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COURT OF APPEALS  
DIVISION ONE

NO. 62279-0-1

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

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STATE OF WASHINGTON,  
Respondent,

v.

BRADLEY PETERS  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable George Mattson

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT

*Because a family can be, and in this case was, a neutral and general community for purposes of ER 608, Josephine Besable's testimony of Luz Peters' reputation for untruthfulness should and likely would have been admitted.*

Respondent mischaracterizes State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006). That decision does not stand for the proposition that families in general are not "neutral or general" communities for purposes of reputation evidence, as the State asserts. State's Response Brief at 17, 18 Fn 3.

In Gregory, the Court found that *the particular family in question* was not a "neutral or general" community. 158 Wn.2d at 804-05. The defendant sought to introduce the testimony of the victim's ex-boyfriend, regarding the victim's reputation for untruthfulness in the community. Id. at 804. The Court found that this family was not a valid community under ER 608 for three reasons, two of which were fact-specific and clearly distinguishable from this case. First, the purported community, which had discussed the victim's reputation, consisted of only two people, the sister and the ex-boyfriend. Id. at 805. "Any community comprised of two individuals is too small to constitute a community for purposes of ER 608." Id., citing State v. Lord, 117 Wn.2d 829, 874,

822 P.2d 177 (1991). Here, in contrast, Josephine Besabe's interview indicates that the community which discussed Luz Peters' reputation for untruthfulness was sufficiently widespread throughout the family that they called her by a nickname which means "one who makes up stories." CP 48-49. The declaration is not sufficiently detailed to describe which family members used this nickname, but the implication is that Josephine Besabe's references to "the family" would include at least their parents and their brother Paul.

Another factor which swayed the Gregory Court was the fact that the ex-boyfriend's knowledge was several years old and thus too remote to be relevant. 158 Wn.2d at 805. Here, in contrast, Josephine Besabe was not someone with a previous, terminated relationship to Luz Peters. As her sister, she had an ongoing relationship with her, presumably up until the time of trial. Her statements in the interview regarding Ms. Peters' reputation were stated in the present tense, and influenced her current belief that Ms. Peters' allegations were false. CP 48-49.

The only factor in Gregory which applies to families in general is the one cited by Respondent: "the inherent nature of familial relationships *often* precludes family members from

providing an unbiased and reliable evaluation of one another.” 158 Wn.2d at 805 (emphasis added). However, the Court did not state a per se rule, or even a presumption, that families cannot be neutral communities. Rather, the Court reflected the common sense expectation that the loyalty and affinity within a family will result in a bias towards one another. Where, as here, other facts balance out that expectation, the family may indeed be a neutral community. Here, there was no evidence of discord between the sisters, but there was evidence that Ms. Beabe had a negative view of Mr. Peters. Thus, the neutrality of the community and reliability of Ms. Beabe’s testimony were actually bolstered by the surrounding facts.

Gregory, like the cases discussed in Appellant’s Opening Brief, actually cut in favor of admitting Josephine Besabe’s testimony. The rationale of ER 608 was “that it was best to restrict evidence concerning a person’s reputation to that group of people who knew the witness best” and even today, the purpose of the rule is “to facilitate testimony from those who know a witness’ reputation for truthfulness so that the trier of fact can properly evaluate witness credibility.” State v. Land, 121 Wn.2d, 494, 499-500, 851 P.2d 678 (1993), citing 1 McCormick, Evidence § 43 (John W. Strong ed., 4<sup>th</sup> ed. 1992); 5 Wigmore Evidence § 1616 (1974); 5A

Tegland, Wash. Prac., Evidence § 230(1) at 197 (3d ed. 1989).

Because of the depth and breadth of knowledge that family members have regarding a witness' reputation, they may in fact be qualified witnesses – as long as they meet the requirements of ER 608. Here, the facts indicated neutrality and the family did not present the problems of the family in Gregory. Instead, Josephine Besabe's testimony would have served the purpose of ER 608, to put before the trier of fact qualified information about Luz Peters' credibility, in a trial where that credibility was the central issue.

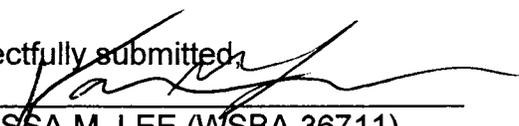
Because trial counsel did not attempt to introduce this critical testimony, although any negative testimony from Ms. Besabe could not have outweighed its exculpatory effect and may in fact have bolstered it, his representation of Mr. Peters was deficient.

B. CONCLUSION

For the reasons presented here and in his Opening Brief, Bradley Peters respectfully requests that this Court reverse the lower court's order denying the motion for a new trial.

DATED this 11<sup>th</sup> day of September, 2009.

Respectfully submitted,

  
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DIVISION ONE**

STATE OF WASHINGTON, )  
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NO. 62279-0-I

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 COURT OF APPEALS DIVISION ONE

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |  |
|--|--|
| <p>[X] DANIEL KALISH, DPA<br/>         JAMES WHISMAN, DPA<br/>         KING COUNTY PROSECUTOR'S OFFICE<br/>         APPELLATE UNIT<br/>         516 THIRD AVENUE, W-554<br/>         SEATTLE, WA 98104</p> | <p>(X) U.S. MAIL<br/>         ( ) HAND DELIVERY<br/>         ( ) _____</p> |
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**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2009.

X \_\_\_\_\_ 

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