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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re Personal Restraint Petition of

DEVON ADAMS,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Per In re Coats,<sup>1</sup> the mere existence of a facial invalidity on a judgment and sentence does not create a “super exception” allowing a petitioner to raise otherwise time-barred claims in a personal restraint petition. Ten years after Adams was convicted of murder, the trial court resentenced him because his offender score had been miscalculated. Does this open the door to Adams being able to attack his conviction based on a claim that would otherwise be time-barred under RCW 10.73.090 and .100?

2. Should this petition be dismissed because under the “successive petition” doctrine of RAP 16.4(d), “no more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown”?

3. Should this petition be dismissed because Adams presents insufficient credible evidence to support his claim?

**B. PROCEDURAL FACTS**

In September of 1999, Adams was charged with First-Degree Murder with a firearm enhancement and First-Degree Unlawful Possession of a Firearm. Appendix A.<sup>2</sup> In April of 2000, a jury found Adams guilty as charged. Appendix K. On September 1, 2001, Adams was sentenced.

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<sup>1</sup> 173 Wn.2d 123, 267 P.3d 324 (2011).

<sup>2</sup> All appendices refer to the appendices attached to the State’s Response to Personal Restraint Petition filed in the Court of Appeals.

Appendix S. Although advised of his right to appeal, Adams did not file a direct appeal. Appendix U and V.

In April of 2009, Adams filed a collateral attack in the trial court claiming that his offender score had been miscalculated. Appendix W. Adams committed several of his 13 felony crimes before turning 15 years old. These convictions were improperly counted in his offender score. See State v. Smith, 144 Wn.2d 665, 30 P.3d 1245 (2001).

Adams was resentenced on June 1, 2009. Appendix X. Adams contends his resentencing allows him to collaterally attack his conviction based on ineffective assistance of counsel, an otherwise time-barred claim. He claims that (1) the State made an offer to a lesser charge and defense counsel did not convey the offer to him, and (2) defense counsel should have had him undergo a mental evaluation before trial. The Court of Appeals ruled that Adams' petition was a prohibited successive petition and that it was time-barred.

C. ARGUMENT

To prevail by way of a personal restraint petition, Adams must meet certain burdens. Ultimately, he must prove 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 Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). First, however, Adams must prove

that his petition was timely filed. In re Quinn, 154 Wn. App. 816, 833, 226 P.3d 208 (2010). Because his petition was filed 10 years after his conviction became final, he must prove that one of the exceptions to the time bars in RCW 10.73.090 and .100 applies. State v. Schwab, 141 Wn. App. 85, 90, 167 P.3d 1225 (2007), rev. denied, 164 Wn.2d 1009 (2008). He must also prove that his attack is not a prohibited successive petition. In re Jeffries, 114 Wn.2d 485, 789 P.2d 731 (1990).

**1. ADAMS' PETITION IS TIME-BARRED.**

As interpreted by this Court in Coats, supra, Adams' petition is time-barred under RCW 10.73.090 and .100, because his claim of error and the remedy he seeks do not relate to the facial invalidity in his judgment and sentence.

A conviction "may be collaterally challenged on any grounds for a year after it is final."<sup>3</sup> Coats, 173 Wn.2d at 131; RCW 10.73.090. After one year, a petitioner may challenge a judgment and sentence upon any one of eight enumerated statutory grounds. RCW 10.73.100 lists six grounds upon which a judgment and sentence can be challenged at any time regardless of the facial validity of the judgment and sentence. Adams does not claim that one of the exceptions in RCW 10.73.100 applies. Instead, he relies on one of the two exceptions enumerated in RCW 10.73.090.

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<sup>3</sup> If no direct appeal is filed in a case, a judgment becomes final on the date it is filed with the clerk of the trial court. RCW 10.73.090(3)(a).

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 if [1] the judgment and sentence is valid on its face and [2] was rendered by a court of competent jurisdiction.

RCW 10.73.090(1) (numbering added).

To circumvent the time-bar provisions of RCW 10.73.090(1), Adams relies on his claim that his original judgment and sentence was not valid on its face.<sup>4</sup> The invalidity identified by Adams, however, was an offender score miscalculation that has been remedied. The claim he raises in this petition is a claim of ineffective assistance of counsel, and the remedy he seeks is reversal of his conviction. Under Coats, Adams' claim is time-barred because his claim does not relate to the specific invalidity of his judgment and sentence. The only difference between Adams' case and Coats is that the invalidity or error in the judgment and sentence in Coats had not yet been corrected by the trial court, while here, the trial court has already corrected the invalidity or error in the judgment and sentence.

A summary of the procedural history in Coats reveals the failings of Adams' argument. In 1995, Coats pled guilty to conspiracy to commit first-degree murder, conspiracy to commit first-degree robbery and

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<sup>4</sup> The State will use the term "facially invalid" when describing Adams' prior judgment and sentence. However, the State agrees with Justice Madsen's concurrence in Coats, that the determination of facial invalidity should be based solely on the actual judgment and sentence, and that resorting to external documents is prohibited under the statute. Coats, at 148-50, 160. To find otherwise renders the term "valid on its face" meaningless and defeats the statutory intent of limiting untimely collateral attacks. In challenging his offender score, Adams relied on documents from his juvenile cases. See Appendix W.

first-degree robbery. He received a standard range sentence of 20 years on the conspiracy to commit murder charge, concurrent with 51 months on the conspiracy to commit robbery charge and 109 months on the robbery charge. Each sentence was within the standard range. However, the judgment and sentence erroneously stated that the maximum sentence for conspiracy to commit first-degree robbery was life in prison, when in fact, the maximum sentence is only 10 years.

Fourteen years after being sentenced, Coats filed a petition seeking to withdraw his plea of guilty. Like Adams, Coats argued that his judgment and sentence was not valid on its face, and thus he was free to challenge his underlying conviction without regard to the time-bar provisions of RCW 10.73.090 and .100. This Court disagreed.

The majority of this Court held that Coats' judgment and sentence was not facially invalid because facial invalidity only exists where the trial court exceeds its statutory authority in imposing a sentence, and that had not occurred. Coats, at 135. Although the judgment and sentence listed an incorrect statutory maximum, the actual term of confinement imposed was below the correct statutory maximum, and thus the sentence was within the court's authority and the judgment and sentence was valid on its face. Coats, at 142-44.

In contrast, both concurring opinions found that the listing of an incorrect statutory maximum constituted facial invalidity regardless of whether the sentence actually imposed was within the correct statutory maximum. Despite this difference, all three opinions were in agreement on one important point: facial invalidity on a judgment and sentence does not act as a “super exception,” allowing for otherwise time-barred claims that are unrelated to the facial invalidity.

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.

Coats, at 141 (majority opinion).

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.

Coats, at 164 (Stephens, J. and Fairhurst, J., concurring); also Coats, at 145 (it is an “improper interpretation of the statute,” to believe 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”) (Madsen, C.J., concurring).

The purpose of the time-bar limitation is to promote finality in judgments and to manage the flow of post-conviction challenges by requiring that collateral attacks be brought promptly. Coats, at 149-59 (citing In re Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008)). “Collateral

review is not a substitute for appeal.” In re Hews, 99 Wn.2d 80, 86, 660 P.2d 263 (1983). Collateral relief “undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” Id.

Here, just as in Coats, an error was found in the judgment and sentence. Under Coats, the remedy is to correct the error. Adams filed his collateral attack in the trial court. He received the remedy he asked for and was entitled to. This does not “re-start the clock” as to time-barred claims.

To argue that the difference in the posture of the two cases--that Adams has received the remedy for his collateral attack while Coats had yet to receive his remedy--entitles Adams to bring otherwise time-barred claims, would be to write Coats out of existence. All a petitioner would have to do to raise time-barred claims would be to have the trial court correct an unrelated error in a judgment and sentence. For example, this Court remanded Coats case back to the trial court to correct the error in the judgment and sentence. Under Adams’ theory, once the trial court corrected the error in Coats’ judgment and sentence, Coats would be free to raise the same claim that this Court already ruled was time-barred.

As Justice Stephens aptly stated, “Coats [and Adams] would have us construe the invalidity exception in RCW 10.73.090 as a ‘super exception’ that removes the time bar not only for the specific claim that fits the

exception, but for all other claims as well.” Coats, at 170. This would “open the door to claims that do not fall within one of the enumerated exceptions...and would require [the Court] to ignore the interests of finality in situations where the legislature intended finality to carry the day.” Id. There is “no indication” that the legislature intended to create such a sweeping exception. Id. This Court should hold that the finding of a facial invalidity does not create a “super exception” for unrelated claims that would frustrate the legislative intent and circumvent the time-bar rules of RCW 10.73.090 and .100.<sup>5</sup>

## 2. ADAMS’ PETITION IS SUCCESSIVE.

Successive petitions raising the same issue are not allowed. Adams previously filed, and the Court of Appeals dismissed, a prior petition raising the same ineffective assistance of counsel claim.

Two provisions govern the prohibition on filing successive petitions. RCW 10.73.140 limits the Court of Appeals’ ability to consider successive petitions:

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person

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<sup>5</sup> In In re Bradley, 165 Wn.2d 934, 205 P.3d 123 (2009), the defendant pled guilty and was sentenced with an incorrect offender score. In a PRP, Bradley claimed that his plea was involuntary and that he could raise this otherwise time-barred claim because of the facial invalidity of his judgment and sentence. This Court addressed the voluntariness of the plea. But, as stated in Coats, Bradley does not stand for the proposition that an issue unrelated to a facial invalidity is not time-barred. Rather, the State accepted that a time-bar exception applied, and thus, the case stands only “for the proposition it established; not for the propositions conceded by the parties.” Coats, at 137-38.

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. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. **If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. ...**

RCW 10.73.140 (emphasis added). RAP 16.4(d) also limits a court's ability to consider successive petitions:

The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. **No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.**

RAP 16.4(d) (emphasis added).

RCW 10.73.140 applies only to the Court of Appeals. RAP 16.4(d) contains a similar prohibition and applies fully and equally to this Court. In re Martinez, 171 Wn.2d 354, 362, 256 P.3d 277 (2011). Under both provisions, a second petition claiming relief similar to that requested in an earlier petition decided on the merits bars consideration of the second petition absent a showing of good cause, such as a change in law. In re Stoudmire, 141 Wn.2d 342, 350, 5 P.3d 1240 (2000). There must be judicial finality regarding claims that have already been adjudicated.

In re Becker, 143 Wn.2d 491, 495, 20 P.3d 409 (2001). Summary dismissal is the appropriate remedy for a successive petition. Id. at 497 (citing In re Bailey, 141 Wn.2d 20, 22, 1 P.3d 1120 (2000)).

In 2001, Adams filed a petition in the Court of Appeals. Appendix Y. Adams claimed that his trial counsel was ineffective, in part, for failing to convey a plea offer. Id. The Court dismissed Adams' petition, not because of any procedural bar, but because Adams provided insufficient evidence to support his claim. Appendix Z. Adams' current petition attempts to relitigate the same claim. There has been no change in the law since Adams' prior collateral attack. Accordingly, this Court must dismiss this petition as successive. See In Re Stenson, 142 Wn.2d 710, 720, 16 P.2d 1 (2001) (recasting the same issue in different terms does not constitute new grounds allowing for the hearing of previously rejected claims).

Adams counters that he filed the prior petition *pro se*, that it was not decided on the merits, and that he is really attacking a different judgment. Pet. Reply in Support of PRP at 1, 3. First, the fact that Adams filed his prior petition *pro se* is of no moment—that limitation applies to the “abuse of the writ” bar, not the successive petition bar. In re Adolph, 170 Wn.2d 556, 564, 243 P.3d 540 (2010); In re VanDelft, 158 Wn.2d 731, 738 n.2., 147 P.3d 573 (2006). RAP 16.4(d) bars a petition “(1) where the prior application had been denied on grounds previously heard and determined,

or (2) if there has been an abuse of the writ.” Adolph, 170 Wn.2d at 564 (emphasis added). Under part (2) of the rule, a “new issue” may not be raised in a subsequent petition if the petitioner was represented by counsel throughout post-conviction proceedings; to do so is an abuse of the writ. VanDelft, at 738 n.2. The State is not arguing an abuse of the writ.

Second, Adams’ argument that the issue was not decided on the merits is incorrect. The Court of Appeals dismissed Adams’ petition because he provided insufficient evidence to support his claim. Refiling the same claim with a greater quantum of “evidence” does not change the fact that the prior ruling was based on the evidence, i.e., that it was based on the merits of the claim. If simply providing more evidence were a basis to have a claim reheard, then a petitioner could refile claims *ad infinitum*, so long as he could assert that he had a greater quantum of evidence each time. There is no such exception in the rule.

Finally, Adams’ claim that this is not a successive petition because he is “attacking a new judgment” is without support. RAP 16.4(d) is not a rule based on the facial validity of a particular version of a judgment and sentence. The rule focuses on the request for relief. By its terms, RAP 16.4(d) bars a subsequent petition that seeks “similar relief on behalf of the same petitioner.” The relief sought in Adams’ current and prior petitions is the same: reversal of his conviction due to a claim of ineffective assistance

of counsel. Under Adams' theory, RAP 16.4(d) becomes a nullity if a trial court amends or changes a judgment and sentence for any reason. Collateral attacks prior to that event, even on exactly the same grounds, would not be considered as a prior petition under the rule. There are no policy reasons that would support such a strained interpretation of the rule.

**3. ADAMS HAS FAILED TO PROVIDE CREDIBLE EVIDENCE THAT COUNSEL WAS INEFFECTIVE.**

Adams contends that his trial counsel was ineffective for failing to investigate a possible diminished capacity defense prior to trial, and for failing to convey to him an alleged plea offer to second-degree murder. These factual claims should be rejected.

**a. Relevant Facts.**

Franklin Brown was a 41-year-old mentally challenged local handyman.<sup>6</sup> He was known around the neighborhood as a peaceful man who would go door-to-door with his weed-whacker seeking to earn some money.

On September 8, 1999, Adams, who was drunk and high on sherm, confronted Brown on a residential street in Seattle. Adams' three companions tried to persuade Adams to leave Brown alone. Brown was

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<sup>6</sup> Adams failed to provide the Court with a report of proceedings. Thus, the facts recited come from court documents and affidavits of trial counsel. See Appendix B, C, D and E.

unarmed, carrying only his weed-whacker and an extension cord. What happened next was observed by Adams' companions and two neighbors.

Adams began harassing Brown and proceeded to go through Brown's pockets looking for drugs or money. When Brown verbally responded, Adams called Brown a "bitch" and a "nigger." When Brown asked to be left alone, Adams pulled out a gun and proclaimed, "you don't know who I am." Adams then lowered the gun and began to walk away. However, the assault did not end there. Witnesses watched as Adams turned, shoved his gun into Brown's neck and began firing. Adams continued to fire even after Brown fell to the ground. Adams fired multiple shots into Brown's back as he lay on the ground.

Two days later, Adams contacted longtime defense attorney Michael Danko, who arranged for his surrender. Appendix E and F. Brown had previously retained Danko, who had negotiated a favorable plea agreement for Brown in a domestic violence case. Appendix G.

In March of 2000, Adams proceeded to trial. Danko sought and received jury instructions on the lesser offenses of second-degree murder, first-degree manslaughter, and second-degree manslaughter. Appendix I and J. Danko also successfully argued that the court should give a voluntary intoxication instruction. Id. On April 6, 2000, the jury found Adams guilty as charged. Appendix K.

Both before and after trial, Danko sought to determine the status of a vehicular assault case involving Adams that was pending a charging decision. Appendix L. Prior to trial, the State advanced a single plea offer. In a written memo, the State suggested that Adams plead guilty to first-degree murder, with the State agreeing not to file vehicular assault charges. Appendix M. Adams' trial attorney and the prosecutor both agree that this was the only plea offer ever made.<sup>7</sup> Appendix D and E.

Post-trial, Danko retained Doctor John Berberich to conduct a psychological evaluation of Adams in the hopes of finding evidence to support an exceptional sentence downward. Appendix Q. Ultimately counsel sought an exceptional sentence based on Berberich's report and the facts of the case.<sup>8</sup> Appendix F and R. Recognizing that voluntary drug and alcohol use is excluded by statute as a basis for an exceptional sentence, Danko argued that, in conjunction with Adams' alcohol and drug usage, Adams suffered from mental issues that supported an exceptional sentence. Id.

In his report, Berberich detailed a long history of violent behavior by Adams, stating that he was "uncontrollable" by the fifth grade, was

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<sup>7</sup> Adams denied he was the driver, and thus, the offer went no further. Appendix M. As a result, charging was delayed until DNA and forensic testing could be completed. With additional evidence, in February of 2002, Adams was charged with vehicular assault. Appendix N. Adams again retained Danko to represent him. Danko negotiated a favorable plea whereby Adams received no additional confinement time. Appendix P.

<sup>8</sup> RCW 9.94A.390(1)(e) (recodified at RCW 9.94A.535) allows for an exceptional sentence if a defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.

committing burglaries and robberies by age 13, and that he had an “extensive drug history” starting at age 12. Appendix R. He related that Adams was “well known for being belligerent and very difficult to deal with” when he was on sherm or alcohol, and that attempts at drug treatment and anger management had failed. Under the influence, Adams was “predisposed ... toward violently acting out.” Id.

Berberich also opined that Adams suffered from an anti-social personality disorder and post-traumatic stress disorder that, in combination with his alcohol and drug abuse, impaired his ability to appreciate the wrongfulness of his behavior at the time he murdered Brown. “It is reasonable to assume,” Berberich opined, that Adams would experience great fear when involved in an argument with another man.<sup>9</sup>

Adams received a 360 month exceptional sentence on a range of 471 to 608 months, based on a “failed defense” of diminished capacity.

Appendix S and T; RCW 9.94A.535(1).<sup>10</sup> The court stated that a diminished capacity claim would not have amounted to full defense, but that

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<sup>9</sup> No medical records or other evidence was submitted to support Berberich’s opinion, and the opinion was not stated in terms of “a reasonable degree of medical certainty.” Berberich’s conclusion suggests that he was unaware of the facts of the case. For example, there was no evidence that the encounter between Adams and Brown was a confrontation between two angry men or that Adams acted in self-defense. Rather, the evidence showed that Adams approached a defenseless, mentally ill man and killed him in unprovoked anger. It is difficult to reconcile this with Adams’ current claim that Berberich’s opinion could support a mental defense. Rather, it appears that Berberich’s analysis and opinion were aimed solely toward obtaining an exceptional sentence.

<sup>10</sup> With a corrected offender score, Adams received an exceptional sentence of 304 months on a standard range of 336 to 440 months. Appendix X.

it played a significant role in determining an appropriate sentence.

Appendix T.

**b. Standard Of Review.**

To prevail on an ineffective assistance claim, Adams must prove that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced him, i.e., there is a reasonable probability that but for counsel's errors the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

A court begins with the strong presumption that counsel has rendered adequate assistance. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices." In re Elmore, 162 Wn.2d 236, 253, 172 P.3d 335 (2007).

**c. There Was No Reason To Pursue A Mental Defense.**

Post-trial, counsel engaged the services of Doctor Berberich in a successful attempt to obtain an exceptional sentence. While the majority of the doctor's report discussed Adams' significant drug, alcohol and anger

problems, in a few passages, Berberich opined that Adams suffered from PTSD and depression.

Adams does not contend that counsel was ineffective for failing to present a diminished capacity defense at trial. Rather, he contends counsel should have had him evaluated prior to trial to see whether there was a viable mental defense. This assertion is without support.

A diminished capacity defense requires evidence of a mental condition that prevents the defendant from forming the requisite intent necessary to commit the crime charged. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). When defense counsel knows, or has reason to know, of mental problems that are relevant to creating an informed defense theory, counsel has a duty to conduct a reasonable investigation. State v. Kelley, 146 Wn. App. 370, 375, 189 P.3d 853 (2008) (citing In re Brett, 142 Wn.2d 868, 16 P.3d 601 (2001)). Here, Adams provides no evidence that *prior to trial*, counsel knew, or should have known, that he suffered from any significant mental condition. Nothing submitted to the court (see Appendix a<sup>11</sup> and Appendix b<sup>12</sup>) shows that anyone suspected that Adams suffered from anything other than alcohol, drug and anger problems.

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<sup>11</sup> Appendix "a" contains prior judgment and sentences submitted to the trial court. Prior courts required Adams to undergo drug and alcohol treatment, but none required him to undergo mental health treatment.

<sup>12</sup> Appendix "b" contains discharge summaries from Lakeside-Milam and a DSHS group home. Neither summary shows that Adams suffered from any type of mental illness.

Counsel had Adams evaluated in the hopes of obtaining a favorable sentence--which he did. Counsel had no reason to believe that Adams was so mentally ill that he did not possess the *mens rea* to commit murder. Thus, counsel was not deficient for failing to have Adams undergo a mental evaluation prior to trial.

Additionally, Adams' assumption that any reasonable attorney would have pursued a diminished capacity defense had he known of Berberich's evaluation is flawed. If trial counsel's conduct can be characterized as legitimate "trial strategy or tactics," it cannot serve as a basis for an ineffective assistance claim. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Here, presenting a mental defense was fraught with danger and was unlikely to succeed.

When a specific *mens rea* is an element of the crime, a defendant may present evidence showing an inability to form that *mens rea*. State v. Greene, 92 Wn. App. 80, 106, 960 P.2d 980 (1998). "Acceptable bases for arguing a lack of capacity include voluntary intoxication...and mental disorder, but not emotion (e.g., jealousy, fear, anger, hatred, etc.)." Id. (internal citations omitted).

Here, counsel presented an intoxication defense and obtained jury instructions for each diminishing *mens rea* level for homicide: premeditated intentional murder (first-degree murder), intentional murder (second-degree

murder), recklessly causing the death of another (first-degree manslaughter), and negligently causing the death of another (second-degree manslaughter). The fact that Adams suffered from alcohol and drug problems was without question. By presenting this defense, counsel was able to argue the very thing a diminished capacity defense would provide, with major benefits over raising a true diminished capacity defense.

First, it is evident from Berberich's report that Adams' alleged mental issues arose out of his substance abuse issues. All that would be added by pursuing a mental defense, in conjunction with a voluntary intoxication defense, would be for a professional witness to opine that Adams suffered from PTSD that may also have played a role in his inability to form the requisite intent. However, a diminished capacity defense would come with extreme risks.

When a party opens up a subject of inquiry on direct, he contemplates that the rules will permit cross-examination on the same subject matter. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Asserting a diminished capacity defense would have opened the door to Adams' history of assaultive behavior – evidence that would have made it much more difficult to persuade a jury that Adams was culpable only of some lesser offense. For example, the jury would have heard about Adams' prior convictions, including an armed robbery, and his history of violence

and threats to kill others. See Appendix c. Additionally, Adams would have been subject to further evaluation by State experts.

This Court has recognized the reasonableness of forgoing presentation of mental health evidence. Elmore, 162 Wn.2d at 258 (the failure to present mental health evidence was reasonable because it would “have opened the door to damaging rebuttal evidence” and subjected the defendant to further evaluation). A voluntary intoxication defense allowed counsel to argue for lesser offenses in the same way as a diminished capacity defense would, without the stigma of a defense expert positing mental health issues never observed by others, and without the risk of opening the door to other damaging evidence. That Adams’ current counsel may have chosen a different approach is of no moment. See Harrington v. Richter, \_\_\_ U.S. \_\_\_, 131 S. Ct. 770, 790-92, 178 L. Ed. 2d 624 (2011) (reasonable for defense counsel not to hire an expert who might have supported the defendant’s version of events—counsel could instead choose a strategy of cross-examining the State’s witnesses about the lack of evidence). Adams fails to meet his burden of showing that his counsel’s performance was deficient.

As to the prejudice prong of the Strickland test, Adams must prove that “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Hendrickson, 129 Wn.2d at 78.

Adams relies on nothing more than speculation. He argues that because the trial court relied upon Berberich's report to impose an exceptional sentence, the outcome of the trial would necessarily have been different. This ignores the fact that the jury rejected Adams' claim that he could not form the requisite intent because of his drug and alcohol use—the major factor in his behavior according to Berberich. Adams also ignores the fact that, had he asserted a diminished capacity defense, the jurors would have heard other damaging evidence, and that, in granting an exceptional sentence, the court stated that diminished capacity would not have risen to a complete defense.

**d. No Plea Offer To A Lesser Charge Was Ever Made.**

Adams contends that the State conveyed a plea offer to second-degree murder to his trial counsel, but that the offer was not conveyed to him, and thus his counsel was ineffective. This argument fails. No such offer was ever made (considering the facts of the case, there would have been no reason for the State to extend such an offer), and the only "proof" Adams advances consists of inadmissible and self-serving hearsay. Further, Adams fails to meet the test announced by the United States Supreme Court in Missouri v. Frye, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

As a threshold matter, to even obtain a reference hearing, a petitioner must state in his petition the facts underlying his claim and the evidence

available to support the factual allegations. RAP 16.7(a)(2)(i). Even then, “[t]his does not mean that every set of allegations which is not meritless on its face entitles a petitioner to a reference hearing.” In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Bald assertions and conclusory allegations will not support a reference hearing. Id. Additionally, even where a petition may allege a facially adequate reason to grant relief, if there is “no apparent basis in *provable fact*,” a reference hearing will not be ordered. Id.

If the petitioner’s allegations are based on matters outside the existing record, he “must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief.” Id. If the petitioner’s evidence is based on knowledge in the possession of others, he may not simply state what others would say, he must present their affidavits or other corroborative evidence, and the affidavits must contain matter to which the affiants may competently testify. Id. A statement that constitutes hearsay is insufficient to obtain a hearing. In re Gentry, 137 Wn.2d 378, 398, 972 P.2d 1250 (1999). The Court will not examine the State’s response if the petitioner fails to meet this threshold burden. Rice, at 886-87.

Adams fails to meet his threshold burden. According to both the trial prosecutor and Adams’ trial counsel, no offer to second-degree murder was ever made. Appendix D and E. The only offer was to plead guilty as

charged in exchange for the promise that the State would not file vehicular assault charges arising out of another incident. Appendix M.

The only evidence Adams provides consists of his and his mother's self-serving affidavits and a newspaper article, all of which contain claims of what others may have said. This evidence is insufficient to obtain relief. There is no credible evidence to show that a plea offer to a lesser charge was ever made. Thus, Adams is not entitled to relief of any kind.

**e. Plea Offers And Ineffective Assistance Of Counsel.**

Under the Sixth Amendment, "defense counsel has the duty to communicate formal [plea] offers from the prosecution," that are "favorable to the accused." Frye, 132 S. Ct. at 1408. Where a formal and favorable plea offer is allegedly not relayed to a defendant by his counsel, and where the defendant is then convicted at trial, a defendant alleging ineffective assistance must meet certain requirements. These requirements help ensure against late, frivolous, or fabricated claims made after a trial. Id. at 1408.

First, a defendant must prove that a formal plea offer was made but not relayed to him. Id. Adams cannot show that an offer was made, or that it was a "formal" offer.<sup>13</sup> If a defendant meets this part of the test, he must

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<sup>13</sup> The "offer" alleged by Brown did not include any terms or conditions. On the other hand, the memo sent to Brown's counsel about pleading guilty as charged (Appendix M) is at best characterized as an offer to discuss the possibility of coming to terms on a deal. A formal plea offer would likely include, at a minimum, an offender score, standard range and sentence recommendation.

prove two things to show prejudice. First, he must prove that there is a reasonable probability that he would have accepted the offer. To this end, it is necessary to show a reasonable probability that the end result would have been “more favorable by reason of a plea.” Id. at 1409. Second, he must prove that there is a reasonable probability that the plea would have been entered prior to the State rescinding the offer. Id.

Adams cannot meet these requirements. Adams faced a standard range sentence of 471 to 608 months. He obtained an exceptional sentence of 360 months. Second-degree murder carried a standard range of 358 to 457 months. Thus, the only way Adams could show that he would have accepted a plea to a reduced charge instead of proceeding as he did, is if the State had offered a plea deal that not only included a reduction in the charge, but also included a sentence recommendation at the absolute bottom of the standard range. Adams cannot show that such an offer was made.

Additionally, Adams cannot show when the alleged offer was made or whether acceptance was time-limited. This is critical because if there is a question as to whether the State would have rescinded the offer before the plea was entered, Adams’ claim fails. Frye, at 1410-11. Here, sometime prior to trial, Adams became a suspect in a vehicular assault case. If this

had occurred during the pendency of the plea offer, it is highly likely that the State would have rescinded the offer.<sup>14</sup>

Finally, upon proof of such a claim, a defendant is entitled to have the State reoffer the plea offer. Lafler v. Cooper, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376, 1391, 182 L. Ed. 2d 398 (2012). That cannot happen here. Adams cannot state what the terms of the alleged offer were. Was there an agreed sentence recommendation? Was Adams barred from seeking an exceptional sentence? These deficiencies demonstrate that Adams cannot meet his burden in proving his claim of ineffective assistance of counsel.

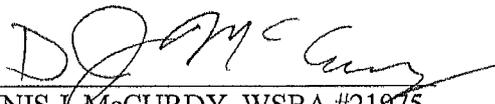
**D. CONCLUSION**

For the above reasons, this Court should dismiss Adams' petition.

DATED this 9 day of January, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DENNIS J. McCURDY, WSBA #21975  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
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<sup>14</sup> Plea agreements are contracts between a defendant and the State. State v. Talley, 134 Wn.2d 176, 182, 949 P.2d 358 (1998). The State may withdraw a plea offer at any time prior to entry of a guilty plea. State v. Yates, 161 Wn.2d 714, 741, 168 P.3d 359 (2007).

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, Jeff Ellis, containing a copy of the Supplemental Brief of Respondent, in IN RE PERSONAL RESTRAINT OF ADAMS, Cause No. 87501-4-I, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



\_\_\_\_\_  
Name  
Done in Seattle, Washington

01-09-13  
\_\_\_\_\_  
Date

## OFFICE RECEPTIONIST, CLERK

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**To:** Ly, Bora  
**Cc:** McCurdy, Dennis; 'jeffreywinellis@gmail.com'  
**Subject:** RE: Personal Restraint Petition of Devon Adams/Case # 87501-4

Rec'd 1-9-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**From:** Ly, Bora [<mailto:Bora.Ly@kingcounty.gov>]  
**Sent:** Wednesday, January 09, 2013 2:01 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** McCurdy, Dennis; 'jeffreywinellis@gmail.com'  
**Subject:** Personal Restraint Petition of Devon Adams/Case # 87501-4

Dear Supreme Court Clerk:

Attached for filing in the above-referenced Personal Restraint Petition, please find the Supplemental Brief of Respondent.

Please let me know if you should have difficulties with this electronic filing. Thank you.

Sincerely,

Bora Ly  
Paralegal  
Criminal Division, Appellate Unit  
King County Prosecutor's Office  
W554 King County Courthouse  
516 Third Avenue  
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For

Dennis McCurdy  
Senior Deputy Prosecuting Attorney  
Attorney for the Respondent