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SUPREME COURT
STATE OF WASHINGTON
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No. 87501-4

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

DEVON ADAMS,

PETITIONER.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

Devon Adams asks this Court to apply the plain language of the statute governing when the time to file a PRP starts.

RCW 10.73.090 states 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). The statute’s language is plain. In order for the time limit to apply, a judgment must be (a) final; and (b) valid on its face. When a judgment is not “valid on its face” the one year time limit simply does not apply.

Mr. Adams’ first judgment was not valid on its face. That point is beyond dispute. Because his first judgment was not valid on its face, Adams was resentenced and a new judgment entered. Adams’ current judgment is valid on its face. As a result, Mr. Adams had one year from when that valid judgment became final to file his PRP.

The State argues that the interest in finality which underlies the statute should control. However, the issue in this case is not what rule this Court create out of whole cloth or how this Court should construe ambiguous statutory language. The statute says what the statute says. The State’s argument that Adams only had one year from the “invalid” judgment to file his PRP is contrary to the plain language of the law.

II. ARGUMENT

A. THE STATUTE SAYS WHAT THE STATUTE SAYS.

Mr. Adams' first judgment was invalid on its face. As a result, the trial court vacated that judgment; resentenced Adams; and entered a new judgment. The State did not appeal from either the facial invalidity finding or the new sentence. As a result, the fact that Adams' first judgment was not valid on its face is beyond dispute. The State's ability to challenge the facial invalidity of a prior judgment has passed, especially in light of fact that the State could have, but did not challenge the trial court finding previously. Mr. Adams filed this PRP within one year of the date of his current, valid judgment became final.

The question posed by this case is whether Adams' petition is timely. The answer is found in the plain language of the statute.

Resolution of this case turns statutory interpretation, which is a question of law reviewed *de novo*. *In re Det. of Williams*, 147 Wash.2d 476, 486, 55 P.3d 597 (2002). When interpreting a statute, "the court's objective is to determine the legislature's intent." *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, we " 'give effect to that plain meaning.' " *Id.* (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002)). Only if, after this inquiry, the statute is

susceptible to more than one reasonable interpretation may a court “resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wash.2d 365, 373, 173 P.3d 228 (2007).

A court must attempt to effectuate the “plain meaning” of the words used by the Legislature, examining each provision in relation to others in search of a consistent construction of the whole. *Advanced Silicon v. Grant County*, 156 Wash.2d 84, 89–90, 124 P.3d 294 (2005). In construing a statute, courts “interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.” *Rivard v. State*, 168 Wash.2d 775, 783, 231 P.3d 186 (2010).

RCW 10.73.090 provides that the one year time limit only starts to run when a judgment that is valid on its face becomes final. The statute requires more than a final judgment. Only when the judgment and sentence is final *and* valid on its face does the one year limit apply.

The only ways to conclude that Mr. Adams’ petition is untimely is to read out of the statute the “valid on its face” clause or to read into the statute a provision that divides one judgment into two parts—one for the conviction and one for the sentence. This Court cannot do so. Only the Legislature is permitted to revise and amend the statute.

If RCW 10.73.090’s two requirements are not met, then the one-year limitation does not commence. There is no statutory provision which starts

the one-year clock running from a final, but “invalid on its face” judgment. There is no statutory provision which splits a singular judgment and starts the time to collaterally attack a conviction (but not the sentence) when a judgment is final, but not valid on its face. The one-year time limit under RCW 10.73.090 only applies “if the judgment and sentence is valid on its face [.]” See *In re Personal Restraint of Thompson*, 141 Wash.2d 712, 718, 10 P.3d 380 (2000).

The lower court held that *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 131-40, 267 P.3d 324 (2011), dictates a different outcome. *Coats* is inapposite and the lower court was wrong. In *Coats*, this Court did not conclude that Coats’ judgment was invalid on its face, but that his petition was nevertheless untimely. Instead, this Court concluded that Coats’ judgment was valid on its face. As a result, any discussion in *Coats* about potential time limitations on a PRP when a judgment is not valid on its face is *dicta*.

However, it is important to note that *Coats* accurately summarized the statute when it noted “(f)irst, to avoid RCW 10.73.090’s one-year time bar on challenging judgments that are valid on their face, the error must render the judgment and sentence ‘invalid.’ ” *Id.* at 135. See also *id.* at 138 (“Put another way, for the petitioner to avoid the one-year time bar, he or she must show that the judgment and sentence is ‘facially invalid.’ ”).

Nevertheless, the court below and the State both seize on this

Court's concluding comment: "Further, the 'not valid on its face' limitation of RCW 10.73.090 is not a device to make an end run around the one-year time bar for most errors, including errors at trial that affect a fair trial." *Id.* at 144. Adams certainly agrees that a post conviction petitioner cannot point to a trial error as a means to undermine an otherwise valid on its face judgment. Put another way, a facial invalidity must be found on the judgment itself—not just in the corresponding trial record.

On the other hand, if this Court concluded in *Coats* that the one-year time limit to challenge a conviction runs from finality where the judgment is invalid on its face, then this Court should correct its error. In order to reach such a conclusion, this Court must read into the statute language that the Legislature did not include. In order to reach such a result, the statute would need to read: "No 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, except if the judgment and sentence is valid on its face then the one-year limitation does not apply to the portion of the sentence that is not valid on its face." The statute says no such thing.

Certainly, the Legislature could have drafted such a statute. There are undoubtedly legitimate policy reasons for such language. In fact, the State's entire argument rests on those policy arguments. However, this Court is not entitled to use those policy considerations to judicially redraft the statute. This Court's duty is to apply the law as written.

Dividing a “judgment” into two separable components with two independent time bars would also require overruling *In re Skylstad*, where this Court stated:

In criminal cases, “[t]he sentence is the judgment.” *Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937) (stating a judgment cannot be final if the sentence has been vacated); *see also State v. Harrison*, 148 Wash.2d 550, 561-62, 61 P.3d 1104 (2003) (stating after defendant's “sentence was reversed, ... the finality of the judgment is destroyed” and defendant's “prior sentence ceased to be a final judgment on the merits”); *Siglea*, 196 Wash. at 286, 82 P.2d 583 (“In a criminal case, it is the sentence that constitutes the judgment against the accused, and, hence, there can be no judgment against him until sentence is pronounced.”). Similarly, final means “the imposition of the sentence.” *Flynt v. Ohio*, 451 U.S. 619, 620, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981) (per curiam); *see also Teague v. Lane*, 489 U.S. 288, 314 n. 2, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (“[A] criminal judgment necessarily includes the sentence imposed upon the defendant.”). Therefore, litigation on the merits continued and *Skylstad*'s judgment could not be final until his sentence was final.

160 Wash.2d 944, 950 162 P.3d 413 (2007). In criminal cases, “[t]he sentence is the judgment.” *Berman v. United States*, 302 U.S. 211, 212 (1937) (stating a judgment cannot be final if the sentence has been vacated); *see also State v. Harrison*, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003) (stating after defendant's “sentence was reversed, ... the finality of the judgment is destroyed” and defendant's “prior sentence ceased to be a final judgment on the merits.”).

Removing the time bar does not give a petitioner an unlimited amount of time to challenge the validity of a judgment or to bring a petition. If the time bar does not apply, the State can still argue that laches

should bar the petition. See generally *In re Parentage of Hillborn*, 114 Wash.App. 275, 58 P.3d 905 (2002). When applicable, the State can also argue that the re-litigation bar applies. See e.g., *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 671, 101 P.3d 1 (2004) (A collateral attack may not renew an issue “raised and rejected on direct appeal unless the interests of justice require relitigation of that issue.”).

However, any attempt to impose a limit on the scope of issues that can be raised in a PRP where a judgment is not valid on its face does violence to the plain language of RCW 10.73.090. In this case, a valid judgment was first entered when the invalidity on the face of the first judgment was corrected and Adams was resentenced. There is only one judgment in this case and it is not the previous judgment that was not valid on its face.

Measured from that date, Adams’ petition is unquestionably timely.

B. WHERE A PRO SE POST-CONVICTION CLAIM IS SUMMARILY DISMISSED BECAUSE NO EVIDENTIARY SUPPORT IS OFFERED, THIS COURT CAN CONSIDER THE CLAIM WHEN IT IS SUPPORTED BY EVIDENCE IN A TIMELY, SUBSEQUENT PETITION.

Mr. Adams previously filed a *pro se* PRP where he claimed trial counsel failed to communicate the State’s pre-trial plea offer. That claim was summarily dismissed because Adams offered no evidentiary support for the claim. In this petition, he supports the claim with extra-record evidence.

This Court should reach the merits of this claim, rather than apply the re-litigation bar. Adams does not seek to re-litigate the claim. He seeks to litigate it for the first time. His position is fully supported by this Court's caselaw.

Under RAP 16.4(d), “[n]o more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.” “A successive petition seeks ‘similar relief’ if it raises matters which have been ‘previously heard and determined’ on the merits or ‘if there has been an abuse of the writ or motion remedy.’ ” *In re Pers. Restraint of Jeffries*, 114 Wash.2d 485, 488, 789 P.2d 731 (1990) (quoting *In re Pers. Restraint of Haverty*, 101 Wash.2d 498, 503, 681 P.2d 835 (1984)).

Adams filed his previous petition without the aid of counsel. When a petitioner is represented by counsel throughout the entirety of post-conviction proceedings, it is an abuse of the writ to raise a new issue that could have been raised in an earlier petition. *In re Restraint of Greening*, 141 Wash.2d 687, 700–01, 9 P.3d 206 (2000). “Here, both petitions at issue were filed on a *pro se* basis, and consequently, the abuse of the writ doctrine does not apply.” This Court continued, noting that when a petition has been summarily dismissed because it was not supported by proof, a subsequent petition which includes that missing proof should not be barred:

Because we find that (1) Greening's first attempt to raise the issue was "not sufficient to command judicial consideration and discussion in a personal restraint proceeding," see *In re Personal Restraint of Webster*, 74 Wash.App. 832, 833, 875 P.2d 1244 (1994) (citing *In re Personal Restraint of Rice*, 118 Wash.2d 876, 886, 828 P.2d 1086 (1992)), and (2) there is no reasonable basis to conclude that the issue's merits were previously reviewed, we find that the issue was not "previously heard and determined" for purposes of successive petition analysis."

Id. at 700. Like Greening, Adams first petition was dismissed without an examination of the merits. Under *Greening*, this Court should consider the merits of Adams' plea bargaining claim.

However, "even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground." *In re Taylor*, 105 Wash.2d 683, 717 P.2d 755 (1986). The ends of justice merit re-examination of an issue where it is supported by new evidence. *In re Personal Restraint of Benn*, 134 Wash.2d 868, 886, 884 85, 952 P.2d 116 (1998). If this Court somehow concludes that the ends of justice do not merit an examination of Adams' plea bargain claim, his additional claim that counsel was ineffective for failing to investigate his diminished capacity is being raised for the first time.

C. THIS COURT SHOULD REMAND FOR AN EVIDENTIARY HEARING

In this petition, Adams raises two issues that he supports with extra-record evidence. If either of those claims rest of material disputed facts, then that dispute can only be resolved at an evidentiary hearing.

With regard to the plea bargaining claim, after trial a newspaper reporter quoted former King County DPA James 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 in that declaration. 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 prior to filing a PRP, once a petition is remanded for a hearing the rules of discovery apply.

In addition to these disputed facts, Mr. Adams has 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.

For the first time after trial, trial counsel directed that a psychologist evaluate Mr. Adams. *See* Appendix F to PRP. Although the evaluation was directed at sentencing criteria, Dr. John P. Berberich concluded that Mr. Adams was unable to premeditate at the time of the crime. Dr. Berberich found that Mr. Adams “suffers from Post Traumatic Stress Disorder (PTSD), characterizing the resulting symptoms as “severe.” In

addition, he diagnosed Adams with depression and substance abuse. Indeed, Dr. Berberich found the extent and degree of violence that Adams had been exposed to virtually unparalleled. (“I have seen many defendants who have been charged with murder. Mr. Adams’ history is unique in my experience.”).

Rather than use this information as support for a new trial (or more appropriately, seeking to withdraw so that new counsel could act to protect Mr. Adams’ rights), counsel presented Dr. Berberich’s evaluation at sentencing. The persuasiveness of Dr. Berberich’s evaluation resulted in the imposition of an exceptional sentence below the standard range.

The sentencing court’s *Findings* specifically state:

2. The court finds that the issue of diminished capacity raised in this case constitutes a ‘failed defense.’ (*sic*)

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

If these material facts are disputed by the State, then this Court should either remand this PRP for an evidentiary hearing or for a decision on the merits. RAP 16.11 (b).

The court rules require a petitioner to make a preliminary, non-speculative showing. 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, 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 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). It is important to keep in mind, while applying this standard, that prior to an evidentiary hearing, a petitioner does not have a

right to discovery devices and cannot compel a witness to provide information.

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. 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 (9th 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). However, a petitioner is not strictly limited to repeating verbatim the words in his supporting declarations. The fact that discovery devices apply only *after* a hearing is authorized supports the conclusion that the evidentiary hearing also serves to fully develop the facts relevant to a claim. A post-conviction petitioner should not be precluded from obtaining a hearing where he presents non-speculative

proof, but where a strict reading of the rules of evidence and the inability to compel responses frustrates his ability to establish the whole truth in declarative form.

With regard to the plea bargain claim, Adams presented evidence (albeit disputed evidence), that an offer was made to defense counsel but was never communicated to Adams. In addition, Adams has declared that he would have accepted the offer, if he had been informed of it. The United States Supreme Court recently reaffirmed that the failure to communicate a plea offer violated the Constitution. See *Frye v. Missouri*, ___ U.S. ___, 132 S.Ct. 1399 (2012). As a result, he has made out a *prima facie* claim and is entitled to a hearing.

Frankly, it appears that Adams' diminished capacity claim is undisputed. The State argues that trial counsel had no reason to investigate Adams capacity to premeditate. However, counsel's decision to investigate Adams' mental condition after conviction belies that contention. Further, remedies were available to Adams after that investigation revealed Adams' diminished capacity. Counsel simply and deficiently failed to pursue these options.

As a result, Adams is entitled either to relief on this claim or, at a minimum, to an evidentiary hearing.

III. CONCLUSION

Based on the above, Mr. Adams' petition is timely. This Court should either remand for an evidentiary hearing or grant relief.

DATED this 26th day of November, 2012.

Respectfully Submitted:

/s/ Jeffrey E. Ellis

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Attached please find Mr. Adams' supplemental brief, which has been served on opposing counsel through this email.

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