

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

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IN RE THE PERSONAL RESTRAINT PETITION OF:

**DEVON ADAMS,**

PETITIONER.

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**REPLY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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A. STATUS OF PETITIONER

Devon Adams filed a PRP attacking his recent judgment and sentence for Murder in the First Degree and Unlawful Possession of a Firearm entered on June 1, 2009. In response, the State argues that Adams' petition is untimely and successive. Because Adams attacks the current, as opposed to the previous judgment, it is neither.

The State then disputes Adams' extra-record facts, while alleging that his only proof (on the plea offer claim) incompetent. It is not.

This Court should remand this case to the trial court in order to resolve the material disputed facts.

B. ARGUMENT

1. MR. ADAMS' PETITION IS TIMELY.

RCW 10.73.090 plainly provides that "(n)o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final *if the judgment and sentence is valid on its face* and was rendered by a court of competent jurisdiction." (emphasis supplied). Thus, where a judgment is invalid on its face, the one year limitation does not commence.

In this case, there is no dispute but that Adams' prior judgment was facially invalid. As a result, a new judgment was entered. Mr. Adams' petition was filed within one year of the date the new judgment became

final.

Under the State's theory Mr. Adams' judgment of conviction became final years ago, even if his judgment and sentence did not. The "multiple judgments in one case" theory that the State's argument depends on was recently rejected by the Supreme Court in *Pers. Restraint of Skylstad*, 160 Wn.2d 944, 162 P.3d 614 (2008), which held that "RCW 10.73.090 is not ambiguous, and noted that a "judgment is final" when any of the requirements of RCW 10.73.090 are met. In this case, one of the requirements (a facially valid judgment) was not met until 2009.

Likewise, in a section with the header: *Can a Judgment Be Final if the Sentence Is Not?*, the Supreme Court answered that question, "no." In addition, the Court noted that "(w)hen a court reverses a sentence it effectively vacates the judgment because the '[f]inal judgment in a criminal case means sentence.'" 160 Wn.2d at 954.

Given the clear language of the statute, the State strains to rest its argument on language found in cases dealing with the right to file a second appeal after a second appeal that seeks to challenge the underlying conviction. Adams does not quarrel with the results reached in those cases. Instead, the direct appeal cases are simply inapposite.

According to the plain language of the applicable statute, Mr. Adas' petition is timely.

2. MR. ADAMS' PETITION IS NOT SUCCESSIVE.

Because Mr. Adams is attacking a new judgment, his petition is not successive. Put another way, this is Adams' first attack on this judgment.

However, even if RAP 16.4(b) applies, it requires a previous determination of a similar claim *on the merits*. A successive petition seeks "similar relief" if it either renews claims already "previously heard and determined" on the merits or raises "new" issues in violation of the abuse of the writ doctrine. *In re Personal Restraint of Haverty*, 101 Wash.2d 498, 503, 681 P.2d 835 (1984) (quoting *Sanders v. United States*, 373 U.S. 1, 15, 17, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)).

That clearly did not happen in the previous PRP, which was dismissed without ever addressing the merits because Adams (acting *pro se*) did not support his claim with any proof.

On the other hand, Adams certainly does not object to this Court transferring this petition to the Supreme Court by virtue of RCW 10.73.140, although Adams contends transfer is not necessary because this is his first petition attacking his current, facially valid judgment.

3. MR. ADAMS WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO COMMUNICATE THE STATE'S "MURDER 2<sup>o</sup>" OFFER. MR. ADAMS WAS PREJUDICED BECAUSE THERE IS A REASONABLE LIKELIHOOD THAT HE WOULD HAVE ACCEPTED THE OFFER, IF COUNSEL HAD COMMUNICATED IT TO HIM.

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

Because material facts are disputed in this case, this Court should either remand this PRP for an evidentiary hearing or for a decision on the merits. RAP 16.11 (b) (“If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing.”).

As a result, the State’s argument to this Court in its *Response* that its facts are more persuasive than Adams’ facts is premature. Instead, these arguments are best made after a trial court has heard the evidence and found facts. For that reason, Adams’ reply is limited to demonstrating the need for a hearing prior to any decision on the merits.

After a PRP is filed and briefed, the “Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will

refer the petition to a panel of judges for determination on the merits.”

RAP 16.11.<sup>1</sup> The rule further provides:

If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing.

*Id.* Thus, the Chief Judge has the option of sending the entire PRP to the trial court for both an evidentiary hearing or referring those issues based on contested extra-record facts to the trial court for the conduct of an evidentiary hearing and entry of factual findings. In the latter case, this Court then applies those factual findings to the applicable law.

As a threshold matter, the petitioner must state the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. RAP 16.7(a)(2)(i). Bald assertions and conclusory allegations will not support the holding of a hearing. *See In re Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988). Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient.

Rather, with regard to the required factual statement, the petitioner must state *with particularity* facts which, if proven, would entitle him to relief. Where Petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. Where

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<sup>1</sup> Although not defined in the rule, frivolousness is generally defined as “wholly without merit.”

facts are outside of the trial record and especially where the facts are disputed and/or involve credibility determinations, the need for an evidentiary hearing is at its zenith. *See Frazer v. United States*, 18 F.3d 778, 784 (9th Cir.1994) (“Because all of these factual allegations were outside the record, this claim on its face should have signaled the need for an evidentiary hearing.”). Borrowing from the analogous habeas standard (a comparatively higher standard), in showing a colorable claim, a petitioner is “required to allege specific facts which, if true, would entitle him to relief.” *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir.1998) (internal quotation marks and citation omitted).

Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

In short, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. An evidentiary hearing plays a central role in sorting through and ensuring the reliability of the facts upon which

legal judgments are made. *See Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9<sup>th</sup> Cir. 1994) (A habeas petitioner who asserts a colorable claim who has never been given an opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court).

Material disputed facts exist in this case that can only be resolved at an evidentiary hearing.

With regard to the plea offer, a newspaper reporter quoted DPA Konat as stating that he was surprised that Adams did not plead guilty to second-degree murder—an admission by a party opponent. Although Mr. Konat denied the plea offer in his subsequent declaration, he did not explain his inconsistent statement to the reporter. When undersigned counsel asked via email, DPA Konat chose not to respond—which he had the right not to do. While a post-conviction petitioner has no discovery devices at his disposal, once a petition is remanded for a hearing then the rules of discovery apply.

In addition to these facts, Mr. Adams has not declared twice that his former attorney admitted such an offer had been made, but was not communicated because trial counsel apparently subjectively determined it was not “serious.” Thus, Adams has presented competent, non-speculative evidence that the State made a second-degree murder plea offer. He is entitled to an evidentiary hearing on this claim.

Likewise, Adams is entitled to an evidentiary hearing on his ineffectiveness claim based on trial counsel's failure to explore a diminished capacity defense. Trial counsel goes to great lengths, despite the fact that the scope of the waiver of the attorney-client privilege has never been defined, to negate Adams' claim. *See e.g., State v. Cloud*, 95 Wn.App. 606, 976 P.2d 649 (1999). In response, Adams has submitted an additional declaration noting that trial counsel was aware of Mr. Adams' substance abuse and social history prior to trial—information that would have put a reasonably competent attorney on notice that an investigation into Adams' psychological state may prove productive. Indeed, the chronological history of this case belies trial counsel's post hoc rationalization that he had no reason prior to trial to know that anything was wrong (psychologically speaking) with Adams. Indeed, just after trial and without any new facts, trial counsel had Adams evaluated psychologically. This was, of course, reasonable—it just should have been done sooner.

However, even with the evaluation in hand concluding that Adams' severe PTSD substantially interfered with his ability to premeditate, counsel failed to use the evaluation for its full effect—namely, to secure a new trial.

In any event, Adams did not raise this issue in his prior PRP. Further, he supported his claim with admissible, competent, non-speculative evidence. The facts will likely be hotly disputed in a hearing.

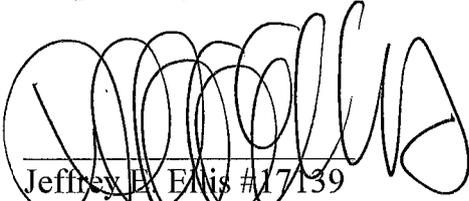
However, it is only at a hearing that any facts can be found and conclusions of law reached. Thus, Adams will reserve further argument until after that has happened.

C. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should remand this case for an evidentiary hearing or for a determination on the merits.

DATED this 4<sup>th</sup> day of March, 2010.

Respectfully Submitted:



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DECLARATION OF DEVON ADAMS

I, Devon Adams, declare:

1. I am the petitioner in this Personal Restraint Petition.
2. I am making this declaration to the best of my ability and memory.
3. At no time prior to trial did Mr. Danko, my previous attorney, bring up the issue of whether I should be evaluated by a psychologist. Instead, Mr. Danko brought up the issue only after I was convicted.
4. However, long before trial Mr. Danko was aware of my problems with substance abuse and the fact that these problems stemmed, at least in part, from the fact that I was repeatedly and seriously abused as a child. Mr. Danko was also well aware of my juvenile criminal history.
5. After I learned that Deputy Prosecutor Konat was quoted as saying that he was surprised that I did not plead guilty to Murder 2°, I asked Mr. Danko why I had not been told about the offer. In response, Mr. Danko told me he did not think the offer was “serious,” but he never denied that Mr. Konat had made the offer to him.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY INFORMATION AND BELIEF.

  
Devon Adams

March 2, 2010 Monroe, WA  
Date and Place



Jeff Ellis <jeffreyerwinellis@gmail.com>

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## PRP of Devon Adams

1 message

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Jeff Ellis <jeffreyerwinellis@gmail.com>

Fri, Feb 5, 2010 at 11:22 AM

To: James.Konat@kingcounty.gov

I read your declaration attached to the response to the PRP. However, I have a few related questions, if you would be so kind:

Did you tell the newspaper reporter something to the effect that you "expected a plea of second-degree murder?" If so, was the statement true?

If not, what did you say?

Hope all is well.

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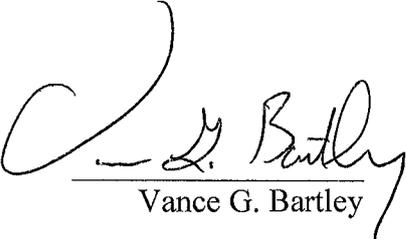
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**CERTIFICATE OF SERVICE**

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on March 4, 2010 I served the parties listed below with a copy of *Petitioner's Reply in Support of Personal Restraint Petition* as follows:

Dennis J. McCurdy  
Senior Deputy Prosecuting Attorney  
W 554 King County Courthouse  
516 3<sup>rd</sup> Ave  
Seattle, WA 98104

3-4-10 Sea, WA  
Date and Place

  
Vance G. Bartley

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