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SUPERIOR COURT  
STATE OF WASHINGTON

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BY RONALD K. CARPENTER

*RC*

**IN THE SUPREME COURT FOR THE STATE OF WASHINGTON**

*In re Personal Restraint Petition of*  
EDWARD MICHAEL GLASMANN,  
Petitioner.

NO. 84475-5

REPLY IN SUPPORT OF MOTION FOR  
DISCRETIONARY REVIEW

**I. INTRODUCTION**

The State misses the point when it argues that Glasmann has not made a sufficient showing to justify discretionary review. The State treats the new facts as settled, despite the fact that the court below failed to take into account the most significant of Glasmann's new facts and failed to direct the conduct of an evidentiary hearing to resolve those disputed facts.

While the decision below nevertheless also fails to accurately apply the law on the issues raised, its preliminary failure is the failure to correctly apply the RAPs and the rule necessitating an evidentiary hearing to resolve material disputed facts.

As a result, the State's *Response* provides an additional reason to grant review.

This reply is therefore confined to that procedural issue.

ORIGINAL

1  
2 II. ARGUMENT

3 Because material facts were disputed in this case, the court below should either  
4 have remanded this PRP for an evidentiary hearing or for a decision on the merits. RAP  
5 16.11 (b) (“If the petition cannot be determined solely on the record, the Chief Judge  
6 will transfer the petition to a superior court for a determination on the merits or for a  
7 reference hearing.”). This Court should either accept review and remand to the Court of  
8 Appeals to apply the correct standard or can remand to the trial court to conduct the  
9 evidentiary hearing.  
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13 After a PRP is filed and briefed, the “Chief Judge determines at the initial  
14 consideration of the petition the steps necessary to properly decide on the merits the  
15 issues raised by the petition. If the issues presented are frivolous, the Chief Judge will  
16 dismiss the petition. If the petition is not frivolous and can be determined solely on the  
17 record, the Chief Judge will refer the petition to a panel of judges for determination on  
18 the merits.” RAP 16.11.<sup>1</sup> The rule further provides:  
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21 If the petition cannot be determined solely on the record, the Chief Judge will  
22 transfer the petition to a superior court for a determination on the merits or for a  
23 reference hearing.  
24

25 *Id.* Thus, the Chief Judge has the option of sending the entire PRP to the trial court for  
26 both an evidentiary hearing or referring those issues based on contested extra-record  
27 facts to the trial court for the conduct of an evidentiary hearing and entry of factual  
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<sup>1</sup> Although not defined in the rule, frivolousness is generally defined as “wholly without merit.”

1 findings. In the latter case, this Court then applies those factual findings to the  
2 applicable law.  
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4 As a threshold matter, the petitioner must state the facts underlying the  
5 claim of unlawful restraint and the evidence available to support the factual allegations.  
6 RAP 16.7(a)(2)(i). Bald assertions and conclusory allegations will not support the  
7 holding of a hearing. *See In re Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988).  
8 Thus, a mere statement of evidence that the petitioner *believes* will prove his factual  
9 allegations is not sufficient.  
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11

12 Rather, with regard to the required factual statement, the petitioner must state  
13 *with particularity* facts which, if proven, would entitle him to relief. Where Petitioner's  
14 allegations are based on matters outside the existing record, the petitioner must  
15 demonstrate that he has competent, admissible evidence to establish the facts that entitle  
16 him to relief. Where facts are outside of the trial record and especially where the facts  
17 are disputed and/or involve credibility determinations, the need for an evidentiary  
18 hearing is at its zenith. *See Frazer v. United States*, 18 F.3d 778, 784 (9th Cir.1994)  
19 (“Because all of these factual allegations were outside the record, this claim on its face  
20 should have signaled the need for an evidentiary hearing.”). Borrowing from the  
21 analogous habeas standard (a comparatively higher standard), in showing a colorable  
22 claim, a petitioner is “required to allege specific facts which, if true, would entitle him to  
23 relief.” *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir.1998) (internal quotation marks and  
24 citation omitted).  
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1           Once the petitioner makes this threshold showing, the court will then examine the  
2 State's response to the petition. The State's response must answer the allegations of the  
3 petition and identify all material disputed questions of fact. RAP 16.9. In order to define  
4 disputed questions of fact, the State must meet the petitioner's evidence with its own  
5 competent evidence. If the parties' materials establish the existence of material disputed  
6 issues of fact, then the superior court will be directed to hold a reference hearing in order  
7 to resolve the factual questions.  
8  
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11           In short, the purpose of a reference hearing is to resolve genuine factual disputes,  
12 not to determine whether the petitioner actually has evidence to support his allegations.  
13 An evidentiary hearing plays a central role in sorting through and ensuring the reliability  
14 of the facts upon which legal judgments are made. *See Siripongs v. Calderon*, 35 F.3d  
15 1308, 1310 (9<sup>th</sup> Cir. 1994) (A habeas petitioner who asserts a colorable claim who has  
16 never been given an opportunity to develop a factual record on that claim, is entitled to  
17 an evidentiary hearing in federal court).  
18  
19  
20

21           Material disputed facts exist in this case that can only be resolved at an  
22 evidentiary hearing. The failure of the court below to order that hearing renders its  
23 decision erroneous.  
24

25           In fact, the State's arguments are almost entirely premised on disputed facts.

26           The rules provide a clear method of resolving those disputes. The rules do not  
27 permit an appellate court to read competing declarations and decide which ones are more  
28 persuasive. Instead, the rules mandate the obvious solution: a hearing where the relevant  
29 witnesses testify and where a trial judge resolves those disputes after seeing, hearing,  
30

1 and observing the witnesses. Because that did not happen and because the decision  
2 below and the State's arguments in response are entirely premised on a particular  
3 resolution of those facts, review is warranted.  
4

5 III. CONCLUSION  
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7 Based on the above, this Court should accept review.  
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9 DATED this 1<sup>st</sup> day of November, 2010.  
10

11 /s/ Jeffrey E. Ellis  
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Attached for filing, pls find a reply in support of discretionary review in the above-entitled case. I ahve served opposing counsel, Mr. Roberts, by simultaneously sending this email and its attachment to him.

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