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No. 52216-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
D'MARCUS GEORGE,

Petitioner.

PETITIONER'S REPLY

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Petitioner

RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, PMB# 176
Seattle, Washington 98115
(206) 782-3353

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A. ARGUMENT IN REPLY

1. THE COURT SHOULD ACCEPT THE STATE'S
CONCESSION

To be entitled to relief under RAP 16.4(b) and the additional court-ordered “threshold” requirements imposed by the state’s highest court, Mr. George has to show by a preponderance of the evidence that he is suffering restraint and the restraint is unlawful. RAP 16.3(b); In re Personal Restraint of Cook, 114 Wn.2d 802, 792 P.2d 506 (1990). The state has conceded that Mr. George is suffering “restraint” as that term is defined for this case. See Brief of Respondent (hereinafter “BOR”), at 2. This Court should accept that concession.

2. THE INTERVENING SUPREME COURT DECISION IN
LIGHT-ROTH CONTROLS ON THE SENTENCING
ISSUE AS PRESENTED

In his Personal Restraint Petition (“PRP”), Mr. George raised, *inter alia*, a challenge to the Court’s failure to apply State v. O’Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), to his direct appeal. PRP Brief at 31-50. More specifically, he argued that O’Dell represented a significant change in the law which should have been applied to his case under In re the Personal Restraint of St. Pierre, 118 Wn.2d 321, 823 P.3d 492 (1992). PRP Brief at 7, 31-50.

Shortly after the PRP was filed, however, the state Supreme Court issued its decision in In re the Personal Restraint of Light-Roth, 191 Wn.2d 328, 442 P.3d 444 (2018). In Light-Roth, the Court held that O'Dell was not a significant change in the law. Light-Roth, 191 Wn.2d at 328-30.

The arguments Petitioner made before the Supreme Court's decision in Light-Roth depended upon the theory that O'Dell was a significant change in the law. PRP Brief at 31-50. The state is correct in so noting. See Brief of Respondent ("BOR") at 9.

Petitioner thus respectfully withdraws those portions of the PRP regarding the failure to apply O'Dell to his case on appeal. Those arguments are contained in Issue 2 on pages 7-8, and at argument pages 31-50.

3. THE RESTRAINT IS UNLAWFUL AND THE STATE'S CLAIMS TO THE CONTRARY SHOULD BE REJECTED

Mr. George also argued that the restraint he is suffering is unlawful under RAP 16.4(c), because the conviction was the result of a trial at which he was denied his Fourteenth Amendment and Article 1, § 22, due process rights to a fundamentally fair proceeding and to having the state bear the full weight of its constitutionally mandated burden of proof. PRP Brief at 21-31.

Several of the claims made by the state in response are easily disposed of by the arguments in Mr. George's briefing and thus need not be addressed here. But several others require reply. The state attempts to gloss over the impact of its misconduct and submits arguments which depend either on misstatements of the arguments or the record. This Court should reject each of the state's claims in turn.

First, the state attempts to recast the issues regarding its own misconduct when it claims that George was properly "impeached" at his *second* trial by his failure to present certain "self-defense" evidence at his *first*. BOR at 4-5. According to the state, George "unambiguously presented a claim of self-defense at his first trial" by testimony he gave, so he was certainly "motivated" to present all the self-defense evidence he could. BOR at 4. As a result, the state suggests, it was not "unfair to allow petitioner's own testimony in that first trial to be used to impeach him in his second[.]" BOR at 3-4.

Mr. George's "motivations," however, are not what kept him from testifying and introducing evidence to support his claim of self-defense at the first trial. Instead, it was the state.

Over and over, the state objected to George's efforts to introduce evidence and testimony in support of his defense at the first trial. The state objected pretrial when George noted his intent to rely on self-defense. State v. George, 161 Wn. App. 86, 87-88, 249 P.3d 202, review denied, 172 Wn.2d 1007 (2011). It objected throughout George's testimony. It prevented him from testifying or that he thought Clark was armed because the blow George felt to his head was so hard it felt like Clark had hit him "with something." 2009 RP 1287-88, 1293. It objected when George tried to testify that Clark's lack of fear when he saw George's gun made George sure Clark "had one of his own." 2009 RP 1235. It objected and had stricken when counsel talked about George's fear of the seriousness of the altercation involving McGrew, and what Clark said to George as Clark approached. 2009 RP 1235. And it explicitly objected when George tried to testify on redirect about his perceived fears that he "knew somebody" had a weapon (stricken as "speculative"), or whether he felt someone was armed ("irrelevant and speculative"). 2009 RP 1339.

Thus, throughout the first trial, when George tried to establish facts relating to his fears and the reasons he thought Clark

had a gun, the state objected and had the relevant answers stricken.

Indeed, the state objected to George's efforts to admit evidence relevant to self-defense at the first trial *on the grounds that the evidence was irrelevant until self-defense was properly raised*. See RP 1181 ("until we have a basis for self-defense to be presented in this case, *this is not relevant information*") (emphasis added). The state claimed at the first trial that George had to testify in order to raise self-defense and that, until George had done so and claimed self-defense, George could not testify about evidence of having concerns for his safety when with McGrew or knew people like Clark were looking for McGrew because of their belief McGrew had been involved in the recent shooting:

if we're heading towards self-defense here, [George] needs to explain the situation and then explain why - - what was going on in his head at the time, and then maybe we will have some relevance; **but at this point in time, until there's been a foundation laid for a self-defense claim, this is not relevant.**

2009 RP 1182 (emphasis added). And the judge ruled on that basis, saying that evidence was *not* admissible until the defendant provided more support for "a self-defense claim." 2009 RP 1182-83.

The evidence excluded at the first trial thus explicitly included evidence which both the court and state admitted *would have been*

relevant to a claim of self-defense, but which the trial court excluded on the erroneous belief that George had insufficiently shown he was entitled to raise self-defense. See George, 161 Wn. App. at 87-88.

The state's success in preventing Mr. George from introducing testimony and evidence to support self-defense at the first trial occurred not just when George himself was on the stand, but with other witnesses, too. See 2009 RP 978, 983-84, 1013 (David Moore, who was at the Shell at time of the incident at the pumps in his van and saw the incident; objections about what it looked like Clark was doing, if he was acting aggressively, etc.); RP 1092 (Ms. Smith, trying to ask if Clark was scary as he approached).

In its response, the state glosses over all of its efforts to prevent George from fully exploring self-defense at his first trial. BOR at 5. In fact, it claims that these efforts have "no relevance" here. BOR at 5. The state's theory is that, because George was allowed to introduce evidence of self defense at his second trial, he could have also introduced evidence to "explain his failure to mention the firearm" at the first. BOR at 5.

But George did not "fail" to mention that he thought Clark was armed at the first trial. He tried to testify about it again and

again. 2009 RP 1224, 1234-35, 1287-99, 1293, 1339. It was only the state's repeated objections and striking of the testimony which precluded further development of that evidence.

Further, the state's claims that there was no "relevance" to its successful exclusion of and objection to self-defense evidence at the first trial depend on ignoring the state's *own* arguments below. At the second trial, the state did not act as if the first trial evidence "irrelevant;" it argued that the evidence was *dispositive*. See 9/2VRP at 91-92.

The very same prosecutors who had won and prevented the evidence and testimony at the first trial used that success as a sword against George at the second. Repeatedly, in questioning George and in closing the prosecutor told the second-trial jurors that George's testimony at the first trial was "not self-defense" and that George had never mentioned a gun at the first trial. 9/2VRP at 91-93 (PRP Brief App. C). The prosecutor further repeatedly suggested that jurors should find the claim of self-defense was not credible because George had not really raised it at the first trial. 9/2VRP at 88-89.

Not only that, the prosecutor first set up the straw man claim that George had never mentioned a gun in the first trial, then used

that “failure” as evidence of George’s guilt. In closing at the second trial, the prosecutor told jurors George had been “under oath” in 2009, had “understood how serious it was” that he was accused, and had known then how important it was “to fully articulate everything that had happened that day,” but had “left out that the victim had a gun, the most important fact.” 9/2RP 88-89. The prosecutor also told jurors that George had understood at his first trial “the need to explain here’s why I murdered this man” at the first trial but had still not mentioned Clark having a gun. 9/2RP 88-89. And the prosecutor told jurors at the second trial that George was fundamentally changing his story of what happened by injecting evidence of a gun “for the first time in 2014,” even though it was the same prosecutor who had objected whenever George had tried to introduce evidence that he thought Clark had a gun at the first trial. See id.

It was George’s “failure” to “fully articulate everything that happened that day” at the first trial which the state claimed at the second trial rendered George’s entire defense of self-defense not credible. Id. Even though the state was the reason the evidence was not developed at the first trial, the state told jurors at the second

that, “in 2009 his testimony was not self-defense,” even projecting those words as part of the state’s “Powerpoint” media presentation in closing. See PRP Brief App. A.

With self-defense as the *only* issue, the prosecutor told jurors that George had never mentioned a gun when he testified in 2009 but was only at the second trial saying, “I perceived a gun.” 25RP 175. Indeed, the prosecutor told jurors that these differences were such that George was “either. . .lying in 2009 or he’s lying now,” after which the prosecutor declared, “and I submit to you he’s lying now.” 25RP 175.

The prosecutors who made these arguments were present at the first trial. They thus knew that George had testified at that trial that 1) he thought Clark was armed because he must have hit George “with something” as the hit George felt was so hard, 2) that Clark had acted to George like he had “no fear” which made George think Clark himself had a gun, 3) that George did not see a gun but “knew somebody had something,” and 4) that he was concerned that Clark possibly had a gun. 2009 RP 1224, 1234-35, 1287-88, 1293, 1235, 1339, 1342-43.

Thus, the prosecutors knew that George *had* mentioned the

possibility of a gun at the prior trial. It was simply not true that he had never mentioned a weapon. Not only did they nevertheless still argue that George had *never* mentioned a gun, they told jurors at the second trial that George had suddenly now fabricated a gun for the second trial only and was thus “lying now.”

On direct appeal this Court dismissed the state’s misstatements as if they were just awkward comments trying to indicate that George’s “testimony in 2009 was insufficient to establish a claim of self-defense.” PRP App. L at 15-16. And it affirmed, despite these comments, despite the theme, despite counsel’s objections below, by recasting the comments as merely inarticulate.

This was in error. The comments misled the jury again and again, arguing that George’s claim of self-defense should be rejected (and he thus should be convicted) based on a false claim that George had never mentioned a weapon at the first trial. This was not just inartful argument that George’s 2009 testimony was insufficient to have established a claim of self-defense. George was precluded from fully expanding on self-defense at the first trial by the state’s own actions.

It is misconduct for a prosecutor to first prevent the accused from presenting evidence, then use that “failure” to argue the defendant is untruthful. State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995). In Kassahun, for example, the accused shot and killed the victim outside a gas station the accused and others owned. He sought to get evidence regarding the alleged victim’s gang membership and activity and that of some of the witnesses, to explain his claim of self-defense, but the trial judge excluded all evidence, only allowing Kassahun to say he had a subjective fear that the victim was in a gang. Kassahun’s store was plagued by gangs and his life had been threatened by a gang member recently, and the victim had tried to rob Kassahun’s store just prior to the shooting. 78 Wn. App. at 942.

Kassahun’s story about the shooting changed and witnesses disputed whether Kassahun had hit the victim before the victim attacked Kassahun, but he maintained he had shot the victim in self-defense. In closing, the prosecutor faulted Kassahun for trying to claim there were “lawless gangs taking over and running the show in the parking lot, everywhere, but where was the evidence of that?” 78 Wn. App. at 946-47. The trial court overruled the defense objection.

On review, the court of appeals found the prosecutor had committed misconduct and the trial judge had erred in overruling the objections. 78 Wn. App. at 952.

The Court said,

Having prevailed. . . in its effort to preclude Kassahun from discovering objective evidence of [the victim's] gang membership and gang activities and that of some of the witnesses who were in the parking lot at the time of the shooting, it was misconduct for the prosecutor to imply in argument to the jury that Kassahun was being untruthful because he failed to offer objective evidence to support his belief that his business was being overrun by gangs.

78 Wn. App. at 952.

Just like in Kassahun, here the state first prevented introduction of evidence, then used that success as evidence that the defendant was lying to the jury in order to fabricate a claim of self-defense. This was misconduct. Where, as here, counsel repeatedly objects below, the appellate court must reverse if there is simply a “substantial likelihood” the misconduct affected the verdict. State v. Boehning, 127 Wn. App. 511, 513, 111 P.3d 899 (2005).

There was more than such a likelihood here. Self-defense was the *only* issue at trial. There was no question that George fired the shots that killed Clark. The only issue was whether George had done so in self-defense. Counsel objected contemporaneously, even

asking the trial court to correct the state's misstatements and instruct jurors that George *had* claimed self-defense at the first trial but had been precluded by the state from making a full record. 9/2RP at 88-91. The unpublished decision in this case erred in suggesting that these arguments were somehow inartful and benign reference to the lack of sufficient evidence of self-defense at the prior trial. And of course, the decision did not explain why such argument would be reasonable where, as here, the defendant was precluded from full exposition on self-defense but clearly had tried to mention a belief that Clark had a gun at the first trial, multiple times.

Standing alone, this error supports granting Mr. George relief. He has shown by more than a preponderance of the evidence that he suffered actual and substantial violation of his due process rights to a fundamentally fair trial and to having the state disprove his claim of self-defense, beyond a reasonable doubt. And the ends of justice are not served by allowing an erroneous ruling on serious prosecutorial misconduct to stand.

This was not, however, the only misconduct at the second trial and not the only fundamental error in the unpublished opinion - all of which went directly to the sole issue of self-defense.

One of those issues is not addressed by the state at all. In his PRP, Mr. George argued that the unpublished opinion erred in declaring that it was not improper or a misstatement of the law when the trial prosecutor told jurors George could not establish a claim of self-defense unless Clark had a gun at the time of the shooting. PRP Brief at 28-29. In rebuttal closing argument, the prosecutor first told jurors George was either “lying in 2009 or he’s lying now” and had changed his story to try to show he feared great personal injury in order to now claim self-defense. 25RP 176. The prosecutor then told jurors that “[u]nless you have him [Clark] armed with a gun, you don’t have the risk of severe pain and suffering” required to claim self-defense. *Id.* Counsel’s objection to the “misstatement of the law” was overruled.

Counsel also moved for a mistrial at the close of the case, arguing *inter alia* that the prosecutor had committed serious misconduct by saying the only way George was authorized to use “lethal self-defense” was to prove that Clark had a firearm, but the judge thought the prosecutor had not “intentionally” misstated the law. 25RP 181-83.

In his PRP, Mr. George argued that this was error. He pointed

to this Court's decision in the first appeal which had specifically rejected this theory of the state that George had to prove Clark had a gun or was assaulted in a particularly injurious way in order to use deadly force in self-defense. George, 161 Wn. App. at 97. This was the theory at the first trial which the state had advanced to ensure that George could not raise self defense. See id.

The state's failure to respond to this issue is telling, given that this Court already ruled, in the first appeal, that it was error as a matter of law to say George had to prove Clark had a gun or had severely injured George with the blow to the head for George to claim self-defense. Id. This Court noted that the trial court had erred in holding that George could not raise a claim of self-defense for the shooting unless he could show that Clark's assault caused a risk of severe injury or death or unless George could put a gun in Clark's hand. Id. Instead, this Court held, there did not even have to be a real, actual threat of such harm, "so long as a reasonable person in the defendant's situation could have believed that such threat was present." George, 161 Wn. App. at 97.

Even after this ruling and even after the case being remanded back for a new trial, the state *still* pursued the same claim this Court

had rejected in the first appeal, at the new trial.

In affirming in the unpublished opinion, this Court agreed that “the law does not require George to prove that Clark had a gun in order to establish a self-defense claim[.]” PRP App. L at 16-17. Once again, however, it glossed over the prosecutor’s actual words, assuming that the state had really meant to argue that, under the specific facts of this case, self-defense would not be supported unless Clark had a gun. PRP App. L at 16-17.

But the state had previously argued that self-defense could not exist without Clark having a gun or proof from George of more than just the minor assault by Clark. That is why the state was able to prevent George from instructing the jurors on self-defense at the first trial. In reversing after the first trial and remanding for the second, this Court specifically faulted the trial court for accepting this argument that there had to be a gun or some assault that was itself threatening to life, more than just “a blow that was with sufficient force to cause him to lose consciousness,” for George to be able to claim self-defense:

Imminent threat is not necessarily an immediate threat but instead acknowledges the circumstances “hanging threateningly over one’s head; menacingly near.”

Nor does imminent threat require any actual physical assault, let alone an attempted lethal assault. Here, as the trial court correctly opined, “[Y]ou don’t shoot somebody for hitting you.” Nevertheless, the trial court mischaracterized the situation as it appeared to George, **especially by incorrectly assuming that Clark’s initial physical battery of George offered the only justification for his fear.**

PRP App. L at 13-14 (emphasis added; citations omitted).

The same prosecutors who had convinced the first trial judge that George could only claim self-defense if he proved Clark had a gun or that Clark had assaulted him severely and who *lost* on that argument on appeal made the same arguments at the second trial suggesting the very same theory that this Court had condemned. This Court’s unpublished opinion erred in light of the record, which shows that these were not inartful attempts to refer to the specific evidence in the case but instead arguments that the Court had previously condemned as improper statements of the law.

Again, this misconduct directly impacted the only issue in the case - whether George had shot Clark in self-defense. Both the state and federal due process clauses require the state to bear the burden of disproving self-defense, because it negates an essential element in the case. See State v. Acosta, 101 Wn.2d 612, 615, 683 P.3d 1069 (1984). The state’s failure to dispute that this misconduct occurred

or even address it is akin to an apparent concession. See In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983). Even standing alone, this error would support granting Mr. George's PRP, because it shows by more than a preponderance that George suffered actual and substantial prejudice to his due process rights to a fundamentally fair proceeding. Once again, the state's misconduct went directly to the only issue at trial - whether George shot Clark in self-defense. And once again, the misconduct, glossed over on direct review, relieved the state of its constitutional weight of disproving George's claim of self-defense.

The state admits that the unpublished opinion was "glaringly wrong" in one respect. BOR at 6. The state concedes that the opinion should not have held proper the comment that "we don't care" what George was thinking at the time of the incident on the specific grounds cited. BOR at 6. The unpublished opinion stated that the comment was proper and not misconduct because it just amounted to arguing that "**George failed to prove one component of self-defense, the jury did not need to consider the other component.**" See BOR at 6 (emphasis added); PRP App. L at 15-17.

The state's concession is well taken, because the law is plain.

It is the state, not Mr. George, which bore the burden of disproving self defense, beyond a reasonable doubt. Acosta, 101 Wn.2d at 615. George did not have to “prove” *any* component of self-defense.

The state properly concedes this error but then attempts to cast its argument as proper for a reason the unpublished opinion did not. BOR at 6-7. According to the state, the argument was only “seeking to persuade the jury to apply the objective reasonableness standard to petitioner’s conduct.” BOR at 6-7.

“Objective reasonableness,” however, is not alone the test. Self-defense has both subjective *and* objective components. See State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1994). As a result, it is necessary for a jury to subjectively stand in the defendant’s shoes and view his actions in light of all the facts and circumstances known to him. See State v. Wemer, 170 Wn.2d 333, 337-38, 241 P.3d 310 (2011). Jurors are *required* to determine if the accused had a subjective fear and then, whether that fear was objectively reasonable in light of what the defendant knew and experienced. State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977).

“Restraint” is unlawful and relief is required if a petitioner such as Mr. George shows by a preponderance of the evidence that

he suffered “actual and substantial” prejudice to a constitutional right. RAP 16.4(c); In re the Personal Restraint of Cook, 114 Wn.2d at 805. Mr. George has met this burden. There was no issue that George shot Clark. The only issue was whether he did so in self-defense. It was the state’s constitutional due process burden to disprove self-defense beyond a reasonable doubt and to do so in a fundamentally fair trial. Instead of meeting that burden with actual evidence, the state engaged in misconduct so flagrant that counsel objected and moved for a mistrial again and again.

An issue is not “heard and determined” just because the same ground was determined adversely to the appellant on direct review on the merits if the ends of justice would be served by reaching it. See In re Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984). Here, the ends of justice would be served. Due process requires the state to bear the full burden of proving its entire case beyond a reasonable doubt, and further compels that the state “must disprove self-defense in order to prove that the defendant acted unlawfully,” as a matter of constitutional law. Acosta, 101 Wn.2d at 616.

The prosecution’s misstatements of the evidence and process of the first trial was the foundation of its argument that George had

not acted in self-defense. It misled the jury on the facts. It exploited its own success in excluding evidence at the first trial. And it repeatedly misstated the crucial law of self-defense. This was not inartful errors - this was a theme brought to the courtroom by experienced prosecutors who were trying to “win” a conviction, not ensure that justice was done. The state engaged in this misconduct and emphasized it by projecting a mug shot and emphasis on the claim that George looked “like a monster” in closing to ensure that jurors were fully unable to decide this case fairly and impartially as required.

Mr. George was actually and substantially prejudiced by the unfair trial and the interests of justice support ensuring that only those fairly convicted are subjected to punishment in our state. This Court should find that George has met his burden of proving his case by a preponderance of the evidence, and should reverse and remand for a new trial.

B. CONCLUSION

Mr. George has met the burden of proving that it is more likely than not that he has suffered actual and substantial prejudice to his constitutional rights to a fair trial and to have the state bear the full burden of its constitutional weight to prove its case and disprove self defense, beyond a reasonable doubt. This Court should grant Mr. George relief from the unlawful restraint he is suffering as a result, and should order a new trial.

DATED this 10th day of July, 2019.

Respectfully submitted,



Kathryn Russell Selk, No. 23879
1037 N.E. 65th St. PMB 176
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Reply to opposing counsel at Pierce County Prosecutor's Office via the Court's upload service and caused a true and correct copy of the same to be sent to Petitioner by depositing in U.S. mail, with first-class postage prepaid at the following address: Mr. D'Marcus George, DOC 870911, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 10th day of July, 2019.



KATHRYN RUSSELL SELK, No. 23879
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, #176
Seattle, Washington 98115
(206) 782-3353

RUSSELL SELK LAW OFFICE

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