Supreme Court No. _____



Court of Appeals No. 59762-4-II

SUPREME COURT

STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

BRENTON DWAYNE THOMPSON, Petitioner.

---

# PETITION FOR REVIEW

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Brenton Dwayne Thompson, Pro Se
Incarcerated Individual No. 725911
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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A. IDENTITY OF PETITIONER

Brenton Dwayne Thompson, Petitioner Pro Se asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

Petitioner moved the Court of Appeals to modify the Commissioner's June 16, 2025 ruling granting Appointed Appellate Counsel's Anders Motion to Withdraw and dismissal of appeal. A copy of the decision is in the Appendix at page A.

C. ISSUES PRESENTED FOR REVIEW

1. A SUFFICIENTLY COMPLETE RECORD IS NECESSARY FOR AN ADEQUATE AND EFFECTIVE REVIEW. COULD THE LOWER COURT FULFILL ITS CONSTITUTIONAL DUTY WITHOUT A FULL EXAMINATION OF ALL THE PROCEEDINGS?

2. A PROCEEDING THAT NEVER TOOK PLACE CANNOT BE PRESUMED RELIABLE. DID TRIAL COUNSEL'S DEFICIENT PERFORMANCE CAUSE PETITIONER TO FORFEIT A JUDICIAL PROCEEDING?

3. AN UNWANTED COUNSEL REPRESENTS THE DEFENDANT ONLY THROUGH A TENUOUS AND UNACCEPTABLE LEGAL FICTION. DID APPOINTED APPELLATE COUNSEL FAIL TO PROVIDE AN ADVOCATES' ANALYSIS OF ISSUES AS A PREDICATE FOR DIRECT REVIEW?

D. STATEMENT OF CASE

Upon an Amended Information, CP at 7-22, a 2000 jury returned a general verdict of guilt to murder first degree, CP at 31. The same jury returned a verdict of not guilty to a charge of unlawful possession of a firearm second degree, CP at 32.

In 2021, the Washington State Supreme Court issued an opinion invalidating Revised Code of Washington (RCW) 6.50.401, the State's strict liability drug possession statute. See State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021).

On December 1, 2023, a proceeding was held by Pierce County Superior Court Judge Edmund Murphy in which a new term of incarceration was imposed that included two consecutive firearm enhancements and entered an intervening Judgment And Sentence, CP at 165-182.

Considering a motion for post-conviction DNA testing, CP at 183-187, Judge Edmund Murphy "reviewed the pleadings submitted by the Defendant ... the court's archived filed, ... the Defendant's first direct appeal," and determined that "the Defendant's motion fails to meet any of the requirements of RCW 10.73.170(2)." CP at 191-194.

In its Ruling Granting Counsel's Motion To Withdraw And Dismissing Appeal, Division Two Court of Appeals Commissioner Karl R. Triebel determined that "appellate counsel was not appointed to represent Thompson for an appeal from his convictions, which became final 22 years ago. ... Counsel in this case had no duty or obligation to raise issues from Thompson's original trial" and concluded "here, Thompson prepared a five-page motion for postconviction DNA testing complete with argument, as well as citations to statutes, caselaw, law review articles, and the trial record from his case. These documents complied with the procedural requirements of RCW 10.73.170. And Thompson's motion failed on the merits, not on procedural grounds." Id. (June 16, 2025).

On June 26, 2025, a motion to modify a Commissioner's ruling of June 16, 2025 was filed in this case. A panel of judges considered and denied the motion on August 13, 2025.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Due Process Clause of the Fourteenth Amendment confers both procedural and substantive rights. "Constitutional analysis must begin with 'the language of the instrument,' Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 186-189, 6 L.Ed. 23 (1824), which offers a 'fixed standard' for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United States Sec. 399, p. 383 (1833)." Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 235, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022).

"Prior cases have held the provision that 'no State ... deprive any person of life, liberty, or property without due process of law,' U.S. Const., Amdt. 14, Sec. 1, to 'guarantee more than fair process,' Washington v. Glucksberg, 521 U.S. 702, 719, 138 L.Ed.2d 772, 177 S.Ct. 2258 (1997)(slip op., at 15), and to cover a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them,' Daniels v. Williams, 474 U.S. 327, 331, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986), see also Zinermon v. Burch, 494 U.S. 113, 125, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990)(noting that substantive due process violations are actionable under Sec. 1983)." County of Sacramento v. Lewis, 523 U.S. 833, 840,118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

In support of its sentencing decision in 2023, the trial court in this case stated, "I looked at the appellate decisions that had been entered previously -- because obviously I wasn't the judge that heard any of the prior trial or been engaged in the sentencing -- to try to get a sense of what this case was about...." RP at 41. "The court has to look at what happened on that day, that night. And in looking at the facts as outlined in the appellate court decisions, you had a .45 - caliber semiautomatic handgun. ... The witness who testified indicated that ... you had followed Ms. Maroni, shooting at her. She tried to climb a fence, fell, and was shot six times. ... All were fired from the same gun. One of the bullets entered her abdomen, exited her back and was located behind where she was eventually found. ... There was plenty of evidence ... the shots fired when she's at the fence, unable to go anywhere else. ... That's what happened July 8, 1998." RP at 44-45.

"An error made a second time is still a new error. That is especially true here, where the state court conducted a full resentencing and reviewed the aggravating evidence afresh." Magwood v. Patterson, 561 U.S. 320, 339, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010).

Petitioner filed a notice of appeal, which the Court of Appeals (COA) opened under Cause No. 59142-1-II.

From Petitioner's motion and pursuant to RCW 10.73.170, the trial court acknowledged that "the Defendant is requesting that the testing be 'specifically on the firearm(s) and other forensic/ballistic evidence....'" Order On Defendant's Motions For Post-Conviction DNA Testing And Appointment of Counsel (ORDER), pg. 1.

The court went on to state that "the court reviewed the pleadings ... reviewed the court's archived file" and "in the Defendant's first direct appeal, the Court of Appeals said in its unpublished opinion: 'Although the jury verdict does not indicate the jury's basis for finding Thompson guilty, the State's evidence pointed to Thompson as the principle, not as the accomplice in Maroni's murder. Jones testified that ... he [saw] Thompson at the fence and heard additional shots after Maroni had climbed over the fence and fallen to the ground. Jones' eyewitness testimony was supported by the police investigation. ... The police also recovered a .45 caliber bullet from underneath Maroni's body. This bullet correlated with the wound Maroni received that entered the front of her abdomen and exited through her back. A forensics expert concluded that it was fired from the same .45 caliber firearm." State v. Thompson, 117 Wn.App. 1085 (2003).'" ORDER, at 1-2.

Resting on facts unsupported by the record, the trial court's heedlessness should cast a somewhat somber reflection on the fairness of the proceeding when you learn from the record that forensics experts actually testified that "a piece of copper jacking from a projectile and a whole bullet was recovered from beneath the dirt ... once the victim was moved. ..." State of Washington v. Brenton Dwayne Thompson, PCSC Cause No. 99-1-01611-6, Verbatim Report of Proceedings (VRP) at 628-629 (2000). "These two projectile items were fired from either a .38 Special Revolver or a .357 Magnum Revolver ... These two items were fired by the same firearm." VRP at 2086-2087.

For the first time in the entire life of this case, the State, in its Response Brief acknowledged the fact that "undeniably, ... this means [she] was shot with both guns." Response Brief, at 15-16. Undoubtedly, this revelation controverts the Court of Appeals' 2003 opinion finding that "there was no credible evidence indicating that someone other than Thompson was the shooter." ORDER at 2.

Ultimately, "the court found that the motion is not supported by any rational argument in the law or fact." ORDER at 4.

In Fiske v. Kansas, 274 U.S. 380, 385-386, 47 S.Ct. 655, 71 L.Ed.2d 1108 (1927), the Court said, "we will review the findings of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the federal question to analyze the facts."

However, under RCW 10.73.170, a trial court is not required to enter written findings supporting the denial of a motion for postconviction DNA testing. Authoritatively construed, RCW 10.73.170 is unconstitutional.

During both, the resentencing proceeding and in its decision-making process on Petitioner's motion, the trial court relied on unsupported summary conclusions of a record that is "no longer available at the records center because they have reportedly been destroyed." A Ruling By Commissioner Bearse, (July 10, 2024) COA No. 59142-1-II.

When a full verbatim transcript is not available, the Supreme Court looks to Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971). Mayer requires a "record of sufficient completeness to permit proper consideration of the appellant's claims." Id. at 194 (quoting Draper v. Washington, 372 U.S. 487, 499, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963)).

Supreme Court "decisions have held that the Due Process Clause protects two categories of substantive rights. The first, consists of rights guaranteed by the first eight amendments. Those amendments originally applied only to the federal government, Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 7 Pet. 243, 247-251, 8 L.Ed. 672 (1833), but this Court has held that the Due Process Clause of the Fourteenth Amendment 'incorporates' the great majority of those rights and thus makes them equally applicable to the states. See McDonald v. Chicago, 561 U.S. 742, 763-767, 130 S.Ct. 3020, 177 L.Ed.2d 894, and nn. 12-13. The second category -- comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.' Timbs v. Indiana, 586 U.S. __, __, 139 S.Ct. 682, 203 L.Ed.2d 11, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2019) (slip op., at 3) McDonald, 561 U.S., at 764, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 Glucksberg, 521 U.S., at 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772." Dobbs, 597 U.S., at 237-238.

On this record, it is clear that the lower court's decisions during the resentencing hearing and in denying Petitioner's motion, turned on an interpretation of the forensic evidence produced at the original trial.

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318-319, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the Court stated, "forensic evidence is not uniquely immune from the risk of manipulation. A forensic analyst responding to a request from a law enforcement official may feel pressure -- or have an incentive -- to alter the evidence in a manner favorable to the prosecution.

According to a study under the auspices of the National Academy of Sciences, 'because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.' National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 183 (2009), at 23-24." Id.

Shockingly, the issue here is not with the forensic scientists but the review court's reliance on an unsupported narrative of the "destroyed" record in their exercise of power to affirm Petitioner's conviction and deny him access to the requested evidence for testing.

A sufficiently complete transcript, necessary for an adequate and effective review, are such rights that are "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed,' Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)." Glucksberg, 521 U.S. at 721.

Here, as in Draper, the State of Washington did not undertake to carry its burden of showing that something less than a complete transcript would suffice and as such, Petitioner's assignment of errors cannot be fairly judged without recourse to the trial record.

To be clear, the fundamental liberty interest being asserted here is the constitutional right to an appeal upon review of a sufficiently complete transcript.

"'A trial court abuses its discretion if the decision rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" State v. Crumpton, 181 Wn.2d 252, 257, 332 P.3d 448 (2014) (citing State v. Rafay, 166 Wn.2d 644, 655, 222 P.3d 86 (2009)).

In Washington, "case law supports using a favorable presumption when deciding whether to grant a motion for postconviction DNA testing." It is "held that this presumption is part of the standard in RCW 10.73.170." Crumpton, 181 Wn.2d at 260. "In affirming this presumption, the court should [not] focus on the weight or sufficiency of evidence presented at trial to decide a motion for postconviction DNA testing. It must focus on the likelihood that DNA evidence could demonstrate the individual's innocence in spite of the multitude of other evidence against them. In other words, a court should evaluate the likelihood of innocence based on a favorable test result, [not] the likelihood of a favorable test result in the first place." Id. at 262.

Here, in the Court of Appeals' attempt to salvage the trial court's denial upon an unsupported narrative and resurrect its failure to use a standard that included use of a favorable presumption, the Court in Division Two simply parroted what this Court said in State v. Riofta, 166 Wn.2d 358, 370-371, 209 P.3d 467 (2009).

On this record, there is no indication that the trial court used a standard that included use of a favorable presumption. In its Order On Defendant's Motions For Post-Conviction DNA Testing And Appointment of Counsel, CP at 191-194, the trial court stuck to the statutory language with no mention of a presumption of favorability or hypothetical inferences from an exculpatory test result as Division Two does, impermissibly exceeding its role as a review court.

Having found that a favorable presumption is a part of Washington law, this Court must now find that the trial court did not apply the proper standard and thus, abused its discretion in denying Petitioner's motion.

Contrary to the Court of Appeals' reasoning that Petitioner's convictions "became final 22 years ago," counsel had a duty and an obligation to raise issues that became ripe as a result of the trial court's decision to deny Petitioner's motions.

"'De novo' means de novo__ starting from the beginning, anew," Alaska Airlines, Inc. v. Department of Labor & Industries, 1 Wn.3d 666, 674, 531 P.3d 252 (2023), and in this case, the trial court entered into the record an intervening Judgment And Sentence on December 1, 2023.

Although "appellate courts retain the authority to clarify and refine the outer bounds of the trial court's available range of choices and, in particular, to identify appropriate legal standards," State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012), courts "do not consider 'questions of credibility, persuasiveness, and conflicting testimony.'" State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (quoting In re Pers. Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011)).

A court's "role is to safeguard important constitutional and statutory rights," State v. Sterns, 2 Wn.3d 869, 881, 545 P.3d 320 (2024), and not to "reweigh the evidence on review." State v. Ramos, 187 Wn.2d 420, 453, 387 P.3d 650 (2017).

On direct review from a trial court's denial of a motion for postconviction DNA testing, the court's role is simply to determine whether the trial court's "decision rested on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Crumpton, 181 Wn.2d 252, 257, 332 P.3d 448 (2014) (quoting State v. Rafay, 166 Wn.2d 644, 655, 222 P.3d 86 (2009)).

"The constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law." Evitts v. Lucey, 469 U.S. 387, 396, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985).

In this case, trial counsel's deficient performance caused Thompson to forfeit a judicial proceeding to which he was otherwise entitled to under the Fourteenth Amendment to the United States Constitution and this demands a presumption of prejudice because no court can accord any presumption of reliability "to judicial proceedings that never took place." Roe v. Flores-Ortega, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000),

"The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment. Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceedings. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skills and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (citing Adams v. United States ex rel. McCann, 317 U.S. 269, 275-276 (1942)).

At the trial court level, counsel orally moved the court "to vacate the verdict and made a request for a new trial." VRP at 2197. In response, the court stated, "make your motion and I'll rule on them." VRP at 2198. Whether Petitioner was entitled to a judicial proceeding at this stage is certainly a nonfrivolous issue that warrants attention.

""The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but rather] simply to ensure that criminal defendants receive a fair trial' Strickland, 466 U.S. at 689. The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. See 466 U.S. at 688 (defendants must show that counsel's representation fell below an objective standard of reasonableness).

In most cases, a defendant's claim of ineffective assistance of counsel involves counsel's performance during the course of a legal proceeding, either at trial or on appeal. ... In some cases, however, the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was -- either actually or constructively -- denied the assistance of counsel altogether. 'The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage.' United States v. Cronic, 466 U.S. 648, 659, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984). The same is true on appeal. See Penson v. Ohio, 488 U.S. 75, 88, 102 L.Ed.2d 300, 109 S.Ct. 346 (1988). Under such circumstances, 'no specific showing of prejudice is required,' because 'the adversary process itself is presumptively unreliable.' Cronic, supra, at 659." Flores-Ortega, 528 U.S. at 481-483.

"Counsel has a constitutionally imposed-duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S., at 480.

Here, as one of "the three categories of cases described in Strickland," the Court said, "we presume prejudice in a case of denial of counsel. ... With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the Strickland test, for it is only necessary for him to show that a reasonable competent attorney would have found one nonfrivolous issue warranting a merits brief." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

In her failure to recognize the interrelated record of the resentencing proceeding and the post-conviction motion, appointed appellate counsel abandoned her obligation to find any arguable issues and made only an abstract evaluation of Petitioner's motion. The lower court's denial of Petitioner's motion entitled him to an appeal as a matter as of right and thus, any issue relating to the original trial record relied upon by the court in its decision-making process warranted a merits brief.

"The function of the Anders brief is to enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court." McCoy v. Court of Appeals, Dist. 1, 486 U.S. 429, n. 13, 108 S.Ct. 1895, 150 L.Ed.2d 440 (1988). "The constitutional requirement of substantive equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. ... His role as advocate requires that he support his client's appeal to the best of his ability." Anders v. California, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1977).

"To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous." McCoy, 486 U.S., at 442.

In a letter dated December 6, 2024 and received by Petitioner with appellate counsel's motion to withdraw, counsel stated, "I have completed my review of the record and transcript from your case and, unfortunately, after my review of the record, research of the law, as well as consultation with another experienced appellate attorney, I was unable to find any non-frivolous issues to appeal.

First, because you are appealing the trial court's denial of your motion for postconviction DNA testing, the appellate court will only look to see if the Superior Court abused its discretion in denying that motion. We cannot raise any new or additional challenges to your conviction or sentence. ..." Paragraphs 1-2.

On this appellate record, it is evident that Petitioner's motion for DNA testing was made after an intervening new Judgment And Sentence was entered by the Superior Court upon a complete and new assessment of all of the purported evidence in this case, arguments by the state and Petitioner, and the law.

For her part, appellate counsel further stated she "reviewed the available record and researched all pertinent legal issues and conferred with another attorney concerning legal and factual bases for appellate review...." Motion To Withdraw As Counsel, pg. 2.

Seemingly, this should have been an impossible task to undertake as raised above, being that the original trial record "is no longer available" for review.

With appellate counsel's deficient performance, "the court -- not counsel -- then proceeds, [after] a full examination of all the proceedings, to decide whether the case is wholly frivolous. ... If it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." Anders, 386 U.S., at 744.

As with counsel's alleged actions, the fact that "the requested transcripts are no longer available at the records center because they have reportedly been destroyed," Commissioner Aurora Bearse, no court can "pursue all the more vigorously its own review." Anders, supra at 745.

F. CONCLUSION

Based on the foregoing reasons, this Court should accept review.

DATED this 29th day of August, 2025.

Submitted By:

_____

Brenton Dwayne Thompson,
Appellant Pro Se.

**EXHIBIT A**

Filed
Washington State
Court of Appeals
Division Two

August 13, 2025

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>BRENTON DWAYNE THOMPSON,<br><br>Appellant. | No. 59762-4-II<br><br>ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING |

Appellant, Brenton Thompson, moves this court to modify the commissioner's June 16, 2025 ruling granting counsel's motion to withdraw and dismissing appeal. After consideration, we deny the motion. It is

SO ORDERED.

Panel: Jj. Lee, Cruser, Veljacic

FOR THE COURT:

Cruser, C.J.

**BRENTON THOMPSON - FILING PRO SE**

**August 29, 2025 - 3:32 PM**

**Transmittal Information**

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