

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

MICHAEL SUBLETT,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Michael Sublett filed a timely PRP challenging his Thurston County Superior Court judgment of conviction for murder and his subsequent life sentence as a persistent offender. Mr. Sublett raised several challenges to both his conviction and sentence. Where his claims are based on facts not in the trial record, Sublett provided sworn competent, admissible evidence.

In response, the State contests some of Sublett's new evidence, but then ignores the plain language of the rules which require an evidentiary hearing. RAP 16.11.

Mr. Sublett replies to some of the State's arguments and rests on his opening brief for the remaining issues. For those claims where the evidence is uncontested (such as the misconduct during closing), this Court should grant relief. Otherwise, this Court should remand for an evidentiary hearing.

B. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DURING CLOSING MANDATES REVERSAL.
2. MR. SUBLETT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S FLAGRANT MISCONDUCT.

The State argues that the PowerPoint slide in the instant case which superimposed the word "guilty" over an (unadmitted) photo of Mr. Sublett was materially different than the (admitted) photo of a defendant with

“guilty” super-imposed on the defendant’s face three times in *Glasmann*.

The State is wrong.

There are admittedly differences between the misconduct in *Glasmann* and in this case. However, there is no question but that the prosecutor committed misconduct in this case and that the misconduct merits a new trial.

In the case at bar, the prosecutor superimposed the word “guilty” over a photo of Mr. Sublett. Because the photo was not admitted, the judge asked the prosecutor to take it off the screen after showing it. RP 977-78; 1003. However, the trial court did not sustain the defense objection; did not strike the argument; and did not instruct jurors not to consider either the photo or the prosecutor’s argument. *Id.* The prosecutor was simply prevented from indefinitely leaving the photo on the screen. The fact that the prosecutor was limited in the amount of time he was permitted to show a highly improper and highly inflammatory PowerPoint slide does not remove the resulting prejudice.

Likewise, it is true that the prosecutor in *Glasmann* presented additional, improper slides. However, both *Glasmann* and subsequent caselaw make it clear that reversal is warranted based on the “guilty” slide alone. The State inexplicably fails to cite *State v. Hecht*, 179 Wash.App. 497, 319 P.3d 836 (2014), which reversed based solely on a PowerPoint slide that superimposed the word “guilty” over the defendant’s face. The

Court held: “The slides of Hecht's photograph with a large red “GUILTY” printed across his face were at odds with the prosecutor's duty to ensure a fair trial. No legitimate purpose is served by a prosecutor showing the jury a defendant's photograph with the word “GUILTY” superimposed over his face. Such images are the graphic equivalent of shouting “GUILTY. A prosecutor could never shout in closing argument that ‘[the defendant] is guilty, guilty, guilty!’ and it would be highly prejudicial to do so.” *Id.* at 507 (internal quotations removed).

The Court of Appeals continued:

We conclude that the prosecutor's slides undermined Hecht's right to a fair trial by creating the substantial likelihood of a verdict improperly based on passion and prejudice. “The impact of such powerful but unquantifiable material on the jury is exceedingly difficult to assess” but, as in *Glasmann*, we conclude that the misconduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. The prosecutor's misconduct necessitates reversal of both convictions and remand for a new trial.

Id. at 507. Both *Hecht* and *Glasmann* mandate reversal in this remarkably similar case.

2. MR. SUBLETT’S DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN SUBLETT WAS FORCED TO WEAR A SHOCK DEVICE ONLY BECAUSE HE WAS ON TRIAL FOR MURDER.
3. MR. SUBLETT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE SHOCK DEVICE.

The State does not attempt to suggest that a particularized security concern justified the requiring Mr. Sublett to wear a stun-device. Instead,

the State argues that Mr. Sublett has not shown prejudice, asking this Court to entirely discard Mr. Sublett's sworn statement describing the how the stun-device affected and prejudiced him, while utterly failing to present any contesting evidence of its own.

Mr. Sublett is unquestionably a competent witness about his trial experience. Sublett's declaration states: "During the trial, I was almost always in fear of getting shocked. As a result, I was not able to always concentrate on what the witnesses were saying. There were many times that I wanted to tell my attorney something about the witness or to get his attention, but was afraid to because I was afraid it would be misunderstood by the officers. For example, I kept my hands on the table when I wanted to raise my hand to signal my attorney. Mostly, I just sat still and tried not to show emotion." *Declaration of Sublett* attached to PRP.

This declaration describes several types of prejudice. The unwarranted use of a shock device interfered with Sublett's ability to be present—to listen to what the witnesses had to say. It interfered with his right to consult with counsel—both in terms of paying attention to the witnesses and in terms of consulting with counsel for purposes of cross-examination. Finally, it interfered with Mr. Sublett's presentation at trial—resulting in Sublett appearing cold and emotionless, not because he was indifferent to the death of the victim or because he did not care about the trial proceedings—but, as a reasonable strategy to deal with the unjustified

chance that he would receive a debilitating shock simply for trying to participate in his own trial.

Because the State has not disputed the material facts, this Court can grant relief. Otherwise, this Court should remand for an evidentiary hearing.

4. MR. SUBLETT IS ACTUALLY INNOCENT OF THE PERSISTENT OFFENDER FINDING.

Mr. Sublett was convicted in California of two counts of robbery. In his sworn declaration, he states that he was convicted of more serious conduct than he actually committed and that but for his California counsel's deficient advice to plead guilty, there is a reasonable likelihood that Sublett would have been convicted of a less serious crimes—crimes that are not comparable to strikes. According to *In re PRP of Carter*, 172 Wash.2d 917, 263 P.3d 1241 (2011), Sublett is entitled to attack a persistent offender finding by showing that he was factually innocent of the crime of conviction used to support a persistent offender finding.

In response, the State asks this Court for one of the prior convictions to credit the unsworn statements of former defense counsel (who Sublett claims was ineffective) and the remarks of the judge in response to those statements as conclusive proof that Sublett, in fact, used force to obtain the property. As to the other prior conviction, the State simply argues that Sublett's sworn statement should be categorically rejected.

Due process demands more. So, do the court rules. Both demand a hearing where the evidence is contested so that a judge, who hears and sees the witnesses, can make credibility judgments. Both demand an opportunity for discovery; to call witnesses; and to cross-examine.

If this Court does not reverse Mr. Sublett's conviction, it should remand for an evidentiary hearing regarding whether he is "actually innocent" of persistent offender status.

C. CONCLUSION

Based on the above, this Court should either grant Mr. Sublett's PRP or remand for an evidentiary hearing.

DATED this 28^h day of July, 2014.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served opposing counsel with a copy of the attached Reply Brief by electronically filing it and sending a copy to:

PAOAppeals@co.thurston.wa.us

July 28, 2014//Portland, OR

/s/Jeffrey Ellis

ALSEPT & ELLIS LAW OFFICE

July 28, 2014 - 9:51 AM

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