Appendix A

Decision of Washington Court of Appeals, Division I, dismissing Petitioner's PRP, for which review is sought.

FILED
5/31/2023
Court of Appeals
Division I
State of Washington

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF: CHRISTOPHER SEAN BURRUS, Petitioner.	No. 84380-0-I ORDER OF DISMISSAL

Christopher Burrus challenges his restraint under the judgment and sentence entered in King County Superior Court No. 17-1-06713-6 SEA. A jury found Burrus guilty therein of one count of attempted murder in the first degree. Because Burrus's petition does not present an arguable basis for collateral relief, it must be dismissed.

BACKGROUND

The underlying charges against Burrus arose from an incident where Burrus poured gasoline on Kasey Busch and threw a lit flare at him, causing him to catch fire. See State v. Burrus, 17 Wn. App. 2d 162, 164, 484 P.3d 521 (2021), review denied, 198 Wn.2d 1006 (2021). Busch suffered second and third degree burns to 30 percent of his body. Id. The State charged Burrus with attempted murder in the first degree with the aggravating factor that his conduct manifested deliberate cruelty. Id. at 164-65. At the close of trial, the court also instructed the jury on the lesser included offense of attempted murder in the second degree. Id. at 167. The jury found Burrus guilty of attempted murder in the first degree; it also found that the State proved that Burrus's conduct manifested deliberate cruelty. Id. at 167.

The trial court imposed an exceptional sentence of 300 months. Id.

On direct appeal, this court affirmed, rejecting Burrus's arguments that (1) the to-convict instruction for attempted murder in the first degree omitted the essential element of premeditation and (2) the trial court erred by imposing an exceptional sentence based on the jury's finding of deliberate cruelty. Id. at 170. Burrus then filed this personal restraint petition.[1]

DISCUSSION

To successfully challenge his judgment and sentence by means of a personal restraint petition, Burrus must establish 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 Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Burrus must make these showings by a preponderance of the evidence. In re Pers. Restraint of Yates, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). As further discussed below, Burrus fails to do so with regard to each of the grounds for relief he raises in his petition.

[1] Burrus's judgment and sentence became final on September 10, 2021, when this court issued the mandate in Burrus's direct appeal. Therefore, the one-year time bar that generally applies to personal restraint petitions expired on September 10, 2022. See RCW 10.73.090(1) (personal restraint petition must generally be filed within one year after judgment and sentence becomes final); RCW 10.73.090(3) (explaining when a judgment and sentence becomes final). On July 26, 2022 and August 19, 2022, Burrus filed, in this court, motions to extend the time to file a personal restraint petition. By letter dated August 23, 2022, the clerk of this court directed Burrus to file his personal restraint petition "on or before September 22, 2022." Burrus then filed his personal restraint petition on September 21, 2022. Under these circumstances, it is appropriate to equitably toll the one-year time bar and reach the merits of Burrus's petition. Cf. In re Pers. Restraint of Fowler, 197 Wn.2d 46, 53, 479 P.3d 1164 (2021) ("Equitable tolling is a remedy, used sparingly, that allows an action to proceed 'when justice requires it, even though a statutory time period has elapsed.' " (quoting In re Pers. Restraint of Bonds, 165 Wn.2d 135, 151, 196 P.3d 672 (2008) (plurality opinion))).

Ground 1: Denial of Motion for Continuance

Burrus first contends that relief is warranted because the trial court erred by denying his motion to continue the trial so that he could retain an expert to testify in support of a diminished capacity defense. He points out that in 2018, he was examined by Dr. Brent Oneal, who diagnosed him with a variety of disorders, including intermittent explosive disorder. And he asserts that the trial court erred by "denying access to a mental health expert who could determine whether and how the[se] diagnoses were relevant to the case."

But even assuming without deciding that the trial court erred, and assuming further that the error was one of constitutional magnitude as Burrus claims, Burrus fails to establish actual and substantial prejudice. To show actual and substantial prejudice, Burrus " 'must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice,' but that the outcome would more likely than not have been different had the alleged error not occurred." In re Pers. Restraint of Meippen, 193 Wn.2d 310, 315-16, 440 P.3d 978 (2019) (internal quotation marks omitted) (quoting In re Pers. Restraint of Hagler, 97 Wn.2d 818, 825, 650 P.2d 1103 (1982)). And even Burrus acknowledges that "[t]o maintain a defense of diminished capacity, the defendant must produce expert testimony that a mental disorder, not amounting to insanity, impaired his ability to form the culpable mental state to commit the crime charged." See State v. Cienfuegos, 144 Wn.2d 222, 227-28, 25 P.3d 1011 (2001) (" 'Diminished capacity instructions are to be given whenever there is substantial evidence of such a condition and such evidence logically and reasonably connects the defendant's alleged mental

condition with the inability to possess the required level of culpability to commit the crime charged.' " (quoting State v. Griffin, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983))).

Yet Burrus provides no evidence that an expert would have so testified. To the contrary, Burrus admits in his reply brief that, "the prejudice caused by the denial of [expert] services is speculative." Burrus asserts, in this regard, that this court should order a reference hearing to determine "whether another expert would have found a diminished capacity defense, and if so whether the jury would have reached a different verdict." But this assertion fails because "the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations." In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Burrus relies heavily on Pirtle v. Morgan to support his claim for relief. 313 F.3d 1160, 1162 (9th Cir. 2002). But, in Pirtle, the issue was whether trial counsel was ineffective for failing to request a diminished capacity instruction in light of the substantial evidence presented at trial, through expert testimony, to show that the defendant lacked the capacity to premeditate. 313 F.3d 1160, 1162 (9th Cir. 2002). Because Burrus points to no similar evidence, his reliance on Pirtle is misplaced.

Burrus's reliance on Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), and McWilliams v. Dunn, 582 U.S. 183, 137 S. Ct. 1790, 198 L. Ed. 2d 341 (2017), is also misplaced. Under Ake and McWilliams, when a defendant demonstrates that his mental state is likely to be a significant factor in

his defense, the State must provide a mental health professional capable of conducting an appropriate examination and assisting him in evaluation, preparation, and presentation of a defense. Ake, 470 U.S. at 86; McWilliams, 582 U.S. at 187. Burrus argues that Dr. Oneal's report "fell far below the meaningful assistance required by Ake . . . and McWilliams." But Burrus goes on to acknowledge that "the record does not show whether he was actually prejudiced" by this asserted error. And absent a showing of actual and substantial prejudice, Burrus's claim that he is entitled to relief based on the trial court's denial of a continuance necessarily fails. Cf. Meippen, 193 Wn.2d at 316 ("If the petitioner fails to make the threshold, prima facie showing of actual and substantial prejudice, we must dismiss his [petition].").

Ground 2: Ineffective Assistance of Counsel

Burrus next contends that collateral relief is warranted because he was deprived of effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, Burrus must establish both (1) that counsel's performance was deficient and (2) that he was prejudiced by the deficient performance. In re Pers. Restraint Petition of Crace, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). In this context, prejudice requires showing a " 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Id. (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " Id. (quoting Strickland, 466 U.S. at 694).

Burrus first asserts that his trial counsel was ineffective because she did not timely investigate Burrus's diagnoses and their use for trial strategy, and failed to request additional expert evaluations earlier in the adversarial process. But even assuming without deciding that counsel's performance was deficient, Burrus fails to establish prejudice. As already discussed, Burrus provides no evidence that additional expert evaluations would have been favorable to him, and he acknowledges that the prejudicial value of any expert testimony is speculative. Cf. In re Pers. Restraint of Davis, 188 Wn.2d 356, 379, 395 P.3d 998 (2017) (explaining that "[w]ithout supporting declarations from relevant experts," petitioner's assertion of prejudice from counsel's failure to consult additional experts was "entirely too speculative to meet [his] burden of showing ineffective assistance of counsel"). And, while Burrus asserts that "[i]f defense counsel had requested expert assistance from the court in a timely manner, she likely would have been able to present an adequate defense to the jury," this conclusory assertion does not warrant relief. See Rice, 118 Wn.2d at 886 ("[b]ald assertions and conclusory allegations" are insufficient, and "[i]f the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief").

Burrus next asserts that trial counsel was ineffective because she did not object to the prosecutor's statement, in closing, that "when you douse somebody in gasoline and you ignite them, there is no other intent but to kill them."[2] But as

[2] In addressing this assertion, both Burrus and the State quote from Volume 11 of the verbatim report of proceedings from Burrus's direct appeal, No. 80849-4-I. That volume is hereby

this court observed in Burrus's direct appeal, "[d]uring trial, Burrus admitted to dumping gasoline on Busch and throwing a lit flare at him." Burrus, 17 Wn. App. 2d at 166. Although Burrus claimed that he did not intend to kill Busch and Burrus's counsel vigorously argued that theory during closing, a reasonable inference from Burrus's testimony is that he did have the intent to kill. And, the prosecutor had "wide latitude" in closing "to draw and express reasonable inferences" from that testimony, including, as here, to rebut Burrus's closing argument. See State v. Fletcher, 20 Wn. App. 2d 476, 500 P.3d 222 (2021) ("During closing argument, prosecutors have wide latitude to argue reasonable inferences from the evidence."); cf. State v. Mathes, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) ("Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective."). Consequently, Burrus does not show that the trial court would likely have sustained an objection to the prosecutor's argument, much less that an objection was reasonably likely to have changed the result of trial. Thus, he fails to show that prejudice resulted from counsel's decision not to object. See In re Pers. Restraint Petition of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) ("To prove that failure to object rendered counsel ineffective, Petitioner must show that . . . the proposed objection would likely have been sustained, and that the result of the trial would have been different." (footnote

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transferred to the file for this personal restraint petition proceeding. See RAP 16.11(a)-(b) (authorizing the Acting Chief Judge to "enter other orders necessary to obtain a prompt determination of the petition on the merits").

omitted)).

Ground 3: Deprivation of Right to Trial by Jury

Burrus next argues that because the State did not charge him alternatively with assault, he was deprived of his right to a trial by jury because "the jury was prevented from believing [Burrus] when he admitted assaulting the victim, but denied intending to kill him." This argument is without merit. As the State points out, even if Burrus could have been charged alternatively with assault, the prosecutor had the discretion not to file that charge. See State v. Rice, 174 Wn.2d 884, 901, 903, 279 P.3d 849 (2012) (explaining that a "prosecuting attorney's most fundamental role . . . is to decide whether to file criminal charges against an individual and, if so, which available charges to file," and although each charge filed must be authorized by the legislature, "[t]he underlying discretion to select from available charges in each individual case remains with the prosecutor"). Moreover, the prosecutor's decision not to charge Burrus with assault did not prevent the jury from believing Burrus's theory that he lacked intent to kill and, thus, committed only assault and not murder: Had the jury believed that theory, it would have been required to acquit Burrus of murder. But, it did not.

Ground 4: Cumulative Error

Finally, Burrus argues that cumulative error warrants relief. "The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless." In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014),

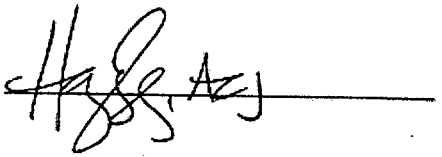
abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). "The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial." Id. "In other words, the petitioner bears the burden of showing multiple trial errors and that the accumulative prejudice affected the outcome of the trial." Id. (emphasis added). Burrus fails to show that the cumulative error doctrine applies here, where Burrus does not establish prejudice with regard to his first two claims for relief and fails to establish error with regard to his third.

CONCLUSION

Burrus's petition does not present an arguable basis for collateral relief given the constraints of a personal restraint petition proceeding. Therefore, it must be dismissed. See RAP 16.11(b) (petition will be dismissed if the issues presented are frivolous); In re Pers. Restraint of Khan, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015) ("[A] personal restraint petition is frivolous where it fails to present an arguable basis for collateral relief either in law or in fact, given the constraints of the personal restraint petition vehicle.").

Now, therefore, it is hereby

ORDERED that this personal restraint petition is dismissed under RAP 16.11(b).



Appendix B

Decision of King County Superior Court (conviction and sentence) which was affirmed by the Court of Appeals.

COPY TO COUNTY JAIL NOV 2 2 2019

FILED
KING COUNTY, WASHINGTON
NOV 2 2 2019
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. CHRISTOPHER SEAN BURRUS, Defendant.	)	No. 17-1-06713-6 SEA **JUDGMENT AND SENTENCE FELONY (FJS)**

I. HEARING

I.1 The defendant, the defendant's lawyer, Janet M. Cavallo, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Kasey Burch, Candace Neisinger, Kevin Burrus, Roopali Dhingra

II. FINDINGS

There being no reason why judgment should not be pronounced, the court **finds**:
2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on 10/08/2019 by Jury Verdict of:

Count No.: 1 Crime: Attempted Murder In The First Degree
RCW: 9A.28.020 and 9A.32.030(1)(a) Crime Code: 00124
Date of Crime: 11/07/2017

☐ Additional current offenses are attached in **Appendix A**

SPECIAL VERDICT or FINDING(S):

(a) ☐ While armed with a **firearm** in count(s) _____ RCW 9.94A.533(3).
(b) ☐ While armed with a **deadly weapon** other than a firearm in count(s) _____ RCW 9.94A.533(4).
(c) ☐ With a **sexual motivation** in count(s) _____ RCW 9.94A.835.
(d) ☐ A V.U.C.S.A offense committed in a **protected zone** in count(s) _____ RCW 69.50.435.
(e) ☐ **Vehicular homicide** ☐ Violent traffic offense ☐ DUI ☐ Reckless ☐ Disregard.
(f) ☐ **Vehicular homicide** by DUI with _____ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).
(g) ☐ **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.
(h) ☐ **Domestic violence – intimate partner** as defined in RCW 26.50.010(7), RCW 9A.36.041(4) and RCW 10.99.020 was pled and proved for count(s)_____.
(i) ☐ Crime before 7/28/19: **Domestic violence (other)** as defined in former RCW 10.99.020 was pled and proved for count(s)_____.
(j) ☐ Crime on or after 7/28/19: **Domestic violence – family or household member** as defined in RCW 26.50.010(6) and RCW 10.99.020 was pled and proved for count(s)_____.
(k) ☐ Current offenses **encompassing the same criminal conduct** in this cause are count(s)_____ RCW 9.94A.589(1)(a).
(l) ☒ **Aggravating circumstances** as to count(s) 1 : **Deliberate Cruelty RCW 9.94A.535 (3) (a)**

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY**: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

☐ Criminal history is attached in **Appendix B**.
☐ One point added for offense(s) committed while under community placement for count(s) _____

2.4 **SENTENCING DATA**:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
1	0	XV	180 to 240		180 to 240 Months	Life and/or $50,000

☐ Additional current offense sentencing data is attached in **Appendix C**.

2.5 **EXCEPTIONAL SENTENCE**

☒ Findings of Fact and Conclusions of Law as to sentence above the standard range:

Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) 1.

Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) 1. ☐ The court would impose the same sentence on the basis of any one of the aggravating circumstances.

☒ An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

☐ An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.
☐ The Court DISMISSES Count(s) _____.

Appendix C

Decision of the Washington Supreme Court denying review of the Court of Appeals' decision.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: CHRISTOPER SEAN BURRUS, Petitioner.	No. 102142-9 Court of Appeals No. 84380-0-I RULING DENYING REVIEW

The King County prosecutor charged Christopher Burrus with attempted first degree murder for an incident in which he poured gasoline on another person and lit him on fire, causing severe burns. Burrus received appointed counsel. During trial preparation, Burrus was evaluated by a psychologist who, in an October 2018 report, diagnosed him with, among other things, "intermittent explosive disorder" and substance use disorder. Defense counsel in August 2019 came across a federal decision, *Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002), a murder prosecution in which the court held that the defendant's trial attorney was ineffective in not requesting a diminished capacity instruction when there was evidence that at the time of the murders the defendant suffered from a temporal lobe, or "explosive dyscontrol," seizure kindled by chronic drug use. *Id.* at 1169-72. Claiming that Burrus suffered from this same disorder, yet noting that the psychologist who examined Burrus offered no opinion on the cause or effect of the disorder or its connection with drug use, and thus would not alone support a diminished capacity defense, counsel requested a continuance so that

she could hire an expert who would specifically explore the defense in relation to Burrus's condition. The superior court denied the motion, Burrus was ultimately convicted, and Division One of the Court of Appeals affirmed. *State v. Burrus*, 17 Wn. App. 2d 162, 484 P.3d 521, *review denied*, 198 Wn.2d 1006 (2021). In that appeal, Burrus did not challenge the superior court's denial of his motion for a continuance to explore a diminished capacity defense.

Burrus timely filed a personal restraint petition in the Court of Appeals, arguing in part for the first time that the superior court erred in denying his motion for a continuance, and that defense counsel was ineffective on this issue. Finding no arguable basis for relief, the acting chief judge dismissed the petition as frivolous. *See In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015). Burrus now seeks this court's discretionary review. RAP 16.14(c).

To obtain this court's review, Burrus must show that the acting chief judge's decision conflicts with a decision of this court or with a published Court of Appeals decision, or that Burrus is raising a significant constitutional question or an issue of substantial public interest. RAP 13.5A(a)(1), (b); RAP 13.4(b). He does not make this showing. Noting the existence of a constitutional right to appointment of an expert when an indigent defendant shows that their mental state is likely to be significant to their defense,[1] Burrus urges that the acting chief judge was wrong in requiring him (an indigent petitioner) to establish actual and substantial prejudice by showing that an expert evaluation would have supported a diminished capacity defense. *See State v. Cienfuegos*, 144 Wn.2d 222, 227-28, 25 P.3d 1011 (2001) (defendant claiming diminished capacity must produce expert testimony that a mental disorder impaired the defendant's ability to form the mental state for the crime charged). He urges that he has

[1] *See McWilliams v. Dunn*, 582, U.S. 183, 137 S. Ct. 1790, 198 L. Ed. 2d 341 (2017); *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

presented enough to at least justify a reference hearing on this issue. But the acting chief judge rightly observed that reference hearings are held only to resolve genuine factual disputes, not to fish for possible evidence supporting a petitioner's claims. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). As indicated, Burrus did not challenge the denial of his continuance motion on direct appeal, and while it is true that on appeal he would have been limited to the record, he provides nothing additional here that would justify collateral relief or a reference hearing to settle factual issues.

In sum, the acting chief judge properly dismissed Burrus's personal restraint petition.

The motion for discretionary review is denied.

Walter M Burris
DEPUTY COMMISSIONER

August 23, 2023

Appendix D

Order of the Washington Supreme Court denying rehearing.

SENT

JAN 03 2024

FILED
SUPREME COURT
STATE OF WASHINGTON
1/3/2024
BY ERIN L. LENNON
CLERK

THE SUPREME COURT OF WASHINGTON

In the Matter of the Personal Restraint of:	)	No. 102142-9
CHRISTOPHER SEAN BURRUS,	)	**ORDER**
Petitioner.	)	Court of Appeals No. 84380-0-I

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu and Whitener, considered this matter at its January 2, 2024, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to modify the Deputy Commissioner's ruling is denied.

DATED at Olympia, Washington, this 3rd day of January, 2024.

For the Court

González C.J.

CHIEF JUSTICE

Appendix E

Personal Restraint Petition Considerations by Suzanne Lee Elliott of the Washington Appellate Project. A legal treatise addressing Constitutional injustice within Washington's system of collateral review.

PERSONAL RESTRAINT PETITION CONSIDERATIONS

Suzanne Lee Elliott
Washington Appellate Project
June, 2022

When one looks at the published decisions of the Washington appellate courts, one thing is clear – the vast majority of the cases never reach the substantive claim or, if they do, the error is deemed harmless. My ***personal*** opinion is the remedy of post-conviction relief for our indigent clients is mostly illusory. As a result, punctilious compliance with RAP Title 16, RCW Title 10.73. required. It pays to reread these provisions every time you draft a PRP.

But I do have some suggestions for litigation that can perhaps start to remedy this problem.

1. You have to make sure the entire record that informs your issue is in the appendix to the PRP. If the client has completed a direct appeal, move to transfer the clerk's papers and VRP to the new PRP cause number so you do not have to resubmit matters that are already easily accessible to the appellate court. I have never had a motion to transfer denied.

2. You have to have as much of your investigation completed as is humanly possible ***before*** you file. Pursuant to *In Re Rice*, 118 Wash. 2d 886, 828 P.2d 1086 (1992), a petitioner must state with particularity facts that, if

proved, would entitle the petitioner to relief. "Bald assertions and conclusory allegations" are not sufficient. *Id.* If the evidence is based on knowledge in the possession of others, the petitioner must present their affidavits with admissible statements or other corroborative evidence. *Id.* And only by showing that the petitioner has admissible evidence supporting the facts stated in the petition may the petitioner obtain a reference hearing to resolve factual disputes. *Id.*

And the petitioner's own declaration of regarding ineffective assistance is not enough. A defendant's "self-serving affidavit is insufficient to support a claim of ineffective assistance of counsel." *State v. Osborne*, 102 Wash .2d 87, 97, 4 P.2d 683 (1984).

3. But - there is no mechanism for a client who wishes to file a PRP to use customary discovery rules and procedures when investigating. You do not have subpoena power. You cannot note depositions. With an indigent client, you do not have access to funds for consulting with experts. So, if you cannot complete your investigation under those circumstances, you have to file what you have and ask the Court of Appeals for the funds and permission to use particular discovery tools to complete your investigation. Such a motion should include what you seek to discover and why you cannot get it (e.g. trial attorney will not talk to you, prosecutor will not provide

his/her unredacted file). You also need to ask for the funds for funds for an investigator, and if need be, an expert.

4. *Rice* applies equally to the State and I do not see enough people arguing that the State has not met its burden under *Rice*. "The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State ***must meet the petitioner's evidence with its own competent evidence***. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions." *In re Rice* at 886–87.

5. You must also *always* ask for a remand for an evidentiary hearing in the superior court. Ask for one in every case. If you do not you will never get review in federal court. More on that later.

6. In my view, *In Re Rice*, is wrongly decided on several grounds but in particular on an equal protection basis. In *Rice* the Court made a policy choice. All RAP 16.7 (2) requires is: "A statement of (i) the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations, and (ii) why the petitioners restraint is unlawful for one or more of the reasons specified in rule 16.4(c)."

The Court took the words "the evidence available" and imposed the following policy decision on indigent defendants (keep in mind Rice as a capital case and had appointed counsel):

> As for the evidentiary prerequisite, we view it as enabling courts to avoid the time and expense of a reference hearing when the petition, ***though facially adequate***, has no apparent basis in provable fact. In other words, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. Thus, a mere statement of evidence that the petitioner believes will prove his factual allegations is not sufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. he affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

In essence *Rice* requires you to prove your claim – without funds or discovery tools - before you even get an evidentiary hearing. Now imagine you are an indigent defendant in prison with no access to a real law library, perhaps not fluent in English or with intellectual disabilities, and ask yourself if that person has a realistic opportunity to comply with *Rice*. And contrast that to a person in custody who has the funds to hire a lawyer on the outside to work up her claim. You see the problem and we should be asking the court to reexamine *Rice* and the lack of discovery tools available to our clients.

7. Ineffective assistance of counsel claims are particularly problematic and we should be arguing that counsel must be appointed and an investigation funded for every IAC claim. Washington forces almost all IAC claims into post-conviction proceeding because most IAC occurs outside the trial record. *State v. McFarland*, 127 Wash. 2d 322, 338, 899 P.2d 1251, 1258 (1995). And even if the poor performance is on the record, the State or the appellate court will conjure up some basis to call the failures "strategic." So you need evidence to demonstrate that no legitimate strategic decision was made.

Counsel should be arguing that the current PRP system deprive them of their right to appeal under Const. Art. 1, §22.

Where the state has granted a defendant - whether rich or poor – an appeal as a matter of right an indigent appellant is entitled to the appointment of competent counsel. *Douglas v. People of State of Cal.*, 372 U.S. 353, 356, 83 S. Ct. 814, 816, 9 L. Ed. 2d 811 (1963). *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S. Ct. 585, 591, 100 L. Ed. 891 (1956). As a result, indigent criminal defendants in Washington are appointed counsel and provided with trial court record at public expense for

a direct appeal. See also *Draper v. State of Wash.*, 372 U.S. 487, 488, 83 S. Ct. 774, 775, 9 L. Ed. 2d 899 (1963).

But in Washington's post-conviction scheme, petitioners are not appointed counsel unless petitioner requests counsel (and only after the chief judge has determined that the issues raised by the petition are not "frivolous.") RCW 10.73.150(4). By contrast, petitioners with with money hire counsel to draft the initial personal restraint petition. And petitioners with counsel are less likely to find their petitions frivolous. See e.g. *In re Caldellis*, 187 Wash. 2d 127, 135, 385 P.3d 135, 140 (2016)(petitioner represented by counsel demonstrated petition was not frivolous); *In re Khan*, 184 Wash. 2d 679, 685, 363 P.3d 577, 580 (2015)(same).

8. Your client will not get federal review of a federal constitutional claim if you do not investigate, make sure every essential item necessary to your claim is before the state court, if something is missing, explain why your investigation cannot be completed under the current rules and ask for an evidentiary hearing.

The recent decision in *Shinn v. Ramirez* involves the separate cases of Jones and Ramirez, both of whom were convicted and sentenced to death in Arizona. Both men received abysmal legal assistance during their trials. Both of their lawyers failed to raise IAC claims during state post-conviction

proceedings — the time to raise ineffective assistance of counsel claims. Because of this, Jones and Ramirez sought relief in federal court. Under the previous decision in *Martinez v. Ryan,* federal habeas petitioners could argue they were entitled to claim their post-conviction lawyer was IAC in failing to properly raise claims in state court post-conviction and get an evidentiary hearing to flesh out the evidence of IAC.

NO MORE. "A federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on ineffective assistance of state post-conviction counsel," Justice Clarence Thomas wrote for the majority, adding that "serial relitigation of final convictions undermines the finality that 'is essential to both the retributive and deterrent functions of criminal law.'" He also talks a lot about respecting the state court and federalism.

Jones is very likely innocent but will now be put to death.

This is particularly troubling since, as described above, indigent petitioners have very little chance of fulling litigating their claims trial counsel was ineffective.

9. Finally, you have to all of this within one year of any mandate on direct appeal. I include some paragraphs from an unpublished decision about a PRP that was filed ONE day late.

The mandate in the criminal case against Oakes was issued on January 15, 2016, making the judgment final on that date. RCW 10.73.090(3)(b). That day was a Sunday and the next day was a holiday. Oakes had to file his petition no later than January 17, 2017, to comply with the statutory one-year limit. RAP 18.6(a). Oakes mailed the petition on Tuesday, January 17, 2017. It reached this court and was filed on January 18, 2017, one day after the time limit expired.

Oakes contends the time for filing should be extended under RAP 18.8(b). This is not permitted. The one-year time limit of RCW 10.73.090 is a statutory limitation period. Courts do not have the authority to waive statutory limitation periods, as opposed to time limits set down in court rules. State v. Robinson, 104 Wn. App. 657, 665, 17 P.3d 653, review denied, 145 Wn.2d 1002 (2001). The statutory time limit is a mandatory rule that acts as a bar to appellate court consideration of collateral attacks, unless the petitioner shows that an exception under RCW 10.73.100 applies. Robinson, 104 Wn. App. at 662. Oakes' untimely filing does not come within any of the exceptions.

Alternatively, Oakes contends the time limit was tolled. The one-year limit in RCW 10.73.090(1) is subject to equitable tolling. In re Pers. Restraint of Bonds, 165 Wn.2d 135, 143, 196 P.3d 672 (2008). Equitable tolling is an exception to a statute of limitations that should be used "sparingly." Bonds, 165 Wn.2d at 141. The predicates for equitable tolling are bad faith, deception, or false assurances, along with the exercise of diligence by the party who seeks to be exempted from the time limit. Bonds, 165 Wn.2d at 141; Robinson, 104 Wn. App. at 667. Equitable tolling should not be applied to a garden variety claim of excusable neglect. Robinson, 104 Wn. App. at 667, 669.

Matter of Oakes, 4 Wash. App. 2d 1010 (2018) unpublished.