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Tue 1/17/2012 3:58 PM

COA2#42974-8-II  
PRP of Nick Arquette

*consolidated to  
COA# 42546-7-II*

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

In re the Matter of the	)	
Personal Restraint of	)	
Nick T. Arquette,	)	<b>PERSONAL RESTRAINT</b>
Petitioner	)	
	)	<b>PETITION</b>
	)	

This petition for relief from personal restraint is filed on behalf of Nick T. Arquette by Jordan B. McCabe, WSBA No. 27211. Ms. McCabe is appointed counsel for Mr. Arquette in direct appeal No. 42546-7, filed August 30, 2011. Petitioner requests the Court to consolidate this petition with his direct appeal.

1. Status of Petitioner. Nick T. Arquette petitions for relief from restraint resulting from the unlawful conviction of a crime. He is not currently in custody. He is free on bond pending the disposition of Appeal No. 42546-7-II, filed in this Court August 30, 2011. Mr. Arquette resides at 260 25<sup>th</sup> Avenue, Longview, WA 98632.

The restraint on Mr. Arquette consists of a judgment and sentence filed May 14, 2011, in Cowlitz County Superior Court Cause No. 09-1-01031-2, and affirmed by this Court in an unpublished opinion filed June 21, 2011, in Appeal No. 40776-1-II.

2. Grounds for Relief. Mr. Arquette seeks relief on the following grounds:

(i) *Facts and Supporting Evidence.*<sup>1</sup> State's witness Gary McKee alleged that Petitioner, Nick Arquette, sold him an old Datsun pickup. McKee claimed that Arquette freely delivered to him both the signed title and the truck itself. But Arquette filed a stolen vehicle report with the police. Based upon the conflict between Arquette's story and McKee's, the State charged Arquette with making false statements to a police officer in the performance of his duty. Cowlitz County Cause No. 09-1-01031-2.

Arquette testified at his jury trial that his stolen vehicle report was true. He was convicted by jury and appealed. This Court affirmed the conviction in Appeal No. 40776-1-II, filed June 21, 2011 (*Arquette I*).

Then, in Cowlitz County Cause No. 10-1-01249-1, the State again prosecuted Arquette for perjury, this time for asserting the same allegedly

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<sup>1</sup> A full statement of facts with citations to the record will be found in the Appellant's opening brief in Appeal No. 42546-7-II.

false statements at the trial. Arquette was again convicted after a bench trial. That conviction is now before this Court on direct appeal no. 42546-7-II (*Arquette II*).

Arquette seeks reversal in both *Arquette I* and *II*, based on the same record and arguments. Petitioner seeks to consolidate this petition with his direct appeal.

(ii) *Other Remedies Are Inadequate.* This Court filed the mandate in Appeal No. 40776-1-II on September 12, 2011, terminating review in that case.

(iii) *Restraint is Unlawful for the Following Reasons.* Mr. Arquette meets the restraint requirements of RAP 16.4(b) due to the stigma and other collateral consequences associated with a conviction for lying under oath. *See, e.g., In re Martinez*, 171 Wn.2d 354, 363-364, 256 P.3d 277 (2011), citing *In re Pers. Restraint of Powell*, 92 Wn.2d 882, 887, 602 P.2d 711 (1979) (unlawful conviction can serve as restraint on liberty.)

The evidence was insufficient as a matter of law to meet the State's exceptionally rigorous burden of proving perjury. Therefore, it is reasonably probable that this Court would have reversed the conviction had the sufficiency issue been before it. Appellate counsel in *Arquette I* rendered ineffective assistance by not challenging the sufficiency of the evidence to support the perjury conviction.

In *In re Frampton*, 45 Wn. App. 554, 559, 726 P.2d 486 (1986), as in this case, Frampton's conviction had already been affirmed on appeal and he employed a personal restraint petition to argue that he had been denied the effective assistance of counsel during the appeal. *Id.*

The Court should grant Arquette's petition for relief.

I. THE CONVICTION AND SENTENCE  
VIOLATE THE CONSTITUTION OF THE  
UNITED STATES AND THE CONSTITUTION  
AND LAWS OF WASHINGTON. RAP 16.4(c)(2).

1. **The evidence was insufficient to prove perjury.**

On a challenge to the sufficiency of the evidence, the same standard applies regardless of whether the case is tried to a jury or to the court. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), citing *State v. Little*, 116 Wn.2d 488, 491, 806 P.2d 749 (1991).

The requirements for proof of perjury are longstanding and well established:

There must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.

*Arquette I*, at 2, quoting *Nessman v. Sumpter*, 27 Wn. App. 18, 23, 615 P.2d 522 (1980), quoting *State v. Rutledge*, 37 Wn. 523, 528, 79 P. 1123 (1905).

The State failed to meet this burden. It presented only one direct witness supported by circumstantial evidence that fell far short of proof sufficient to overcome Arquette's oath.

***The General Sufficiency Standard Does Not Apply to Perjury:***

The dispositive issue in *Arquette I* was the adequacy of the jury instructions. In that context, the statement of facts underlying this Court's decision in *Arquette I* sets forth the evidence in the light most favorable to the State. *Arquette I*, at 1-2. This reflects a basic misunderstanding of the standard of proof for perjury.

Generally, review evidence is sufficient to support a criminal conviction if the State proves the essential components of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In most cases, evidence is deemed sufficient if a rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The Court's recitation of the facts in *Arquette I* reflects

the erroneous standard by presenting the testimony of the State's witness as proven fact. *Arquette I*, at 1.

The general sufficiency standards are inadequate in a prosecution for perjury, however. *State v. Dial*, 44 Wn. App. 11, 16, 720 P.2d 461, review denied, 106 Wn.2d 1016 (1986).

***Proof Must Exceed Beyond Reasonable Doubt:*** The proofs required to sustain a perjury conviction are the strictest known to the law, with the sole exception of treason. *State v. Olson*, 92 Wn.2d 134, 136, 594 P.2d 1337 (1979). Because the perjury standard is more stringent than beyond reasonable doubt, it is error to accept the truth of the State's evidence and all reasonable inferences. That rule simply does not apply in a prosecution for perjury. *Olson*, 92 Wn.2d at 135-36.

Rather, absent a second direct witness, the State must establish corroborating circumstances by independent evidence "of such a character as clearly to turn the scale and overcome the oath of the defendant and the presumption of innocence." *Nessman* at 23, quoting *Rutledge*, 37 Wash. at 528. Otherwise the defendant must be acquitted. *Id.*

In holding that the evidence must be "of such a character as clearly to turn the scale and overcome the oath of the defendant and the presumption of innocence," *Nessman* is effectively saying that the evidence must be viewed in a light most favorable to the defendant.

Where, as here, the State presents only a single direct witness who tells a different story than the defendant's version, the State must produce independent evidence sufficient to overcome the presumption of innocence (which is to say evidence that constitutes proof beyond a reasonable doubt). Otherwise, the defendant must be acquitted. *Rutledge*, 37 Wash. at 528.

Thus it was error for this Court to hold that, absent a second direct witness, corroboration could consist of run-of-the-mill circumstantial evidence, on the general principle that direct and circumstantial evidence are deemed equally reliable. *Arquette I*, at 2, citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This is because, in the context of a perjury prosecution, circumstantial evidence is not clearly equivalent to direct evidence.

*Delmarter's* holding that the particular circumstances of each case must be considered when evaluating the trustworthiness of circumstantial evidence has drifted over the years. As this Court did in *Arquette I*, courts routinely state the *Delmarter* rule as a bald, unqualified holding that circumstantial evidence is just as reliable as direct. *See, e.g., State v. Meah*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2011 WL 6144964), Slip Op. 65566-3-I at 1; *State v. Grimes*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 6018399, Slip Op. 40392-7-II at 10. But *Delmarter* did not establish

a bright line rule that circumstantial evidence is always as reliable as direct evidence by definition. Rather, the particular facts must be taken into account in evaluating the probative value of both circumstantial and direct evidence. *Delmarter*, 94 Wn.2d at 638, citing *State v. Gosby*, 85 Wn.2d 758, 766, 539 P.2d 680 (1975).

In *Delmarter*, for example, the fact at issue was “plainly indicated as a matter of logical probability.” *Delmarter*, at 638. That is not the case here. The facts alleged to refute Arquette’s testimony were not plainly indicated as a matter of logical probability. Arquette’s story was no less logical or plausible than McKee’s.

The State presented no corroborating evidence of sufficient reliability to overcome Arquette’s oath. That McKee somehow acquired the signed title proves nothing. That fact is equally consistent with Arquette’s claim that he signed the title in anticipation of a sale that fell through and it was stolen, probably by Tribble. If true, then McKee could have obtained the title from Tribble. It is insufficient that the trial court found McKee’s version more credible in light of the “known facts,” as the State argued. 8/11/11 RP 15. The State did not prove any “known facts.” The “facts” accepted by the trial court consisted solely of unsupported allegations by McKee that were insufficient as a matter of law to

overcome the oath of Arquette that he did not deliver either the title or the vehicle to McKee.

**2. Appellate counsel in *Arquette I* was ineffective for failing to challenge the sufficiency of the evidence.**

Ineffective assistance of counsel is established by showing both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient where it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Review is highly deferential to counsel's performance, which is strongly presumed to be reasonable. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). This presumption is rebuttable, however, if no "conceivable legitimate tactic explain[s] counsel's performance." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

A personal restraint petitioner may establish prejudicially ineffective assistance of appellate counsel by showing that there is a reasonable probability this Court would have reversed the judgment on an issue appellate counsel should have raised. *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). That is the case here.

Prejudice to a personal restraint petitioner is presumed for certain categories of constitutional error. *In re Boone*, 103 Wn.2d 224, 233, 691 P.2d 964 (1984); *In re Richardson*, 100 Wn.2d 669, 679, 675 P.2d 209 (1983). An error of the sort that can never be considered harmless on direct appeal is also presumed prejudicial for purposes of personal restraint petitions. *Boone*, 103 Wn.2d at 233.

Conviction on insufficient evidence is such a presumptively prejudicial error, because it contravenes the due process clause of the Fourteenth Amendment and thus results in unlawful restraint. *Martinez*, 171 Wn.2d at 363-364, citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); RAP 16.4(c)(2).

Accordingly, Arquette has established sufficient prejudice to support his petition for relief from restraint.

3. Statement of Finances. Petitioner is indigent, pursuant to the Order of Indigency filed August 31, 2011 and included in the Clerk's Papers of Appeal No. 42546-7-II.

4. Request for Relief. Arquette asks the Court to consolidate his personal restraint petition with direct appeal No. 42546-7-II and to reverse all perjury convictions. The issues presented are identical and are based on the same record, which is before the Court.

5. Oath. Jordan B. McCabe, appointed counsel for Nick T. Arquette in Appeal No. 42546-7-II, declares as follows: I have examined this petition and to the best of my knowledge and belief it is true and correct.

Respectfully submitted, this 17<sup>th</sup> day of January, 2012.

*Jordan B McCabe*

Jordan B. McCabe, WSBA No. 27211  
Counsel for Nick T. Arquette  
Seattle, Washington

**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that electronic service was made upon the following via the Division II upload portal:

[sasserm@co.cowlitz.wa.us](mailto:sasserm@co.cowlitz.wa.us)  
Susan I. Baur, Cowlitz County Prosecutor's Office

Hall of Justice, 312 SW 1st Ave  
Kelso, WA 98626-1799

A copy of this Petition, together with the Appellant's opening brief in appeal no. was mailed to:

Nick T. Arquette  
260 25<sup>th</sup> Avenue  
Longview, WA 98632

*Jordan B McCabe* Date: January 17, 2012  
Jordan B. McCabe, WSBA No. 27211