No. 49044-7-II

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF

SERGEY V. GENSITSKIY,

Petitioner.

REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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A. PETITIONER HAS ESTABLISHED A *PRIMA FACIE* CASE OF CONSTITUTIONAL ERROR

In *In re Rice*, 118 Wn.2d 876 (1992), the Washington Supreme Court announced guidelines for consideration of personal restraint cases. To make out a *prima facie* case of constitutional error, the petitioner must submit sufficient factual support for his claims. *See id.* at 886. Here, although Petitioner has been afforded no opportunity to conduct discovery,[1] he has satisfied *Rice* by submitting detailed declarations from several fact witnesses. Petitioner has also provided declarations from two well-respected expert witnesses, Brad Meryhew and Barbara Corey. Most of this evidence is unrebutted.

The State has put forward a generic legal objection to the conclusions of Petitioner's expert witnesses. *See Response at 8-9, 16.* In fact, this is precisely the type of evidence that has previously been accepted by the Washington Supreme Court when considering these types of claims. *See, e.g., In re Brett*, 142 Wn.2d 868, 878 (2001) (holding that counsel was ineffective based upon claims of three legal experts). *Accord Thompson v. Calderon*, 109 F.3d 1358, 1364 (9th Cir. 1996) (noting that court considered testimony of attorney expert witnesses).

[1] Unlike all other civil proceedings, a PRP petitioner may not conduct discovery unless and until the appellate court transfers the case to the superior court for a reference hearing. *See* RAP 16.12. Here, as discussed below, many of the key witnesses have refused to cooperate with Petitioner's counsel.

B. THE STATE HAS FAILED TO RAISE ANY MATERIAL ISSUE OF DISPUTED FACT

The *Rice* Court also set forth a clear directive to the State if it intends to controvert any of the Petitioner's factual claims:

> Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. 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 886-87 (emphasis added). Here, the State has failed to meet these most-basic requirements.

In response to Claim 1, the State has submitted declarations from two witnesses with knowledge of Petitioner's case: Anna Klein and Gayle Hutton. But these witnesses concede the core facts. Both Klein and Hutton acknowledge that the State presented the motion at issue in an *ex parte* proceeding and without ever providing notice to the defense. In addition, Klein does not dispute Petitioner's contention that the prosecution used the information to complete a background investigation of the potential jurors. Consequently, the Court should find that the State used an *ex parte* process to gain an unfair advantage during Petitioner's trial proceedings.

The State also presents a declaration from a prosecuting attorney, James Smith, who has no knowledge of the *Gensitskiy* case. Even so, the State asks this Court to accept Smith's proclamation that "criminal defense attorneys in Clark County are aware of the process to view jury questionnaires." *Smith Dec.* ¶ *4*. Yet Smith is not a criminal defense attorney and his self-serving contention is little more than rank speculation. *See, e.g., Rice*, 118 Wn.2d at 886 (factual allegations must be based on "more than speculation, conjecture, or inadmissible hearsay"); *Winkler v. Giddings*, 146 Wn.App. 387, 393 (2008) ("expert testimony must be based upon the facts of the case and not speculation"). The Court should strike the Smith declaration in its entirety.[2]

Apparently, the State would now hope to justify its conduct by claiming that some amorphous and ill-defined group of defense attorneys are "aware" that Clark County's prosecutors present *ex parte* requests like this prior to trial. But the State has failed to present any admissible evidence that would support such a finding. For example, the State has failed to offer evidence from a single defense attorney. And what Smith has presented, a motion *in limine* that was actually submitted by a defense attorney undermines the State's position.

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[2] The Court should also strike the portion of Klein's declaration that contains a similar assertion. *See Klein Dec.* ¶ *3*

When examining this threshold question, this Court must treat Petitioner's factual allegations as true. *See, e.g., Lewis v. Bours,* 119 Wn.2d 667, 670 (1992). Moreover, it is undisputed that neither the Petitioner nor his counsel ever received notice of the State's *ex parte* communications with Superior Court Judge Stahnke.[3]

As to Claims 2 and 3, the State has failed to present any competent evidence. Rather, the State has offered nothing more than speculation and argument in response to Petitioner's claims of ineffective counsel.

C. SEVERAL WITNESSES, INCLUDING ALL OF THE STATE'S WITNESSES, HAVE REFUSED TO COOPERATE IN THESE PROCEEDINGS

Before filing this PRP, Petitioner's counsel did everything in his power to investigate this case. Unfortunately, Petitioner received only meager cooperation from trial counsel. *See Maybrown Supp. Dec.* ¶¶ *7-9.* Trial counsel steadfastly refused to turn over Mr. Gensitskiy's file until he was directed to do so by a representative of the WSBA. *See id.* ¶ *8.* Later, after numerous requests, trial counsel did confirm what seemed obvious from the record: that he had no knowledge that the State had presented an

[3] The State has submitted pleadings from another (and unrelated) personal restraint case in an attempt to challenge the credibility of Petitioner's trial attorney, Charles Buckley, Jr. The State would seem to argue that the claims in Buckley's declaration are not worthy of belief in light of his representations in that separated, unrelated case. *See* Response at 6-7. The State's claim is misguided since there is no real dispute regarding the core facts. Moreover, the State's argument cannot be squared with its claim that Petitioner should have presented a more-detailed submission from the trial attorney. *See* Response at 37, 41.

ex parte motion to obtain the jury book before trial. *See id.* Trial counsel never agreed to discuss the details of his representation and Petitioner was unable to obtain further information – no less a declaration – regarding his handling of this case. *See id. ¶ 10.* However, as new counsel has explained, there is nothing in trial counsel's files that would indicate he made any strategic decision regarding these matters. *See id.*

Petitioner faced similar difficulties when attempting to investigate all that was presented by the State's witnesses. After receiving the State's Response, counsel sent a letter to the State's witnesses (via their attorney) and requested an opportunity to speak with them regarding their claims in this case. *See id. ¶ 11* and *App. A.* The State failed to provide any response to this request. *See id.* Moreover, Petitioner's counsel made a similar request to Judge Stahnke. *See id.* and *App. B.* Likewise, the judge failed to respond to this request.

In arguing this case, the State has failed to provide any response to the most fundamental question: Why would the prosecutor present this motion in an *ex parte* manner, without providing any notice to the defense, if there was no attempt to hide her intentions? Given this record and the State's failure to provide any response, the Court should conclude that the State's conduct was calculated to facilitate its clandestine investigation of

the potential jurors before trial.[4] At a minimum, the Court should allow Petitioner an opportunity to conduct discovery (and a hearing) regarding this claim.

D. THE STATE HAS OFFERED NO LEGITIMATE JUSTIFICATION FOR ITS *EX PARTE* MOTION TO JUDGE STAHNKE

1. Introduction

The State acknowledges that it presented an *ex parte* motion to Judge Stahnke, even though he was not the assigned trial judge, to obtain a copy of the jury book in advance of trial without providing notice to the defense. The State can point to nothing that would authorize its behavior. In fact, this type of conduct has been condemned as a violation of ethical rules and contrary to fundamental fairness. *See generally* John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer* 634 (1996) (emphasizing that an attorney may not submit an order for the court's signature without sending it to opposing counsel). *See also In re Carmick*, 146 Wn.2d 582 (2002) (ethics rules violated where lawyer suggests that opposing counsel was aware of proposed Order); *In re Judd*, 629 P.2d 435 (Utah 1981) (ethics rules violated where counsel failed to send Order to opposing counsel).

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[4] Here, Anna Klein made a premeditated decision not to present the motion in open court on July 25, 2011, so that she could obtain the Order via an *ex parte* proceeding later that same day. The only reasonable inference is that the prosecutor engaged in gamesmanship to conceal this conduct from Petitioner and his attorney.

Nevertheless, relying upon a defense that amounts to *argumentum ad antiquitatem* – the logical fallacy that a practice is acceptable because it's always been done that way – the State claims (without supporting evidence) that this type of motion is "common" and "routine" in Clark County. The State's repeated incantation does not legitimize the unlawful conduct. At its core, the State does little more than acknowledge that Clark County prosecutors engage in this sort of conduct because they are able to get away with it.

The State relies exclusively upon the misguided notion that its conduct might be permitted by a local civil rule (identified as Clark County Local Civil Rule "LCR" 47). First, LCR 47 does not authorize this practice. Second, the State's reading of LCR 47 cannot be squared with basic notions of fairness and due process. Third, the State can point to nothing within the rule that would allow for the presentation of an *ex parte* motion during a closed court proceeding in a criminal case.

2. LCR 47 Does Not Authorize this Type of Conduct

The State relies heavily, almost exclusively, upon LCR 47 to justify its behavior in this case. *See Response at 14-24.* Yet the argument is illusory.

As a threshold matter, the State repeatedly describes the rule as "Local Rule 47," but fails to point out that it is a local rule for civil cases (and not a rule of general application).[5] Respondent does not suggest how a local ***civil*** rule could apply in the context of a criminal case. Procedural due process in criminal cases is the pinnacle of constitutional due process. *See, e.g.,* Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Imperative Guidelines*, 45 St.Louis U L.J. 303, 391 (2001). By contrast, such rights do not apply in most civil proceedings. *See, e.g., Downey v. Pierce County*, 165 Wn.App. 153, 167 (2011) ("[T]here is no constitutional due process right to appeal in civil cases involving 'only property or financial interests.'").

Moreover, LCR 47 does not create any substantive rights – and it certainly does not establish a procedure for *ex parte* motion practice in criminal cases. Rather, the rule is intended to restrict access to juror questionnaires. There is no reasonable reading of LCR 47 that would permit a litigant to obtain pretrial access to juror questionnaires without providing reasonable notice to opposing counsel.

By its terms, LCR 47 does not allow either party special (or unilateral) access to this juror information – and it certainly does not allow

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[5] This local civil rule is intended to supplement CR 47. There is nothing to suggest that LCR 47 would have any application in a criminal case. Moreover, there is no similar provision within Clark County's local criminal rules.

for an *ex parte* contact with a judge regarding an ongoing criminal proceeding. In fact, this type of *ex parte* contact is strictly prohibited by Judicial Canon 2.9. Such contacts are also outlawed by Clark County Local General Rule 0.4.

As one Washington commentator has recently explained:

> As a general rule, motions must be made on notice, and orders should not be issued on an *ex parte* basis. An exception is made when the parties have joined in the request for relief and there exist no contested issues. The only other time a party should attempt to move ex parte is when a statute or rule ***explicitly*** authorizes such a motion.

Tegland 14A Wash. Pract. § 22.24 (emphasis added). LCR 47 makes no mention of *ex parte* practice – and it certainly does not explicitly (or even implicitly) authorize the presentation of an *ex parte* motion.

LCR 47 seems to include a limited exception that would permit parties in a civil proceeding to gain access to juror information at some point during or after trial. Nothing in the rule suggests that such access is available before trial. Moreover, the rule applies only where the party obtains "express approval of the trial judge." *Id.* Here, the State did not obtain approval from the trial judge. Instead, without justification, the State presented the motion to a judge with no connection to the litigation.

Klein offers up the self-serving assertion that "it is common practice for attorneys to seek an ex parte order from the court allowing

them to review the jury book." *Klein Dec.¶ 3.* The prosecutor cites no authority for such a brazen assertion – and there is nothing in the rules that would allow for the presentation of an *ex parte* motion. Simply put, a defendant would never anticipate that a local civil rule could authorize this sort of conduct. *See Maybrown Supp. Dec. ¶ 6.*

The State would like to sweep its conduct under the rug by relying upon a speculative (and unsupported) claim by Smith that "criminal defense attorneys in Clark County are aware of this process." Smith Dec. ¶ 4. Petitioner questions this bold assertion. *See Maybrown Supp. Dec. ¶ 5.* Notably, Smith does not claim that criminal defense attorneys are aware that some prosecutors choose to present **an *ex parte* motion** to the Court. Nor does Smith claim – or even suggest – that the State should be permitted to engage in this practice without giving notice to the defense.

Even Smith does not claim that this type of *ex parte* practice is authorized by any court rule or case authority. He simply asserts that he is "aware" of situations in which the Court has authorized defense counsel to have access to jury questionnaires. In making this representation, Smith seems to concede that such requests were ***not*** presented in an *ex parte* manner. Rather, they were made in open court – via a written or oral motion to the trial judge.

By way of example, the State now points to a single case in which a criminal defense attorney (Matthew Hoff) submitted a request for pretrial access to the juror questionnaires by way of a motion *in limine*. *See Response App. C*. Again, this request was not made in an *ex parte* manner – it was presented by motion, with notice to the prosecutor, and so it could be argued in open court. Also, Hoff did not even suggest that such a motion could be supported by LCR 47. Rather, he argued that access was required to protect the defendant's "Constitutional rights to a fair trial and due process of law." *Id.*

Unlike the prosecutor in this case, Hoff presented this motion in open court and with notice to the opposing party. This evidence, in itself, severely undermines the State's claims. Apparently, this defense attorney does not believe that he can obtain this type of information by filing a secret (or *ex parte*) motion in the Superior Court.

The State has asked the Court to ignore the declaration of undersigned counsel because he does not "regularly" try cases in Clark County. *See Response at 8*.[6] Yet, as noted in a supplemental declaration, Mr. Maybrown has tried cases in Clark County and he tried a similar sexual assault case in October 2014. Although Mr. Maybrown consulted with experienced local practitioners before that trial commenced, he was

[6] In making this argument, the State seems to believe that due process principles are applied differently in Clark County than in any other county in Washington.

never advised that the Clark County prosecutor might attempt to present an *ex parte* Order that would permit unilateral access to the jury questionnaires before trial. *See Maybrown Supp. Dec. ¶ 5.*

The State makes a half-hearted effort to rationalize the prosecutor's behavior by noting that indigent defendants are permitted to make *ex parte* applications in criminal cases. *See Response at 17.* This is a foolhardy comparison, for that practice is necessary to protect the defendant's constitutional rights. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1984); *State v. Punsalan*, 156 Wn.2d 875 (2006)). *See also Yakima v. Yakima Herald*, 170 Wn.2d 775, 794 (2011). Accordingly, this *ex parte* practice is explicitly authorized by statute and the criminal rule. *See* RCW 10.101.060; CrR 3.1(f). Such a procedure is also necessary in light of RPC 1.6. *See Comments to CR 3.1(f)* ("Since a showing of need requires disclosure of defense theory or, at least, of defense tactics, there could be no justification for such disclosure becoming an automatic discovery device for the prosecution solely because of the defendant's indigency.") There is no comparable authority for the prosecutor's behavior in this case.

Finally, the State proclaims, again without citation to any authority, that the entry of Judge Stahnke's Order was a "ministerial" act. *See Response at 17.* But a ministerial act involves no discretion – it is

defined as a "mandatory and imperative" duty. *See Burg v. City of Seattle*, 32 Wn.App. 286, 290-91 (1982) (citing authorities). LCR 47 expressly provides that, in most instances, the Superior Court Administrator may ***not*** release jury questionnaires to any party. While the rule seems to authorize the trial judge to exercise discretion, it does not create or impose a "mandatory and imperative" duty in any respect.[7]

The Court should take note of all that is missing from Respondent's submissions. The State offers no explanation for the presentation of this motion in chambers and in a closed court proceeding. The State offers no explanation for the failure to consult with defense counsel regarding these matters. And the State offers no explanation – and certainly no justification – for the failure to provide a copy of the motion and order to defense counsel. The State's conduct can only be described as a surreptitious effort to gain an advantage in this litigation.

3. A Local Civil Rule Cannot Be Used as a Ruse to Usurp Constitutional Protections

Local procedural rules may not be applied where they are in derogation of other laws and constitutional protections. *See, e.g., Harbor Enters., Inc. v. Gudjonsson,* 116 Wn.2d 283, 293 (1991); *Perez v. Garcia*, 148 Wn.App. 131, 140 (2009). *Accord Somlyo v. J. Lu-Rob Enter., Inc.*,

[7] If this rule was to create a mandatory duty, it might say something like: "The Superior Court Administrator is directed to permit all parties full and unfettered access to all juror questionnaires."

932 F.2d 1043, 1046 (2d Cir. 1991) ("Local Rules have the force of law, ..., to the extent that they do not conflict with rules prescribed by the Supreme Court, Acts of Congress, or the Constitution. . . ."). Even the Clark County rules provide in the preamble: "These rules are supplemental to the State rules and are not to be construed in derogation thereof." Clark County Local Rules - Scope of Rules.

In *City of Seattle v. Williams*, 101 Wn.2d 445 (1984), for example, the prosecutor sought to enforce a local rule which explicitly stated that the defendant would waive his right to jury if he failed to file a prompt written demand for a jury trial. The court found the rule invalid, noting that it had invalidated similar local rules which allow waiver of the jury trial right from a silent record. A prosecutor cannot rely upon a local rule insofar as it undermines rights that are mandated by the constitution, statute or state rule. *See id.* at 451.

The State now asks this Court to interpret LCR 47 in a manner that conflicts with basic notions of due process. The Court must reject this invitation – particularly insofar as the State's interpretation runs counter to Washington Const. Art. I, § 10. *See. e.g., State v. Chen*, 178 Wn.2d 350, 355-56 (2013) (statute that limits dissemination of competency report cannot overcome constitutional provision that demands openness).

4. **The Defendant Did Not Waive His Right to Be Present**

Every defendant has a due process right to be present where his presence has a reasonably substantial relation to his opportunity to defend against the charge. *See United States v. Gagnon*, 470 U.S. 522, 526 (1985). The Washington Constitution explicitly guarantees such a right. *See* Wash. Const. Art. I, § 22. Here, Petitioner was not present when the prosecutor presented, and Judge Stahnke considered, the State's motion for special access to the jury book. As Petitioner has explained:

> If I had known that the prosecutor intended to obtain the juror list before trial, I would have insisted that my lawyer obtain the same opportunity before trial. But, I was never given any chance to make this request since no one ever told me that the prosecutor was doing this.

Gensitskiy Dec. ¶ 8.

The Washington Supreme Court has previously held:

> For over a century it has been recognized that "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale,* 68 U.S. 223, 233(1864). The fundamental requisites of due process are "the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), and "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Thus, "at a minimum" the due process clause of the Fourteenth Amendment demands that a deprivation of life, liberty or property be preceded by "notice and opportunity for hearing appropriate to the nature of the case." *Mullane*, at 313. Moreover, this

> opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Olympic Forest Prod., Inc. v. Chaussee Corp., 82 Wn.2d 418, 422, 511 (1973).

The State argues that Petitioner had no right to be present during the presentation of the State's motion for pretrial access to the jury book. The State would seem to claim that this motion is unlike all other motions. Yet, in truth, it is no different than a garden-variety pretrial motion (akin to a motion *in limine*) and such motions may not be considered in an *ex parte* proceeding.

Recently, the Washington Supreme Court emphasized that every criminal defendant has a right to be present during all aspects of the jury selection process. *See. e.g., State v. Slert*, 186 Wn.2d 486 (2016). Yet, in a curious bit of sleight of hand, the State argues that the viewing of the jury book was not a part of the trial proceedings. *See Response at 23-24*. This argument misses the point, for the question is not whether the defendant has a right to be present when the prosecutor ***reviews the juror book***. The question revolves around the ***presentation and consideration of the pretrial motion that granted the prosecutor special access to the jury book***. The State has offered nothing to suggest that a prosecutor is

free to litigate such a motion in a secret proceeding and outside the presence of the defendant.

5. The State's Pretrial Motion Should Not Have Been Considered in a Closed (Or "In Chambers") Proceeding

More than a decade ago, the Washington Supreme Court explained that the public right to trial "extends to pretrial proceedings." *State v. Easterling*, 157 Wn.2d 174 (2006). Division One has identified a variety of activities a judge may conduct in chambers, including the consideration of an "agreed order," without violating this mandate. *See In re Detention of Ticeson*, 159 Wn.App. 374, 386 (2011). Here, the State did not present an "agreed order," and it can point to no case which would permit the presentation of a pretrial motion in a closed proceeding where the motion is for the unilateral benefit of the prosecution (or, as here, where the defense has no notice of the motion or its presentation).

While the right to open judicial proceedings protects an important public interest – it is also necessary to protect the rights of the litigants in the case. *See, e.g., State v. Brightman,* 155 Wn.2d 506, 514 (2005). This constitutional provision would serve no purpose if a litigant, such as the Prosecutor in this instance, could claim an unfettered right to present its motions in a closed proceeding and without ever providing notice to the defense.

6. The *Ex Parte* Communications Amounted to a Structural-Type Error

Petitioner has argued that the errors in this case are "structural" in nature. The State did not respond to this argument. Instead, it now claims (in a single sentence) that Petitioner has not demonstrated "substantial prejudice" in this proceeding. *See Response at 24.*

Petitioner will not repeat the arguments from his Opening Brief. *See Opening Brief* at 27-30. However, as noted by a long-time prosecutor, the prosecutor in this case used an *ex parte* process to obtain an "unfair advantage during the *Gensitskiy* proceedings." *Corey Dec.* ¶ 27. With this information in hand, the State was afforded a unilateral opportunity to conduct an investigation – and to ask law enforcement officers to conduct an investigation – of the prospective jurors. *See id.* ¶¶ *23-31.*

E. THE PRESUMPTION OF TRIAL COUNSEL'S COMPETENCY IS OVERCOME BY UNREBUTTED EVIDENCE OF DEFICIENCY

Petitioner is familiar with the "presumption" that defense counsel's conduct is usually competent. *See Response at 29-30.* "However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130 (2004)). "[S]trategy must be based on reasoned decision-making." *In re Hubert*, 138 Wn.App. 924, 928 (2007)

(trial counsel's failure to request a necessary jury instruction demonstrated both deficient performance and prejudice).

A reviewing court is not at liberty to "indulge '*post hoc* rationalization' for counsel's decision-making that contradicts the available evidence of counsel's actions." *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (*quoting Wiggins v. Smith*, 539 U.S. 510, 526 (2003)). Rather, the critical question is "whether an attorney's representation amounted to incompetence under 'prevailing professional norms.'" *Id.* at 690. "An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all." *Correll v. Ryan,* 465 F.3d 1006, 1015-16 (9th Cir. 2006).

Petitioner alleges that he was denied his right to effective trial counsel in two separate, but related, respects. First, counsel made no attempt to sever the underlying charges. Second, counsel failed to take any action in response to the improper expert testimony of Erin Haley. The court must accumulate the errors when considering this claim.

1. <u>Failure to File Any Motion to Sever</u>

Brad Meryhew has provided a comprehensive declaration which explains that it is almost always in the accused's interest to seek a separate trial in a case involving multiple allegations of sexual misconduct with multiple victims. *See Meryhew Dec. ¶ 32.* Here, unlike other cases, many

of the allegations were unrelated and subject to severance. *See Opening Brief at 37.*

The State does not strenuously challenge this argument. Instead, it asks this Court to conclude that trial counsel must have made a "reasonable tactical decision" not to seek any severance in this case. *See Response at 41.* Yet the State points to no evidence to support such a claim. "Absent any evidence in the record to support this theory [this court should] decline to speculate about defense counsel's tactical intentions." *State v. Warren*, 55 Wn.App. 645, 654 (1989).

Respondent criticizes Petitioner for not presenting a declaration from trial counsel regarding this matter. *See Response at 41.* However, as explained by newly-retained counsel, trial counsel has refused to discuss the details of his representation. *See Maybrown Supp. Dec. ¶¶ 7-9.* This is not too surprising, as many trial attorneys are reluctant to participate in an investigation of their own professional conduct.

Respondent also criticizes Petitioner for failing to provide his own declaration regarding this matter. *See Response at 41.* But this was not the defendant's decision to make. Rather, consistent with RPC 1.2, the decision whether to seek a severance is one of those matters that is delegated to the sound judgment of trial counsel. *See, e.g., State v. Sutherby*, 165 Wn.2d 870, 884-85 (2009) ("The record in this case reflects

no legitimate strategic of tactical reason for Sutherby's counsel's failure to move for a severance."). *See also People v. Lewis*, 609 N.E.2d 673 (Ill. 1992); *Hills v. Florida*, 78 So.3d 648 (Fl. 2012); *Yecovenko v. State*, 173 P.3d 684 (2007).

2. Failure to Take any Action in Response to the Improper Testimony of Erin Haley

This was a classic "he said/she said" case – where there was no evidence other than C.S.G.'s testimony in support of the charged offenses. In an effort to buttress these claims, the State presented the expert testimony of Erin Haley. Not only did Haley testify at great lengths about her belief that C.S.G. was suffering from PTSD, she also claimed that the syndrome was caused by sexual assaults committed by this Petitioner. To make certain that no one could miss the point – and that she had (somehow) confirmed the veracity of C.S.G.'s claims – Haley told the jury that C.S.G. had a "diagnosis of sexual abuse of a child." RP 287. As if this was not enough, the State chose to emphasize this improper testimony at the close of the case where the prosecutor made the following arguments to the jury:

- You heard that she's been diagnosed with posttraumatic stress disorder. That corroborates what she's saying. *See* RP 1285.

- You've heard from [C.S.G.'s] therapist, who testified that [C.S.G.'s] been diagnosed with posttraumatic stress disorder. *See* RP 1333.

- And you heard it from the witness stand, you saw it in the emotion expressed by [C.S.G.], you should know it by the corroboration. As far as the feelings that she's had, the PTSD, all of that speaks to its truth. *See* RP 1340.

Numerous courts have reversed convictions where the State has presented similar (but less egregious) testimony regarding "syndrome evidence" since it is indistinguishable from an opinion that the alleged victim had, in fact, suffered a rape or sexual assault. *See Opening Brief at 38-40 (citing cases)*. And Division II considered a nearly identical issue in *State v. Florczak*, 76 Wn.App. 55 (1994). There, in reversing the defendant's conviction, the court concluded that the presentation of this sort of testimony was not merely an evidentiary error. Instead, it amounted to a violation of the constitution. *See id.* at 74.

Initially, the State attempts to downplay this situation by arguing that Haley's diagnosis was "unobjectionable" and that her testimony was "proper and admissible." *See Response at 35-36, 39*. But this argument flies in the face of *Florczak*. There, the court found that an even milder form of testimony – where the expert witness claimed that the PTSD is "consistent with a child who has suffered sexual abuse" – amounted to constitutional error. And here, unlike *Florczak*, the prosecutor argued to

the jury that this syndrome evidence was proof positive of C.S.G.'s veracity.

At other points in its Response, the State seems to concede that this testimony was objectionable. *See Response at 35-36.* Undaunted, the State posits a fantastical claim that trial counsel might not have objected to this testimony "to bolster his theory of the case." *Id. at 35.* But there is no evidence to support the State's argument and any such strategy would not be reasonable. Rather, as was aptly noted by Meryhew:

> It is hard . . . to fathom testimony that could be more inflammatory – and more prejudicial – than this expert's testimony to the effect that Mr. Gensitskiy had sexually abused C.S.G. and that this abuse had caused her to suffer from a severe psychiatric condition (posttraumatic stress disorder).

Meryhew Dec. ¶ 48.

Changing course, the State claims that Haley's testimony was of little significance in this case and contends it was "brief and harmless." *See Response at 35.* But if this was true, why did the prosecutor repeatedly emphasize the PTSD diagnosis during closing argument? In fact, recognizing the power of this evidence, the prosecutor exhorted the jury to accept Haley's testimony – claiming that her diagnosis, in itself, "corroborates what [C.S.G.'s] saying" – and to convict Petitioner of these offenses.

In a case such as this one – where there was no corroborating evidence,[8] where there is a significant delay in reporting, and where the defendant made a consistent and forceful denial – any competent attorney would have recognized that Haley's testimony was exceptionally prejudicial. The prosecution cannot seriously claim that the untainted evidence in this case was "overwhelming," or even particularly "strong."

F. THE STATE HAS FAILED TO PROVIDE A MEANINGFUL RESPONSE TO PETITIONER'S CLAIM OF INEFFECTIVE APPELLATE COUNSEL

Petitioner's appellate counsel, Lenell Nussbaum, has conceded that she (1) failed to raise any claim regarding the *ex parte* motion and order and (2) overlooked any issues regarding Haley's testimony as she was not familiar with the *Florczak* case. *See Nussbaum Dec.* ¶¶ 6-8. The State would like to distort the claim by describing it as a contention that "appellate counsel did not raise the lack of objection on appeal." *Id.* at 24 (heading). Petitioner has not asserted such a claim.

A careful review of the State's Response reveals that it has failed to provide any meaningful response to Claim 3.[9] Relief should be granted for this reason alone.

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[8] The State assert that C.S.G.'s testimony was somehow corroborated by her siblings' testimony. *See Response at 37.* Yet, in fact, two of the siblings testified that the claims against their father had been manufactured and fabricated. And, ultimately, the only convictions that survived appellate review were based upon the claims of C.S.G.

[9] Respondent addresses this claim in a single sentence. *See Response at 39.*

In Washington, a reference hearing must be ordered if the pleadings raise a *prima facie* claim of constitutional error which cannot be resolved on the existing record. *See* RAP 16.11(b); *In re PRP of Williams*, 111 Wn.2d 353, 365 (1988). The Washington Supreme Court has compared review of the factual support for a PRP to ruling on a motion for summary judgment. *See State v. Harris,* 114 Wn.2d 419, 435-36 (1990) (comparing PRP review to that of civil summary judgment and claims of incompetency to be executed). In other words, the appellate court is required to order a reference hearing if competent evidence is submitted which raises a triable issue.

Here, at bare minimum, this Court must remand the case for a reference hearing under RAP 16.12. Given Petitioner's arguments in Claim 1, any such hearing should be held outside of Clark County.

G. CONCLUSION

For all of these reasons, and in the interests of justice, Petitioner's conviction must be vacated and reversed.

RESPECTFULLY SUBMITTED this 20th day of January, 2017.

Todd Maybrown by Danielle Smith

Todd Maybrown, WSBA #18557

Danielle Smith, WSBA #49165

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

In re the Personal Restraint Petition of SERGEY V. GENSITSKIY, Petitioner.	NO. 49044-7-II DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20th day of January, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

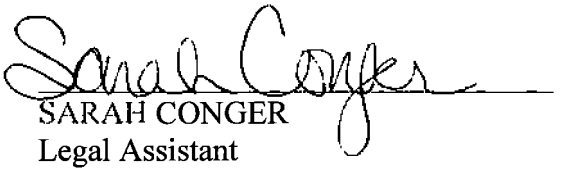
REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Anne Cruser (anne.cruser@clark.wa.gov); Rachael Probstfeld (rachael.probstfeld@clark.wa.gov); Todd Maybrown (todd@ahmlawyers.com); and Danielle Smith (danielle@ahmlawyers.com).

I certify that I sent a copy of the foregoing document to the Petitioner via United States Mail, postage prepaid.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of January, 2017, at Seattle, Washington.



SARAH CONGER
Legal Assistant

ALLEN HANSEN MAYBROWN & OFFENBECHER P.S.

January 20, 2017 - 9:37 AM

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