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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

*In re Personal Restraint Petition of:*

DEVON ADAMS,  
Petitioner.

No. 87501-4  
CoA No. 64265-1-I

MOTION FOR DISCRETIONARY  
REVIEW

I. IDENTITY OF MOVING PARTY

Devon Adams, Petitioner, seeks the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Grant discretionary review of the order dismissing Mr. Adams' *Personal Restraint Petition*. That order was entered on June 14, 2012. Attached as Appendix A.

III. FACTS

*Introduction*

Devon Adams challenges his King County judgment of convictions for Murder in the First Degree and Unlawful Possession of a Firearm (Case No. 99-1-07761-6). Although Mr. Adams was found guilty of the above-listed crimes on April 6, 2000, he challenges the *Judgment* entered on June 1, 2009. That judgment was the result of the trial court resentencing Mr. Adams because his prior *Judgment and Sentence* was facially invalid. Mr. Adams filed this PRP within one year of the date of entry on the current judgment.

ORIGINAL

1           *The Crime, The Uncommunicated Plea Offer, and The Uninvestigated Defense*

2           On September 8, 1999, Devon Adams and Franklin Brown argued and eventually  
3  
4 Mr. Adams shot and killed Mr. Brown. As a result, Mr. Adams was charged with one  
5 count of First Degree Murder with a Deadly Weapon.

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7           Prior to trial, the State (through former Deputy Prosecuting Attorney James Jude  
8 Konat) told Mr. Adams's attorney (Michael Danko, who has since voluntarily resigned  
9 from the Bar) that the State was willing to reduce the charge to Second Degree Murder in  
10 return for a guilty plea. However, Mr. Danko failed to communicate that plea offer to  
11 Mr. Adams.  
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14           Because Mr. Adams did not know of the plea offer, he proceeded to trial. If  
15 Adams had been told about the plea offer, he would have accepted it.

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17           At trial, defense counsel called no witnesses, but instead argued that Mr. Adams'  
18 apparent intoxication resulted in an inability to premeditate or form the intent to kill. The  
19 defense failed. A jury convicted Mr. Adams in under three hours.  
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21           After sentencing, an article appeared in the *Seattle Times* (noting that the defense  
22 at trial presented no witnesses), which quoted Sr. DPA Konat as having "expected a plea  
23 of second-degree murder." This was how Mr. Adams first learned of the earlier plea  
24 offer.  
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1           When Mr. Adams's mother, Ann DeKoster, learned of the plea offer she wrote to  
2 Mr. Danko incensed that the second-degree murder offer had never been communicated  
3 to her son.  
4

5           If he had been told of the offer, Mr. Adams would have accepted it. Mr. Adams is  
6 not stupid. His decision to proceed to trial was not the result of a glaring misperception  
7 of his actions, a delusional belief system, or simple obstinacy. Instead, Adams went to  
8 trial because he was told that the only offer was to plead guilty as charged.  
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11           Although no defense was presented at trial, one was available—a defense  
12 discovered by trial counsel *after trial*. For the first time after trial, trial counsel directed  
13 that a psychologist evaluate Mr. Adams. Although the evaluation was directed at  
14 sentencing criteria, Dr. John P. Berberich concluded that Mr. Adams was unable to  
15 premeditate at the time of the crime. Dr. Berberich found that Mr. Adams “suffers from  
16 Post Traumatic Stress Disorder (PTSD), characterizing the resulting symptoms as  
17 “severe.” In addition, he diagnosed Adams with depression and substance abuse.  
18 Indeed, Dr. Berberich found the extent and degree of violence that Adams had been  
19 exposed to virtually unparalleled. (“I have seen many defendants who have been charged  
20 with murder. Mr. Adams' history is unique in my experience.”).  
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25           As a result, Dr. Berberich opined that, at the time of the homicide, Mr. Adams'  
26 ability to appreciate the wrongfulness of his conduct was “substantially impaired.”  
27 “Because of his history, it is reasonable to assume that Mr. Adams would be likely to  
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1 experience great fear at times when he was involved in an argument with a man. His  
2 intoxication at the time of the homicide, in combination with this Personality Disorder  
3 and Post Traumatic Stress Disorder would indeed have impaired his ability to fully  
4 appreciate the wrongfulness of his behavior.” As a result, Dr. Berberich concluded that  
5 Adams ability to premeditate was substantially impaired at the time of the crime.  
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8         Rather than use this information as support for a new trial (or more appropriately,  
9 seeking to withdraw so that new counsel could act to protect Mr. Adams’ rights), counsel  
10 presented Dr. Berberich’s evaluation at sentencing. The persuasiveness of Dr.  
11 Berberich’s evaluation resulted in the imposition of an exceptional sentence below the  
12 standard range.  
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15                 *The Original Judgment Was Invalid on its Face*

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17         When Adams was first sentenced the court miscalculated the offender score. In  
18 April 2009, Adams filed a motion in the trial court arguing that Adams judgment was  
19 invalid on its face and that he was entitled to be resentenced. The trial court agreed. The  
20 trial court’s order stated that because Adams’ juvenile convictions should not have been  
21 counted, “Adams’ judgment is facially invalid.” The State did not appeal. As a result,  
22 Adams original judgment was vacated and he was resentenced on June 1, 2009.  
23  
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25         The current PRP was filed in October 2009. The case was then stayed for several  
26 years by the Court of Appeals pending this Court’s decision in *PRP of Coats*.  
27

28         On June 14, 2012, an order was entered lifting the stay and dismissing the PRP.  
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1 IV. ARGUMENT

2 1. MR. ADAMS' PETITION IS TIMELY AND NOT SUCCESSIVE.

3  
4 This Court should accept review to answer an open question: when a judgment is  
5 invalid on its face and a new judgment is issued, does a defendant have one year from  
6 entry of the new judgment to file a collateral attack? The court below answered that  
7 question in the negative. The plain language of the statute supports a "yes" answer.  
8

9 Criminal defendants can bring collateral attacks against their judgment and  
10 sentence but must do so within one year of their judgment being final, but only "if" that  
11 judgment is "valid on its face." Specifically, RCW 10.73.090 provides:  
12

- 13  
14 (1) No petition or motion for collateral attack on a judgment and sentence in a  
15 criminal case may be filed more than one year after the judgment becomes  
16 final *if the judgment and sentence is valid on its face* and was rendered by  
17 a court of competent jurisdiction.

18 By the plain terms of the statute, in order for the one year limitation to commence,  
19 the judgment must be final and must be valid on its face.

20 In this case, Mr. Adams' original judgment was invalid on its face. The trial court  
21 entered an order declaring the original judgment invalid. The State did not challenge that  
22 order. As a result, Adams was resentenced and a new judgment entered. The old  
23 judgment has no force, now. Adams does not challenge the old judgment. He challenges  
24 the June 2009 judgment. It is indisputable that Adams filed his PRP within one year  
25 from the date of the only judgment that exists in his case.  
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29 The lower court decision reads the phrase "if the judgment and sentence is valid  
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1 on its face” out of the statute. In addition, the lower court reads in clause that is not  
2 present in the statute.  
3

4 According to the reasoning of the lower court, Mr. Adams’ has two final  
5 judgments. According to the reasoning of the lower court, Adams’ judgment of  
6 conviction became final years ago, even if his judgment and sentence did not.  
7

8 The “multiple judgments in one case” theory that the State’s argument depends on  
9 an argument that was recently rejected by this Court in *Pers. Restraint of Skylstad*, 160  
10 Wn.2d 944, 162 P.3d 614 (2008), which held that “RCW 10.73.090 is not ambiguous,  
11 and noted that a “judgment is final” when any of the requirements of RCW 10.73.090 are  
12 met. In this case, one of the requirements (a facially valid judgment) was not met until  
13 2009.  
14

15 Likewise, in a section with the header: *Can a Judgment Be Final if the Sentence Is*  
16 *Not?*, this Court answered that question, “no.” In addition, the Court noted that “(w)hen  
17 a court reverses a sentence it effectively vacates the judgment because the ‘[f]inal  
18 judgment in a criminal case means sentence.’” 160 Wn.2d at 954.  
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21 In criminal cases, “[t]he sentence is the judgment.” *Berman v. United States*, 302  
22 U.S. 211, 212 (1937) (stating a judgment cannot be final if the sentence has been  
23 vacated); *see also State v. Harrison*, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003)  
24 (stating after defendant's “sentence was reversed, ... the finality of the judgment is  
25 destroyed” and defendant's “prior sentence ceased to be a final judgment on the merits.”).  
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1 See also *Teague v. Lane*, 489 U.S. 288, 314 n. 2 (1989) (“[A] criminal judgment  
2 necessarily includes the sentence imposed upon the defendant.”).  
3

4 According to the plain language of the applicable statute, Mr. Adams’ petition is  
5 timely.  
6

7 The lower court nevertheless concludes that *In re Pers. Restraint of Coats*, 173  
8 Wn.2d 123, 131-40, 267 P.3d 324 (2011), compels a different outcome. This is a dubious  
9 proposition given that this Court did not find a facially invalid judgment in *Coats*.  
10 Instead, the lower court relies on dicta in *Coats* that a post-conviction petitioner may not  
11 claim a facially invalid judgment in order to make an end run around the post-conviction  
12 time bar. While that language can be read to support the lower court decision, it is dicta  
13 because the *Coats* court did not find an invalidity. In addition, that dicta did not take into  
14 account the plain language of RCW 10.73.090. Most importantly, *Coats* was making a  
15 different argument than Adams makes today. *Coats* argued that his conviction was  
16 infected by errors not apparent on the face of his judgment and that he could attack those  
17 errors in order to show the judgment was invalid. This Court disagreed.  
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22 In this case, Adams’ judgment was invalid. That judgment was vacated and a new  
23 judgment was entered. Under the plain language of the statute, Adams had one year from  
24 the current and only judgment in his case to file his collateral attack. Because he did just  
25 that, this Court should consider the merits of Adams’ petition. Because Adams attacks a  
26 new judgment, by definition this PRP is also not successive.  
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1           2.     MR. ADAMS WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE  
2                   ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO COMMUNICATE THE  
3                   STATE’S “MURDER 2° OFFER. MR. ADAMS WAS PREJUDICED BECAUSE  
4                   THERE IS A REASONABLE LIKELIHOOD THAT HE WOULD HAVE ACCEPTED  
5                   THE OFFER, IF COUNSEL HAD COMMUNICATED IT TO HIM.

6           The period from the arraignment extending to the beginning of trial is “perhaps the  
7 most critical period of the proceedings.” *Nunes v. Mueller*, 350 F.3d 1045, 1052 (9th  
8 Cir.2003) (citing *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

9           The Sixth Amendment requires that a defendant have effective assistance of  
10 counsel at all “critical stages” of the criminal process, including the plea stage. *United*  
11 *States v. Leonti*, 326 F.3d 1111, 1116-17 (9th Cir. 2003). The *Strickland* two-part test is  
12 applicable to a case in which a defendant contends that his counsel was constitutionally  
13 inadequate during the guilty plea process. *Hill v. Lockhart*, 474 U.S. 54, 58 (1985). This  
14 well-established two-prong test for evaluating ineffective assistance of counsel claims is  
15 deficient performance and resulting prejudice. More specifically, to prevail on an  
16 ineffective assistance of counsel claim, a defendant must show that counsel's  
17 performance “fell below an objective standard of reasonableness” and that “there is a  
18 reasonable probability that, but for counsel's unprofessional errors, the result of the  
19 proceeding would have been different.” *Id.* at 688, 697. *See also Bell v. Cone*, 535 U.S.  
20 685, 695 (2002).

21           An ineffective assistance of counsel claim can arise from failure to inform a  
22 defendant of a plea bargain.  
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1 As a general rule, defense counsel has the duty to communicate formal offers from  
2 the prosecution to accept a plea on terms and conditions that may be favorable to the  
3 accused. *Missouri v. Frye*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1399, 1408 (2012) (“This Court now  
4 holds that, as a general rule, defense counsel has the duty to communicate formal offers  
5 from the prosecution to accept a plea on terms and conditions that may be favorable to  
6 the accused.”). A defense attorney has an obligation not only to communicate any plea  
7 offers to a client but also to provide him with sufficient and accurate information to make  
8 an informed decision on whether or not to plead guilty. *Padilla v. Kentucky*, 559 U.S. \_\_\_,  
9 130 S.Ct. 1473 (2010); *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1376 (2012).

10  
11 Like this case, *Frye* involved the failure of defense counsel to communicate a plea  
12 offer to the defendant. The United States Supreme Court had little difficulty applying the  
13 first-*Strickland* prong. “Here defense counsel did not communicate the formal offers to  
14 the defendant. As a result of that deficient performance, the offers lapsed. Under  
15 *Strickland*, the question then becomes what, if any, prejudice resulted from the breach of  
16 duty.” *Id.* at 1409.

17  
18 Washington courts have recognized for years that defense lawyers must  
19 communicate all plea offers to their clients. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d  
20 683 (1984); *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987) (citing  
21 numerous cases in accord). *See also United States v. Day*, 285 F.3d 1167, 1172 (9<sup>th</sup> Cir.  
22 2002) (incorrect advice from counsel regarding plea deprives defendant of opportunity to  
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1 make an informed decision); *United States v. Rivera-Sanchez*, 222 F.3d, 1057, 1060-61  
2 (9<sup>th</sup> Cir. 2000) (counsel is required to communicate the terms of a plea offer and ensure  
3 that the defendant understands its terms and significance); *United States v. Blaylock*, 20  
4 F.3d 1458, 1465-66 (9<sup>th</sup> Cir. 1994) (failure to communicate plea offer constitutes  
5 ineffective assistance of counsel).  
6  
7

8 Here, Adams has clearly established a *prima facie* claim of deficient performance  
9 justifying an evidentiary hearing. The State made Mr. Adams an offer of second-degree  
10 murder, a significant reduction in the charge which has a lower standard sentence range  
11 and no mandatory minimum. That offer was not communicated to Mr. Adams until after  
12 trial—when Adams could no longer accept the offer. Thus, Adams has established that  
13 trial counsel was deficient.  
14  
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16 In order to establish prejudice, Adams must show that he would have made a  
17 different choice (entered a guilty plea), but for counsel's deficient performance (failure to  
18 inform him of the plea offer). Even if a defendant has insisted upon going to trial and  
19 received a fair trial, he can still establish prejudice if he can show that there is a  
20 reasonable probability that the result would have been different. *Blaylock*, 20 F.3d at  
21 1466 (defendant entitled to show that had he known of a plea offer, he would have  
22 accepted it).  
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26 The fact that Mr. Adams went to trial is certainly not proof that he would not have  
27 pled guilty, if he had been informed of the plea offer. Mr. Adams went to trial on the  
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1 crime charged. His defense was not one of innocence—denying any connection to the  
2 crime. Instead, he defended with a claim of diminished responsibility. Thus, pleading  
3 guilty is not contrary to, but is consistent with his (uninformed) decision to go to trial.  
4

5 Just as importantly, Adams relies on extra-record evidence—his own declaration  
6 and the declarations of those who were aware of his state of mind at the time of this  
7 prosecution. This Court should remand this claim for an evidentiary hearing.  
8

9  
10 3. MR. ADAMS WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE  
11 ASSISTANCE OF COUNSEL WHEN, PRIOR TO TRIAL, COUNSEL FAILED TO  
12 INVESTIGATE ADAMS' MENTAL STATE AT THE TIME OF THE CRIME AND  
13 WHERE, AFTER TRIAL, COUNSEL DID SO RESULTING IN AN OPINION OF  
14 DIMINISHED CAPACITY, BUT WHERE TRIAL COUNSEL DID NOT SEEK A NEW  
15 TRIAL.

16 To maintain a diminished capacity defense, a defendant must produce expert  
17 testimony demonstrating that a mental disorder, not amounting to insanity, impaired the  
18 defendant's ability to form the culpable mental state to commit the crime charged. *State*  
19 *v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001); *State v. Ellis*, 136 Wn.2d 498, 504, 963  
20 P.2d 843 (1998). In *Ellis*, the defendant was charged with two counts of aggravated first  
21 degree murder. Thus, like this case, the culpable mental state for that crime was  
22 “premeditated intent to cause the death of another person.” In that case, an expert opined  
23 that Ellis’ mental disorders compromised defendant's perceptual process, his decision-  
24 making capacity and his ability to properly regulate his behavior:  
25

26  
27 [Defendant Ellis] is in a situation where certain stressors arise. And given  
28 the weaknesses in his psychological makeup, the mind is overpowered  
29 basically by—there is a breakdown in the deliberation process, in forming  
30

1 judgments and decisions, and the person ends up acting from disarray and  
2 from confusion and emotional forces, rather than from a deliberate forming  
3 of intent....

4 *Id.* at 520-21.

5  
6 Given these facts, this Court found that it was an abuse of discretion to exclude  
7 such testimony. As the Court explained in *Atsbeha*, “it is not enough that a defendant  
8 may be diagnosed as suffering from a particular mental disorder. The diagnosis must,  
9 under the facts of the case, be capable of forensic application in order to help the trier of  
10 fact assess the defendant's mental state at the time of the crime. The opinion concerning a  
11 defendant's mental disorder must reasonably relate to impairment of the ability to form  
12 the culpable mental state to commit the crime charged.” 142 Wn.2d at 921.  
13  
14

15 In this case, trial counsel did not investigate and therefore did not discover Mr.  
16 Adams' diminished capacity defense until after trial.  
17

18 Dr. Berberich's evaluation notes that he first met with Mr. Adams on June 29,  
19 2000. Mr. Adams was convicted months earlier—on April 6, 2000. Thus, Adams can  
20 easily establish deficient performance. See *In re Pers. Restraint of Brett*, 142 Wn.2d 868,  
21 16 P.3d 601 (2001).  
22  
23

24 “Prejudice” is the second prong of the test. That prong is also satisfied because,  
25 although Dr. Berberich wrote a report addressing sentencing factors, his opinion supports  
26 a diminished capacity defense. Dr. Berberich opined that Mr. Adams shot the victim  
27 while experiencing several severe psychiatric symptoms. “Because of his history, it is  
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1 reasonable to assume that Mr. Adams would be likely to experience great fear at times  
2 when he was involved in an argument with a man.” In this case, Mr. Adams’ homicidal  
3 act was in response to that fear, diminishing his ability to premeditate.  
4

5 The fact that the sentencing court found Dr. Berberich’s report persuasive enough  
6 to impose an exceptional sentence is further compelling proof of prejudice. Indeed, the  
7 sentencing court’s *Findings* specifically state:  
8

9 2. The court finds that the issue of diminished capacity raised in this case  
10 constitutes a ‘failed defense.’  
11

12 \*\*\*\*

13 4. The court finds that the defendant’s mental state at the time of the offense  
14 substantially affected and diminished his capacity to appreciate the  
15 wrongfulness of his conduct or to conform his conduct to the requirements  
16 of the law....

17 Although the *Findings* also confusingly reference Mr. Adams’ failed  
18 “intoxication” defense at trial, they support the conclusion that—if the evidence had been  
19 developed at the time of trial—Adams had a viable defense of diminished capacity.  
20 Thus, there is a reasonable likelihood of a different outcome if trial counsel had  
21 investigated and presented this evidence.  
22

23  
24 Once trial counsel had Dr. Berberich’s evaluation in hand, his failure to move for a  
25 new trial (or to withdraw so that non-conflicted counsel could bring such a motion)  
26 constituted a third and separate instance of ineffectiveness. Although Mr. Adams does  
27 not raise the claim here, it illustrates the repeated failures of trial counsel throughout this  
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29  
30

1 case.

2 V. CONCLUSION  
3

4 This Court should accept review of Mr. Adams' PRP.

5 DATED this 17<sup>th</sup> day of June, 2012.  
6

7 /s/ Jeffrey E. Ellis  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

In the Matter of the Personal	)	
Restraint of:	)	No. 64265-1-I
	)	
DEVON ADAMS,	)	ORDER LIFTING
	)	STAY AND DISMISSING
Petitioner.	)	PERSONAL RESTRAINT
	)	PETITION
_____	)	

Devon Adams has filed this personal restraint petition challenging his jury convictions for first degree murder and unlawful possession of a firearm based on the shooting and death of Franklin Brown in King County No. 99-1-07761-6 SEA. Following his conviction in 2000, the court imposed an exceptional sentence below the standard range of 360 months. Adams did not appeal.

Nine years later, in April 2009, Adams filed a motion in superior court to vacate his judgment and sentence. He challenged his sentence on the basis that some of his pre-1997 juvenile convictions had washed out and should not have been included in his offender score. The State agreed and in June 2009, Adams was resentenced to 304 months based on a recalculated offender score.

In October 2009, Adams filed the instant petition. He claims he was denied effective assistance of counsel because prior to trial his trial counsel failed to inform him of the State's offer to allow him to plead guilty to second degree murder. Adams became aware of the alleged offer because of a newspaper article published the day after he was sentenced. He claims that had he been advised of the offer in a timely manner, he would have accepted it. He also contends his counsel was ineffective

because he failed to conduct a pretrial investigation of his mental state at the time of the crime.

Adams contends that his petition is timely under RCW 10.73.090 because it was filed within one year of his 2009 resentencing. Adams' petition was stayed pending the Supreme Court's consideration of related issues in In re Pers. Restraint of Coats, 173 Wn.2d 123, 131-40, 267 P.3d 324 (2011). That case is now final and accordingly, the stay is lifted.

To prevail on collateral attack, Adams bears the burden of showing either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). In addition, Adams bears the burden of showing that his petition was timely filed. In re Pers. Restraint of Quinn, 154 Wn. App. 816, 833, 226 P.3d 208 (2010). Finally, under RCW 10.73.140, this court will not consider a personal restraint petition that raises the same grounds for review as were raised in a previous personal restraint petition or other collateral attack. Adams fails to satisfy these burdens and his untimely and successive petition must be dismissed.

Adams contends that his 2000 judgment and sentence was invalid on its face due to the erroneous inclusion of washed out prior convictions and this facial invalidity waives the time bar with respect to the claims he is making here. The Supreme Court rejected this position in In re Coats. 173 Wn.2d at 141. Coats pleaded guilty to several crimes in 1995 and the court imposed a standard range sentence of 20 years. However, the judgment and sentence erroneously stated the statutory maximum

sentence for one of his crimes. Fourteen years after the sentence was imposed, Coats argued that because of the error, his judgment and sentence was invalid on its face. He further argued that this facial invalidity allowed him to challenge the validity of his guilty plea.

The majority held that Coats' judgment and sentence was not facially invalid because, although the judgment and sentence contained an error, the sentencing court did not exceed its authority in entering the judgment because Coats' actual sentence was below the statutory maximum sentence. In re Coats, 173 Wn.2d at 135-36. The two concurring opinions disagreed with the majority's conclusion that the judgment was not invalid on its face because of the error. But all nine justices expressly disagreed with Coats' "main contention—that once the one-year time bar of RCW 10.73.090(1) is avoided as to one claim, it is automatically avoided as to all claims asserted by the petitioner." In re Coats, 173 Wn.2d at 145 (Madsen, concurring), 164 (Stephens, concurring) ("the remedy for an invalid judgment and sentence is correction of the error that renders the judgment and sentence facially invalid, not opening the door to other time-barred claims"). The majority observed:

The exception for facially invalid judgments and sentences may not be used to circumvent the one-year time bar to personal restraint petitions relating to fair trial claims. A claim that the judgment is not valid on its face may not be used to make an end run around the time limit and a personal restraint petition.

In re Coats, 173 Wn.2d at 141.

In re Coats is consistent with the Supreme Court's earlier decision in In re Skylstad, 160 Wn.2d 944, 162 P.3d 413 (2007). In that case, the court considered the issue of when a judgment becomes final for purposes of RCW 10.73.090. Skylstad was

convicted of robbery in 2002. In October 2003, Division Three of this court affirmed the conviction, but remanded for resentencing. The Supreme Court denied review and the mandate issued on May 4, 2004. Shortly thereafter, Skylstad was sentenced again. The appellate court affirmed his sentence on October 11, 2005 and on November 21, 2005, he filed a personal restraint petition. The appellate court dismissed the petition as time-barred because it was not filed within one year of the May 4, 2004 mandate terminating review of the 2002 judgment and sentence. The Supreme Court reversed and remanded, concluding that the time limitations of RCW 10.73.090 do not prevent a defendant from challenging a judgment and sentence until both the judgment and sentence become final.

The court held that a judgment is not final under RCW 10.73.090 until direct review is terminated on both the conviction and the sentence. Thus, a "mandate disposing of a timely direct appeal from the conviction," for purposes of RCW 10.73.090(3)(b), "means the mandate that terminates review of both conviction and sentence—only then can the appeal be entirely disposed of." Skylstad, 160 Wn.2d at 953. Skylstad's judgment and sentence had not yet become final at the time the first mandate issued because direct review of his sentence was still pending.

Skylstad's direct appeal from his conviction cannot be disposed of until both his conviction and sentence are affirmed and an appellate court issues a mandate terminating review of both issues. Therefore, because his second appeal was still pending, no final judgment was entered and the one-year limitation had not yet begun.

Skylstad, 160 Wn.2d at 954.

Here, because Adams did not appeal, his judgment and sentence became final the day it was entered.

After a defendant is convicted he has three options: he can accept the judgment and sentence, he can appeal to only our state courts, or he can appeal to our state courts, and then, if he loses, can seek review in the United States Supreme Court on a federal issue. If a defendant chooses not to appeal (or his time to appeal expires), judgment is final when the trial court clerk files the judgment. RCW 10.73.090(3)(a). This ends all litigation on the merits. Alternatively, if a defendant appeals, then the judgment is final when the appellate court issues its mandate "disposing of the direct appeal." RCW 10.73.090(3)(b). This terminates review and similarly ends all litigation on the merits. Finally, if the defendant petitions the United States Supreme Court for certiorari, then the judgment becomes final when the United States Supreme Court denies his petition. RCW 10.73.090(3)(c). This also terminates review and ends litigation on the merits. Therefore, pursuant to RCW 10.73.090 a judgment becomes final when all litigation on the merits ends.

Skylstad, 160 Wn.2d at 948-49 (footnote omitted). Adams's conviction and sentence therefore became final on September 5, 2000. He filed the instant petition nine years later in October 2009. The facial invalidity in his judgment and sentence Adams established in his 2009 motion does not allow him to raise the otherwise time-barred challenge to his guilty plea he seeks to assert in this petition.

In addition, personal restraint petitions may not simply reiterate issues that were resolved on appeal or in a prior collateral attack. Adams filed a personal restraint petition in 2001 (No. 49318-3-1) claiming ineffective assistance, specifically challenging counsel's alleged failure to communicate a plea offer. RCW 10.73.140 provides in relevant part: "If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition."

A new petition "must raise new points of fact and law that were not or could not have been raised in the principal action." In re Becker, 143 Wn.2d 491, 496, 20 P.3d

409 (2001). A petitioner cannot create a "new" ground for relief by recasting the same issue as an ineffective assistance claim, or by merely supporting a previous ground for relief with different factual allegations or different legal arguments. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). Adams' argument that this petition is not successive because his previous petition was filed before his 2009 resentencing is not persuasive, nor supported by any authority.

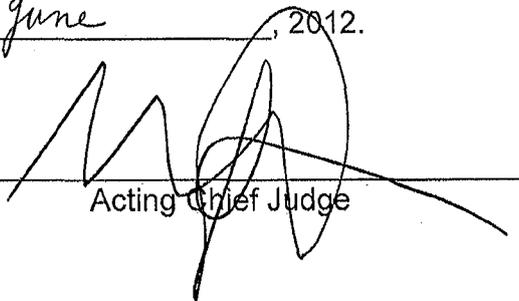
Accordingly, this untimely and successive petition must therefore be dismissed under RCW 10.73.090 and RCW 10.73.140. See Becker, 143 Wn.2d at 500.

Now, therefore, it is hereby

ORDERED that the previously imposed stay in this matter is lifted, and it is further

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

Done this 14<sup>th</sup> day of June, 2012.

  
\_\_\_\_\_  
Acting Chief Judge

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STATE OF WASHINGTON  
2012 JUN 14 AM 9:00

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My apologies. Attachment is attached this time.

Jeff Ellis  
Attorney at Law  
Oregon Capital Resource Counsel  
621 SW Morrison Street, Ste 1025  
Portland, OR 97205  
206/218-7076 (c)

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Attached please find a motion for discretionary review for filing. A copy will be filed in the Court of Appeals. I have served opposing counsel through this email.

Jeff Ellis  
Attorney at Law  
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206/218-7076 (c)