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WASHINGTON STATE
SUPREME COURT

NO. 93143-7

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

KEVIN LEE ESTES, RESPONDENT

Court of Appeals Cause No. 46933-2
Appeal from the Superior Court of Pierce County
No. 14-1-00724-0

SUPPLEMENTAL BRIEF OF PETITIONER

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FILED AS
ATTACHMENT TO EMAIL



ORIGINAL

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does a claim of ineffective assistance of counsel fail when the defendant cannot establish any prejudice and cannot go outside the record to determine if he was advised that the lesser included charges constituted a strike offense under the persistent offender statute?
2. Is a direct appeal an inappropriate remedy for the defendant, who could file a personal restraint petition where a reference hearing could be ordered to develop the appropriate record to assess his claim?

B. STATEMENT OF THE CASE.

1. Procedure

The State originally charged Kevin Estes, hereinafter referred to as "defendant," with two counts of second degree assault and one count of felony harassment by information on February 19, 2014, under cause number 14-1-00724-0. CP 1-2. Each of these three counts included a deadly weapon enhancement. CP 1-2. The information was later amended on July 8, 2014, to allege an aggravating factor due to defendant's criminal history. CP 114-116. With a second amended information, the State added an additional second degree assault charge, again with a deadly weapon enhancement. CP 117-119. The State filed a

third amended information July 31, 2014, and removed the additional assault charge. CP 206-208.

On February 27, 2014, the State filed a Persistent Offender Notice informing defendant that he was facing a third strike offense for both second degree assault charges and the felony harassment charge. CP 381.

During the pendency of his case, the defendant often filed his own motions and pleadings. In total, defendant filed approximately 30 separate documents with the court. CP 9-29, 35-36, 37-40, 41-43, 44-47, 48-52, 59-63, 68, 69-70, 71-75, 76-77, 78-79, 80-81, 82-84, 85-87, 102-104, 109-113, 120-121, 122-123, 124-128, 129-131, 132, 133-134, 135-137, 141-144, 145-205, 248-250. Among the documents filed was a demand from defendant that his charges be reduced to a misdemeanor with credit for time served or he was wanting to go to trial. CP 85-87. Nothing in defendant's filings, however, suggests that he was interested in resolving his case for anything more than a misdemeanor.

After defendant was convicted of the lesser offense of assault in the third degree and felony harassment, both with deadly weapon enhancements, defense counsel makes a single statement—"He wasn't convicted of a strike offense"—on which the Court of Appeals based its reversal. RP 504. This is the only reference that is part of the appellate

record to even suggest that counsel was unaware that the charges of which defendant was convicted constituted a strike offense.

After trial but prior to sentencing, defense counsel moved to dismiss the deadly weapon enhancements. CP 341-349; RP 509-25. The trial court denied defense counsel's motion to dismiss. RP 524-5. Because the deadly weapon enhancements made each of defendant's current conviction strike offenses, RP 504; RCW 9.94A.030(32)(t), the court sentenced defendant to life in prison without the possibility of parole on November 21, 2014 pursuant to Washington's Persistent Offender Accountability Act (POAA). CP 368.

The Court of Appeals issued its opinion on April 19, 2016. The Court of Appeals reversed the defendant's convictions, finding that defense counsel was deficient and that prejudice resulted, not at trial, but in counsel denying the defendant an informed decision on plea bargaining. In fact, the Court of Appeals specifically found that the defendant did not incur any prejudice whatsoever in defense counsel's trial performance. *See* Court of Appeals opinion at 13.

The State filed a timely petition for review, which was granted. This supplemental brief follows.

2. Facts

A detailed account of the substantive facts can be found in the Court of Appeals opinion #46933-2-II.

C. ARGUMENT.

1. A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FAILS WHEN THE DEFENDANT CANNOT ESTABLISH ANY PREJUDICE AND CANNOT SUPPLEMENT THE RECORD TO ESTABLISH WHETHER OR NOT HE WAS ADVISED THAT THE LESSER INCLUDED CHARGES CONSTITUTED STRIKE OFFENSES.

To demonstrate a denial of the effective assistance of counsel, defendant must satisfy a two-prong test.

First, defendant must show that his attorney's performance was deficient. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, 733 (1986) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2054, 80 L. Ed. 2d 674 (1984)). This prong requires showing that his attorney made errors so serious that he did not receive the "counsel" guaranteed to defendants by the Sixth Amendment. *Id.* Second, defendant must demonstrate that he was prejudiced by the deficient performance. *Id.* Satisfying this prong requires the defendant to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 672-3, 101 P.3d 1 (2004), *see also State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011). A "reasonable

probability” is a probability that is sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694.

“The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Similarly, “[t]he defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” *Id.* at 337 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

a. Defendant cannot show that his attorney’s performance was deficient.

When asserting that an attorney’s performance was deficient, a criminal defendant must show that the attorney’s conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Judicial scrutiny of an attorney’s performance must be highly deferential. *Id.* at 689. “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance...” *Id.* In evaluating an attorney’s performance, courts must make every effort to eliminate the distorting effects of hindsight. *Id.* Counsel’s performance is to be evaluated from counsel’s perspective at the

time of the alleged error and in light of all the circumstances. *Davis*, 152 Wn.2d at 673.

On appeal, defendant contends that his defense counsel was ineffective because his attorney allegedly did not know that if defendant was convicted of any felony with a deadly weapon enhancement, it would constitute a strike offense under RCW 9.94A.030(32)(t). SAG at 2. However, the record reveals multiple instances where defense counsel attempted to rebut the State's allegation that defendant was armed with a deadly weapon at the time of his altercation with Prusek.

Defense counsel's efforts to counter the State's allegation that defendant was armed with a deadly weapon at the time of the altercation began prior to trial. During motions in limine, defense counsel made a motion specifically requesting that the knife found on defendant's person outside of the residence be excluded from evidence. CP 250. Defense counsel also moved to exclude any photographs of either of the knives involved in the case. CP 250. Both of these motions were argued before the trial court and both were ultimately denied. RP 42-49.

Defense counsel's efforts to undermine the deadly weapon enhancements continued during trial. Defense counsel conducted extensive cross-examination of several witnesses. During Prusek's testimony, defense counsel specifically inquired into his ability to recall details about the knife that was used against him. RP 186-87. Defense counsel also asked Officer Pigman what he could recall about the knife on

the refrigerator, and specifically asked whether his estimation as to the knife's length pertained to the whole knife or just the blade. RP 256-57.

In addition to cross-examination regarding the knife, defense counsel also made an extensive argument in the trial court objecting to the admission of exhibit 6 (the knife found on defendant outside the residence). RP 199-205. Finally, during closing argument, defense counsel questioned the recollection of several witnesses regarding their descriptions of the knife used in the altercation and the manner in which it was used. RP 468-69. The record makes it clear that the deadly weapon enhancements were an appropriate area of focus for defense counsel both before and during trial.

“Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland*, 466 U.S. at 688. The State's case against defendant was subjected to a reliable adversarial testing process. Defense counsel had notice that defendant was facing a third strike soon after the State filed the original information. CP 381. Even after having been advised of the fact that he faced a third strike, the defendant still declined to negotiate his case.¹ Moreover, the record reveals that defense counsel tested the State's

¹ The notice of persistent offender was filed on February 27, 2014. CP 381. *After* the notice was filed, the defendant filed 30 of his pretrial motions and pleadings, including the motion demanding a reduction to a misdemeanor offense or he wanted to go to trial. *See* CP 9-29, 35-36, 37-40, 41-43, 44-47, 48-52, 59-63, 68, 69-70, 71-75, 76-77, 78-79, 80-81, 82-84, 85-87, 102-104, 109-113, 120-121, 122-123, 124-128, 129-131, 132, 133-134, 135-137, 141-144, 145-205, 248-250.

allegation that defendant was armed with a deadly weapon on multiple occasions through pretrial motions, cross-examination, and closing argument.

The record demonstrates that the State's case against defendant was subjected to a reliable, adversarial testing process. Defendant's trial counsel addressed the issue of the size of the knife multiple times both before and during trial. Courts "defer to an attorney's strategic decisions to pursue, or forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has not chosen to employ." *Riofta v. State*, 134 Wn. App. 669, 693, 142 P.3d 193 (2006). Defendant's trial counsel chose a certain line of defense to present at trial. This line of defense was not deficient simply because it was unsuccessful. As argued below, the defendant's trial was free from any prejudicial error.

b. Defendant has failed to show he suffered any prejudice resulting from a deficient performance by his trial counsel.

To prevail on a claim for ineffective assistance of counsel, a "defendant must affirmatively prove prejudice, not simply show that 'the errors had some conceivable effect on the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693). "In doing so, 'the defendant must show that there is a reasonable

probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*

The record in this case contains ample evidence to find that defendant was armed with a deadly weapon at the time of his altercation with Prusek regardless of his attorney's chosen trial strategy.

A knife with a blade over three inches is a *per se* deadly weapon. *State v. Thompson*, 88 Wn.2d 546, 548, 564 P.2d 323 (1977). Officer Pigman testified that the total length of the knife on the refrigerator was about 6 inches. RP 256-57. Prusek testified that the knife used against him had a blade about 3.5 to 4 inches. RP 134. Exhibit 2 consisted of a photo of the knife Officer Massey found on Mr. Estes' person next to a ruler. Ex. 2. The forensic evidence technician testified that the blade measured over three inches in the photo. RP 217-18.

Thus, the jury was presented with testimony indicating that both knives were *per se* deadly weapons due to having blades longer than three inches, and had the opportunity to examine a photograph of one of the knives next to a ruler as exhibit two was admitted into evidence. Ex. 2; RP 218. After examining all of this evidence, the jury was convinced beyond a reasonable doubt that defendant was armed with a deadly weapon when he threatened Stoltenberg and subsequently fought with Prusek. CP 330; CP 336; CP 338.

As an alternative to the length requirement to classify a knife as a deadly weapon, the jury could have found that Defendant was armed with

a deadly weapon due to the manner in which he used the knife during his altercation with Prusek. “The character of an implement as a deadly weapon is determined by its capacity to inflict death or injury, and its use as a deadly weapon by the surrounding circumstances, such as the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” *Thompson*, 88 Wn.2d at 548-49. Whether a knife constituted a deadly weapon based on the manner it was used is a question of fact for the jury to decide. *Id.* at 548.

The record contains sufficient evidence to conclude that defendant used the knife involved in the altercation in a manner that could inflict death. Stoltenberg testified that defendant was thrusting the knife toward Prusek’s body. RP 90-91. Prusek testified that defendant was “flailing” around with the knife in his hand as they struggled and that he was stabbed on his foot and finger. RP 133-34. He also testified that the knife was capable of inflicting serious injury or death. RP 134. Mr. Randle described the knife he placed on the refrigerator as “sharp.” RP 303.

The jury had sufficient evidence before it to be convinced beyond a reasonable doubt that defendant was armed with a deadly weapon at the time of the altercation. The evidence against defendant was such that the result of the proceeding could not reasonably have been different regardless of defense counsel’s strategic decisions. The Court of Appeals correctly found:

Estes's attorney made several motions to keep the knife found on Estes out of evidence, both before and during trial. He also moved to exclude pictures of that knife. The trial court denied both motions. Further, defense counsel attacked Pursek's, Stolenberg's, and Pigman's memory regarding the knife that was in the apartment. And, during closing argument, defense counsel presented the theory that the State failed to prove Estes assaulted anyone with a knife and that the State could not prove that the knife in evidence was the knife in the apartment. Estes has not shown prejudice on this point.

Court of Appeals Opinion, page 13-14.

This case is analogous to *State v. Crawford*, 159 Wn.2d 86, 147 P.3d 1288 (2006). In *Crawford*, the defendant was charged with first degree robbery and second degree assault. *Id.* at 90. He had an extensive criminal history, including a prior conviction for second degree robbery and a conviction for first degree sexual abuse. *Id.* While the State and the defense were both aware of the prior second degree robbery conviction, neither was aware of the sexual abuse conviction. *Id.* After learning about the sexual abuse conviction, neither party investigated it further and neither party engaged in further plea negotiations. *Id.* at 91. After trial, the State notified the defense that the sexual abuse conviction subjected the defendant to a life sentence as a persistent offender. *Id.* The defendant moved for a new trial on the basis that, had he known he was facing his third strike, he would have accepted an offer that had been made by the State. *Id.*

This Court affirmed the defendant's conviction and life sentence, holding in part that the defendant failed to establish any prejudice. This court held that (1) there was no indication that the prosecutor was willing to offer the defendant the option of pleading guilty to a nonstrike offense, (2) it would have been highly speculative to conclude that the State would have been willing to reduce the charge to a nonstrike offense, (3) the defendant would have been sentenced as a persistent offender unless the State had agreed to reduce the charges, and (4) the defendant presented no mitigation package. *Id.* at 100-101. The court concluded that “. . . we reiterated that the test requires more than the existence of evidence that *might* have changed the outcome. It requires the defendant to *affirmatively* prove prejudice.” *Id.* at 102.

Similar to *Crawford*, the defendant in the case also cannot show prejudice. As argued below, there is nothing in the record to indicate that the State had ever been willing to reduce the charges to a nonstrike offense. There is also no mitigation. Absent a record as to any of these matters, the defendant cannot establish any prejudice and, under *Crawford*, an ineffective assistance of counsel claim fails.

The defendant in this case received a trial free from any prejudicial error. His counsel made the appropriate arguments, at least some of which were effective in convincing the jury not to convict him of the more serious offenses. Because the defendant cannot establish any prejudice, his claim of ineffective assistance of counsel fails.

c. The defendant cannot supplement the record on a direct appeal.

This court has previously held in *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995) that matters outside the appellate record must be raised in a personal restraint petition. In this case, however, the Court of Appeals, contrary to *McFarland*, considered allegations in the defendant's Statement of Additional Grounds that his defense counsel did not advise him that a weapon enhancement made any felony offense a strike offense. Statement of Additional Grounds, page 14.

A defendant alleging ineffective assistance of counsel has the burden to show, *from the record*, the absence of legitimate strategic or tactical reasons that would support the challenged conduct by counsel. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). As the Court of Appeals dissent states, the assertion by defendant that his attorney did not advise him that a weapon enhancement would result in any of his convictions being strikes is not part of the appellate record and cannot be considered in evaluating the defendant's claim of ineffective assistance of counsel. Dissent at 16, *see also State v. Dunaway*, 109 Wn.2d 207, 220-21, 743 P.2d 1237 (1987).

The majority concluded that because defense counsel did not know that a weapon enhancement elevated a felony to a strike offense, he could not provide mitigation. The record, however, suggests otherwise. The

Omnibus Order that was filed on July 1, 2014, states “No offer at this point. This is a 3rd strike case, and a mitigation packet from defense is necessary before negotiations can take place.” CP 396-398. This order clearly informed the defense that they were responsible for initiating negotiations. While the Court of Appeals majority opined that defense counsel “could not fully inform Estes of his options regarding mitigation as offered by the State” it could also have easily been the case that the defendant simply did not want to mitigate his case and chose not to do so.

During the pendency of this case, the defendant filed approximately 30 separate motions and documents which is an indication that he was not interested in resolving his case. More evidence that the defendant was not interested in mitigation was one of the 30 documents, titled “Propositioning Ms. Clarkson” filed on May 20, 2014. CP 85-87. In that document, the defendant offered a resolution of a misdemeanor with credit for time served. In the same document, the defendant states that if his offer is not accepted, then “it’s time for trial.” *Id.* Such sentiment would suggest that he was not interested in any resolution other than his proposed misdemeanor. As the Court of Appeals dissent states, there are many reasons why a criminal defendant would decline to negotiate, which appears to be the case here. Moreover, at the time defense counsel made the single erroneous statement that the defendant was not convicted of a strike offense, the defendant notably remained silent

and did not express any surprise. It was only on appeal did the defendant improperly raise the alleged failure of defense counsel to so advise him.

It is not "clear" from the record that defense counsel failed to understand that any felony with a deadly weapon. Alternatively, this court have been defense counsel's deliberate attempt to inject an ineffective assistance claim into the case as an effort to create an issue on direct appeal². A single, offhand remark by counsel should not be considered evidence of ineffective assistance of counsel. Defense counsel may have been momentarily confused or simply misspoke. As argued below, a reference hearing would provide much more information to the appellate courts about what defense counsel did or did not know before trial. The Court of Appeals relied, in part, on the defendant's own bald assertion that his attorney did not advise him that a deadly weapon enhancement would

² Our courts have long recognized a defendant's capacity to misuse ineffective assistance of counsel claims as a strategy to secure undeserved relief. Until the results of professional discipline and malpractice claims closely follow the outcome of successful ineffective assistance claims, there is also an incentive for defense counsel to admit constitutionally deficient performance to favorably position his or her client for a successful appeal. As the court held in *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 734, 16 P.3d 1 (2001):

We note, with increasing concern, that it seems to be standard procedure for the accused to quarrel with court-appointed counsel, or to develop an undertone of studied antagonism and claimed distrust, or to be reluctant to aid or cooperate in preparation of a defense. This appears to be done in order to argue on appeal that the accused was deprived of due process alleging he was represented by incompetent counsel." *State v. Piche*, 71 Wash.2d 583, 589, 430 P.2d 522 (1967) (quoting *State v. Keller*, 65 Wash.2d 907, 908, 400 P.2d 370 (1965)).

elevate any felony to a strike offense. Court of Appeals Opinion, page 7, 14. Without the function of a personal restraint petition and possibly a reference hearing, the record cannot be clarified and this issue should not be determined based on the actual record before this court.

Moreover, there *is* evidence that the defendant and his attorney were aware that he was facing his third strike. First, the omnibus order that was signed by all parties indicated “No offer at this point. This is a 3rd strike case, and a mitigation packet from the defense is necessary before negotiations can take place.” CP 396-398. The language of the omnibus order does not specify which charges or lesser included offenses made the case a “3rd strike case” but clearly provided notice to the defense that they needed to take the initiative of providing mitigation if they wished to engage in plea negotiations. In this case, as stated above, it is clear that the defendant did not wish to engage in plea negotiations despite being informed that this was a persistent offender case.

Second, the State provided written notice that this was a persistent offender case. The notice listed the charges of assault in the second degree, assault in the second degree and felony harassment. CP 381. While the Court of Appeals held that the State’s notice was “deficient,” the State respectfully disagrees. The State was not required to provide notice to the defense regarding his persistent offender status, but chose to do so. *See State v. Thorne*, 129 Wn.2d 736, 921 P.3d 514 (1996), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124

S. Ct 2531, 159 L. Ed. 2d 403 (2004); *State v. Crawford*, 159 Wn.2d 86, 147 P.3d 1288 (2006). The State's notice listed all of the charges the defendant was charged with, including felony harassment—an original charge of which the defendant was found guilty. CP 381. A careful reading of the notice would tell the reader that the only reason that a felony harassment would be considered a strike offense is because a sentencing enhancement elevated it to such. Neither the defendant nor the Court of Appeals majority cites to any authority to suggest that the State was somehow required to list every possible lesser included offense.

- d. The defendant was not entitled to plea bargaining and therefore he is not entitled to relief based on a failure to engage in plea negotiations.

The defendant cannot assert any prejudice from his election not to engage in plea negotiations. The defendant does not have a constitutional right to plea bargain. *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d, 376 (1981) (citing *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct 837, 51 L. Ed. 2d 30 (1977)).

The Court of Appeals held that “the State specifically stated at the sentencing hearing that it offered to work with Estes to avoid a third strike but that Estes declined to negotiate.” Court of Appeals Opinion, page 14. The State respectfully asserts that such a conclusion is a mischaracterization of what the State actually said at sentencing. At the time of sentencing the State indicated:

Your Honor, I would like to note for the record also, and I think we may have done so at the beginning of the trial in this case, as the Court is aware, our office has a policy on third strike cases where the defense, the defense has an opportunity to seek mitigation, and come to our office, asking for something other than a third strike resolution. The Defendant, Mr. Estes, declined to enter into any negotiations whatsoever during the entire course of this case. Also he did not wish to avail himself of the mitigation process. I just wanted to put that on the record.

RP 534.

The State never represented that it would have offered the defendant a nonstrike offense if he had presented mitigation. The State merely made a statement of fact—that no mitigation was presented. The record is void of any statement from the State regarding what it would have offered if mitigation had been presented. In fact, similar to the defendant in *State v. Crawford*, 159 Wn.2d 96, 147 P.3d 1288 (2006), the defendant in this case had a lengthy criminal history, including manslaughter, two counts of assault in the second degree, assault in the third degree, and two counts of promoting prostitution. CP 360-374. Additionally, as the State indicated in its sentencing memorandum, even if the defendant had not been convicted of a third strike offense, the State would have sought an exceptional sentence based on the standard range being too lenient. This case was not one in which the State appeared eager to reduce his charges in any meaningful way and were not required to do so. Under the reasoning of *Crawford, supra*, the defendant was not entitled to a reduction or a plea bargain.

2. THE CORRECT REMEDY IN THIS CASE WOULD BE FOR DEFENDANT TO FILE A PERSONAL RESTRAINT PETITION AND, POSSIBLY FOR A REFERENCE HEARING AS PART OF THE COLLATERAL ATTACK AS THE RECORD DOES NOT ESTABLISH ANY PREJUDICE.

As the Court of Appeals dissent further states, the defendant is not without remedy—he could file a personal restraint petition, at which point a reference hearing might be appropriate. A reference hearing would include testimony from the defendant and both attorneys, at which point a record could be developed about what defense counsel knew or did not know. It would also clarify what was told to the defendant regarding plea negotiations. As the court held in *State v. Burke*, 132 Wn. App. 415, 132 P.3d 1095 (2006), if a defendant wishes to raise an ineffective assistance of counsel claim that would require additional evidence or facts not in the trial record, the appropriate means of doing so would be a personal restraint petition. *Id.* at 420 (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). The defendant should be required to file a personal restraint petition in this case to address his claim of ineffective assistance of counsel.

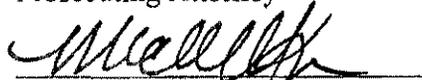
D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the defendant's conviction and sentence as a persistent

offender. The defendant cannot establish any prejudice and therefore an ineffective assistance of counsel claim fails.

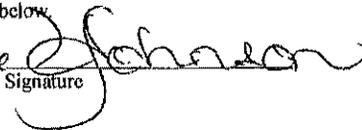
DATED: OCTOBER 19, 2016.

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Attached please find the Supplemental Brief of Petitioner, Motion Requesting Authorization to Supplement the Record with Additional Clerk's Papers, and the Supplemental Designation of Clerk's Papers.