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No. 51647-1-II
Thurston County Superior Court No.13-1-00914-9

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

IN RE THE PERSONAL RESTRAINT OF
BRIAN COX

REPLY BRIEF

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I. REPLY ARGUMENT

The State filed one count of solicitation to commit first degree murder. The evidence of that crime was not overwhelming. To shore up that count, the State filed a second count of solicitation to commit first degree murder based solely on the testimony of Kenneth Parmley, a jailhouse snitch. To boost Parmley's credibility, advance the State's case on both counts and to undercut Cox's defense to both charges, the State called Thurston County Senior Deputy Prosecutor Mark Thompson.

Both witnesses had to testify truthfully but they did not. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Both Thompson and the trial prosecutor Juris knew the testimony was not truthful or complete. Once the State called both Parmley and Thompson, the state had to provide Cox with any exculpatory evidence in its possession. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2nd 215 (1963). The State failed to do so.

For the first time in this prosecution the State has disclosed an extensive email exchange between Juris, Thompson and Mr. Hack, Parmley's lawyer. These emails are exculpatory and were never provided to Cox or his counsel. Although the State believes these emails and the declarations clear the State of any *Napue* or *Brady* violations, they do not.

They further substantial the violations of Cox's state and federal constitutional rights.

A. COX'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE PROSECUTOR PRESENTED FALSE EVIDENCE.

Thompson's trial testimony was untruthful in two ways.

First Thompson testified that he was the first person advised by the corrections staff that Parmley had information about Cox he wanted to share. RP 462. He said that Parmley had not asked for any consideration in exchange for the information. Id. He said that Parmley's lawyer did not ask for any consideration either. RP 463. Instead Thompson testified that Parmley's lawyer clarified that Parmley just had felt it 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 that Parmley was not provided any consideration. Id.

On July 29, 2013, Thompson wrote Juris and said "if you're needing Parmley's testimony against Brian Cox, you have my authority to offer to plead to (a full) robbery 2nd degree. (not merely attempt) in exchange for his truthful testimony (which will be verified by polygraph etc.) against Cox, which would include a full discussion of his proposed testimony." Thompson also emailed Hack which said he had given Juris the authority to reduce Parmley's charge to second degree robbery.

Only ***after*** recovering that email did Hack email back and tell Thompson that Parmley was willing to "help Craig for zero consideration". Appendix 1 page 3.

The next morning, Juris emailed Thompson and said that despite Hack's email that Parmley would help without consideration, "***somehow I don't believe that***." Appendix 1 page 1 (emphasis added). He added, "***No use selling the farm if we don't need to.***" Id.

The testimony that no offer was made was not truthful. An offer was made, and it was expressly tied to Parmley's testimony against Cox. While Hack confirms the emails and states that "there was no indication that the resolution was in any way conditioned on Parmley's testimony against Brian Cox", the July 29 email contradicts that conclusion. And, tellingly, Hack does *not* state he never told Parmley about the July 29 email. And the State does not include a declaration from Parmley.

Second when cross-examining Thompson defense counsel asked: "So any of the notes or conversations from Mr. Parmley or conversations with Mr. Hack, was it mention that he had hoped, for in for a better deal?" Thompson said "no." RP 464. This statement is demonstrably untrue.

On July 30, Detective Kolb interviewed Parmley. After the interview, she sent an email to Juris & Thompson and said: "***FYI 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 off the streets." Appendix 1 page 7 (Emphasis added). Parmley received exactly 12 months.

The only truthful response to defense counsel question was "yes."

And before his trial testimony Thompson acknowledged that he had offered a deal conditioned on Parmley's testimony. On August 13, 2015, Thompson told Hack that if Juris was still planning to call Parmley, "we can immediately look into wrapping Mr. Parmley's case up." Thompson then states: "***However, despite the information and "timeline noted above, I still believe that Craig would have to disclose to Cox's counsel at least the arguable influence of my case on Mr. Parmley's offered information against Mr. Cox.***" Appendix 2 at 17. Thompson's testimony conflicts with this statement.

The deliberate deception of a court and jurors through the presentation of known false evidence is incompatible with "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935). A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict. *United States v. Bagley*, 473 U.S. 667, 680, n. 9, 105 S. Ct. 3375, 3382, 87 L. Ed. 2d 481 (1985).

The State's evidence on both counts was far from convincing. And, on Count 2, Parmley was the *only* witness. As one Court has observed:

> Criminals caught in our system understand they can mitigate their own problems with the law by becoming a witness against someone else. Some of these informants will stop at nothing to maneuver themselves into a position where they have something to sell.

United States v. Bernal-Obeso, 989 F.2d 331, 334 (9th Cir. 1993).

Had Thompson been truthful in his response, Cox's lawyer could have cross-examined Thompson about the coincidence between Parmley's requested reduction and the sentence he received. Cox's lawyer could also have cross-examined Parmley about what he thought motivated the State's reduction of his charges. This would have supported Cox's defense that Parmley maneuvered himself into a position where he had something to "sell" to the State. Once impeached with this evidence the jury may have decided not to believe Parmley. This created a reasonable likelihood that the false testimony affected the jury's verdict.

B. COX WAS DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BECAUSE THE STATE FAILED TO DISCLOSE MATERIAL IMPEACHMENT EVIDENCE.

The State concedes, as it must, that it must disclose all material exculpatory evidence in its possession. But none of the emails attached to

its Response were disclosed to Cox before trial. The State provides no reason why this evidence – which could have been used to impeach both Thompson and Parmley – was never provided.

Besides the evidence discussed above, the emails also disclose that Parmley told the State on July 1, 2013, that he had information on Cox. Appendix 2, page 11. On Monday, July 29, Thompson "threw out" the reduction to second degree robbery to Hack after a pretrial conference. Appendix 2 page 12. Then, on the July 30, 2013, Thompson emailed the jail stating that he was considering a reduction for Parmley but wanted to know if Parmley would be eligible for "CDP" if the charge were reduced to a second-degree robbery. Thompson noted that he had "cc'd this to Craig Juris and Karl Hack, each of whom has a "passing interest" in the answer to this question as well. Appendix 2 at 9. Had this information been revealed Cox's lawyer have used it to impeach Thompson's testimony that no assistance had been given Parmley.

Thompson testified that 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. But the newly disclosed emails demonstrate on August 13, 2013 Thompson emailed an offer to Hack. Appendix 2 at 16. Thompson again investigated whether he could prove first degree robbery. Contrary to his

later testimony Thompson told Hack: "Again, I am not too worried about the victim's impeachables, in light of the other evidence in this case including your client, on video, trying to hide a BB gun after the alleged robbery attempt." Appendix 2 at 18.

And, as late as August 13, 2013 Thompson emailed Hack and attempted to get him to confirm that he had not shared the offer with Parmley. Appendix 2 at 17. He also said: "I am ***tentatively*** indicating to you that my of 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 ok with this***." As late as August 13, there was still discussion that the plea was premised on Parmley's testimony against Cox. Appendix 2 at 17.

Finally, the emails reveal additional, undisclosed actions by Parmley that called his credibility into question. In August 2013, Parmley was still trying to communicate with Detective Kolbe. He was placed in protective custody and, via his lawyer, asked Thompson if the State could assist him getting out of that restrictive setting. The State also failed to tell the defense it was assisting Parmley in clearing up his Jefferson County warrants. Appendix 2 at 23

During plea negotiations, 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 BW- 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.]

Appendix 2 at 28.

If Parmley's plea deal was implicitly conditioned on his testimony, why was the email sent to Juris? Why is the phrase "no strings attached" in quotation marks? Thompson's suspicions he was being "conned" related to Parmley's credibility. *Benn v. Lambert*, 283 F.3d 1040, 1055 (9th Cir.2002)(reversed when prosecution failed to disclose that an

informant-witness had a history of lying and was viewed by law enforcement as untrustworthy).

Juris's declaration indicates that he did not understand his duty under *Brady.* First, nothing in his declaration explains why he failed to disclose all the emails even though Thompson recognized that the discussion of the plea deal needed to be disclosed to Cox's counsel.

Moreover, Juris states:

> I did not research or review Parmley's outstanding warrant history as I did not believe it was relevant to his testimony or admissible at trial.

Juris Declaration at 3. Prosecutors may not remain willfully blind to avoid their obligations under *Brady*. Once Juris called Parmley he had a duty to investigate and disclose any information held by the jarl, the police and his own office. It was not his job to determine what is relevant or admissible before turning over information about his jailhouse informant. The prosecutor's duty is to turn over all evidence bearing on the credibility of an informant. If there is question about the relevance or admissibility of the evidence, the trial judge resolves the issue.

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

In the United States, 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, 633, 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); and (3) defense counsel to test such evidence with vigorous cross examination, *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) ("Cross examination is the principle means by which the believability of a witness and the truth of his testimony are tested."). 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 the courts have made this choice, relevant evidence bearing on the credibility of an informant must be timely revealed (1) to defense counsel as required 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).

Here the State circumvented all these safeguards by violating its duties under *Brady*. As a result, Cox was deprived of his ability to fully and impeach both Thompson and Parmley.

Had the State complied, the undisclosed *Brady* evidence at issue would have almost completely neutralized Thompson and Parmley's testimony. And, doubt about Count 2, would have undermined Count 1. The State shored up Count 1 by suggesting Cox would have had no motive to solicitate the murder of Lopez-Ortiz unless he had solicited Lopez - Ortiz to kill his wife.

Evidence is material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Cox must show only that the government's evidentiary suppression undermines confidence in the outcome of the trial. Cox has amply demonstrated the suppressed evidence was material and that it undermines the confidence in the outcome of the trial.

C. THIS PETITION IS NOT FRIVOLOUS AND SHOULD BE REFERRED EITHER TO THE TRIAL COURT FOR A REFERENCE HEARING OR TO A FULL PANEL OF THE COURT FOR REVERSAL OF THE CONVICTIONS

The State concedes there is a genuine issue of fact but argues that a reference hearing is unnecessary. Response at 35. When there are disputed issues of fact, this court generally orders a reference hearing for a determination on the merits in superior court. *In Re Reise*, 146 Wn App 772, 780, 192 P. 3rd 949 (2008).

In Cox's view, the *Napue* and *Brady* violations are amply demonstrated by the state's emails and declarations. Cox's convictions should be reversed the matter remanded for new trial.

But missing from the State's response is any declaration from Parmley affirming his trial testimony and disavowing any the connection between the reduction of his charges and his statement to Detective Kolb and his later testimony. There is some indication that Parmley may have something to add to the issues. He called undersigned counsel and said that he had information he wanted to share. See Declaration of Suzanne Lee Elliott. Because Parmley was represented by counsel, I contacted Hack and indicated I wanted to speak to Parmley. I have heard nothing back from either person.

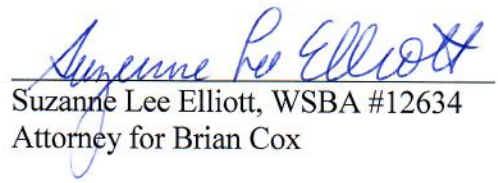
Regrettably, under RAP Title 16, the petitioner does not have the power to conduct a deposition or demand discovery unless this Court remands for an evidentiary hearing. Cox continues to assert that the record demonstrates that Parmley understood he was getting consideration from the State to testify against Cox. It certainly appears that his motivation was never solely to do his civic duty and protect the public. And armed with the emails the State suppressed, his trial counsel could have demonstrated that fact. If this Court determines that an evidentiary hearing is necessary, is should also authorize a deposition of Parmley.

IV. CONCLUSION

This Court should grant Cox's petition, reverse Counts 1 and 2 and remand for a new trial. In the alternative, this Court should remand to the Thurston County Superior Court for an evidentiary hearing.

DATED this 14th day of June 2018.

Respectfully submitted,



Suzanne Lee Elliott, WSBA #12634
Attorney for Brian Cox

CERTIFICATE OF SERVICE

I certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on:

Craig Juris
Thurston County Prosecutor's Office
2000 Lakeridge Dr SW Bldg 2
Olympia, WA 98502-6045
United States
jurisc@co.thurston.wa.us

Brian Glenn Cox #372830
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

6/14/18
Date

Suzanne Lee Elliott

I, Suzanne Lee Elliott, am over the age of 18 and make this declaration from personal knowledge.

1. I am a member of the Washington State Bar Association.

2. I represent Mr. Cox in this appeal.

3. I filed the Personal Restraint Petition on December 19, 2017.

4. On February 15, 2018 this Court sent out its initiation of proceedings letter and instructed the State to respond.

5. Shortly thereafter Mr. Ken Parmley left a message on my office phone asking me to call him because he had information about this case.

6. I immediately contacted the Thurston County Prosecutor Joseph Jackson who stated that he did not know why Mr. Parmley called me.

7. I then contacted Mr. Hack, Mr. Parmley's counsel, and told him that Mr. Parmley had called me and that I wanted to speak to Mr. Parmley with his permission. See attached email. I never received a call back from either Mr. Hack or Mr. Parmley.

8. I have no idea how Mr. Parmley learned of the PRP or my representation of Mr. Cox.

I declare under penalty of perjury under the Laws of Washington that the forgoing is true and correct.

Signed in Seattle this 14th day of June, 2018.

Suzanne Lee Elliott

Suzanne Lee Elliott

Ken Parmley

Suzanne Elliott

Tue 3/20/2018 3:00 PM

Sent Items

To:karl-hack@comcast.net <karl-hack@comcast.net>;

I would very much like to hear what Mr. Parmley has to say. He left me a number 1-360-789-8135. I am happy to participate in a conference call with you and him. I am available anytime this week except Thursday morning.

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LAW OFFICE OF SUZANNE LEE ELLIOTT

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