

FILED
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Court of Appeals No. 73785-6-I
Division I
State of Washington

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

PARAMJIT SINGH BASRA,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Because the State has disputed the most of the facts that comprise Mr. Basra's claims and because this Court is not a factfinding court, this Court should remand this PRP either for an evidentiary hearing or for a determination on the merits. RAP 16.11(b).

To obtain an evidentiary hearing, a PRP Petitioner must demonstrate that he has competent, admissible evidence to establish facts which would entitle him to relief. *In re Rice*, 118 Wash.2d 876, 886, 828 P.2d 1086 (1992). A petitioner must state with particularity facts which, if proven, would entitle him to relief. *Id.* A mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient. *Id.* 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. *Id.* *Rice* does require corroboration when a Petitioner's declaration is based on his own knowledge. It requires only competent admissible evidence. Further, a non-capital Petitioner does not have any discovery rights until and unless a hearing is ordered. RAP 16.12.

"Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition." *Id.* at 886. 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.” *Id.* at 887.

In the most recent case to apply these rules, the Washington Supreme Court found that the declaration of the Petitioner stating that he wanted, but his counsel refused to request an interpreter was sufficient to merit remand to the trial court. *In re PRP of Khan*, __ Wn.2d __, __ P.3d __ (2015) (“Whether Khan needed an interpreter is not something we can ascertain from this record. He has met his burden as to this first prong under *Rice* of stating with particularity facts that, if proved, would entitle him to relief.”); (concluding that although Khan has not established prejudice sufficient to justify vacating his conviction, there were sufficient grounds to warrant a reference hearing on prejudice.”).

In this case, Basra’s declaration contains competent admissible evidence supporting his claims, especially when considered with the trial record and other sources. In response, the State cited to certain trial documents, but failed to provide any sworn declarations of its own. Nevertheless, Basra asserts that all of his claims should be remanded for a hearing.

B. ARGUMENT

- 1.a. Mr. Basra was Denied the Right to be Present When Jurors Were Dismissed for Hardship.
- 1.b. Mr. Basra was Denied the Right to Effective Appellate Counsel When Counsel Failed to Assign Error to the Denial of Mr. Basra's Right to Be Present During Jury Selection.

Mr. Basra claimed he was not present on February 6, 2012, when several jurors were excused for hardship. He supported this claim with a reference from the trial transcript and his own sworn declaration, attesting to facts known to him. While the State appears to acknowledge that Basra's claim supports relief, if factually correct, it contests those facts and responds with the unsworn clerk's minutes, which the State argues contradict Basra's claim.

First, this Court should find that the State failed to meet its pleading standard to properly contest the facts. The State did not present a sworn declaration from the clerk. If it contends the clerk's minutes fit within the "public records" exception, an attestation or a certified copy was required. RCW 5.44.010; .040.

If, on the other hand, this Court finds that it can consider the clerk's minutes despite the fact that it is not "admissible," Mr. Basra contends that the factual conflict must be resolved at an evidentiary hearing. RAP 16.11.

- 2.a. Mr. Basra was Denied His Right to a Public Trial
- 2.b. Mr. Basra was Denied His Right to Effective Assistance of Appellate Counsel

After the potential jurors filled out a questionnaire, three jurors were called back for individual questioning. The judge told those jurors that their answers were “just for the people in the room.” *See e.g.*, RP (2/6/12) 20. The State draws another conclusion from the record. The State argues that the judge did not close the courtroom.

This disagreement about what happened demonstrates the need for a hearing.

- 3.a. Mr. Basra Was Denied His Right to Testify
- 3.b. Mr. Basra Was Denied His Right to Effective Assistance of Trial Counsel When Counsel Effectively Denied Mr. Basra His Right to Testify

Mr. Basra testified. However, he was only asked one question. When the prosecutor attempted to ask questions about the crime, defense counsel objected. Basra stated in his sworn declaration that he wanted to testify to all of the relevant events surrounding the death of his wife, but was told that counsel controlled the decision regarding what questions to ask, as his declaration attests. The State did not present any competing declaration.

Basra presented an expert’s declaration that trial counsel’s decision fell below the standard required for reasonably competent counsel. The

State did not present a competing declaration.

Because defense counsel called Basra to testify and despite the fact that Basra was silent before his jury regarding the homicide, he was not entitled to an instructions directing that jurors not use his silence against him.

In its response, the State argues first that Basra's declaration must be corroborated by a second person—despite the fact that *Rice* requires only competent, admissible evidence, not competent, admissible, and corroborated evidence—and then asserts that Basra's testimony could not have made a difference as a matter of law because his statement about what happened was already before the jury. The State is wrong about both points.

When a defendant remains silent at trial, courts presumed a waiver of the right to testify. When a defendant complains for the first time after trial that he wanted to testify, courts view that allegation as undermined by the trial record and have required additional proof. But, that is not this case.

Here, Mr. Basra did not remain silent. He took the stand and testified. There is no case that says because Basra did not contemporaneously demand that more questions be posed to him by counsel that the record conclusively establishes that he agreed with the scope of the examination. Moreover, neither Basra nor the State are able to compel trial counsel to give a statement at this juncture—only after a

hearing is set can either compel testimony from counsel.

Like in *Khan*, Basra has alleged sufficient facts (including on the issue of prejudice) to merit a hearing. There was no evidence alleged in *Khan* about how trial would have been different if *Khan* had been provided an interpreter. The Supreme Court held that those facts must be established at a hearing in order to merit relief.

Mr. Basra contends that he was harmed by the meaningful denial of his right to testify—a fundamental right that he must personally waive. *Rock v. Arkansas*, 483 U.S. 44 (1987). (“Even more fundamental to a personal defense than the right to self-representation...is an accused’s right to present his own version of events in his own words.”).

The facts adduced at trial, including Basra’s own statements, coupled with Basra’s declaration in this PRP are sufficient to merit an evidentiary hearing—even assuming that Basra would have largely repeated his prior statements. This is not an issue that can be evaluated on paper or mechanically. Only through a hearing, can prejudice be accurately assessed.

4. Mr. Basra Was Denied His Right to Effective Assistance of Trial Counsel When Counsel Failed to Investigate Any Medical Factors Contributing to Mr. Basra’s Mental Illness. Mr. Basra Was Prejudiced Because He was Experiencing Thyroid Problems Which Are Medically Linked to Depression.

Mr. Basra contended, through his own declaration, the declaration of his testifying psychologist, and supporting documentation, that a

medical condition which could should have reasonably discovered and which the expert would have found material to his diagnosis could have caused or contributed to his depression and state-of-mind at the time of the crime. Once again, the State fails to present a single contesting declaration. Instead, the State argues that the issue in the case was not whether Basra suffered from a mental disease or defect, but only his state-of-mind at the time of the crime.

Once again, the State makes a number of valid arguments about the possible impact or lack of impact of this new evidence, but those arguments can only be assessed after a hearing. The State suggests that this new evidence would not have changed its expert's opinion, but it presents no declaration for that conclusion.

Further, the State has no way of determining—other than through rank speculation—about what jurors did or did not find lacking in the defense. Proving a medical basis for Mr. Basra's state-of-mind at the time of the crime both could have helped bolster the defense diagnosis. Further, the greater the corresponding depression-symptoms as a result of Basra's medical condition, the more likely it was that he was unable to premeditate and intend to kill—or at least the greater the likelihood that jurors would have reached that conclusion.

Mr. Basra is entitled to an evidentiary hearing on this claim.

5. Mr. Basra Was Denied His Right to Effective Assistance of Counsel When Counsel Conceded Basra's Guilt of Manslaughter Without Basra's Permission, Undercutting Basra's Defense.

Defense counsel told jurors he expected that they would convict Mr. Basra of murder, but then urged: “we think that you may find that he’s guilty of Manslaughter in the Second Degree after you consider it.” RP 943. “That’s what most closely fits here. Fill in guilty.” RP 997 (see also RP at 982 – 984). “Go ahead and fill in “guilty” on Manslaughter in the Second Degree and you’ll be done.” RP at 997. Basra did not authorize that concession and would not have done so, if counsel had consulted with him.

The State agrees that a defense attorney's stipulation to the defendant's guilt as to an element of the crime, over the defendant's known objection, violates the defendant's due process right to hold the State to its burden of proof. But, the State then argues that defense counsel employed a carefully thought out strategy of urging the jury to find Basra not guilty as a result of his mental illness, but in any event to find him guilty of nothing more than the least serious of the crimes on which the jury had been instructed—second degree manslaughter.

Mr. Basra disagrees. Counsel told jurors that this was a very complicated case with an easy solution—a solution he affirmatively invited jurors to adopt: “Go ahead and fill in ‘guilty’ on the Manslaughter in the Second Degree, and you'll be done.” RP 997. That statement is nothing

less than an unauthorized concession.

The State then argues that Basra must show prejudice; that the *Cronic* standard does not apply. Basra disagrees. If this Court accepts the State's position that Basra must establish prejudice, that claim, like the others in this petition, should also be remanded for an evidentiary hearing.

C. CONCLUSION

This Court should remand for an evidentiary hearing and any additional relief that this Court determines is appropriate.

DATED this 11th day of January, 2016.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on today's date I e-filed the attached reply brief and caused a copy to be electronically sent to opposing counsel at:

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/s/Jeffrey Erwin Ellis