

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

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IN RE THE PERSONAL RESTRAINT PETITION OF:

**JOSE GASTEAZORO-PANIAGUA,**

PETITIONER.

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**REPLY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Jose Gasteazoro-Paniagua filed a first and timely PRP, supporting his extra-record claims of error with sworn statements as required by the court rules and caselaw. In response, the State opposes all of Gasteazoro-Paniagua's claims, disputing most of his sworn, extra-record evidence with its own competing evidence. However, rather than concede that this case should be remanded for an evidentiary hearing, the State asks this Court to dismiss this PRP.

The State's response misunderstands the roll of this court when it evaluates a factual dispute in a PRP. The State argues its new evidence is more persuasive—urging this Court to resolve the many disputed facts in its favor. This Court cannot find the facts. Instead, this Court must remand for an evidentiary hearing.

B. ARGUMENT

Standard of Review

A PRP differs in many respects from an appeal, except that they both start in an appellate court. However, unlike assignments of error in an appeal, claims in a PRP are often based on unadjudicated facts. As a result, when material facts are contested this Court must remand to a trial court for

a hearing. This Court is not free, as the State's response repeatedly suggests to sort through the facts, relying on the some and rejecting others.

In Washington, a PRP is required to contain a description of the evidence upon which the petitioner's claim of unlawful restraint is premised and the evidence proffered to support those allegations. RAP 16.7(a). An evidentiary hearing will be ordered if the pleadings raise a prima facie claim of constitutional error which cannot be resolved on the existing record. RAP 16.11(b); *In re PRP of Williams*, 111 Wash.2d 353, 365, 759 P.2d 436 (1988). Washington courts have three options regarding constitutional issues raised in a personal restraint petition:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;
2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for an evidentiary hearing;
3. If a petitioner makes a prima facie claim of error and the facts are not disputed, the court should grant the PRP without remanding the cause for further hearing.

RAP 16.11(a); RAP 16.12; *In re PRP of Rice*, 118 Wash.2d 876, 828 P.2d 1086 (1992); *In re PRP of Hews*, 99 Wash.2d 80, 88, 660 P.2d 263 (1983). The Washington Supreme Court has compared review of the factual support for a PRP to ruling on a motion for summary judgment. *State v. Harris*, 114 Wash.2d 419, 435-436, 789 P.2d 60 (1990) (describing review

of evidence submitted in support of incompetency to be executed claim and comparing that review to a PRP). In other words, the appellate court is required to order an evidentiary hearing if competent evidence is submitted which raises a triable issue. In determining whether the plaintiff has set forth a prima facie case, the court must treat the allegations as true. *Lewis v. Bours*, 119 Wash.2d 667, 670, 835 P.2d 221 (1992) (describing appellate review of an order granting summary judgment).

Washington appellate courts are not fact-finding courts. See *Ruse v. Dep't of Labor & Indus.*, 138 Wash.2d 1, 5, 977 P.2d 570 (1999). Credibility determinations are reserved to factfinders, not the Washington State appellate courts. *State v. Walton*, 64 Wash. App. 410, 415-16, 824 P.2d 533 (1992).

Most of Gasteazoro-Paniagua's claims involve now-disputed facts. As a result, this Court should remand those claims for either an evidentiary hearing or should remand the entire PRP for a hearing and determination on the merits, unless this Court first determines that relief on some other claim is merited. This reply focuses on the need for a hearing, not how that hearing should turn out.

CLAIM 1. THE STATE FAILED TO DISCLOSE BRADY EVIDENCE  
CLAIM 2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO  
DISCOVER AND IMPEACH THE INFORMANT WITNESS

In these related claims, petitioner alternatively claims that the State failed to disclose and/or defense counsel failed to discover impeachment

evidence of the State’s “star” informant witness. In response, the State argues that it disclosed the impeachment evidence and surmises that counsel must have made a reasonable choice not to use it.

After reviewing the State’s *in limine* motion, it appears that the State disclosed the prior convictions of the witness. Petitioner withdraws that portion of his argument.

However, that leaves Petitioner’s claim that defense counsel deficiently failed to impeach the witness with his convictions. The State asks this Court to assume that defense counsel had a valid tactical reason for failing to impeach. However, defense counsel’s declaration establishes otherwise.

That also leaves the facts of Mr. Jacobsen’s pending charges, which the State appears to concede it did not disclose. Instead, the State argues that defense counsel could have discovered those facts during a pre-trial defense interview of Jacobsen. Although the State does not respond to defense counsel’s assertion that he was precluded by Jacobsen’s counsel from pursuing certain matters during the interview. *Response*, p. 19. The State also asserts that defense counsel could have discovered the facts by reviewing media coverage. Finally, the State asserts that the facts of Jacobsen’s crimes were not *Brady* material. *Id.* at 22.

The State argues that defense counsel knew Jacobsen was charged with serious crimes and that fact alone was sufficient to establish his bias—

that the true facts of those crimes added nothing to the equation. The State is wrong. Mr. Jacobsen portrayed Mr. Gasteazoro-Paniagua as a violent man and that Jacobsen feared him. The issue was not merely whether Jacobsen had a bias, it was whether he was a truthful person when he claimed that he had a society's best interest in mind when he questioned Gasteazoro-Paniagua and whether he was telling the truth that Gasteazoro-Paniagua confessed to him.

The facts of Mr. Jacobsen's crime establish that he and his cohorts used lethal violence and the severe threat of lethal violence to get what they wanted. If the State had disclosed this information or if defense counsel had discovered it, Jacobsen would not have been able to portray himself as a "sheep" in jail with a "wolf."

CLAIM 3. THE STATE IMPROPERLY VOUCHER FOR THE INFORMANT-WITNESS.

CLAIM 4. TRIAL COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE.

During direct, the State asked and the informant-witness answered that his plea agreement with the State required him to tell the truth. RP 1147. Defense counsel did not object. Later, the State asked Jacobsen if he "added facts or made up anything." RP 1448. The prosecutor concluded redirect by asking if the cooperation agreement "allowed" Jacobsen "to say anything you want" and then what he was "supposed to do" in order to

receive the reduction in charges. Jacobsen answered: “Tell the truth.” *Id.*  
Once again, defense counsel failed to object/

In his PRP, petitioner argued that allowing the witness to answer that his agreement with the prosecutor required him to tell the truth constitutes vouching and violates due process and the right to confrontation.

In its response, the State acknowledges (as it must) that the witness answered that he had a plea agreement with the State that required him to tell the truth. See RP 1447. The State then contradicts itself by alternatively arguing that the prosecutor either did not intend to elicit the response or he did and, even though the response was improper and excluded by the trial judge, he knew defense counsel would later open the door to this testimony and so decided to take pre-emptive action (albeit without seeking to revisit the issue with the trial judge). Most significantly, despite the fact that the State obtained a declaration from the trial prosecutor, that declaration did not address this issue. This Court should ignore the State’s unsupported factual assertions.

The State argues that the prosecutor did not improperly vouch for Jacobsen because the trial prosecutor did not ask the offending question, (even if the witness gave an improper answer and the trial prosecutor did not move to strike). *Response*, p. 29.

The intent of the prosecutor is not material and, if it is, the State has failed to establish what it alleges. Whether a witness has testified truthfully is entirely for the jury to determine:

A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.

*United States v. Roberts*, 618 F.2d 530, 536 (9th Cir.1980). The Washington Supreme Court added:

Presumably, prosecutors know that the contents of an agreement made in exchange for testimony may become an exhibit or the subject of testimony at trial, and there is a natural temptation to insert self-serving language into these agreements. Evidence that a witness has promised to give "truthful testimony" in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. While such evidence may help bolster the credibility of the witness among some jurors, it is generally self-serving, irrelevant, and may amount to vouching, particularly if admitted during the State's case in chief.

*State v. Ish*, 170 Wash.2d 189, 197, 241 P.3d 389 (2010). Regardless of the prosecutor's intent, Petitioner's jury heard this improper and prejudicial information.

As noted in the PRP, defense counsel then compounded the error by eliciting harmful information. In the end, Jacobsen was able to portray himself in an untruthful light and Gasteazoro-Paniagua in an unfairly harmful light.

There is a reasonable probability that Mr. Gasteazoro-Paniagua was prejudiced given the centrality of Jacobsen's testimony to this case and the fact that the victim testified he did not know who shot him.

### III. CONCLUSION

Based on the above, this Court should either remand for an evidentiary hearing or should grant this petition.

DATED this 7<sup>th</sup> day of September, 2015.

Respectfully Submitted:

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### CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I efiled the attached reply brief causing it to be served on opposing counsel at:

prosecutor@clark.wa.gov

September 7, 2015//Portland, OR

/s/Jeffrey E. Ellis

**ALSEPT & ELLIS LAW OFFICE**

**September 07, 2015 - 9:18 AM**

**Transmittal Letter**

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