?

A: Yes.

VRP 2198-99.

Dr. Hendrickson's assistant Dr. McIntyre, and a lady named Mrs. Burzins (job title unknown) reviewed the information provided by the staff at Western State and the prosecutor, then drafted significant portions of Dr. Hendrickson's report. Mrs. Burzins was not part of the interview process. VRP 2194.

On cross-examination, Dr. Hendrickson stated:

Q: And Ms. Burzins also participated?

A: Yes. I don't think she was there at the time of the -- she participated in reviewing some records, I believe.

Q: According to your report, it indicates that Dr. McIntyre and Ms. Burzins, whoever that might be, drafted significant portions of your report, is

that correct?

A: Yes.

VRP 2194.

The information that the psychiatrists from Western State Hospital relied on to make their diagnoses was defective and improper because it was gathered under the assumption that Grott was at Western State for a competency evaluation -- not diminished capacity or PTSD. In other words, Western State staff and the admitting psychiatrist were observing Grott for symptoms of incompentency to stand trial, and did not observe him for symptoms of the very reason he was there. VRP 2149.

To this end, consider the following testimony:

> Q (By Counsel): After your assessment, what conclusion did you come to? I'm sorry, with respect to -- what was your diagnosis?
>
> A: The diagnosis that we, I think, settled on -- and this was after a lot of consideration of all the things that I've mentioned, including talking to admitting attending psychiatrist team, was, I believe adjustment disorder and substance abuse -- cannabis use

disorder.

VRP 2149.

Dr. Hendrickson also testified to exactly what constitutes diminished capacity evaluations at Western State:

> A: Diminished capacity is where we do an evaluation to see what was going on at the time of the alleged offense as to whether or not symptoms that were exhibited at the time impaired in a substantial manner the person's ability to form a mental element required in the crime, whether it is intent or knowledge or premeditation.

VRP 2143.

On direct, Dr. Hendrickson also stated:

> Q (By Counsel): You were aware of the incident of February 1st, the shooting on February 1st, 2016?
>
> A: Yes.
>
> Q: And you concluded what about defendant's ability to premeditate on that day?
>
> A: We concluded after consideration of behaviors ... that we don't know what is inside someone's head. We ... have to rely on behavior

> we ... or other people observed to draw inferences from that behavior. Can I give an example of that to demonstrate that?

VRP 2156.

Even when viewed in a light most favorable to the State, and admitting the truth of all the State's evidence and all reasonable inferences that can be drawn therefrom, and deferring to the trier of fact on conflicting testimony, credibility of witnesses and persuasiveness of the evidence, the bottom line is that staff and psychiatrists at Western State did a 15-day competency assessment on Grott -- not a 45- or 90-day serious felony psychological assessment for diminished capacity.

In addition, the error and confusion among Western State staff as to why Grott was even at the hospital in the first place contributed to their erroneous opinions and diagnoses. This, in turn, adversely affected Grott's treatment plan, as well as the diagnosis and opinions of said psychiatrist and treatment staff.

Because Grott's competency to stand trial was under evaluation and in question -- and not his mental condition or capability for possessing

the requisite mental state necessary to commit the crime charged -- the State could not and did not disprove Grott's affirmative defense of diminished capacity by PTSD. The State further failed to meet its burden of proving beyond a reasonable doubt that Grott possessed the requisite mental state to commit the crime charged.

This actually and substantially prejudiced Grott by not giving the jury the accurate information to make a just verdict and not holding the State to its burden -- given that "mental disorders are beyond the ordinary understanding of a lay person." State v. Ellis, 136 Wn.2d 517, 963 P.2d 843 (1998).

Dr. Hendrickson and WSH staff conducted an RCW 10.77.060 "competency and insanity" forensic evaluation. CP 0096. Under State v. Hutchinson, 85 Wn. App. 762 (1997), competency statutes do not apply to cases involving diminished capacity. Grott humbly requests this Court follow stare decisis, adhere to Hutchinson, and reverse his conviction.

5. CONCLUSION

For the foregoing reasons, Grott asks the Court to grant the relief requested in Part D.

C. STATEMENT OF FINANCES

1. I, Robert Grott, [X]do [ ]do not ask this Court to allow me to file this petition without making me pay the filing fee because I am so poor I cannot afford to pay the fee. In support of my request I aver as follows:

2. I have an estimated $ 7.06 spendable balance in my prison trust account.

3. I ask this Court to appoint a lawyer to represent me because I am so poor I cannot afford to pay an attorney.

4. I [ ]am [X]am not employed. My employer, or last date of employment is: 12/21/2012.

5. During the past 12 months I did not get any money from a business, profession, or other form of self-employment.

6. During the past 12 months I did not get any rent payments, interest, or dividends. In that time I have received a total of $ 500.00 from family or friends into my prison account. I currently have a $ 43.56 balance in my non-spendable prison savings account.

7. During the past 12 months I did not have any cash other than stated above, nor did I own any stocks, bonds, or notes.

8. I own the following property or other things of value which belong to me or in which I have an interest:

N/A

9. I [ ]am [X]am not married. My spouse's name is:_____.

10. The following people depend on me for their support:

Name	Age	Relationship
N/A		

11. I owe the following bills:

Creditor	Amount Owed
N/A	

D. REQUEST FOR RELIEF

I want this Court to overturn my convictions and either remand for a new trial or dismiss this case with prejudice.

/ / /

/ / /

E. OATH OF PETITIONER

STATE OF WASHINGTON]
] ss.
COUNTY Of Grays Harbor]

After being first duly sworn on oath, I depose and state: That I am the petitioner, that I have read the petition, know its contents, and attest that it and any attachments are true and accurate.

13 Sept. 2021
Date

ROBERT GROTT #399611
Petitioner, pro se
191 Constantine Way
Aberdeen, WA 98520

SUBSCRIBED AND SWORN TO before me, this 13 day of September, 2021.

Elizabeth A Boyer
NOTARY PUBLIC in and for the State of Washington residing at Aberdeen.
My Commission Expires: 3/30/2023.

Mr. Byrne

Goodmorning Sir, first I'd like to thank you for helping me obtain my clerks papers. I now recognize how important clerks and the work they do is to the Justice system. With that being said I submit to you and the justices my Personel Restraint Petetion, This is the Original but I will also be sending an E-file copy just-in-case. Please dis-regard which-ever is not needed. Also inclosed is a motion for over-length brief and a motion to incorperate the record. Please do not hesitate to inform me if there is anything else needed to help the process move along smoothly. Have a good day.

Truly,

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