Supreme Court No.101293-4
Court of Appeals No. 82849-5-I

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

STATE OF WASHINGTON,
Respondent

v.

BRIAN GLENN COX,
Appellant

AMENDED PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Cox seeks review of the unpublished opinion in *State v. Cox*, #82849-5-I. See Appendix I. A motion for reconsideration was denied August 22, 2022. See Appendix II.

II. INTRODUCTION

The State failed to disclose emails revealing a jailhouse snitch sought a reduction of his charges for testifying against Cox. The trial prosecutor, Craig Juris, called his fellow deputy prosecuting attorney, Mark Thompson to bolster the jailhouse snitch's testimony. Because the State had not disclosed the emails, Thompson testified falsely. The Court of Appeals rubber stamped incorrect and incomplete findings issued by the evidentiary hearing judge and approved of extensive misconduct simply by stating the evidentiary hearing judge's findings of fact were supported by substantial evidence.

III. ISSUES PRESENTED FOR REVIEW

Should this Court take review of an opinion that approves of the State's failure to provide the defense with the material exculpatory evidence about the State's snitch witness, approves of a trial prosecutor's deliberate decision to vouch for the snitch by calling his fellow prosecutor and fails to reverse when that prosecutor testified falsely?

III. STATEMENT OF THE CASE

In 2013, Brian Cox was charged with two counts of solicitation to murder.[1] In Count I, the State alleged Cox offered to pay a co-worker, Ray Lopez-Ortiz, to murder his wife. Lopez-Ortiz reported Cox to the police. The police later recorded a conversation

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[1] The clerk's papers and transcripts from Cox's appeal have were transferred to the Court of Appeals file. The transferred documents are referred to as CP and RP. The clerk's papers and transcript from the evidentiary hearing are referred to as Supp.CP. and Supp.RP. The file from the initial Personal Restraint Petition, was also transferred to file in this matter.

between Cox and Lopez-Ortiz. Cox was arrested and charged with one count of solicitation to murder his ex-wife. Cox was detained.

Kenneth Parmley was charged with attempted first-degree robbery. Thurston County Mark Thompson was assigned to Parmley's prosecution. At the time of his arrest, Parmley had five prior convictions for crimes of dishonesty. He was placed in a cell with Cox on June 21, 2013. RP 472-74. Defense counsel Karl Hack represented him.

Less than a week later, Parmley contacted the State and said he wanted to inform on Cox. He told the police that Cox asked him to kill Lopez Ortiz in exchange for a reduction of the attempted first-degree robbery charge.

This began a series of emails between Juris, Thompson, and Hack.

Thompson emailed Juris and said:

> My current offer on Parmley is not much: plead "as is" - Attempted Robbery 1, and recommend 27 months (low-end) of a 27-36 month sentence range. Although my victim has impeachable priors, it's a strong case.

> However, if you're needing Parmley's testimony against Brian Cox, you have my authority to offer plead [sic] to (a "full") Robbery 2 (not merely attempt) in exchange for his truthful testimony (which could be verified by polygraph, etc.) against Cox, which would include a full discussion of his proposed testimony. Please make it clear that Robbery 2 is still a strike offense. However this range would drop to 6 - 12 months. I'd be willing to give him 12 months [chemical dependency program (CDP)] or 10 months work release; I'm unsure if he's CDP eligible. You'll be "cc'ed" [in] an e-mail that I'm sending to CDP staff to inquire about this. Karl Hack is his attorney.

Supp.CP 222.

Thompson emailed Hack:

> [By the way] - I'm sending an e-mail to Craig Juris that if he has any interest in using Parmley, he can contact you. I have given him case parameters for my case (potential robbery 2 reduction) if he has such an interest.
>
> I am also looking into CDP to see if it's even a possibility for a Robbery 2 dispo[sition], as a Rob[bery] 2 would result in a 6 - 12 month sentence range. Robbery 2nd degree is a "strike'/violent offense for which [electronic home monitoring] is not authorized per RCW 9.94A.734(1) (a). I'm asking CDP (L[ieutenant] Val Peters) whether it's possible for [a] person to do Phase I and II (only) of CDP and/or Phase III on continued work release.
>
> Thompson also emailed Juris:

> My current offer on Parmley is not much: plead “as is” - Attempted Robbery 1, and recommend 27 months (low-end) of a 27-36 month sentence range. Despite the fact that my victim has impeachable priors, it's a strong case.
>
> However, if you're needing Parmley's testimony against Brian Cox, you have my authority to offer [to] plead to (a “full”) Robbery 2 (not merely attempt) in exchange for his truthful testimony (which could be verified by polygraph, etc.) against Cox, which would include a full discussion of his proposed testimony. Please make it clear that Robbery 2 is still a strike offense. However his range would drop to 6 - 12 months. I'd be willing to give him 12 months CDP or 10 months [of] work release; I'm unsure if he's CDP eligible. You'll b[e] “cc'ed” [in] an e-mail that I'm sending to CDP staff to inquire about this. Karl Hack is his attorney.

Hack emailed Thompson:

> Thanks much! Like I said, Parmley is offering to help Craig for zero consideration. The other dude is plain dangerous.

Juris emailed Thompson:

> Thanks for the info. I just sent an e[-]mail to Jen Kolb asking her what she thinks of using Parmley for info[rmation]. As soon as I talk to her I will let you know where we stand. Also, I see an e[-]mail from Hack indicating that Parmley would be willing to help with no consideration. Somehow I don't believe that but you have a better sense of this guy than I do. What is

> your thought? No use selling the farm if we don't need to.

Juris also sent a joint email to Thompson and Hack:

> Karl
>
> Are you saying that Parmley doesn't want a deal in connection to my case? If that is the situation then I will have Detective Kolb interview him [as soon as possible]. If I am reading your e[-]mail incorrectly let me know and I will wait to have Kolb talk to him until you, me, and Mark get a plan in place.

Hack responded:

> If he gets consideration in Mark's case for his cooperation in yours then all the better, but he's not asking for any promises in Mark's case. He thinks your guy needs to be off the street. Go ahead and have Det[ective] Kolb interview Parmley.

Juris told Thompson:

> I have been e[-]mailing with Detective Kolb and with Karl. Parmley is willing to be interviewed about Cox with nothing in return. We had talked about a more in depth investigation but that is being put on hold. Karl said he would be appreciative of any consideration you give him but made very clear in my e[-]mail that he is not expecting any. I am sending Jen in to interview him as soon as she has a chance.

Supp.CP at 222-224.

Kolb interviewed Parmley and sent Juris and Thompson:

> I got a recorded statement from Parmley today.
>
> [For your information] Mark....he's really hoping for a good deal (I think he said low of 12 months or something), but even if he doesn't get what he wants, he knows this guy needs to be kept off the streets.

Supp.CP at 228.

> Thompson emailed Hack and Juris:
>
> Juris would likely use your client's testimony in his case against Brian Cox.
>
> Secondly, I'll indicate that I am willing to give your client the "Robbery 2" based upon his lack of violent history and his request for drug treatment through CDP. But I want to get that entered sooner[rather]than[ ]later, in order to get him onto the waiting list for CDP [as soon as possible] so that he can have time to fully participate in at least Phases I and II. The plea to Robbery 2 would have to be via "in re Barr" as this was not a completed robbery and, therefore, the [probable cause] facts do not establish Robbery 2.
>
> Finally, with respect to your client's involvement as a possible witness in Craig Juris'[s] attempted murder case involving Brian Cox, you have represented to me that your client has already given a statement to law enforcement about conversations he had with Cox while [he was] Cox's cellmate, which involved Cox soliciting your client to possibly "tamper" (at the very least) with a witness in the Cox case. Your client provided his statement to Detective Kolb about this situation prior to any representations or promises by me about what I was going to do specifically with my case

> against him (Parmley). However, I believe that prior to Parmley's statement to Detective Kolb in the Cox case, I had at least sent a “cc” to you of e-mail inquiries I made to L[ieutenant] Peters about the jail's CDP program, which would only be possible if I were later agreeing to reduce the current Attempted Robbery 1 charge to Robbery 2. I'm uncertain whether you had shared my e-mails with your client prior to his statement to Det[ective] Kolb.
>
> In any event, you have indicated that your client is willing to truthfully testify against Cox should he be needed by Craig, and that such truthful testimony would be consistent with his statement to Det[ective] Kolb and be provided without me needing to condition my case's outcome on your client's testimony. I am tentatively indicating to you that my offer of Robbery 2 will not be conditioned on your client's cooperation as a witness in the Cox case, but I want to first ask Craig if he is “okay” with this?

Supp.CP at 244.

> Hack responded to Thompson:
>
> I've only told Parmley that you might let him take Robbery 2, but that you made no promises and that this possibility is not contingent on anything that Parmley may or may not do in the Cox case.

Thompson responded:

> • Plead guilty to an amended charge of Robbery 2nd Degree. This plea should be via in re Barr, as the original charge does not involve a completed Robbery 1.

> • The State's original recommendation is amended only insofar as noted below:
>
> • 12 months jail - may be served in Jail's [CDP] if eligible and to extent eligible.
>
> • As previously discussed via e-mails with L[ieutenant] Val Peters of the jail, “Phase III” normally involves EHM [(electronic home monitoring)]. However, RCW 9.94A.731(1)(a) prohibits EHM for a “violent” offense. The jail will still take a Robbery 2 non-prison sentence and if the person reaches Phase III, they'll likely just remain on work release if otherwise eligible.
>
> ……..
>
> I have confirmed with Craig Juris that he is fine with us proceeding with a [change of plea at sentencing] immediately. To hopefully obtain a [change of plea at sentencing] next week, please let me know [as soon as possible] if I can seek to enter a [pretrial protection order] with your e-mail approval for next week. Please just indicate what dates you are available. Again, I am trying to avoid next Friday if possible.

Supp.CP at 245..

> Thompson also told Hack:
>
> Per your client's info[rmation] that he knew the victim (Greg Hokanson) from their “old drug days”, I did run criminal history on the victim, which I am disclosing to you per this e-mail.
>
> ……

> Again, I'm not too worried about the victim's impeachables, in light of other evidence in this case including your client, on video, trying to hide a B.B. gun after the alleged robbery attempt.

Supp.C.P. at 248.

Parmley was placed in protective custody and, via his lawyer, asked Thompson if the State could assist him getting out of that restrictive setting. Thompson was also assisting Parmley in clearing up his Jefferson County warrants so that he could enter the jail drug treatment program.

Parmley's lawyer asked if Thompson was insisting on drug treatment. Thompson said he was. He then sent the following email to Juris and Hack:

> I'm "ccing" this to Craig because everything here is sound a bit manipulative. [Craig – there are other emails besides just this one. Parmley charged with an attempted Robbery 1 with a 27-36 months sentence range. I was ready to allow him a Robbery 2 (completed" -would have to be in re Barr) after, as I reference above, Parmley was indicating he'd only had treatment once before, that it was not much, and that he really needed treatment. And, besides, he was willing to be your witness "no strings attached". By dropping the charge to a completed Robbery 2, it dramatically drops the sentence range to only 6-12 months. But I was willing to allow him into CDP with a 10 month

> recommendation and made some calls to the jail to make sure they'd take a Robbery 2 into CDP and notwithstanding that EHM is not allow for violent offenses, meaning CDP's phase III's EHM was not going to happen. And CDP said "yes". Then Parmley is trying to avoid CDP due to a Jefferson Co. misdemeanor B.W.- which I've indicated can be easily addressed; then he came back with "how about just 9 months straight time?" I think I'm dealing with a smart con and I figured I'd better give you a head's up about this.]

Supp.CP at 257.

Based upon Parmley's statements, the State charged Cox with a second count of solicitation to murder to Lopez-Ortiz. Although Juris called Parmley and Thompson as witnesses in his case-in-chief, neither Juris nor Thompson provided the above-described emails to Cox and his lawyer, Strophy.

Parmley was the only witness for Count 2. Parmley testified that he wanted to get a deal on his robbery charge but:

> I talked to my attorney, he had talked to the prosecutor, tried to get a deal for me and they weren't going to do anything. But I talked – a little bit of time I thought about it and I just told my attorney that I felt like I needed to do it anyway.
>
> Q. What changed your mind?

> A. It may sound kind of corny, and I started reading the Bible and stuff and I just wanted to do the right thing, and I was actually concerned if he got the wrong person, got ahold of the wrong person, that some of this stuff might actually happen.
>
> Q. He being whom?
>
> A. Brian Cox.

RP 504.

Parmley testified that he never got a deal and: "I got the highest end of my sentence possible for the charge." RP 514. Parmley also denied recanting his statement to the police. RP 514.

Sonny Borja was housed in the same tank as Parmley and Cox. RP 612. He said Parmley told him that Cox was "going to be my (Parmley's) golden ticket out of here," and those were his exact words. RP 620. Borja heard Parmley tell Cox that if he bailed him out, he'd take care of his wife for $10,000, to which Cox responded: "I don't want to pay anybody," he said, "I don't. I'm not - - that's why I'm in here. No, I don't want to do this," you know. RP 618.

To boost Parmley's credibility and undercut the testimony of Borja, Juris called Thompson as a witness. He said that Parmley had

not asked for any consideration in exchange for the information. *Id.*

Thompson testified Parmley's lawyer

> made it clear that Parmley just had felt it that this was wrong and what he had heard from Cox, and that he just wanted to come forward and let somebody know what had been said.

RP 463. He repeated Parmley was not provided any consideration.

Id.

On cross-examination, Strophy asked Thompson what

Parmley was originally charged with. RP 464. Thompson stated:

> I believe I charged him initially with first-degree robbery. I will admit that I was supposed to be checking that prior to testifying. I was scheduled this afternoon and I literally had to hand a couple of cases off to a colleague on a calendar that's going on right now. So that's my recollection.

RP 465. He testified that Parmley entered a plea to second-degree

robbery. *Id*. He did not explain to the jury this reduced Parmley's

standard sentencing range from 27-36 months in prison to 12 months

in a jail-based drug treatment program.

Strophy asked:

> So any of the notes or conversations from Parmley or conversations with Hack, was it mention he had hoped, for in for a better deal?

Thompson said "no." RP 464.

Under questioning by Juris, Thompson told the jury the reduction was because the robbery victim had prior criminal history and because of Parmley's "time in the community that he had been successfully able to remain crime free." RP 467.

Cox was convicted as charged and appealed. The Court of Appeals affirmed in an unpublished decision. *State v. Cox*, 196 Wash. App. 1051 (2016).

In 2017 Cox discovered the 2013 emails between Juris, Thompson, and Hack. He filed a PRP and argued that Thompson had given false testimony and the State had withheld material impeachment evidence. In response, the State provided additional emails. The Court of Appeals issued an unpublished decision remanding the matter for an evidentiary hearing. *Matter of Cox*, 10 Wash. App. 2d 1010 (2019).

At the evidentiary hearing, Juris agreed the only witness for Count 2 was Parmley. Supp. R.P. 45. He also agreed there was no evidence to corroborate Parmley's testimony. *Id*. Without Parmley's testimony, there would never have been a second count. *Id*. Juris agreed he had not provided Strophy with the emails between him, Thompson and Hack. He stated although Thompson told him he should give the emails to Cox's lawyer, he never did. Supp. R.P. 56. He did not provide Strophy with Parmley's charge, guilty plea statement, judgment and sentence. Supp. R.P. 53.

Juris agreed the emails contained far more extensive information about how Parmley resolved his case. Supp. R.P. 71. He agreed the jury did not hear Thompson's assessment he felt Parmley was being manipulative. Supp. R.P. 57, 72. The jury also did not hear Thompson's agreement to recommend drug treatment would also assist Parmley in getting his warrants cleared up. Supp. R.P. 58, 72. Juris also agreed that after Parmley's lawyer told the State Parmley would testify without a deal, he continued to ask for one. Supp. R.P. 59. He agreed the jury did not hear about Parmley's

consideration on the Jefferson county warrant or that he even had outstanding warrants. R.P. 62.

Juris agreed that in Thompson's emails, he suggested that Parmley's statements be confirmed by a polygraph. But he said that would only have been required if there was "some kind of plea" agreement. Supp. R.P. 51.

When asked why he called Thompson as a witness, Juris said he knew there would be an "issue" about whether Parmley received a "deal" so he wanted an "independent witness" to verify that. Supp. R.P. 52. When asked: "You would agree that [Thompson's testimony] bolstered Parmley's testimony," Juris answered "absolutely."

Thompson testified he told Juris to turn the Parmley negotiations over to Strophy. Supp.RP 120. Thompson denied ever making "a deal" with Parmley contingent on his testimony. Supp. R.P. 26. He also said Hack was not seeking "a deal" in connection with the case. Supp.RP. 27. He claimed Parmley never received "a deal" for his testimony. R.P. 31. He admitted, however, Parmley's

charges were reduced and Parmley could enter the Thurston County Chemical Dependency Program. *Id*. Despite the emails back and forth, Thompson denied the reduction had anything to do with Parmley's testimony against Cox even though he used the word "cooperation" in his email. Supp.RP 92, 94.

Strophy testified he had some information to impeach Parmley with but he did not have the emails. Supp.RP 185. But Strophy said the emails were essential to attack Parmley's credibility. He said it would have been helpful impeachment to know Parmley told the prosecutors he was hoping for a better deal; to know Detective Kolb told Thompson Parmley was hoping for a better deal; to know Parmley asked for 12 months and eventually got a reduction of charges and received exactly 12 months; to impeach Thompson with his statement to Juris that their emails about Parmley should be disclosed to the defense; to use Thompson's assessment Parmley might "arguably" be influenced by the reduction; to know Parmley sought to withdraw his plea and Thompson characterized that as "manipulation"; and Parmley was

getting assistance on quashing a $5,000 warrant from Jefferson County. Supp.RP 188-89, 194.

At the close of the evidentiary hearing, the judge found Thompson had not testified falsely, and the emails Juris suppressed were not material. Supp.CP 529-42. He ignored Strophy's testimony about why the State's failure to provide the emails was exculpatory and why having the emails would have allowed him to impeach both Parmley and Thompson.

Cox appealed the evidentiary hearing judge's order.

The Court of Appeals issued an opinion that addresses none of the controlling law. Instead, the Court simply states the reference hearing findings were supported by substantial evidence. Slip Opinion at 9.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review because the Court of Appeals has approved of a serious constitutional violations of Cox's right to due process under the State and Federal constitutions. The

evidentiary hearing judge with the approval of the Court of Appeals has approved of this conduct. As a result, the Court of Appeals' opinion conflicts with controlling United States Supreme Court precedent. RAP 13.4(b).

> 1. A *Brady* violation, a species of prosecutorial misconduct. When prosecutors Juris and Thompson failed to provide Cox with their email exchanges with the snitch's lawyer, they withheld material exculpatory evidence. .

The Supreme Court has held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, despite the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The duty to disclose such evidence is applicable even though there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), It encompasses both impeachment and exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). "[T]he exposure of a witness' motivation in testifying is a

proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316–17, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (citation omitted). Where, as here, important additional grounds for impeachment have been suppressed, it "would have added an entirely new dimension to the jury's assessment of [the witness]" so " 'there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment [of the evidence]' " *United States v. Kohring*, 637 F.3d 895, 905–06 (9th Cir.2011).

The criminal justice system has decided not to prohibit the practice of rewarding self-confessed criminals for their cooperation or to outlaw the testimony in court of those who receive something in return for their testimony. Instead, the courts have relied on (1) the integrity of government agents and prosecutors not to introduce untrustworthy evidence into the system, *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); (2) trial judges and stringent discovery rules to subject the process to close scrutiny, *United States v. Heath*, 260 F.2d 623, 626 (9th Cir. 1958); (3)

defense counsel to test such evidence with a vigorous cross-examination, *Davis v. Alaska*, at 316. To quote the Supreme Court, "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa v. United States*, 385 U.S. 293, 311-12, 87 S.Ct. 408, 418, 17 L.Ed.2d 374 (1966).

Because of this choice, relevant evidence bearing on the credibility of an informant-witness must be timely revealed (1) to defense counsel as required by *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and (2) to the ultimate trier of fact, unless clearly cumulative or attenuated. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986).

Because the State decides whether and when to use such witnesses, and what to give them for their service, the State stands uniquely positioned to guard against false testimony by persons like Parmley. By its actions, the State can either contribute to or

eliminate the problem. The law requires prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty to turn over to the defense in discovery all material information casting a shadow on a jailhouse snitch's credibility.

There are three elements of a *Brady/Giglio* violation: "(1) the evidence at issue must be favorable to the accused, because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *In re Stenson*, 174 Wash.2d 474, 276 P.3d 286 (2012); *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (internal quotation marks omitted)).

Evidence is prejudicial or material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). There is a "reasonable probability" of prejudice

when suppression of evidence "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). But a "reasonable probability" may be found "even where the remaining evidence would have been sufficient to convict the defendant." *Strickler*, 527 U.S. at 290. Suppressed evidence is considered "collectively, not item by item." *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555.

In assessing the materiality of suppressed evidence, a court must consider 1) how competent defense counsel could use the newly discovered exculpatory evidence and 2) what other relevant information the evidence would have led to. In *Stenson,* for example, the Court found the suppressed FBI file and photographs would have been favorable to Stenson, and had it been disclosed, counsel could have used it for the impeachment of the expert's testimony and the results of the tests. *Id*. at 488. The Court concluded Stenson suffered prejudice since the materials were the only pieces of forensic evidence supporting Stenson's conviction. *Id*. at 491.

Brady materiality is a legal question reviewed de novo, but the trial court's underlying factual findings are reviewed for substantial evidence. *State v. Davila*, 184 Wash.2d 55, 74, 357 P.3d 636 (2015).

a. The State failed to produce evidence that would have impeached both Thompson and Parmley.

There is no question Juris knew of the emails and failed to give them to the defense. There is also no dispute he failed to do so *after* Thompson recognized the State had to provide them to the defense and advised Juris of his view. The evidentiary hearing judge misapplied *Brady* when he found the emails were not material because " Parmley's charges and reduction were known to the defense and were placed in front of the jury." Slip Opinion at 5. It is true the prosecutor's sanitized version was related to the jury. But the emails revealed the version testified to impeached the State's presentation of Parmley as someone who asked for nothing and was only testifying because it was the right thing to do.

b. The withheld evidence was material.

The evidentiary hearing judge erred when he determined the withheld evidence was not material. The judge focused on whether the emails established an explicit agreement to reduce Parmley's charges rather than how competent defense counsel could use the exculpatory evidence and what other relevant information the evidence would have led to. To reach this incorrect decision the evidentiary hearing judge simply ignored Strophy's testimony about the value of the withheld impeachment evidence.

The materiality is evident when one compares the character and credibility Parmley presented to the jury with the facts reflected in the email. The jury was told Parmley testified against Cox because he was reading the Bible and decided it was the "right thing" to do. Parmley also told the jury he received the top end of the sentencing range. Thompson backed up his testimony by telling the jury there were no negotiations regarding Parmley's charges, and the charges were reduced because he had been crime-free for a period.

But the emails reveal Parmley sought a deal in exchange for his testimony against Cox from the moment he came forward, just days after being jailed, until right before he entered a plea. He did not plead to the attempted first-degree robbery and he did not get the top of the range for that crime (27-36 months in prison). He pled to second-degree robbery and received a twelve-month sentence. Even if there was no explicit deal regarding Cox's case, he had not been rewarded for his "crime-free time in the community." He was a drug addict. The State wanted to force him into an in-custody treatment program, and the State would help him quash his outstanding warrants. Moreover, at one point, Parmley tried to withdraw from his plea agreement, and Thompson deemed him a "smart con" and "manipulative.

The unrebutted testimony by Strophy established that, with a jailhouse snitch, every item of impeachment evidence withheld was material to attack the witness's credibility. He could have used the information in the emails to demonstrate Parmley was not an otherwise law-abiding citizen who was just "doing the right" thing

because he was "reading the Bible." He was an experienced criminal who knew providing false evidence against Cox would assist him in mitigating his own charges.

2. The prosecutorial misconduct continued when Juris purposely called Thompson to vouch for the snitch's testimony.

Juris testified at the evidentiary hearing. He admitted he "absolutely" called Thompson bolster the snitch's testimony. The Court of Appeals refused to consider this testimony stating: "This court already rejected in Cox's direct appeal his claim that Juris improperly vouched for Parmley's credibility during closing argument." *Cox*, No. 45971-0-II, slip op. at 8." But that was an entirely different form of vouching than the vouching Juris admitted to in the evidentiary hearing. Just because one form was raised on direct appeal does not mean other forms, discovered later, cannot be raised in a personal restraint petition or a second appeal. See *In re Khan*, 184 Wash.2d 679, 689, 363 P.3d 577 (2015)("We may consider a new ground for an ineffective assistance of counsel claim for the first time on collateral review.")

The Court said: “Any claim of improper vouching is beyond the scope of the remand. It is not properly an issue in this appeal. RAP 2.4.” But RAP 2.4 says nothing about issues arising on remand or whether those issues can be addressed in an appeal of a remand order. Rather, the Court of Appeals determined no matter how much additional evidence of prosecutorial misconduct is discovered and developed at an evidentiary hearing, additional misconduct cannot support an appeal because “it was not in the remand order.”

This is an absurd and dangerous ruling. The RAP’s that govern Personal Restraint Proceedings in Title 16 do not allow for any discovery before the PRP is filed. Discovery and evidentiary development occur in the trial court after the Court of Appeals remands for a hearing. Thus, under the Court of Appeals view expressed in this opinion, so long as the additional evidence of misconduct or constitutional violations remain concealed before the the remand any new evidence of misconduct will escape review. In short, the Court of Appeals approach rewards a prosecutor who

successfully conceals evidence until forced to testify about their conduct at the evidentiary hearing.

3. The prosecutorial misconduct culminated when Thompson testified falsely and Juris failed to correct the false testimony.

The United States Supreme Court has consistently held a conviction obtained by the knowing use of perjured testimony is unfair. *See e.g. Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Presenting false testimony cuts to the core of a defendant's right to due process. As the Supreme Court said in *Napue* "[i]t is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Id*. at 269–270. False testimony is material if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Hamilton v. Ayers*, 583 F.3d 1100, 1110 (9th Cir. 2009). A strict standard of materiality applies because they involve a

corruption of the truth-seeking function of the trial process. The materiality of suppressed evidence is considered collectively. *Kyles v. Whitley*, 514 U.S. at 436,

The emails conclusive demonstrate Parmley continually approached Thompson for a "better deal" in the robbery prosecution and that there were "notes." When Thompson testified there were none, his answer was false. And it covered up the fact the State had not disclosed extensive emails regarding Parmley to the defense.

The evidentiary hearing judge abused his discretion when he failed to find Thompson's testimony was false. He skirted the issue by focusing on whether Parmley's charge was reduced in exchange for his testimony. But the question to Thompson was not about the outcome of negotiations. The question was whether Parmley asked for a "better deal" and whether there were notes. The only truthful answer was "yes."

In *Wearry v. Cain*, 577 U.S. 385, 390, 136 S.Ct. 1002, 1004, 194 L.Ed. 2d 78 (2016), the Supreme Court reversed partly because the State had failed to disclose, contrary to the prosecution's

assertions, the snitch had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry. The evidentiary hearing judge cannot change a dishonest answer into an honest answer by changing the question asked.

Thompson also testified falsely that he reduced Parmley's attempted first-degree robbery conviction because the victim in Parmley's case was subject to impeachment and because he had successfully remained crime-free community. The emails reveal the case against Parmley was strong and he was motivated to reduce the charge so Parmley could go into an in-custody treatment program.

Once again, the evidentiary hearing judge abused his discretion by changing the question. He found even though Parmley was addicted to drugs and had outstanding warrants differed from being "crime-free." Thus, according to the evidentiary hearing judge, Thompson's testimony was not "false." But the jury would have understood the trial testimony as confirmation of Parmley's credibly and generally good character. Thompson painted a different picture

of Parmley in the emails. He called him a "smart con" and manipulative.

There is a reasonable probability the results of the trial would have been different had Thompson testified truthfully. Had he answered "yes" to the question about notes, the defense would have known the emails not provided. The evidentiary hearing judge simply did not understand or refused to acknowledge how material the falsehoods were to the defense.

V. CONCLUSION

This Court should grant review.

This brief is complies with RAP 18.17 and contains 5, 954 words.

RESPECTFULLY SUBMITTED this 21st day of September 2022.

/s/Suzanne Lee Elliott
Suzanne Lee Elliott, WSBA #12634
Attorney for Brian Cox

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRIAN GLENN COX, Appellant.	No. 82849-5-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — In 2014, a jury found Brian Cox guilty of two counts of criminal solicitation of first degree murder and one count of violating a domestic violence protection order. This court affirmed the convictions. State v. Cox, No. 45971-0-II, slip op. at 2 (Wash. Ct. App. November 8, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/459710_Unpub_Orig.pdf. In December 2017, Cox filed a personal restraint petition (PRP) in this court, asserting the State had presented false testimony and had failed to disclose impeachment evidence. In re Pers. Restraint of Cox, No. 79664-0-I, slip op. at 1 (Wash. Ct. App. Sept. 3, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/796640.pdf. Cox sought either reversal of his convictions and remand for a new trial, or, in the event the State disputed the characterization of newly disclosed e-mail messages, reference to the superior court for an evidentiary hearing. By order dated July 26, 2018, Cox's PRP was referred to a panel for determination under RAP 16.11(b). By opinion dated September 3, 2019, the matter was transferred to the superior

court for a reference hearing under RAP 16.12 to determine specified fact questions.

The reference hearing was held in Thurston County Superior Court in February 2021. The reference court entered findings of fact that Cox failed to demonstrate that the State presented false testimony or withheld material evidence.

Cox now seeks review of the reference court's findings. We deny the relief sought and dismiss the petition.

I

Cox was initially charged with a single count of criminal solicitation of first degree murder (domestic violence) for offering to pay his coworker, Ray Lopez-Ortiz, to make Cox's wife "'permanently disappear.'" Pers. Restraint of Cox, No. 79664-0-I, slip op. at 1 (quoting Cox, No. 45971-0-II, slip op. at 3-4). Cox was arrested and detained after police recorded conversations between Cox and Lopez-Ortiz. Id. at 1-2. Deputy Prosecuting Attorney Craig Juris was assigned to the case. Id. at 4. Attorney Paul Strophy represented Cox.

In June 2013, Kenneth Parmley was charged with attempted first degree robbery. Deputy Prosecuting Attorney Mark Thompson was assigned to Parmley's prosecution, and attorney Karl Hack represented Parmley. Id. at 3-4. At the time of his arrest, Parmley had prior convictions for crimes of dishonesty. Id. at 3. He was placed in a cell with Cox. Id. at 2.

Within a week, Parmley contacted the State to report that Cox tried to hire him to "get rid of" Lopez-Ortiz. Based on Parmley's statements, the State charged

Cox with a second count of solicitation to murder. Numerous e-mail messages were then exchanged between Juris, Thompson, and Hack to negotiate a resolution of Parmley's case. Id. at 8-14. The e-mail communications were not provided to Cox's counsel. Id. at 5.

Parmley's case was resolved before Cox's trial began. Id. at 4. He pleaded guilty to an amended charge of second degree robbery with eligibility for a chemical dependency program.

Both Parmley and Thompson testified at Cox's trial that Parmley did not receive the charge reduction in return for his anticipated testimony. Id. at 2-4.

After Cox was convicted, he later obtained the e-mail communications at issue through a public disclosure request. Id. at 4-5. The e-mail communications are quoted in chronological sequence in our opinion remanding for a reference hearing. Id. at 8-14.

II

This court remanded for a reference hearing to address two specific factual issues: false testimony and disclosure of material impeachment evidence.

First, we directed the reference court to determine (1) whether testimony by Thompson and Parmley was actually false, (2) whether Juris knew or should have known that Thompson and Parmley's testimony was actually false, and (3) whether the false testimony was material. Id. at 20.

Second, the reference court was to decide (1) whether the State failed to timely produce potential impeachment evidence that was material to the question whether Thompson and Parmley were being truthful in their testimony relative to

Parmley's participation as a witness, (2) whether any such evidence that was not disclosed would have provided defense counsel the opportunity to impeach Thompson or Parmley, and (3) if so, whether the failure to provide that evidence to Cox was prejudicial. Id. at 23-24.

Juris, Thompson, Hack, and Strophy testified at the reference hearing, and the reference court found their testimony credible. Following the hearing, the reference court entered findings of fact and conclusions of law.

The reference court stated most of the testimony at the hearing concerned the e-mail messages between Hack and Thompson. Based upon the messages, the reference court found "explicit evidence demonstrated that Mr. Parmley, through his defense counsel, was not asking for a deal in exchange for his testimony."

Cox claimed Thompson was untruthful when he testified at trial there were no notes detailing the negotiations leading to Parmley's amended charge. The reference court reviewed the original trial transcript and noted Thompson was asked more precisely if there were any notes or messages in which either Parmley or Hack expressed that Parmley hoped for a better deal. As the reference court found, "[t]hat differs from asking if there are any notes regarding negotiations." The reference court found the e-mail messages showed Hack indicated to Thompson that Parmley would testify against Cox without consideration, and "[t]here was no explicit deal."

The reference court noted that neither the statement of defendant on plea of guilty nor the judgment and sentence entered in Parmley's case "indicated that

the reduction or recommendation was contingent upon cooperation against Mr. Cox." The reference court found Thompson and Hack were credible when they testified that "a cooperation agreement would have been included in writing if one had existed."

The reference court found that Parmley was not offered a written or formal agreement, but he did receive a reduction in the charge. However, "[t]his information was testified to and put in front of the jury" at Cox's 2014 trial.

In response to Cox's assertion that Thompson told Juris the e-mail negotiations should be provided to Cox's counsel, the reference court stated Thompson did not say the messages themselves should be forwarded, but rather that the resolution of Parmley's case should be communicated: "Mr. Thompson was noting that the resolution of Mr. Parmley's case in conjunction with the timelines and the discussions with his testimony in Mr. Cox's case should be brought up and should be made aware to the defense attorney." As a result, the reference court found, "[t]he circumstances regarding Mr. Parmley's charges and reduction were known to the defense and were placed in front of the jury."

According to the reference court, the evidence and testimony clarifies that at the time of trial, Strophy knew there was a criminal case involving Parmley that Parmley hoped would be resolved with consideration, there was no explicit agreement regarding cooperation, and the case resolved with a reduction in the charge. "[T]hat information was put in front of the jury." "The emails themselves back up those disclosures."

The reference court found, "There is nothing that is materially different or in addition in those emails than what was provided to counsel in Mr. Cox's case."

III

A

"A personal restraint petitioner bears the burden of proving issues in a reference hearing by a preponderance of the evidence." In re Pers. Restraint of Davis, 152 Wn.2d 647, 679, 101 P.3d 1 (2004). Preponderance of the evidence is equivalent to the "more likely than not" standard. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 409, 972 P.2d 1250 (1999).

We review challenged factual findings to determine whether the findings are supported by substantial evidence. Davis, 152 Wn.2d at 679. "Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true." Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 112-13, 937 P.2d 154, 943 P.2d 1358 (1997) (quoted in Gentry, 137 Wn.2d at 410). The trial court's determination of credibility cannot be reviewed on appeal, even where there are other reasonable interpretations of the evidence. Davis, 152 Wn.2d at 680.

Cox asserted Thompson and Parmley testified falsely about Parmley's efforts to obtain a better deal for his robbery charge and that Thompson testified falsely as to whether there were notes about the negotiations.

Juris, Thompson, and Hack all testified at the reference hearing that nothing in the resolution of Parmley's case was contingent on Parmley's testimony against Cox.

The reference court found that the evidence presented during the hearing demonstrated Thompson's testimony was truthful and not false and Parmley's testimony was not false. "The petitioner has not demonstrated by a preponderance of the evidence that false material testimony was presented."

Cox further argued the State withheld material impeachment evidence by failing to disclose the e-mail messages regarding consideration to Parmley for his testimony against Cox.

The reference court found the State provided Cox's attorney with the potential impeachment evidence: "There has been no showing that material information was withheld which, had the information been provided, would have a reasonable probability of affecting the outcome of the trial."

We remanded Cox's PRP for a reference hearing because, in light of the newly-disclosed e-mail messages, it was "unclear" whether Parmley knew of and acted on willingness by the State to reduce his charge, and whether the State did reduce his charge, such that there "could" have been an "implicit agreement" regarding Parmley's testimony notwithstanding the original trial testimony that there was not an agreement. Pers. Restraint of Cox, No. 79664-0-I, slip op. at 19-20. Likewise, we held the evidence presented fact questions concerning whether the State's witnesses had been truthful at Cox's 2014 trial and whether the State had been in possession of, and failed to disclose, material impeachment evidence under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L Ed. 2d 215 (1963). Pers. Restraint of Cox, No. 79664-0-I, slip op. at 23-24.

As to both the existence of an agreement for testimony and the existence of potential Brady material, despite Cox's argument that the newly-disclosed e-mail messages could be interpreted to suggest an implicit agreement for testimony, we remanded because the e-mail messages could also be interpreted in a manner consistent with the absence of any agreement for testimony—and therefore also consistent with the information given to Cox originally and presented at his 2014 trial. Id. at 22-23. The testimony at the reference hearing, together with the e-mail messages, provide substantial evidence supporting the reference court's findings that there was not an agreement for testimony and no withholding of potential Brady material.

The reference court entered both findings of fact and conclusions of law. The conclusions of law exceeded the scope of this court's reference under RAP 16.12. Generally, this court may either refer a PRP to superior court for a determination on the merits or refer a PRP solely to determine disputed facts. See id. When this court refers the PRP for determination on the merits, the superior court makes any necessary factual determinations and reaches the final merits of the PRP, which is subject to review under the same procedure as any other trial court decision. RAP 16.14(b). When this court refers the matter solely to determine disputed facts, the superior court is limited under RAP 16.12 to determining the referenced fact questions and returning the case back to this court to determine the final merits of the PRP.

In this case, following the superior court's findings of fact and conclusions of law, Cox reinitiated proceedings in this court by filing a notice of appeal under

the superior court case number for the original criminal action filed against him in 2013. This court assigned a new appellate case number and procedurally treated the matter as an appeal taken from the superior court's findings of fact.

The combination of this court's original reference, the superior court's findings of fact and conclusions of law, and Cox's notice of appeal did not strictly follow either of the alternate paths envisioned by RAP 16.11(b), RAP 16.12, and RAP 16.14, but we do not find that the procedural posture affects the disposition of this case. We remanded for the trial court to enter findings of fact, we conclude that those findings are supported by substantial evidence, and we conclude based on those findings that Cox is not entitled to relief on his PRP.

B

After the reference hearing that addressed specific factual questions, Cox asserts for the first time in his appeal of the reference hearing findings that Juris committed prosecutorial misconduct by calling Thompson as a witness to vouch for Parmley's credibility at trial. This court already rejected in Cox's direct appeal his claim that Juris improperly vouched for Parmley's credibility during closing argument. Cox, No. 45971-0-II, slip op. at 8. Now Cox "cannot locate any case that addresses the improper form of vouching presented here." All that is offered is the unsupported assertion that "there is an overwhelming likelihood that [Deputy Prosecuting Attorney] Thompson's testimony affected the jury's verdict."

Any claim of improper vouching is beyond the scope of the remand. It is not properly an issue in this appeal. RAP 2.4.

C

Under RAP 10.10, Cox raises several additional challenges to his conviction, including the insufficiency of police authorization to record him, alleged improper police action in arresting and interrogating him and in preserving evidence, entrapment/enticement/inducement, impermissible opinion testimony as to his guilt, his compliance with the domestic violence no contact order, and alleged police violations of the Washington Criminal Records Privacy Act, chapter 10.97 RCW.

Cox's notice of appeal designated the findings of fact and conclusions of law entered by the reference court on remand. His additional concerns are entirely outside the specific factual issues addressed by the reference court. "[I]ssues that involve facts or evidence not in the record are properly raised through a personal restraint petition, not a statement of additional grounds." State v. Calvin, 176 Wn. App. 1, 26, 316 P.3d 496 (2013). We will not review Cox's additional challenges.

IV

The reference court assessed the briefing, statements, exhibits, and testimony of witnesses in light of the questions submitted. The reference court did not find false testimony or a failure to disclose material impeachment evidence. We determine that the superior court's findings of fact are supported by substantial evidence and are affirmed. Cox is not entitled to reversal of his convictions and a new trial.

The substantially prevailing party typically receives an award of appellate costs. The appellate court may direct otherwise when "an adult offender does not have the current or likely future ability to pay such costs." RAP 14.2.

The trial court entered an order of indigency because it found Cox was unable to pay for the expenses of appellate review. We direct that the State is not awarded appellate costs.

We deny the relief sought and dismiss the petition.

Bjke, J.

WE CONCUR:

Coburn, J.

Dwyer, J.

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN GLENN COX,

Appellant.

No. 82849-5-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Brian Cox, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Birk, J.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Amended Petition for Review** to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 101293-4**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: September 21, 2022

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