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Supreme Court No. ~~85459~~-9
King County Superior Court No. 07-1-04039-7SEA

IN THE WASHINGTON SUPREME COURT

In re the Personal Restraint of:

SIONE P. LUI,

Petitioner.

PERSONAL RESTRAINT PETITION WITH LEGAL ARGUMENT AND AUTHORITIES

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TABLE OF CONTENTS

I. STATUS OF PETITIONER/PROCEDURAL HISTORY 1

II. STATEMENT OF THE CASE 1

A. SOURCES OF FACTS 1

B. TRIAL TESTIMONY 2

C. APPELLATE PROCEEDINGS 7

III. GROUNDS FOR RELIEF 7

IV. ARGUMENT 7

A. LUI WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL 7

1. Legal Standards 7

2. General Problems with Defense Counsel 8

3. Counsel Failed to Challenge the State's Theory of the Case 9

4. Defense Counsel Failed to Present Evidence that Lui's Injury Precluded Him From Committing the Crime 20

5. Defense Counsel Failed to Present Evidence Pointing to Another Suspect 23

6. Defense Counsel Failed to Impeach Detective Gulla's Credibility 29

7. Defense Counsel Failed to Object to Prosecutorial Misconduct ... 39

(a) The Prosecutor Argued, Without Evidence, that the Defendant Committed a Sexual Assault .....

(b) Two Detectives Opined that Lui was Lying .....

(c) The Detective and Prosecutor Opined that Lui Showed his Guilt by Failing to Act Like an Aggrieved Fiancée .....

(d) The Prosecutor Violated Lui's Right to Religious Freedom by Questioning a Witness About the Religious Beliefs He and Lui Shared.....

8. Counsel Failed to Seek Additional DNA Testing.....47

B. THE STATE'S MISCONDUCT VIOLATED LUI'S RIGHTS TO DUE PROCESS AND TO RELIGIOUS FREEDOM.....47

1. The State Violated its Obligation to Provide Impeachment Information Regarding Detective Gulla.....47

2. The State's Misconduct During the Trial Violated Lui's Rights to Due Process and Religious Freedom.....52

C. JUROR MISCONDUCT VIOLATED LUI'S CONSTITUTIONAL RIGHTS.....53

V. REQUEST FOR RELIEF.....56

VI. OATH.....56

TABLE OF AUTHORITIES

Cases

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) 48, 49

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997), *cert. denied*, 523 U.S. 1133, 118 S.Ct. 1827, 140 L.Ed.2d 963 (1998) 49

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 28

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) 33

Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) 53

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) 54

Gibson v. Clanon, 633 F.2d 851 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035, 101 S.Ct. 1744, 68 L.Ed.2d 231 (1981) 54

Griffin v. United States, 183 F.2d 990, 87 U.S. App. D.C. 172 (D.C. Cir. 1950) 51

Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) 8

Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) 28

House v. Bell, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) 40

Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1996), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997) 55

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) 48, 50

Lawson v. Borg, 60 F.3d 608 (9th Cir. 1995) 55

Leonard v. The Territory of Washington, 2 Wash. Terr. 381, 7 P. 872 (1885) 27

Lockwood v. A C & S, Inc., 44 Wn. App. 330, 722 P.2d 826 (1986), *aff'd*, 109 Wn.2d 235, 744 P.2d 605 (1987) 55

Monroe v. Butler, 690 F. Supp. 521 (E.D. La.), *aff'd*, 883 F.2d 331 (5th Cir.), *cert. denied*, 487 U.S. 1247, 109 S.Ct. 7, 101 L.Ed.2d 958 (1988) 49

Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014, 807 P.2d 883 (1991) 55

Smith v. Roberts, 115 F.3d 818 (10th Cir. 1997) 49

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) 40

State v. Briggs, 55 Wn. App. 44, 776 P.2d 1347 (1989) 55

State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001) 44

State v. Clark, 78 Wn. App. 471, 898 P.2d 854, *review denied*, 128 Wn.2d 1004, 907 P.2d 296 (1995) 27

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) 42

State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003) 47

State v. Garcia, 45 Wn. App. 132, 724 P.2d 412 (1986) 52

State v. Haga, 8 Wn. App. 481, 507 P.2d 159 (1973) 44

State v. Jackman, 113 Wn.2d 772, 783 P.2d 580 (1989) 55

State v. Jerrels, 83 Wn. App. 503, 925 P.2d 209 (1996) 42

State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008) 40

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 42

State v. Lord, 161 Wn.2d 276, 165 P.3d 1251 (2007) 19

State v. Lui, 153 Wn. App. 304, 221 P.3d 948 (2009) 1

State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) 28

State v. Roberts, 25 Wn. App. 830, 611 P.2d 1297 (1980).....34

State v. Rose, 62 Wn.2d 309, 382 P.2d 513 (1963) 40

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).....53

State v. Saunders, 120 Wn. App. 800, 86 P.3d 1194 (2004) 42

State v. Spencer, 111 Wn. App. 401, 45 P.3d 209 (2002), *review denied*, 148 Wn.2d 1009, 62 P.3d 889 (2003) 34

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997) 44

State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).....40

State v. Wilder, 4 Wn. App. 850, 486 P.2d 319, *review denied*, 79 Wn.2d 1008 (1971).....34

State v. Wright, 87 Wn.2d 783, 557 P.2d 1 (1976), *overruled on other grounds as stated in State v. Ortiz,* 119 Wn.2d 294, 831 P.2d 1060 (1992).....52

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....7

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).....48

Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992) 49

Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).....54

United States v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).....34

United States v. Alvarez, 86 F.3d 901 (9th Cir. 1996), *cert. denied*, 519 U.S. 1082, 117 S.Ct. 748, 136 L.Ed.2d 686 (1997).....50, 51

United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) 48

United States v. Bagley, 641 F.2d 1235 (9th Cir. 1981), *cert. denied*, 454 U.S. 942, 102 S.Ct. 480, 70 L.Ed.2d 251 (1981) 55

United States v. Hibler, 463 F.2d 455 (9th Cir. 1972) 51

United States v. Wood, 57 F.3d 733 (9th Cir. 1995) 49

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) 28

Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) 8

Statutes

RCW 10.73.170 47

Other Authorities

5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, §§ 607.7 through 607.11 at 384-402 (5th Ed. 2007) 34, 35

Rules

CrR 4.7 49

ER 403 20

ER 404 34

ER 608 35

Constitutional Provisions

Const. art. I, § 11 (Religious Freedom) 46

Const. art. I, § 22 (Trial by Impartial Jury) 54

U.S. Const. amend. 14 (Due Process) ..... passim

U.S. Const. amend. 6 (Confrontation) 34

U.S. Const. amend. 6 (Effective Assistance of Counsel) 7

U.S. Const. amend. 6 (Trial by Impartial Jury).....54

I. STATUS OF PETITIONER/PROCEDURAL HISTORY

Petitioner Sione P. Lui is currently incarcerated at the Washington State Reformatory in Monroe, Washington.

The King County Prosecutor charged Lui with Murder in the Second Degree. CP 16. He was convicted as charged. CP 19. The Honorable Michael Trickey sentenced Lui within the standard range to 200 months. CP 36-44.

The Court of Appeals affirmed the conviction in *State v. Lui*, 153 Wn. App. 304, 221 P.3d 948 (2009). His petition for review was granted on December 31, 2009. Oral argument before the Supreme Court took place on September 14, 2010.

Lui's motion for post-conviction DNA testing was granted by the trial court on December 22, 2009. App. 1. The testing is currently pending. Lui will amend this PRP if the testing produces useful results.

Lui was represented in the superior court by Anthony Savage. He is represented in the direct appeal by undersigned counsel.

Lui is not seeking to proceed at public expense.

II. STATEMENT OF THE CASE

A. SOURCES OF FACTS

The facts relating to this petition are based on the clerk's papers and transcripts filed in the direct appeal, and the additional materials filed as an appendix to this PRP.

B. TRIAL TESTIMONY

On February 9, 2001, Elaina Boussiacos was found dead in the trunk of her car, which was parked in the lot of the Woodinville Athletic Club (WAC). Her fiancé at the time was Sione Lui. The evidence against Lui was entirely circumstantial. There was no eyewitness to the crime, no confession, and no history of domestic violence between Lui and Boussiacos. The State concedes that the crime was "unsolved" until 2007. Brief of Respondent at 13; App. 10 (Declaration of David Zuckerman) at Ex. E. The only additional evidence acquired at that time, however, was a new interview of Lui, in which he continued to deny the crime, and some new DNA testing, which is discussed below.

Lui and Boussiacos met in 1999. V RP 425. By the end of 2000 they were living together at an apartment in Woodinville. V RP 414. Their relationship was somewhat volatile and both were jealous. V RP 403-04. But at times they were very happy with each other and spoke of getting married. VI RP 695-96 (testimony of Boussiacos's mother). The status of their engagement frequently changed. Boussiacos would alternately wear or remove her engagement ring, depending on how she was feeling about Lui at the moment. IV RP 371.

In late January, 2001, Boussiacos learned that Lui had been talking with a woman named Sina Packer. Packer and Lui had a sexual relationship in the past but were now just friends. V RP 504-05, 508-11; VI RP 641; VI RP 1424. Nevertheless, Boussiacos was mad at Lui, in particular because he lied about how often he was in touch with Packer. V

RP 500-01. Boussiacos told Packer that the engagement was off. V RP 502.

On January 28, 2001, Boussiacos bought a ticket to California. VI RP 623. She planned to visit her mother, Maria Phillips. VI RP 697-98. Phillips testified that Boussiacos spoke of ending the engagement, but Phillips advised her not to do anything rash. VI RP 698-99. On Friday, February 2 at 9:30 p.m., Boussiacos dropped off her son from a previous marriage with his father, Anthony Negron. VI RP 651, 660. Boussiacos's flight was scheduled to leave at 8:30 a.m. on Saturday, February 3, 2001, but she was not on the flight. VI RP 623.

On Monday, February 5, Phillips informed Lui that her daughter never arrived. VI RP 703. Lui and his friends then made various efforts to search for Boussiacos, including posting missing person flyers around Woodinville. VI RP 725, 733; XVI RP 1742. Sam Taumoefolau testified, in particular, that he and Lui were in the mall next to the WAC copying and posting flyers on Tuesday, February 6 and Wednesday, February 7. XVI RP 1739-42. They did not see Boussiacos's car in the club's lot. XVI RP 1775-76. Taumoefolau recalled asking someone at the WAC to put up a flyer. XVI RP 1772. Katherine Wozow, the owner of the WAC, believed that Boussiacos's car had been sitting in her lot since the morning of February 3. VI RP 742-45. She was not aware of anyone requesting to put up missing person flyers at her club. VI RP 747.

On Friday, February 9, WAC staff contacted the police about the car, and the police confirmed that it belonged to the missing person. VI

RP 745. Detectives arrived at the club that evening. VII RP 837; VIII RP 948-49. They found Boussiacos's body in the trunk of her car. VII RP 951. She was wearing sweatpants and a long-sleeved t-shirt. VII RP 865-66. She had some injuries including bruising in the area of her neck. VII RP 865. Her bra was stuffed up inside of her shirt. VII RP 866-67. It appeared that she had been dressed by someone else. IV RP 344; XVI RP 1726-28; XVI RP 1832. There was a suitcase, gym bag and "travel bag" in the car. VII RP 886, 895. She wore little makeup.

Several witnesses testified that Boussiacos was in the habit of dressing nicely and putting on makeup whenever she went out. When Sina Packer met with Boussiacos at a restaurant on January 31, 2001 (V RP 494-96), however, her hair was pulled back in a pony tail and she had hardly any makeup on. V RP 503.

Nine identifiable fingerprints were found on the car. None of them belonged to Lui. XII RP 1578, 1581.

The detectives found a small blood stain by the stick shift. VII RP 883. It was collected into evidence. VIII RP 1031. The Washington State Patrol Crime Laboratory (WSPCL) obtained a DNA profile from the blood. IX RP 1194-95. It did not match Lui or Boussiacos. IX RP 1224-25.

The steering wheel contained Boussiacos's DNA with a trace of unidentified male DNA. IX RP 1218.

A very small number of Lui's sperm cells were found on Boussiacos's underpants. IX RP 1220-21, 1271. The cells could have

been there for a long time. IX RP 1269-71. Similarly, a very small amount of Lui's sperm was found in the vaginal swabs taken from Boussiacos. IX RP 1235-36. Again, the WSPCL scientist could not say how long they had been present. IX RP 1254.

The crime scene team from WSPCL was not called out to examine Boussiaco's car for trace evidence. IX RP 1260. Nobody tested her clothing to see whether the perpetrator left skin cells on it when putting her in the trunk. IX RP 1274.

The victim's shoelaces contained DNA belonging to either Lui or his son[1], DNA belonging to either James Negron or his son, and DNA belonging to an unidentified male. XI RP 1514-20, 1553-54. The DNA testimony also raised the possibility of a weak, unknown male profile in the vaginal wash. XI RP 1569-70. The record does not reflect any attempt to determine whether the unidentified profiles found on the stick shift, the shoelaces, the steering wheel, and the vaginal wash matched each other.

Lui's home was in the total control of the Sheriff's Office for several weeks, beginning on February 9, the day Boussiacos's body was found. XVI RP 1714-15. During that time the police were free to examine and seize any items they wished. XVI RP 1715-16. Lui had no advance notice that he would not be allowed back in the house after February 9. XVI RP 1716. The police found no signs of violence. VIII RP 943-48, 957-58, 1009-11.

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[1] The "Y-STR" testing used on these samples cannot distinguish between members of the same paternal lineage.

On Wednesday, February 14, eleven days after Boussiacos went missing and five days after she was found dead, Detective Denny Gulla arranged for dog tracker Richard Schurman to meet him at the WAC parking lot. VIII RP 959-60. Detective Gulla brought with him an article of male clothing he had found in the Lui household. VIII RP 961. The dog sniffed the clothing and then pursued a track that led through the mall adjacent to the WAC, and ultimately to Lui's home. VIII RP 1072-77. The State's theory was that Lui killed Boussiacos, put her body in the trunk of her car, drove it to the WAC parking lot, and then walked back to his apartment. XVI RP 1840-41. The defense suggested that the dog was following the more recent path Lui took when he walked through the area with Taumoefolau. VIII RP 1104-06. Schurman could not say when the scent trail was laid down. *Id.* Schurman acknowledged that scent deteriorates over time. VIII RP 1087-89. Bloodhounds are certified based on their ability to follow 24-hour-old trails. VIII RP 1089-90. Regarding an 11-day-old trail, Schurman stated: "I would start to be real cautious about watching my dog's behavior, because they tend to go off trail." VIII RP 1106. The oldest trail he had ever followed was 12 days old. VIII RP 1097.

Medical examiner Dr. Richard Harruff testified that Boussiacos had various injuries and that death was caused by strangulation. X RP 1357-98.

The jury convicted Lui of murder in the second degree, as charged. CP 19. He was sentenced within the standard range to 200 months. CP 36-44.

C. APPELLATE PROCEEDINGS

Lui has argued on direct appeal that his right to confrontation was violated when the State presented surrogate expert witnesses in place of the doctor who actually performed the autopsy and the scientists who actually analyzed the DNA samples. As noted above, the Court of Appeals affirmed and the Washington Supreme Court granted review.

III. GROUNDS FOR RELIEF

1. Lui was denied his Sixth Amendment right to effective assistance of counsel.
2. The State's misconduct violated Lui's Fourteenth Amendment right to due process.
3. Juror misconduct violated several of Lui's constitutional rights.

IV. ARGUMENT

A. LUI WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

1. Legal Standards

A criminal defendant has a Sixth Amendment right to competent counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This right is violated when the defendant is prejudiced by counsel's deficient performance, that is, when there is a reasonable likelihood that counsel's error could have affected the result.

Id. The prejudicial effect of counsel's errors must be considered cumulatively rather than individually. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1515, 146 L.Ed.2d 389 (2000); *Harris v. Wood,* 64 F.3d 1432, 1438-39 (9th Cir. 1995).

2. General Problems with Defense Counsel

Lui was represented at trial by Anthony Savage, who was approximately 78 years old at the time of trial. Mr. Savage expressed little interest in interviewing State witnesses, finding defense witnesses, or locating helpful experts. He left it to Lui's family to work with investigator Denise Scaffidi, with little attorney guidance. Celese Lui, the defendant's wife, spent many hours reviewing the discovery and leaving post-it notes with comments or questions for Savage, but he would never directly answer her questions or discuss her ideas. He spent very little time meeting with his client. *See* Declarations of: Celese Lui (App. 2); Sione Lui (App. 3); Ray Taylor (App. 4); Grant Mattson (App. 5); Denise Scaffidi (App. 13). For example, Ray Taylor's declaration includes the following:

> I attended several meetings with Mr. Savage and Celese Lui at Savage's office. I had several specific questions for Mr. Savage, including how he planned to deal with the DNA and the dog tracking evidence. He never gave any clear answers. Sometimes in mid sentence he would seem to forget what we were talking about. He would give vague responses, such as, "they don't have anything on him. All they have is a big story." Sometimes, he didn't seem to recall things that we had just discussed.

App. 4 at para. 5.

During trial, Mr. Savage was not always alert. He dozed off several times. App. 3 (Declaration of Sione Lui) at para. 5; App. 6 (Declaration of William Harris) at para. 2; App. 5 (Declaration of Grant Mattson) at para. 4. Towards the end of the trial, Mr. Savage had a falling accident that caused him to deteriorate significantly, both mentally and physically. XI RP 1466-71; App. 2 (Declaration of Celese Lui) at para. 11; App. 3 (Declaration of Sione Lui) at para. 5; App. 7 (Declaration of Joan Byers); App. 5 (Declaration of Grant Mattson) at paras. 2-4; App. 6 (Declaration of William Harris) at para. 2.

These problems with Mr. Savage led to several errors during the trial, as discussed below.

3. Counsel Failed to Challenge the State's Theory of the Case

As discussed above in section II(B), the State's theory of the case was that Lui killed Boussiacos at their home in the early morning hours of Saturday, February 3, 2001, placed her body in the trunk of her car, drove the car to the lot of the Woodinville Athletic Club (WAC), and walked home. XVI RP 1840-41, 1849. It supported this theory with dog tracking evidence and with testimony from the manager of the WAC that the car appeared in the lot by Saturday morning. The defense failed to adequately challenge that theory. It could have presented evidence from several witnesses that 1) Boussiacos's car did *not* appear in the lot until several days after she disappeared; 2) Lui had been putting up missing person flyers in the general area of the dog's route, which gave an innocent explanation for the presence of his scent; and 3) the tracking dog's

behavior did not, in any event, prove that Lui followed precisely the same route as the dog, and certainly did not prove that he did so around the time Boussiacos disappeared.

In opening statement, the prosecutor stressed the importance of the dog tracking. "[O]ne other little thing that he couldn't have anticipated that is that the defendant unwillingly left behind a clue to who had parked that car, and then ran away." IV RP 347. The prosecutor then spent three pages of transcript discussing the work of Sarah, the bloodhound. IV RP 347-51. The State's theory was also based in part on the testimony of WAC employee Katherine Wozow, who claimed that that the victim's car sat in the parking lot from the morning of Saturday, February 3, 2001, until February 9, 2001 (the day the police found Boussiacos's body in the trunk of her car). IV RP 342; VI RP 735-48. The State repeated its theory in closing argument. XIV RP 1849.

The defense maintained that Boussiacos left the home on Saturday morning and was killed by some unknown perpetrator. Defense counsel recognized before trial that the time the victim's car appeared in the WAC parking lot was critical to his case. I RP 54-55. The trial court agreed. *Id.* If the car did not appear in the lot until later, it was more likely that Boussiacos was killed by someone else, who later drove her car to the lot.

The defense supported its theory, however, only with witness Sam Taumoefolau, who testified that the car was not in the WAC lot when he and the defendant put up missing person flyers in the area several days after Boussiacos's disappearance. *See* section II(B). Because defense

counsel failed to prepare him for testimony, Mr. Taumoefolau had difficulty getting his point across. Taumoefolau's first language is Tongan and he has difficulty expressing himself in English. *See* App. 8 (Declaration of Sam Taumoefolau) at para. 3. Nevertheless, defense counsel failed to meet with him prior to trial to prepare his testimony. Instead, the two spoke together briefly in the hallway just before Taumoefolau took the stand. *Id.* at para. 2. Further, although most of Taumoefolau's testimony involved describing the route he and Lui took while postering, defense counsel failed to prepare an exhibit that covered the relevant area. Instead, counsel asked Taumoefolau to use a State exhibit which did not cover many of the areas Taumoefolau was trying to describe. This left his testimony often incomprehensible. *Id.* at paras. 5-8. Further, counsel inexplicably ended his questioning when Taumoefolau had discussed only about half of the route he and Lui followed. *Id.* at para. 12. In fact, defense counsel forgot to ask Taumoefolau whether Boussiacos's car was in the WAC lot when he and Lui put up posters. Taumoefolau was forced to blurt that out during the prosecutor's questioning. XIV RP 1775-76. Taumoefolau's testimony came off so poorly that some jurors believed he was claiming to visit a mall that did not even exist at the time. *See* App. 9 (10/10/09 Declaration of Denise Scaffidi) at para. 9.

In closing argument, the State maintained that the trail Sam Taumoefolau described was "hardly the path of two men passing out flyers." XIV RP 1841. "Especially since we heard testimony, that really

all that is down by the gym is a construction site for fire station and a post office. That's it." *Id.* "Why on earth would you twice go back around and come up and go to where the dog did, climb up through the bushes and start through here without stopping at Target, Cost Plus or Cineplex Odeon, if you are so anxious to get flyers out and do it while walking around." XIV RP 1841-42.

In fact, Taumoefolau was trying to explain that there was a good reason why he and Lui looped from the Kinko's to the gym and back. They had only a few flyers when they began their efforts that day, so they began by dropping off an order at Kinko's. While waiting for it, they took the few flyers they had and did the relatively short loop that took them by a restaurant, the WAC and back to the Kinko's. Inexplicably, Mr. Savage ended his questioning without asking where the men went after obtaining their new copies. Taumoefolau would have explained how they went through the larger mall mentioned by the prosecutor, and then headed home through the Park and Ride. App. 8 at paras. 6-12.

Taumoefolau has now explained in detail how he could have presented credible testimony that he and Lui covered much of the area later followed by the tracking dog, and how he knew that Boussiacos's car was not in the WAC lot on as of Tuesday, February 6, 2001. App. 8 at paras. 5-19.

Further, the defense did not need to rely solely on Taumoefolau because at least three additional witnesses could have testified about Lui's postering and/or explained when Boussiacos's car appeared in the WAC

lot. According to a police report, WAC employee Amber Mathwig reported that she first saw Boussiacos's car in the lot on Wednesday, February 7, 2001 – four days later than Ms. Wozow reported seeing the car. The same report indicated that a coworker of Mathwig's knew the car was not in the lot as of the afternoon of Tuesday, February 6. *See* App. 9 (10/10/09 Declaration of Denise Scaffidi) at Ex. A. Mr. Savage's copy of this discovery page (LUI 1319)[2] contained a note from the defendant's wife, Celese Lui: "This is very important! Worker from Woodinville Athletic says car was not there on 2-6-01 at 1400 hours." App. 10 (Declaration of David Zuckerman) at para. 4; App. 2 (Declaration of Celese Lui) at para. 5.1 and Ex. A.[3] When Ms. Scaffidi, the defense investigator, interviewed Mathwig, she explained how she could be certain the car was not in the lot as of Monday, February 5. App. 9 (10/10/09 Declaration of Scaffidi) at para. 4 and Ex. B (report of interview). (Mathwig could not say whether the car appeared on Tuesday or Wednesday because she worked only on Mondays, Wednesdays and Fridays.) Although defense counsel called Mathwig to the stand and asked her some questions about the dog tracking, he inexplicably failed to ask her the critical questions about the car. XIV RP 1733-35.

The failure to question Mathwig properly may have been due to an injury suffered by defense counsel during the trial. On April 17, 2008, Mr.

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[2] The State numbered the discovery pages LUI 0001 through LUI 3939.

[3] Mr. Savage permitted Ms. Lui to view the discovery in his office. She made numerous notes on it. *See* App. 2 (Declaration of Celese Lui) at paras. 5-5.4.

Savage appeared in court with a walker. XI RP 1466. After observing Savage, the trial court recessed the trial out of concern that Savage could not provide effective assistance. XI RP 1467-71. Savage reported that he would go directly to the hospital for x-rays. XI RP 1470-71. Although Savage returned to court on April 21, 2008, several observers maintain that he was in little better condition by then. *See* App. 2 (Declaration of Celese Lui); App. 3 (Declaration of Sione Lui); App. 4 (Declaration of Ray Taylor); App. 5 (Declaration of Grant Mattson); App. 6 (Declaration of William Harris); App. 7 (Declaration of Joan Byers).

The defense could also have called witness Paul Finau. In a taped statement with Detective Doyon on February 13, 2001, Finau explained how he searched and postered with Lui on both Monday, February 5, and Wednesday, February 7, 2001. *See* App. 10 (Declaration of David Zuckerman) at Ex. B (LUI 2387-2397). This statement was made one day before Richard Schurman and his dog performed their trailing. VIII RP 959-60. Mr. Savage's copy of the interview contains a post-it note from Celese Lui pointing out that Finau might be able to confirm that Boussiacos's car was not in the WAC lot until several days after she disappeared. App. 2 (Declaration of Celese Lui) at para. 5.3. When interviewed by investigator Scaffidi, Finau confirmed that he and Lui were specifically searching for Boussiacos's car on Monday, February 5, 2001, and it was definitely not in the WAC lot on that date. App. 9 (10/10/09 Declaration of Scaffidi) at para. 8 and Ex. C. When Finau later heard that the car had been found in the WAC lot on February 9 he found that strange

because he knew it was not there on February 5. *See* App. 11 (9/1/09 Declaration of Paul Finau).

Further, counsel could have confirmed Lui's postering activities in the area of the dog search through Lui's sister Falepaini Harris. *See* App. 12 (8/31/09 Declaration of Falepaini Harris). *See also*, App. 10 (Declaration of David Zuckerman) at para. 7 and Ex. A. Harris, who lives on Oahu, first gave this information to the Honolulu police on May 31, 2001. A transcript of the interview was provided to the defense in discovery. *Id.* Harris explained that she flew to Washington at Lui's request after he informed her that Boussiacos was missing. *Id.* When asked to describe Lui's friends, Harris said she met Sam and various members of Lui's rugby team while staying with Lui. *Id.* at 2472-73. There were "[a] lot of phone calls from his rugby guys" because they were helping Lui put up flyers. *Id.* at 2473. She knew they had been putting up flyers in the neighborhood because she went with Lui to Kinko's to run off more copies and he pointed out flyers he had already put up in the area. "The neighborhood was covered, yeah." *Id.* at 2474. She was aware that this had been going on since Monday. "[T]hey were going out almost every night." *Id.* at 2474. Discovery page 2474 contains a post-it from Celese Lui stating: "witness to Sione walking around Woodinville." *See* App. 2 (Declaration of Celese Lui) at para. 5.2.

Ms. Harris returned home shortly after Boussiacos's body was found. She knew nothing about dog tracking and had no idea why the

Honolulu police were asking her questions about Lui putting up flyers. App. 12 (8/31/09 Declaration of Falepaini Harris) at para. 6.

The State called Harris as a witness at trial. Neither side asked her any questions about Lui's postering efforts. VII RP 804-36.

Lui's family believed it important to present their own expert on dog tracking. App. 2 (Declaration of Celese Lui) at para. 8. At their request, investigator Denise Scaffidi located such an expert, Van Bogardus, and prepared a report concerning him which she forwarded to Mr. Savage. Counsel declined to use the expert, however. In his view, the dog tracking was unimportant because it was explained by Lui's postering in the area. *See* App. 13 (Declaration of Denise Scaffidi) at para. 4. The defense was on notice, however, that the State would emphasize the evidence at trial. In a document provided to the defense in discovery, prosecutor Kristin Richardson described the dog tracking as "the best piece of evidence we have." App. 10 (Declaration of David Zuckerman) at 10 and Ex. D. As discussed above, the State relied extensively on the dog tracking evidence as proof of guilt, and the defense failed to convince the jury that Lui's postering explained the presence of his scent in the area of the WAC.

An expert could have explained why the dog tracking in this case should not be taken as proof that Lui followed a path from where Boussiacos's body was found to his home. *See* App. 14 (9/27/09

Declaration of Dr. James C. Ha).[4] Dr. Ha, a professor at the University of Washington, has a Ph.D. in zoology with a specialization in animal behavior.

First, under the State's theory of the case, Mr. Schurman's dog would have been following an 11-day-old trail, laid down on the same day Ms. Boussiacos disappeared. As Dr. Ha explains, the likelihood of a dog following such an old trail is quite low. *Id.* at paras. 6-7. It is more likely that the dog was following a more recent trail, such as one Lui would have left when postering the neighborhood the following week. *Id.* at 8.

Second, "[a] bloodhound can detect a person's scent only if some biological material from the person's body comes in contact with the dog's scent organ." *Id.* at 9. This microscopic material "could be blown a great distance in even a light breeze." *Id.* Therefore, the dog is "not necessarily following a person's trail," but is "merely detecting the current position of the scent particles." *Id.*

Third, "a dog cannot tell *when* scent particles left a person's body." *Id.* at 10 (emphasis in original). "The path the dog follows could be based on scent particles left on different days and in different areas, as long as the various areas visited by the person are sufficiently close together that the dog does not lose the scent entirely." *Id.*

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[4] Undersigned counsel chose to work with Dr. Ha rather than with Mr. Bogardus in part because he is located in Seattle rather than in California. It appears that any qualified expert on animal behavior would reach similar conclusions.

Fourth, it is hardly surprising that the dog ultimately trailed to Lui's home. A person would normally leave a large quantity of scent particles near his home, and some of them "could easily travel out into the nearby streets through wind or through the disturbance of a car." *Id.* at para. 13. "One would expect a bloodhound to track to the home once it was anywhere near it, since a person's scent gradient would normally point strongly towards his own home." *Id.*

Fifth, it is possible that Schurman's dog was trailing Boussiacos's scent rather than Lui's. It was detective Gulla, not Schurman, who gathered the scent articles, which Gulla described as items of men's clothing found in the Lui/Boussiacos house. VIII RP 961. "If those items came into contact with the victim or her clothing, however, they would have contained some of her scent as well. According to his testimony in *State v. Sherer*, Mr. Schurman believed such a transfer had taken place in that case." App. 14 (9/27/09 Declaration of Ha) at 14.

Defense counsel should himself have reviewed Schurman's testimony in *State v. Sherer*, King County No. 00-1-00183-1SEA. In discovery provided to the defense, the prosecutor noted the connection to *Sherer*. App. 10 (Declaration of David Zuckerman) at para. 11 and Ex. E. A brief inquiry would have revealed that undersigned counsel was currently handling Mr. Sherer's federal habeas case and had a transcript of Schurman's testimony available. Mr. Savage would then have learned that, in the *Sherer* case, Schurman believed one of the bloodhounds was

tracking the scent of the male defendant, even though the scent article belonged to the missing female victim. *See id.* at Ex. I.

In fact, had defense counsel done his homework, he could have excluded the dog tracking evidence entirely. In *State v. Lord*, 161 Wn.2d 276, 165 P.3d 1251 (2007), the Supreme Court found that dog tracking testimony proffered by the defense was properly excluded as irrelevant. The State's theory in that case was that the defendant abducted the victim from a stable, brought her to his workshop where he raped and killed her, and then drove her body to another location. *Id.* at 281, 293. A bloodhound handler attempted to locate the missing victim shortly after her disappearance. *Id.* at 283. His dog tracked the victim's scent from the stable, through the woods and out to a road. The handler maintained that his dog followed the "freshest scent" although he also stated that his dogs had the ability to follow a scent up to two weeks old. *Id.* As the defense noted, if the victim traveled from the stable through the woods on the day she disappeared, that would be inconsistent with the State's theory of the abduction. The trial court properly found the testimony irrelevant, however, because the handler could not rule out that the dogs were following a trail from one of the victim's earlier visits to the stable, rather than from her visit on the day of her disappearance. *Id.* at 294-95.

Similarly, in this case Mr. Schurman could not say that his dog was following a scent trail left on the same day that Ms. Boussiacos's car appeared in the WAC parking lot and his testimony was therefore irrelevant. In fact, as noted above, Schurman could not even state with any

certainty that his dog was following Lui's scent. The defense could therefore have successfully excluded the evidence as irrelevant under ER 401 and 402.[5]

Thus, the defense could have easily defeated the State's theory of the case.

4. Defense Counsel Failed to Present Evidence that Lui's Injury Precluded Him From Committing the Crime

Prior to trial, Celese Lui explained to Anthony Savage that Sione Lui could not have committed the crime because he was recovering from a serious arm injury at the time. Celese provided Savage with Sione's medical records but he dismissed the subject out of hand, in the belief that a large man like Lui would have been capable of committing the crime even if injured. Mr. Savage never consulted with an expert on that point. App. 2 (Declaration of Celese Lui) at para. 9.

After trial, Ms. Lui provided the same records to Dr. Theodore Becker, who holds a Ph.D. in Human Performance (a field that includes biomechanics). App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at para. 1. Dr. Becker also reviewed other information including the files and testimony of the medical examiner in this case, and detailed measurements of Lui's hands. *Id.* at 3. As he explains, Lui suffered a severe right forearm fracture on September 30, 2000. A plate was fixed over the bone with six screws. Lui was in a "long arm upper extremity fiberglass cast"

[5] Alternatively, even if the trial court found some marginal relevance, it should have excluded the evidence under ER 403 as more prejudicial than probative.

from October 11 to November 13, 2000. "The forearm muscles will atrophy significantly after a month in such a cast." *Id.* at 5. Lui's right hand grasping strength would have been significantly less than his left as of early February, 2001 (the time of the murder). In fact, Lui's physical therapy notes from March, 2001, show that his right hand had little more than half the strength of his left even then. *Id.* at 6. Boussiacos's injuries, however, were caused by an attacker whose right hand was stronger than his left. *Id.* Boussiacos could easily have pulled Lui's right hand off her neck. *Id.* at 7.

In addition, "[s]everal of Boussiacos's injuries are clearly caused by the hands of her attacker." *Id.* at 8. "To determine whether Lui's hands could have caused these injuries, I requested precise measurements of multiple aspects of Lui's hands and fingers." *Id.* Investigator Denise Scaffidi took these measurements and provided digital photographs for verification. *Id.* at para. 8 and Exs. B and C. *See also*, App. 9 (10/10/09 Declaration of Denise Scaffidi) at para. 11. Several of Boussiacos's injuries clearly correspond to specific parts of the assailant's hands. Lui's hands are not even close in size to those of the assailant. App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at 9-11.

Sam Taumoefolau could have confirmed that Lui's right arm was still quite weak as of February 2, 2001. App. 8 (9/21/09 Declaration of Taumoefolau) at para. 20. For that reason, Lui could not play his usual instruments, ukulele or guitar, at a luau on Saturday, February 3. He had to rent a bass instead. *Id.* at 21. *See also*, App. 16 (10/20/09 Declaration

of Sione Lui) at Ex. A. Dr. Becker's detailed evaluation of the mechanics of playing each instrument shows that Lui's choice of instruments was consistent with the weakness that would be expected from the arm injury. App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at 12-17. Several witnesses could have confirmed that Lui did not normally play bass. *See* App. 17 (10/5/09 Declaration of Robert Talbott); App. 18 (10/7/09 Declaration of Mark Jensen); and App. 19 (10/22/09 Declaration of Julia Makous).

Based on his review, Dr. Becker's opinion is that "Lui could not have been the killer of Elaina Boussiacos." App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at para. 4.

It is true that Jaimee Nelson testified at trial that Lui once moved a heavy dresser for her and that this "probably" took place in November or December, 2000. IV RP 374-75. As Dr. Becker points out, Lui could not have done that during those months because he would either have had his arm in a cast or had the cast very recently removed (in which case the arm would be atrophied and very weak). App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at para. 18. Of course, at the time of trial, Nelson was attempting to remember the date of a relatively unimportant event that took place nearly eight years earlier. She must have been off by a couple of months. If Lui moved a dresser for her in 2000, it happened before he broke his arm on September 30, 2000.

5. Defense Counsel Failed to Present Evidence Pointing to Another Suspect

After Elaina Boussiacos disappeared, her friends and family consistently pointed to her ex-husband, James Negron, as the likely perpetrator. Detective Doyon's report includes the following:

> According to family members and friends of the missing, they are suspect of the former husband, Mr. NEGRON because there was apparently some discussion between NEGRON and BOUSSIACOS regarding modifying their parenting plan and child support. Their feeling are [sic] that this would be a motive for Mr. NEGRON to "get rid" of ELAINA.

App. 10 (Declaration of David Zuckerman) at Ex. G (LUI 2231). The group also informed Detective Doyon that Negron "used to be a gang member in the Riverside, California area, a group called the East Side Longos." *Id.*

Detective Gulla's follow-up report of February 6, 2001 includes the following:

> EVAMARIE GORDON called. She is an ex-roommate of the victim's, for 2.5 years. EVAMARIE says that the victim has a hostile ex-husband named JAMES NEGRON, whom victim just had a huge fight with about 2 weeks ago. EVAMARIE said JAMES NEGRON is gang or previously gang related and has a hot temper. EVAMARIE says she was at the victim's home on occasions when their child would come home from JAMES NEGRON's, all covered in bruises from JAMES beating him. EVAMARIE said JAMES NEGRON had full custody of the boy, but he couldn't afford to keep him all the time anymore, so he stayed with the victim and visited JAMES. EVAMARIE says the victim asked JAMES for money towards the boy and he had a fit and the fight broke out.

App. 2 (Declaration of Celese Lui) at para. 5.4 and Ex. D (LUI 2288). Anthony Savage's copy of this discovery contains a post-it note from Celese Lui that includes the following: "Very important [large asterisk]. Evamarie thinks James did it. Gangs, beating son. I think there is big $ problems with James." *Id.* The same detective's report is repeated at LUI 3079. On that page, Celese Lui's note reads: "Evamarie states James and Elaina just had a huge fight [large asterisk]. James could not afford Anthony. James *beat* Anthony." *Id.*

Ms. Gordon gave a taped interview with Detective James Doyon on February 12, 2001. App. 10 (Declaration of David Zuckerman) at Ex. F. She had known Boussiacos for six or seven years and the two were roommates, friends and co-workers for much of that time. *Id.* at LUI 2407. James Negron had primary custody of Boussiacos's son Anthony,

> but he has a [sic] anger problem and he couldn't handle it. I don't if [sic] I can say this, but he'd always beat his little boy, and when Anthony would come back on Sunday nights, I'd see bruises all over him, and Elaina told me he had an anger management, and so I talked to Anthony every now and then about it, and he told me yeah, my daddy did this, my daddy did that, but see, Elaina feared him. Elaina totally feared James.

Id. at LUI 2410.[6] For that reason, Boussiacos would not let Negron know where she lived. *Id.* When asked what Boussiacos said about her marriage to Negron, Gordon replied: "[W]e talked about how he'd fight, how they'd fight. He had no hesitance as far as hitting a woman . . . I

[6] Again, Celese Lui placed a note informing Savage of the importance of this passage. App. 2 (Declaration of Celese Lui) at para. 5.4 and Ex. D.

guess he had a very bad anger management." *Id.* at LUI 2411. Although the police apparently told Gordon that Negron had an alibi, she still considered him a likely suspect:

> I have one question is, if they haven't ruled this out, I know that James has a tight alibi, but he does have connections, as far as knowing that Elaina planned on going out of town, picking the son up on Monday, why couldn't he have got one of his, I'm sorry I'm saying this, his friends from Tacoma to plan it where he followed Elaina home and camped out? . . .

Id. at LUI 2418-19. Detective Doyon then ended the interview. *Id.* at LUI 2419.

Boussiacos's sister, Sofia Harman, reported that

> JAMES NEGRON had a friend beat SOFIA'S boyfriend, while a gun was held to SOFIA. SOFIA says JAMES NEGRON used to be associated with the East Side Longo Gang out of Long Beach. SOFIA said that JAMES NEGRON had to get out of that area, probably due to drug dealing or gang activity, so he fled with their son to Washington, even though he and the victim were still married at the that time. Victim found out they were here, then came up here too...They confirm that JAMES NEGRON has full custody of ANTHONY, but the victim told JAMES NEGRON she was going to take him to court for child support because she has him most of the time.

App. 2 (Declaration of Celese Lui) at Ex. D. (LUI 2294).

In his interview with Detective Doyon, Negron admitted that Boussiacos had spoken to him about changing the parenting plan and child support. App. 10 (Declaration of David Zuckerman) at Ex. G (LUI 2233). Negron knew a week in advance that Boussiacos was planning a trip to California on Saturday, February 3, 2001, because he and Boussiacos

changed their usual parenting schedule to accommodate the trip. *Id.* at Ex. H (LUI 2668-69). Never in the course of two taped interviews with detectives, however, was he asked about his gang connections, his history of violence against Boussiacos, or his arguments with her regarding child custody. *Id.* at LUI 2666-89.

On April 25, 2007, Attorney Richard Pope sent an e-mail to Anthony Savage. App. 20 (Declaration of Richard Pope) at para. 2 and Ex. A. Pope explained that he had represented both Sione Lui and Elaina Boussiacos in their respective divorce proceedings. Pope possessed information relevant to the murder charge. *Id.* Savage wrote back to Pope, promising to call him after reviewing the discovery. *Id.* at Ex. B. But Savage never followed through. *Id.* at para. 3.

Pope provided to Celese Lui a timeline of events relating to Boussiacos's divorce. *Id.* at para. 3 and Ex. C. Pope could have explained that James Negron, while still married to Elaina Boussiacos, fled from California to Washington with their son Anthony. In 1995, Negron forged Boussiacos's signature on dissolution papers, granting himself custody of Anthony. When Boussiacos finally learned of this, she retained Pope, who obtained an order vacating the dissolution. In a letter to Negron's counsel, Pope noted that "my client still has major concerns about your client as a parent, given the history of incidents with violence and police." *Id.* at Ex. C, p. 5. Celese Lui passed this information on to Mr. Savage. App. 2 (Declaration of Celese Lui) at para. 7.

Prior to trial, the State moved in limine to exclude: evidence pointing to James Negron as an alternate suspect; Negron's and Boussiacos's gang life; and Negron's violence. CP 9. Savage conceded the points. I RP 49-52.

Savage likely believed the evidence to be inadmissible, but he was mistaken. Other suspect evidence is properly excluded when it is speculative and there is a danger of jury confusion and waste of time. *State v. Clark*, 78 Wn. App. 471, 477-78, 898 P.2d 854, *review denied*, 128 Wn.2d 1004, 907 P.2d 296 (1995). "By contrast, if the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime." *Id.* at 479, *citing Leonard v. The Territory of Washington*, 2 Wash. Terr. 381, 7 P. 872 (1885). Here, the evidence against Lui was entirely circumstantial and he was entitled to present circumstantial evidence pointing instead to Negron. The evidence was not merely speculative. Negron had a history of violence against Boussiacos and had a strong motivation to maintain primary custody of his son Anthony, as evidenced by his commission of forgery and perjury in the dissolution case. At the time of the murder, Negron and Boussiacos had recently quarreled over her desire to obtain primary custody of Anthony. Negron knew when Boussiacos planned to travel to California, so he could have lain in wait for her when she left her house. DNA matching his profile was found on Boussiacos's shoelaces. His "alibi" was hardly airtight; only his

wife maintained that he was home at the time Boussiacos disappeared. The wife was present during Negron's interview by Detective Doyon and then agreed with his account. App. 10 (Declaration of David Zuckerman) at Ex. H (LUI 2679-80). In any event, as Ms. Gordon pointed out, Negron had arranged in the past to have others commit violence for him.

In addition, regardless of state-law standards, Lui had a right to present other suspect evidence and argument under the due process and compulsory process clauses of the Sixth and Fourteenth Amendments to the federal constitution. *See Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). In fact, the Washington Supreme Court has recognized that the exclusion of probative "other suspect" evidence would violate the federal constitution. *See State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

Further, even if the evidence pointing to Negron were not admissible initially, it became admissible after the State opened the door. After redacting Lui's statement to Detective Peters (*see* I RP 46), the State chose to leave in Lui's comments about Negron's gang membership. App. 31 (Trial Ex. 169) at 27-28. Among other things, Lui said that Boussiacos told him that Negron used to kill people and that she feared him. The State also asked Detective Bartlett to confirm that Negron had an alibi and she responded: "That is correct." X RP 1428. Defense counsel failed to object that the question was leading and that the answer could only have

been based on hearsay. The State's purpose was apparently to suggest that Lui was making outlandish accusations against Negron to deflect blame from himself. In fact, the State's brief in the direct appeal makes this point. *See* Brief of Respondent at 14 and n.15; App. 10 (Declaration of David Zuckerman) at Ex. C.

After the State presented this evidence, the defense was entitled to rebut it by showing that Lui's statements about Negron were not fabrications, but were consistent with what Boussiacos's close friends and family members had related to him. The defense was also entitled to show that Negron did not truly have a strong alibi for the crime.

6. Defense Counsel Failed to Impeach Detective Gulla's Credibility

In its trial memorandum filed on December 24, 2007 (App. 21), the State moved to exclude any allegations of misconduct by Detective Denny Gulla.

> In 2005, the Seattle Post-Intelligencer ran an article that included information about Det. Gulla, who is now a patrol officer. The story involved allegations of misconduct through inappropriate contact with underage girls (including an incident 23 years ago!), threatening behaviors with the husband of a girlfriend, allowing gang members to assault another member who consented as part of an initiation, and rough handling of a suspect (20 years ago). There is reference in the article to Gulla being found to have "lied twice to investigators" in the incident from 23 years ago. None of these alleged incidents have ever resulted in criminal charges. The State has received nothing related to the "lying" allegations or anything else in the article.

> While arguably titillating, information derived from the newspaper exposé is not admissible in our trial as impeachment or for any other reason.

App. 21 at 10.

The newspaper article is attached as App. 22. It revealed that Gulla's "23-year career has been marked by numerous instances of misconduct." This included assaulting a prisoner in custody, encouraging gang members to beat a new recruit so that Gulla could videotape the initiation, and pulling over his lover's husband on a "bogus traffic stop" and threatening to kill him. The paper also reported allegations that Gulla "sexually molested four teenage girls." In one case, Gulla told an 18-year-old DUI arrestee that he would "make the Breathalyzer go away" if she agreed to go out with him. Gulla then "made an unusual error in conducting the breath test and pointed out his own error in officer's notes, with the result that its use as evidence was invalidated." In many of these incidents, Gulla's superiors concluded that he lied to them when questioned about his misconduct. According to the King County Sheriff Sue Rahr, the department should have fired Gulla "a long time ago" but had been thwarted by a powerful union. As early as 1988, Gulla had "accumulated 3 written reprimands and 5 suspensions. That is a total of 8 separate sustained complaints and 11 manual violations in the past 4 years." *Id.*

In its trial memorandum, the State devoted four pages to excluding information impeaching Denny Gulla. For the most part, the argument seemed to assume that the *only* impeachment information concerning

Gulla would be the article itself. For example, under the heading of "Hearsay", the State argued that "[e]verything contained in the article would be double hearsay in a court of law." *Id.* at 10. The State characterized the misconduct as too old to be relevant, but in fact the article laid out a history of misconduct beginning more than 20 years ago and continuing until the date of the article. For example, one of the most serious allegations involved an incident in 2004 in which Gulla pulled over for no reason the husband of a woman Gulla was dating, threatened to kill the man and, by some accounts, admitted that he would freely lie about his conduct. App. 23F. Gulla was found to have abused his power, was demoted to the rank of deputy, and was suspended for one day without pay. *Id.*

The defense investigator offered to gather further information concerning Det. Gulla, but Mr. Savage expressed no interest. App. 13 (Declaration of Denise Scaffidi) at para. 6. Although the prosecutors had an obligation to learn of and provide complete impeachment information on Gulla, *see* Section IV(B)(1), below, Savage never requested discovery. *See* App. 10 (Declaration of David Zuckerman) at para. 13. There was every reason to believe that further information could be uncovered, since the newspaper article noted that the Sheriff's office resisted disclosure of information and continued to withhold a significant portion of its records on Gulla. App. 22 at pg. 6.

Instead, at a hearing on March 24, 2008, defense counsel conceded that Gulla's misconduct was not admissible at trial. I RP 59. On April 9,

2008, however, defense counsel expressed his belief that the prosecutor would likely not call Gulla as a witness "because of matters referred to in pretrial arguments." VI RP 644. In fact, Det. Gulla did testify to several incriminating matters. *See* VIII RP 940-1042. Among other things, he pointed out that Lui's house, and particularly his garbage can, seemed suspiciously clean. VIII RP 943-44. He also described an interview with Lui, suggesting several times that Lui seemed to be faking concern for Elaina Boussiacos, and concluding that the detectives obtained "nothing useful" from Lui. VIII RP 955-56. He also testified that there were many leaves and pine needles in Lui's driveway but no debris on the victim's shoes, suggesting that she did not walk out the house but rather was carried out after being killed. VIII RP 988. Perhaps most importantly, Gulla was the one who obtained scent samples for the dog trailing that took place on February 14, 2001. He claimed that he carefully followed the instructions of the dog handler in gathering items that would contain Lui's scent, and that he avoided spreading the scent himself along the path ultimately followed by the dog. VIII RP 959-61. But there was no corroboration of that testimony. Mr. Savage made no attempt to impeach Detective Gulla's credibility.

While the article might not itself have been admissible evidence, it certainly suggested some fertile ground for cross-examination. For example, King County Sheriff Sue Rahr is quoted in 2005 as saying that Gulla not only showed poor judgment in the past, but *currently* "lacks the judgment to do the job." When asked why he had not been fired, she

responded: "I've done everything I could do within the confines of the labor contract. I disciplined him, and the discipline was overturned." She blamed that on the Guild, which "is very, very, very successful in overturning discipline cases."

These statements indicate that Gulla's position in the Sheriff's Office had been tenuous for some time as of 2005. It seems doubtful that his position improved much by the time of trial in this case. When he took the stand, Gulla identified himself as a deputy rather than a detective, indicating that his demotion had now lasted for three or four years. RP 941. Thus, it seems reasonable that KCSO records would show that Gulla had concerns about discipline and possibly termination in 2001, when he initially investigated this case, as well as in 2008, when he testified before the jury.

Gulla's tenuous status with KCSO goes directly to his motivation to trump up a case against Lui. Working under a Sheriff who wants to see him fired places him in essentially a probationary status. He would likely have been motivated in 2001 to solve the Boussiacos murder at any cost. Similarly, he would have motivation in the 2008 trial to deny any misconduct.

Gulla's motivations fall within the constitutional right to present evidence of bias. "Bias" is a general term incorporating various factors that can cause a witness to fabricate or slant her testimony, such as prejudice, self-interest, or ulterior motives. *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); 5A Karl B. Tegland,

Washington Practice: Evidence Law and Practice, §§ 607.7 through 607.11 at 384-402 (5th Ed. 2007). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). The right of a criminal defendant to cross-examine witnesses against him as to their bias in favor of the State is guaranteed by the Sixth Amendment to the United States Constitution. *Davis*, 415 U.S. at 315-316. *See also*, *State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002), *review denied*, 148 Wn.2d 1009, 62 P.3d 889 (2003); *State v. Roberts*, 25 Wn. App. 830, 611 P.2d 1297 (1980); *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319, *review denied*, 79 Wn.2d 1008 (1971) ("It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility."); 5A Tegland § 607.7 at 320 ("the defendant enjoys nearly an absolute right to demonstrate bias on the part of the prosecution witnesses"). Among other things, the defense is entitled to explore a witness' "vulnerable status as a probationer." *Davis v. Alaska*, 415 U.S. at 318. Gulla's entire history of misconduct and discipline was relevant to show his exposure to termination and perhaps even to criminal charges.

Some of Gulla's misconduct may also have been admissible under ER 404(b) to show motive and common scheme or plan. For example, that Gulla would sabotage a breath test to get a date tends to show his

motivation to distort evidence for his own gain. In Lui's case, the gain would not have been sexual favors, but rather enhanced status with the Sheriff's Office.

The defense could also likely have presented witnesses to Gulla's reputation for lying under ER 608(a). The State's brief on that point noted that "[t]he defendant in our case has not endorsed any reputation witnesses." App. 21 (12/24/07 State's Trial Memorandum) at 12. In view of Gulla's documented history of lying during investigations, it seems likely that members of the Sheriff's Office – perhaps the Sheriff herself – could have testified at trial to Gulla's poor character for truthfulness based on his current reputation.

The defense could also have cross-examined Gulla about specific instances of conduct reflecting on his credibility. ER 608(b). "Conduct involving fraud or deception is likely to be indicative of the witness's general disposition with regard to truthfulness." 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 608.6, at 361-62. For example, Gulla told Mike Kelly in 2004 that he was prepared to shoot him with a gun taken from a "crack head" and then give a false story about what happened. According to the 2005 article, there were at least two other incidents in which Sheriff's investigators concluded that Gulla lied to them. It is true that these two incidents were somewhat old. The Court could well find them sufficiently probative, however, when they are part of continuing pattern of engaging in misconduct and then lying about it.

Undersigned counsel made his own request to the Sheriff's Office under the Public Records Act. Key portions are attached as App. 23. They include the following:

- **1984** – Gulla was reprimanded for coming to work late and failing to complete his cases. App. 23A.
- **1986 – Kay Bellows incident**. This 15-year-old girl reported that Gulla made a pass at her, lied to her mother during a phone conversation to explain her whereabouts, and continued to call the girl four or five times after the initial contact. When asked to provide his notebook for the relevant date, Gulla falsely claimed he did not have one. When Internal Investigations obtained the notebook, pages were missing and there was no mention of Bellows, although Gulla admittedly spent time with her while on duty. App. 23B.
- **1986 – Jennifer DePriest Incident**. This 18-year-old girl alleged that Gulla offered to make her breath test go away if she would go out with him. Gulla then committed an unusual error that did cause the breath test to be suppressed. Gulla denied that DePriest rode in his patrol car after the incident, but the girl's mother produced a ride-along form with Gulla's fingerprint on it. Once again, Gulla would not produce any notes regarding the contact. Internal Investigations concluded that Gulla engaged in conduct unbecoming an officer and that he made false statements during the investigation. App. 23C.

- **1988** – Gulla committed conduct unbecoming an officer by hitting and cursing at a hit-and-run suspect and then denying his conduct. App. 23D.
- **1992** – Gulla videotaped gang members beating a boy as part of a jump-in, and made no effort to intervene. App. 23E.
- **2004 – Michael Kelly incident**. Gulla threatened to kill the estranged husband of Gulla's girl friend. Gulla was found guilty of inappropriate use of authority and was suspended without pay for one day. He was also demoted from the rank of sergeant to the rank of deputy and transferred to a different patrol. App. 23F.

Many hundreds of pages of allegations remain undisclosed, however, on the ground that the Sheriff's Office found them to be "unsustained." App. 24.

Undersigned counsel also made a written request for discovery from the prosecutor regarding Gulla. App. 25. When the request was denied, Lui filed a motion for discovery. App. 26. That too was denied. App. 27. If the Court finds the present record insufficient to grant relief on this claim, it should order at reference hearing at which Lui can engage in the same discovery his trial attorney should have pursued.

Even without discovery, Savage knew or should have known that Gulla provided false testimony under oath in a trial handled by Savage himself. In 2001, Savage represented the defendant in *State v. Steven Kozol*, King County Superior Court No. 00-1-09050-8 KNT. *See* App. 28. While executing a search warrant, the police seized numerous common

hardware supplies and tools from Mr. Kozol's garage and car on the theory that Kozol used them to build a silencer for the gun used to assault Mr. Wolter. The trial court ruled that the supposed silencer parts were not covered by the warrant. The State then convinced the court that the items were nevertheless properly seized under the "plain view" doctrine, based on the testimony of Detective Denny Gulla. He claimed to immediately recognize the items as silencer materials after viewing them all in "close proximity" to each other in the garage. *See* App. 28.

Kozol's postconviction investigation revealed that many of the items were actually seized by Gulla and other officers from Kozol's car the day after the search of the garage. The federal district court agreed that Gulla's testimony was faulty.

> While the record before this Court supports petitioner's contention that Detective Gulla's pretrial testimony was erroneous, this record does not reveal whether Detective Gulla's testimony was intentionally misleading or just carelessly inaccurate. The record does suggest, however, that both Detective Gulla and the prosecutor who elicited Detective Gulla's testimony at the suppression hearing should have known that the testimony was erroneous.

Report and Recommendation of Magistrate Judge Monica Benton at p. 17, *Kozol v. Payne*, W.D. Wash., C06-1074-MJP-MJB. App. 29. Whether Gulla's testimony in Kozol's case was "intentionally misleading" or "carelessly inaccurate," it certainly reflected poorly on his credibility as a witness.

Thus, had defense counsel aggressively pursued impeachment information regarding Detective Gulla, including appropriate pretrial

discovery requests, he could have undermined Gulla's credibility on the stand. In fact, it seems unlikely the prosecutor would have called Gulla as a witness at all if defense counsel had not conceded that he would not impeach him with his prior misconduct.

7. Defense Counsel Failed to Object to Prosecutorial Misconduct

The State committed misconduct several times during the trial yet defense counsel failed to object.

(a) The Prosecutor Argued, Without Evidence, that the Defendant Committed a Sexual Assault

In her closing argument, the prosecutor emphasized that Pineda's testimony was inconsistent with Lui's claim that he did not have sex with Boussiacos close to the time she disappeared.

> That is the second thing that he will never admit and has never admitted to any one, probably himself included, that is the intercourse that night. He has adamantly denied throughout that they had sex.
>
> He loved the idea of religious righteousness, but he can't even admit to himself, even in the face of semen in her vagina, because whatever happened in that regard that night was very bad.

XIV RP 1828. The prosecutor then suggested that Lui might have sexually assaulted Boussiacos. XIV RP 1829. "Maybe it happened at the same time she was being strangled, maybe not." XIV RP 1830. *See also*, XIV RP 1853. The prosecutor explained the small amount of semen detected as follows: "It is entirely possible that there was no completed sex act and that would have been the final humiliation for him." XIV RP 1830.

In fact, as discussed above the testimony of the State's DNA expert was merely that a tiny amount of Lui's semen was found on the victim's panties and in the vaginal wash. The expert conceded that the sperm cells could have been there for a long time. Therefore, there was no evidence to support a claim that Lui had sexual contact with Boussiacos on the night before she disappeared, much less that any contact was non-consensual.

"Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record." *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008), citing *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007). *See also*, *State v. Rose*, 62 Wn.2d 309, 382 P.2d 513 (1963) (improper for prosecutor to refer to defendant as a "drunken homosexual" where the only homosexual act in evidence was the alleged offense and, despite defendant's admission to having seven or eight drinks, no witness described him as drunk); *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005) (prosecutor improperly suggested in closing that the reason child victim did not confirm all charges originally alleged was that she felt uncomfortable relating such facts in front of the jury).

The United States Supreme Court discussed the prejudice resulting from similar evidence and argument in *House v. Bell*, 547 U.S. 518, 540-541, 126 S.Ct. 2064, 2079, 165 L.Ed.2d 1 (2006). At trial, the prosecution maintained that the semen stains found on the murder victim's underpants

came from the defendant, House. Years later, DNA testing proved that the semen belonged to the victim's husband. The State maintained that this was "immaterial" because "neither sexual contact nor motive were elements of the offense." The Supreme Court disagreed:

> When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncey. . . . Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a factor in persuading the jury not to let him go free.

Id. at 240-41.

Similarly, the State used the DNA evidence in this case to argue that Lui must have had some form of forced sexual encounter with Boussiacos. Recognizing that there was little sperm found, the State suggested that perhaps Lui was unable to complete the sexual act, and that "final humiliation" so enraged him that he committed the murder. This argument was not a reasonable inference from the evidence and was highly prejudicial. Defense counsel should have objected.

(b) Two Detectives Opined that Lui was Lying

When asked why she wished to re-interview Mr. Lui in 2007, Detective Bartlett replied: "Well, the main purpose was beyond the one that I already told you. *But he had told so many lies* and inconsistencies to different detectives, part of it was to see if he would talk to me about these

issues. The other part was to see if, indeed, he would tell me something differently." X RP 1449 (emphasis added).

Later, Detective Peters was asked whether the object of the 2007 interview was to obtain a confession. She replied: "I definitely would have loved to have a confession, *the truth*. . . . Well, the object of this interview was to get more information on specifics that had never been answered and my goal was to get *the truth* and a confession." XIV RP 1720 (emphasis added).

"Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citations omitted). Testimony from law enforcement officers concerning the veracity of another witness may be especially prejudicial because the "testimony often carries a special aura of reliability." *Kirkman*, 159 Wn.2d 928 (citation omitted). Thus, police officers may not testify at trial that they believe a defendant lied to them during interrogation. *See State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001); *State v. Saunders*, 120 Wn. App. 800, 812-13, 86 P.3d 1194 (2004) (error for police officer to testify that defendant's answers during interrogation "weren't always truthful"). A prosecutor commits misconduct by eliciting this type of trial testimony. *State v. Jerrels*, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996).

Mr. Savage should have objected to this testimony.

(c) The Detective and Prosecutor Opined that Lui Showed his Guilt by Failing to Act Like an Aggrieved Fiancée

When the detectives re-interviewed Lui in 2007 they began by falsely telling him that they had two good suspects in the case. X RP 1436, 1453. Detective Bartlett repeated that twice to Lui because "I wanted to elicit any inquiry of whether or not he would ask about anybody who was a suspect in the death of his fiancée or what their relationship was or questions that I thought he would, anybody would ask." X RP 1437. The prosecutor had her explain that he never asked for any specifics of what happened to Boussiacos and never appeared "angry, or upset, or wonder[ed] why it was taking so long to charge someone." *Id.*

On cross-examination, Bartlett further explained: "I think that one of the common things that someone would say is, "oh, I feel some sense of relief, some sense of wanting to know what happened to the love of their life, who was involved, how it happened, how we got to this information and do expect some relief." X RP 1454. She emphasized that Lui never questioned her about the other suspects even though she "offered that more than one time." *Id.*

When Detective Peters was asked whether she and detective Bartlett lied to Lui, she said they gave Lui "test questions" to see whether he would respond like a "grieving fiancée." XIV RP 1720. She insisted that a reasonable person would ask "Who are those suspects? When are you going to arrest them?" XIV RP 1722.

In closing argument, Ms. Richardson argued that "an innocent man would have kicked and screamed over the length of this investigation and how long it took to solve." XV RP 1849.

While it may be proper for a witness to describe the defendant's general demeanor so long as the testimony is based on the witness's first hand observations, *State v. Clark*, 143 Wn.2d 731, 768, 24 P.3d 1006 (2001), it is not proper for a witness to offer expert testimony regarding how a defendant should react to the death of a loved one. *State v. Stenson,* 132 Wn.2d 668, 723-24, 940 P.2d 1239 (1997). In *Stenson*, the Court cited with approval the Court of Appeals decision in *State v. Haga*, 8 Wn. App. 481, 491-92, 507 P.2d 159 (1973). The *Haga* Court properly reversed for misconduct where an ambulance driver "purported to testify as an expert on whether the defendant's reaction was that of a truly bereaved person." *See Stenson*, 132 Wn.2d at 723. It does not appear that the ambulance driver was ever formally offered as an expert witness in *Haga*. Rather, it was enough that the driver claimed to know from experience how spouses tended to react when their mate was mortally injured. *See Haga*, 8 Wn. App. at 489-92; *Stenson*, 132 Wn.2d at 722.

Similarly, in this case, the detectives claimed to have professional experience regarding how a person should react to an investigation into the death of a loved one.[7] In fact, they explained how they "tested" Lui to see

[7] Such testimony is particularly troubling because it assumes that people from all cultures will act the same. Even if it would be common for a native Seattleite to challenge the police in the manner suggested by the prosecutor and the detectives, that does not mean it would be common for a Tongan.

whether he would give the proper responses. This amounted to expert testimony that the defendant behaved like a guilty person. Defense counsel should have excluded such testimony through a motion in limine, or at least objected when it first came up at trial.

(d) The Prosecutor Violated Lui's Right to Religious Freedom by Questioning a Witness About the Religious Beliefs He and Lui Shared

In his cross-examination of Sam Taumoefolau, the prosecutor asked whether the witness knew that Lui was having an affair with Sina Packer while dating Boussiacos. Taumoefolau said he did not know that. XIV RP 1778-79. The prosecutor also brought out, for no apparent reason, that Lui and Taumoefolau are practicing Mormons. XIV RP 1779.

On redirect, Taumoefolau explained that it in Tongan culture it is not appropriate to discuss intimate relations. The prosecutor's re-cross included the following:

> Q. You said that you don't discuss these issues in your culture. What about in your religion?
>
> A. So is my religion.
>
> Q. In fact, in your religion, you aren't supposed to sleep with someone out of wedlock?
>
> A. Yes.
>
> Q. You are not supposed to live with someone out of wedlock?
>
> A. Yes.
>
> Q. You are not supposed to drink?
>
> A. Yes.

Q. You are not supposed to smoke?

A. Yes.

Q. You are not supposed to do caffeine?

A. Yes.

Q. Those are all things that are against the Mormon religion; correct?

A. That is everything. That is what we believe in.

Q. Correct.

A. They teach that principle.

Q. That is the word of wisdom?

A. Yes, the Mormons.

Q. That is the word of wisdom?

A. You have three days that you --

MR. CASTLETON: Thank you. Nothing further.

XIV RP 1783-84.

Article I, section 11 of the Washington Constitution is entitled "Religious Freedom." It includes the following:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual . . . No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Here, the prosecutor's questioning specifically focused on conduct prohibited by the Mormon church, but engaged in (by some witness accounts) by Lui and/or Boussiacos. The apparent purpose was to show that Lui did not live up to the ideals of his religion. There was no relevance to such testimony, but it clearly suggested to the jury that Lui was a person of bad character. This is not a case like *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003), in which the defendant's religious beliefs were relevant to his motive to commit a crime.

Again, the defense should have objected.

8. Counsel Failed to Seek Additional DNA Testing

Trial counsel's performance was deficient in failing to obtain additional DNA tests that the State failed to conduct. As noted above, the trial court has granted Lui's motion for postconviction DNA testing, finding a "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). Lui cannot demonstrate prejudice, however, until the testing is completed. He will supplement this PRP once favorable results are obtained.

B. THE STATE'S MISCONDUCT VIOLATED LUI'S RIGHTS TO DUE PROCESS AND TO RELIGIOUS FREEDOM

1. The State Violated its Obligation to Provide Impeachment Information Regarding Detective Gulla

As discussed in section IV(A)(6), above, defense counsel failed to request impeachment information concerning detective Gulla. Nevertheless, the State had an independent duty to obtain and provide this impeachment evidence on its own.

The Supreme Court has long held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *see also United States v. Bagley*, 473 U.S. 667, 674-76, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481 (1985); *Kyles v. Whitley*, 514 U.S. 419, 432-33, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The Court has established the following three-part test to determine whether a *Brady* violation has occurred: (1) the evidence must have been suppressed by the State, either willfully or inadvertently; (2) the suppressed evidence must be favorable to the accused, either because it is exculpatory or impeaching in nature; and (3) the evidence must be material to the defense, meaning that there is a "reasonable probability" that it would have changed the result. *Strickler v. Greene*, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The State's obligations are not contingent on a defense request for the information. *Bagley*, 473 U.S. at 682-83.

The *Brady* rule encompasses evidence not actually known by the individual prosecutor. "In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" *Strickler v. Greene*, 527 U.S. at 281 (quoting *Kyles v. Whitley*, 514 U.S. at 437). *Carriger v. Stewart*, 132 F.3d 463, 479-82 (9th Cir. 1997), *cert. denied*, 523 U.S. 1133, 118 S.Ct. 1827, 140 L.Ed.2d 963

(1998) (prosecution had a duty to obtain and review a Department of Corrections file of its principle witness); *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995) (in prosecution for conspiracy to defraud Food and Drug Administration, prosecutor was required to disclose information known to FDA).

The State did not meet its *Brady* obligations regarding Denny Gulla. Mr. Savage's file does not reflect any discovery from the prosecutor concerning Gulla's credibility. As discussed above, the prosecutor's trial memorandum suggests that the individual prosecutors made no effort to learn of impeachment evidence concerning Gulla beyond what everyone knew from the newspaper article.

Lui filed a postconviction motion asking the trial court to order the State to provide impeachment information regarding Gulla. App. 26. As Lui pointed out, the *Brady* duty continues after the trial has concluded. *See Smith v. Roberts*, 115 F.3d 818, 819-20 (10th Cir. 1997) (direct appeal pending); *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992) (state has duty to disclose exculpatory evidence under *Brady* during a habeas corpus proceeding); *Monroe v. Butler*, 690 F. Supp. 521, 522-23, 525-26 (E.D. La.), *aff'd*, 883 F.2d 331 (5th Cir.), *cert. denied*, 487 U.S. 1247, 109 S.Ct. 7, 101 L.Ed.2d 958 (1988) (holding that state's failure to disclose exculpatory evidence discovered after conviction violated habeas petitioner's *Brady* rights). Similarly, CrR 4.7(h)(2) provides for a "continuing duty to disclose" discovery. The trial court, however, denied the motion. App. 27.

The discussion in section IV(A)(6), above, shows that significant information was not disclosed. If the Court finds insufficient prejudice based on those facts, however, it should order a reference hearing so that Lui can obtain additional discovery. Although Lui obtained some information through his request under the Public Records Act, the Sheriff withheld many hundreds of pages because she found the allegations to be "unsustained." Impeachment information cannot be withheld from the defense at trial, however, simply because the police or even the prosecutors believe it to be unfounded.

For example, in *United States v. Alvarez*, 86 F.3d 901 (9th Cir. 1996), *cert. denied*, 519 U.S. 1082, 117 S.Ct. 748, 136 L.Ed.2d 686 (1997), the prosecutor failed to disclose a witness statement because the prosecutor thought the witness was "obviously lying." The Ninth Circuit explained:

> It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false. It is "the criminal trial, as distinct from the prosecutor's private deliberations" that is the "chosen forum for ascertaining the truth about criminal accusations."

Id. at 905, quoting *Kyles,* 514 U.S. at 440. Further,

> [b]ecause the government's failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable, it is particularly important for the prosecutor to ensure that a careful and proper *Brady* review is done. Delegating the responsibility to a nonattorney police investigator . . . is clearly problematic.

Alvarez, 86 F.3d at 905.[8]

A similar rule applies to evidence a prosecutor believes may not be admissible. In *Griffin v. United States*, 183 F.2d 990, 87 U.S. App. D.C. 172 (D.C. Cir. 1950), the defendant was convicted of killing a man in a barroom brawl. He claimed he acted in self defense when the victim approached him making threats with his hand in his pocket. A coroner later discovered an open pen knife in the victim's pocket. The prosecution did not disclose the evidence to the defense, believing that evidence of uncommunicated threats was inadmissible. The Court of Appeals first held that the evidence was in fact admissible. The court also expressed the following policy concerning a prosecutor's duty to disclose evidence to the defense:

> It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion, which the District Court sustained and no court has overruled until today. However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful.

Id. at 992-93; *accord United States v. Hibler*, 463 F.2d 455, 459-60 (9th Cir. 1972). Washington law is also in accord.

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[8] The Court did not reverse in *Alvarez* because the information was ultimately disclosed prior to trial. "Our affirmance, however, does not lessen our disapproval of the government's actions." *Id.* at 908.

> There is no exception to this obligation to disclose which would allow either the prosecutor or the court to determine whether the [evidence] is false and, if so, to permit nondisclosure. A rule of disclosure which depended on the, perforce, subjective analysis of a deputy prosecutor made during preparation of a case would be meaningless. It is far too tempting to merely dismiss the unfavorable version as false.

State v. Garcia, 45 Wn. App. 132, 137, 724 P.2d 412 (1986); *see also State v. Wright*, 87 Wn.2d 783, 787, 557 P.2d 1 (1976) ("Of course, neither the police nor the prosecution are to decide for the defense what is favorable or material evidence."), *overruled on other grounds as stated in State v. Ortiz,* 119 Wn.2d 294, 303-04, 831 P.2d 1060 (1992).

Thus, the State should have obtained and disclosed all negative information in the Sheriff's internal investigation files on Detective Gulla. To the extent it believed any of it to be non-discoverable, it could have presented the information to the Court *in camera.* This Court should remand for a reference hearing so that the superior court can determine whether material impeachment information was withheld.

2. <u>The State's Misconduct During the Trial Violated Lui's Rights to Due Process and Religious Freedom</u>

As discussed above in section IV(A)(7), defense counsel failed to object to significant misconduct. Even without an objection, however, this misconduct was so flagrant and ill-intentioned that a curative instruction could not cure the errors. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d

1005 (1995). This Court should therefore review each instance of misconduct independently from the ineffective assistance claim.

Particularly when considered cumulatively, the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

C. JUROR MISCONDUCT VIOLATED LUI'S CONSTITUTIONAL RIGHTS

Based on an interview with juror Clare Comins, the defense has learned that the jurors considered extrinsic information based on one of the juror's purported personal knowledge of the crime scene. *See* App. 9 (10/10/09 Declaration of Denise Scaffidi) at Ex. C.

> 3. [Clare Comins] informed me that he was one of the jurors for the trial and that during deliberations in the above captioned matter there was discussion concerning the credibility of one of Mr. Lui's defense witnesses, a man named Sam.
>
> 4. I took this to be Sam Taumoefolau as this is the only witness with the first name of Sam who testified for Mr. Lui and I am aware that his testimony concerned the issue below.
>
> 5. When asked what the concerns were with Mr. Taumoefolau's credibility, Mr. Comins stated that there were a few issues raised. He stated that one issue concerned Mr. Taumoefolau's testimony that both he and Mr. Lui had distributed missing person's leaflets at a particular mall that was described on the witness stand. The location of this mall was outside the area of the aerial photographs that had been introduced as exhibits in the case, however, Mr. Taumoefolau was

able to describe where this mall was that he and Mr. Lui went to while distributing the leaflets.

6. Mr. Comins stated that during the deliberations by the jury, one of the female jurors explained she had lived in Woodinville at the time of the murder and she knew that the mall described by Mr. Taumoefolau could not possibly have been leafleted in the days following Ms. Boussiacos's disappearance because the mall had not yet been built. Mr. Comins stated further that he believed that the jurors discussed this information during deliberations and that it reflected poorly on Mr. Taumoefolau's overall testimony.

Id. Mr. Comins would not sign a declaration.

In the trial court, the defense moved for an opportunity to contact the remaining jurors to corroborate the statements of Mr. Comins. The trial court denied the defense request for access to juror contact information from the clerk's office. App. 27.

A criminal defendant has state and federal constitutional rights to trial by an impartial jury. *See Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968); U.S. Const. amend. 6; Washington Const. art. I, § 22. The Sixth Amendment also guarantees the rights to confrontation of witnesses and to the assistance of counsel. The Fourteenth Amendment due process clause guarantees the right to a fair trial. All of these rights are violated when the jury receives material information outside of the courtroom. *See Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); *Gibson v. Clanon*, 633 F.2d 851, 854 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035, 101 S.Ct. 1744, 68 L.Ed.2d 231 (1981). "When a juror communicates objective

extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause." *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1996), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997). Such facts will not have been subject to objection, cross examination, explanation, or rebuttal by either party. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014, 807 P.2d 883 (1991) (quoting *Lockwood v. A C & S, Inc.*, 44 Wn. App. 330, 357-58, 722 P.2d 826 (1986), *aff'd*, 109 Wn.2d 235, 744 P.2d 605 (1987)). When misconduct has occurred, "'a new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'" *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir. 1981), *cert. denied*, 454 U.S. 942, 102 S.Ct. 480, 70 L.Ed.2d 251 (1981) (quoting *Gibson v. Clanon*, 633 F.2d at 855); *State v. Briggs*, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989) (citing numerous cases). There is no need for a petitioner to show that all the jurors were exposed to improper extrinsic information. *See Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995). Jurors may testify to the fact that misconduct occurred, but may not testify to the subjective effect that the misconduct had on their internal deliberations. *State v. Jackman*, 113 Wn.2d 772, 782, 783 P.2d 580 (1989).

This Court should find that Lui has at least established a prima facie case of juror misconduct. The Court should remand for an evidentiary hearing at which Lui can question all the jurors about this.

V. REQUEST FOR RELIEF

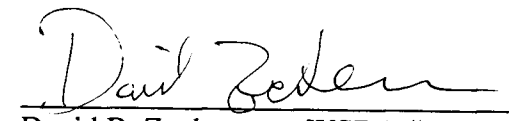
Based on the foregoing, Lui asks this court to reverse and remand for a new trial. In the alternative, he requests a reference hearing.

VI. OATH

After being first duly sworn on oath, I depose and say that: I am the attorney for petitioner, I have read the petition, know its contents, and believe the petition is true.

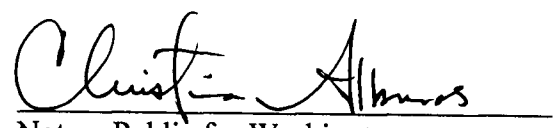
DATED this 28th day of December, 2010.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Sione Lui

SUBSCRIBED AND SWORN TO before me, the undersigned notary public, on this 28TH day of DECEMBER, 2010.



Notary Public for Washington

My Commission Expires: 11/09/12

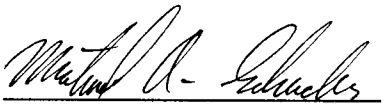
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Personal Restraint Petition and accompanying Appendix to Personal Restraint Petition on the following:

Ms. Deborah Dwyer, Senior DPA
King County Prosecutor's Office
Appellate Unit
516 Third Avenue, W554
Seattle, WA 98104

Mr. Sione P. Lui #319129
Monroe Corrections Center
Washington State Reformatory
PO Box 777
Monroe, WA 98272-0777

December 28, 2010
Date


Michael Schueler

part 1 of 2

ORIGINAL

Supreme Court No. ~~85459-9~~ 72478-9
King County Superior Court No. 07-1-04039-7SEA

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

SIONE P. LUI,

Petitioner.

APPENDIX TO
PERSONAL RESTRAINT PETITION

By:
David B. Zuckerman
Attorney for Petitioner
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-1595

FB E

INDEX TO APPENDIX TO PRP

1. Order on Criminal Motion Re: DNA Testing – December 22, 2009
2. Declaration of Celese Lui – December 13, 2010
3. Declaration of Sione Lui – December 8, 2010
4. Declaration of Ray Taylor – October 7, 2010
5. Declaration of Grant Mattson – October 5, 2010
6. Declaration of William Harris – November 8, 2010
7. Declaration of Joan Byers – October 26, 2010
8. Declaration of Semisi Taumoefolau – September 21, 2009
9. Declaration of Denise Scaffidi – October 10, 2009
10. Declaration of David Zuckerman – November 22, 2010
11. Declaration of Paul Finau – September 1, 2009
12. Declaration of Falepaini Harris – August 31, 2009
13. Declaration of Denise Scaffidi – October 11, 2010
14. Declaration of James Ha, Ph.D. – September 27, 2009
15. Declaration of Theodore J. Becker, Ph.D. – September 1, 2009
16. Declaration of Sione Lui – October 20, 2009
17. Declaration of Robert Talbott – October 5, 2009
18. Declaration of Marc Jensen – October 7, 2009
19. Declaration of Julia Makous – October 22, 2009
20. Declaration of Richard Pope – November 18, 2010
21. State's Trial Memorandum – December 24, 2007
22. "Deputy Accused of Molestations, Abuse", Seattle Post-Intelligencer – November 15, 2005

23.a Personnel Order 84-188 re: Gulla - April 30, 1984

23.b King County Police Memorandum re: IIU Case 86-43; Bellows vs. Gulla – November 25, 1986

23.c King County Police Memorandum re: IIU Case 86-44; DePriest vs. Gulla – November 26, 1986

23.d King County Police Memorandum re: IIU Case 88-44; KCDPS vs. Gulla – November 23, 1988

23.e Arbitration Award – December 7, 1993

23.f King County Sheriff Internal Investigations Follow-Up Report – June 29, 2004

24. Letters from King County Sheriff's Office to David Zuckerman re: Gulla Materials – August 7 & 14, 2009

25. Letter to King County Prosecutors from David Zuckerman – April 24, 2009

26. Defendant's Motion, Memorandum and Declaration Re: Discovery and DNA Testing – May 15, 2009

27. Order on Criminal Motion – June 5, 2009

28. Documents from *Steven Kozol v. Alice Payne*, United States District Court (Western District of Washington) No. CV06-1074-MJP

29. Report & Recommendation, *Steven Kozol v. Alice Payne*, United States District Court (Western District of Washington) No. CV06-1074-MJP – May 4, 2007

30. Agreed Order for Removal of Trial Exhibits – July 15, 2010

31. Suspect Statement of Sione Lui – April 6, 2007

FILED
KING COUNTY WASHINGTON

DEC 22 2009

SUPERIOR COURT CLERK
BY Shawnee Schaeffer
DEPUTY

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

State of Washington vs. Sione Lui Defendant	No. 07-1-04039-7SEA ORDER ON CRIMINAL MOTION (ORCM)

This Court, having heard a motion for post-conviction DNA testing.

IT IS HEREBY ORDERED that the testing, to the extent feasible, will be done by the Washington State Crime Laboratory. Defendant will present to the State by 1/4/10 a list of items it wishes tested and the specific tests to be done. The State will promptly forward the list to WSPCL, which will prepare a report by 2/8/10 regarding the feasibility of each requested test. After receipt of the report, either side may set a hearing to resolve any issues that remain in dispute. Report should include estimated time line to do tests.

Dated: 12/22/09

JUDGE MICHAEL J. TRICKEY

Deputy Prosecuting Attorney, WSBA No. 29445

David Zuckerman
Attorney for the Defendant, WSBA No. 18201

Order on Criminal Motion (ORCM)

POSTED

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF CELESE LUI**

Celese Lui declares as follows:

1. I am the wife of Sione Lui.
2. After Sione was arrested for the murder of Elaina Boussiacos, he called me from the jail and said to call Anthony Savage. He had hired Mr. Savage in 2001 when the police told him that he was a suspect. Sione thought it made sense to call him again because he had some familiarity with the case. Mr. Savage offered to take the case for a flat fee of $25,000.
3. Mr. Savage told me that an investigator, Denise Scaffidi, would be helping with the case. The arrangement was that I would pay her directly for her time. I ended up dealing directly with her regarding the investigation because Mr. Savage was not giving her much to do. Denise also met with my parents to share ideas. There was little guidance coming from Mr. Savage.

(initials)

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DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

4. I asked Mr. Savage several times about getting our own DNA testing, or at least our own expert. He never explained why he would not do that.

5. Mr. Savage permitted me to view all of the discovery at his office. He would set me up at a desk and let me lock the door myself on the way out. I placed numerous post-it notes on the discovery pages because I wished to bring certain matters to his attention. When I would ask him whether he had read my notes, he always said he did, but he would never discuss them with me. The following exhibits are accurate copies of discovery pages, with and without my post-its on them.

   5.1. Ex. A is discovery page LUI 1319, which discusses Amber Mathwig's statement that Elaina's car was not in the parking lot of the Woodinville Athletic Club until several days after Elaina disappeared.

   5.2. Ex. B is LUI 2474. I explained to Mr. Savage that Paini Harris could testify to Sione walking around Woodinville leaving flyers. He said there was no need because there was no dispute that Sione was doing that.

   5.3. Ex. C is LUI 2396, which contains my note suggesting that Paul Finau could confirm that Sione was putting up flyers in the same area the tracking dog followed. Mr. Savage never explained why he did not call Paul Finau as a witness.

   5.4. Ex. D is LUI 2288-89, 2293-94, 2410, 2418 and 3079, which contain my notes regarding statements of Evamarie Gordon, Maria Phillips, and Sofia Harman regarding James Negron. They were explaining to the police why James Negron was a likely suspect.

6. In addition to leaving notes, I would often ask Mr. Savage specific questions about various witnesses and forensic evidence. He would always say something noncommittal like "I'll look into it," but he never got back to me with any answers. If I pushed him about his strategy for the trial, he would just say that the prosecutors did not have much of a case.

(initials)

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6.1. For example, I knew that the police were claiming that James Negron had an alibi for the murder. I asked Mr. Savage to explain to me what the alibi was. He said he would look into that but he never got back to me.

6.2. I also pointed out to him that Evamarie Gordon told the police that Elaina and James Negron had a big fight shortly before she was killed. He promised to interview Evamarie but he never did.

7. After Sione was arrested, we contacted attorney Richard Pope to assist with custody issues concerning Sione's son. Mr. Pope had handled Sione's divorce from Julie Lui, and also Elaina Boussiacos's divorce from James Negron. He felt strongly that information he gained in handling Ms. Boussiacos's dissolution would be helpful in the murder case. He shared with me an e-mail he sent to Anthony Savage and Mr. Savage's response. Although Mr. Savage said he would get back to Mr. Pope after reviewing the discovery, he never did. Mr. Pope also provided me with a copy of a timeline he prepared. I forwarded that timeline to Mr. Savage. The e-mail, letter and timeline are attached as Ex. E.

8. Mr. Savage never explained why he did not pursue the theory that James Negron may have killed Elaina Boussiacos.

9. Denise Scaffidi and I thought it would be helpful to have our own expert to deal with the dog tracking evidence. Ms. Scaffidi discussed with me how she had found someone. I was prepared to pay his fees. Mr. Savage was not interested in the expert. He insisted that the dog tracking evidence was no problem because Sione had walked through the area putting up flyers.

10. I explained to Mr. Savage that Sione could not have committed this crime because he was recovering from surgery for a broken arm. I brought him Sione's medical records. I also brought him a receipt for a bass guitar that Sione had rented close to the time of Elaina's

(initials)

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death because his arm was too weak to play a guitar. Mr. Savage said that Sione must have been strong enough to commit the murder because of his size. He never checked with Sione's physical therapists to see whether that was true, and he never consulted with an expert about that. After the verdict, I provided the same records to Dr. Theodore Becker.

11. After his fall, Mr. Savage could hardly move even with his walker. He did not seem engaged in what was going on. His suit was covered in cat hair. He had to be assisted to stand up. When court resumed on the next Monday, there did not seem to be a great deal of improvement. He was moving and speaking very slowly and appeared to be in a great deal of pain. I was very concerned that he could not handle the trial.

12. I was particularly shocked at the questioning of Amber Mathwig. I knew that Denise Scaffidi had given Mr. Savage a report informing him that Ms. Mathwig could confirm that Elaina's car was not in the Washington Athletic Club parking lot until several days after she disappeared. I was floored when he failed to ask her about that. He never gave any reason why he did not do that.

13. I would testify consistently with this declaration at an evidentiary hearing or a new trial.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

12-13-2010 Lynnwood, WA
Date and Place

Celese Lui

(initials)

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

MAJ CRIMES – DOWN

King County Department of Public Safety

Tip Sheet

Unit/Detective: MAJOR CRIMES

CASE NUMBER 01-041133

PRIORITY A B C

SUBJECT INFORMATION

NAME	CCN	BA
NICKNAME OR AKA	SSN	FILE NUMBER

HOME ADDRESS	CITY	ST	ZIP	HOME PHONE	FBI#
OLD ADDRESSES				GLASSES	FACIAL HAIR
EMPLOYER/ADDRESS	CITY	ST		WORK PHONE	OCCUPATION

RACE	SEX	DOB	AGE	POB	HGT	WGT	HAIR	EYES	BUILD	COMPL

OLN	ST	VEH YR	MAKE	MODEL	COLOR(S)	BODY STYLE

LICENSE	ST	CONDITION/EQUIPMENT	OTHER VEHICLE PLATES

SOURCE

NAME MATHWIG, AMBER

RACE	SEX	DOB	HGT	WGT	HAIR	EYES	OCC

ADDRESS	CITY

HOME PHONE	WORK PHONE
360.794.6472	425.481.4334

ADMINISTRATIVE/TIP PROCESSING INFORMATIO

RECEIVED BY	SERIAL	DATE
WILLIAMS, M.	#02238	021001

ASSIGNED TO	SERIAL	DATE	SUSPENSE

COMPUTER CHECKS BY	SERIAL	DATE	TIME

This is very important! Worker from Woodinville Athletic says car was not there on 2-6-01 @ 1400 hours

No ☐

RP works at Woodinville Athletic C

Says the victim's veh was there by 0900 on 020701.

RPs coworker, who worked on 020601, says the car was *Not* there when she left at 1400.

EX. A

MJ CRIMES – DOHON

King County Department of Public Safety

Tip Sheet

Unit/Detective: MAJOR CRIMES

CASE NUMBER 01-041133

PRIORITY A B C

SUBJECT INFORMATION

NAME	CCN	BA

NICKNAME OR AKA	SSN	FILE NUMBER

HOME ADDRESS	CITY	ST	ZIP	HOME PHONE	FBI#

OLD ADDRESSES	GLASSES	FACIAL HAIR

EMPLOYER/ADDRESS	CITY	ST	WORK PHONE	OCCUPATION

RACE	SEX	DOB	AGE	POB	HGT	WGT	HAIR	EYES	BUILD	COMPL

OLN	ST	VEH YR	MAKE	MODEL	COLOR(S)	BODY STYLE

LICENSE	ST	CONDITION/EQUIPMENT	OTHER VEHICLE PLATES

SOURCE

NAME	AKA
MATHWIG, AMBER	

RACE	SEX	DOB	HGT	WGT	HAIR	EYES	OCCUPATION/EMPLOYER

ADDRESS	CITY	ST	ZIP

HOME PHONE	WORK PHONE	CCN	B/A
360.794.6472	425.481.4334		

ADMINISTRATIVE/TIP PROCESSING INFORMATION

RECEIVED BY	SERIAL	DATE	TIME
WILLIAMS, M.	#02238	021001	0930

ASSIGNED TO	SERIAL	DATE	SUSPENSE DATE

COMPUTER CHECKS BY	SERIAL	DATE	TIME

COMPUTER CHECKS

System	Yes	No	System	Yes	No
SEAKING			MIF		
WACIC			NCIC III		
NCIC			NCIC O/L		
DOL			OTHER		

RP works at Woodinville Athletic Club.
Says the victim's veh was there by 0900 on 020701.
RPs coworker, who worked on 020601, says the
car was *Not* there when she left at 1400.

1 A I'm not familiar with Seattle, but--
2 Q Was it right around the neighborhood or
3 A Not in the neighbor--I guess they were d
4 neighborhood--from the house to the airp
5 what (inaudible).
6 Q Now, do you know if Sione ever went out
7 look for Nina or--with you there or did
8 A Yes. 'Cause we went--we went to Kenko's to do some more--to
9 run off some more copies.
10 Q Flyers?
11 A Yes. And he pointed out--he put up the...the gas stations,
12 he put up--he pointed out the flyers that he had put up on
13 the electric poles and...yeah, yeah. The neighborhood was
14 covered, yeah.
15 Q Was there any kind of search made by he and his friends, at
16 all?
17 A Oh, since Monday night. They go out every Monday night--I
18 mean since Monday night. Even the night I was there, I was
19 sort of afraid to stay by myself, but I said, Yes, go ahead
20 and go out, I can--'cause they were going out almost every
21 night; you know, not knowing what's--where is this thing
22 going to lead to.
23 Q Now, her body was found on the 9th, you said.

Witness to Sione walking around Woodinville.

1 A I'm not familiar with Seattle, but--
2 Q Was it right around the neighborhood or something or...
3 A Not in the neighbor--I guess they were doing the
4 neighborhood--from the house to the airport, so I don't know
5 what (inaudible).
6 Q Now, do you know if Sione ever went out in Woodenville to
7 look for Nina or--with you there or did he--
8 A Yes. 'Cause we went--we went to Kenko's to do some more--to
9 run off some more copies.
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20 and go out, I can--'cause they were going out almost every
21 night; you know, not knowing what's--where is this thing
22 going to lead to.
23 Q Now, her body was found on the 9th, you said.

DET: Um hmm.

WIT: And he...uh, I know it's hurtin' him real bad ' doesn't know what to do. He might just...I mean it's...nothi

DET: Yeah.

WIT: You know, that's...

DET: Well uh...

WIT: 'Cause I haven't seen him since uh, Wedn inesday night again passing out flyers.

DET: Ah. Okay. You mean Wednesday before the

Sam T. has stated that Paul F. was in the gym parking lot on Wednesday Feb 7th. And Finau was not there. Feb like to confirm this with Paul.

WIT: Yeah.

DET: Okay. But you've spoken to him on the phone?

WIT: Yes.

DET: Okay. So Wednesday the uh, 9th? 8th? 7th is the last day you saw him?

WIT: Yeah.

DET: Wednesday 7th? Okay. Uh, do you have any uh...do you any theories about what might've happened to ELAINA?

WIT: Uh, I think is...I, I don't know 'cause I don't really know her all that well. You know uh, I, I just met her just uh, about five, six times. And I've seen...they've been to my house twice. And uh, my wife and I went...we went out to the movies with her and SIONE, you know, spent a few hours together.

DET: Um hmm.

WIT: Because he's very...uh, they seem...they seemed to be a happy couple to me, you know.

DET: Okay.

WIT: You know, they seemed pretty happy. And you know, we went out. That night we went to a theater before Christmas.

DET: Um hmm.

EX. C

DET: Um hmm.

WIT: And he...uh, I know it's hurtin' him real bad 'cause when we talked he just says he doesn't know what to do. He might just...I mean it's...nothin' he could do about it, so.

DET: Yeah.

WIT: You know, that's...

DET: Well uh...

WIT: 'Cause I haven't seen him since uh, Wednesday. 'Cause then we went out Wednesday night again passing out flyers.

DET: Ah. Okay. You mean Wednesday before the body was found?

WIT: Yeah.

DET: Okay. But you've spoken to him on the phone?

WIT: Yes.

DET: Okay. So Wednesday the uh, 9th? 8th? 7th is the last day you saw him?

WIT: Yeah.

DET: Wednesday 7th? Okay. Uh, do you have any uh...do you any theories about what might've happened to ELAINA?

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DET: Um hmm.

WIT: Because he's very...uh, they seem...they seemed to be a happy couple to me, you know.

DET: Okay.

WIT: You know, they seemed pretty happy. And you know, we went out. That night we went to a theater before Christmas.

DET: Um hmm.

are taking, if we would be willing to check out victim's credit cards, because the companies won't tell them anything, and then said "the longer you wait, the worse it's going to get." SOFIA said she and her mother are both flying in tonight and will be coming to my office. She also left her husband's name and number: TERRY HARMAN (303) 859-0459.

Tuesday 02/06/01 **9:44**

Received voice mail message from BOB BOLAN, the legal advisor f
(425) 864-5806.

Tuesday 02/06/01 **9:50**

Called SOFIA HARMAN's home number. Still busy signal.

Tuesday 02/06/01 **9:52**

Called TERRY HARMAN. I relayed to him that I have tried for an h
number is busy. He said he would relay that to her. He said there
said that the victim said the relationship between her and the RP is
supposedly sleeping with his ex-girlfriend, and victim is thinking of
responsible and not the type to do harm to herself. He said that vi
victim through several flights, but victim never showed. (turns out
if he knows why there was a delay in reporting the victim missing.
not show up at her mother's home until she called him, a couple da

The mother had no flight information. So why was she waiting at the airport?

Tuesday 02/06/01 **10:01**

EVAMARIE GORDON called. She is an ex-roommate of the victim's, for 2.5 years. EVAMARIE says that the victim has a hostile ex-husband named JAMES NEGRON, whom victim just had a huge fight with about 2 weeks ago. EVAMARIE said JAMES NEGRON is gang or previously gang related and has a hot temper. EVAMARIE says she was at the victim's home on occasions when their child would come home from JAMES NEGRON's, all covered in bruises from JAMES beating him. EVAMARIE said JAMES NEGRON had full custody of the boy, but he couldn't afford to keep him all the time anymore, so he stayed with the victim and visited JAMES. EVAMARIE says the victim asked JAMES ... ney towards the boy and he had a fit and the fight broke out. EVAMARIE said she is ... company and pretend to be victim, to see if she can get a t... ...y night, the night before victim disappeared, the RP and talked to th ... ARIE describes victim as very routine, and cannot believe she is o...

Very important

Evamarie thinks James did it. Cause James is big # problems beating son. I think Evamarie knew victim was being off at wedding

Tuesday 02/06/01 **10:04**

BOB BOLAN, legal advisor from victim's work, called. He said ...ected her back today. She took yesterday off, because she was goi... victim does not use company credit cards. BOLAN said that the RP is ...eren't going to release them to him, and I said that was a good mov... at U.S. Bank. BOLAN made a point of saying that the victim did n...

Tuesday 02/06/01 **10:14**

RP called from a cellular phone of (425) 260-8004. He said that ...e with financial statements which may show any recent activity. I ...r has a Capital One Visa card, but the information on it is at victim ... and address. RP says he just got off the phone with NEGRON, ar... victim's/NEGRON's 9 YOA son is with NEGRON. I asked how well ... JAMES NEGRON, get along. RP said they get along like typical divorced people, who tr... together because of the child, saying the two only get together to exchange their son. I asked if they have fights or arguments. RP answered just like any other divorced couple, but nothing outrageous. I asked if the victim and JAMES NEGRON had a recent fight or argument. RP said he was in the car when an argument broke out last month, but said it was not a huge deal. RP said they seem to get along unless something about the child is brought up like financial transactions between the two parents. I asked RP how he and victim had been getting along. RP said they talked about 2 weeks ago and agreed that they should not get married sometime 02/15-19/01 as planned. RP said they were both saddened by it, but felt it was the right thing to

EX. D

do. I asked if they were going to continue living together or separate. RP claims they were going to
together. I asked how the victim ended up going to travel to California. RP sa
time off, so she decided to go see her mom for a few days. He said she was d
victim did not arrive in California. RP said victim's mother called and he asked h
mother was making up that victim never arrived. I asked RP what his opinion is
this is so unlike her, that he thinks something happened to her or someone did s
victim's mother to come here because of victim's disappearance.

Maria states "no" when asked if she lied to her RP (sister)

Tuesday 02/06/01 **10:38**

Called Washington Mutual Bank. They will call back with the victim's account info

Tuesday 02/06/01 **10:40**

Called RP. I asked for the banking information for him and victim, as he said he w
retrieve the information. RP said most of victim's account type papers are at work,
account at U.S. Bank. RP called the bank and they said that the victim closed this a
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again said that he begged the victim's mother to come up because of this situation.

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DARLENE, Washington Mutual Bank, called. The victim does not have an account with them.

Tuesday 02/06/01 **11:05**

Victim's mother, MARIA PHILLIPS, called. And left voice mail.

Tuesday 02/06/01 **11:21**

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PHILLIPS describes the victim and JAMES NEGRON as friends, who get along for the
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been physically abusive to victim nor to ANTHONY, the 9 YOA son.

Phillips says Negron bashed out Elaina's windshield.

Tuesday 02/06/01 **11:23**

TERRY HARMAN, victim's brother in-law/SOFIA HARMAN's husband, left voice mail. He said that he has more information, which he thinks may be urgent. He said he found out the victim and the RP's ex-girlfriend confronted RP about his possibly cheating, recently.

Tuesday 02/06/01 **11:33**

Detective TOM JENSEN told me the RP called while I was speaking to MARIA PHILLIPS.

Tuesday 02/06/01 **11:34**

are taking, if we would be willing to check out victim's credit cards, because the companies won't tell them anything, and then said "the longer you wait, the worse it's going to get." SOFIA said she and her mother are both flying in tonight and will be coming to my office. She also left her husband's name and number: TERRY HARMAN (303) 859-0459.

Tuesday 02/06/01 **9:44**

Received voice mail message from BOB BOLAN, the legal advisor for victim's employer Digimine.COM. His number is (425) 864-5806.

Tuesday 02/06/01 **9:50**

Called SOFIA HARMAN's home number. Still busy signal.

Tuesday 02/06/01 **9:52**

Called TERRY HARMAN. I relayed to him that I have tried for an hour and a half to reach his wife SOFIA, but her number is busy. He said he would relay that to her. He said there was something he wanted to be sure we know. He said that the victim said the relationship between her and the RP is not working, victim just found out the RP is supposedly sleeping with his ex-girlfriend, and victim is thinking of ending the relationship. He said victim is very responsible and not the type to do harm to herself. He said that victim's mother went to the airport and waited for victim through several flights, but victim never showed. (turns out the victim never gave any flight info to her) I asked if he knows why there was a delay in reporting the victim missing. TERRY said that the RP did not know the victim did not show up at her mother's home until she called him, a couple days after she thought victim was coming to visit.

Tuesday 02/06/01 **10:01**

EVAMARIE GORDON called. She is an ex-roommate of the victim's, for 2.5 years. EVAMARIE says that the victim has a hostile ex-husband named JAMES NEGRON, whom victim just had a huge fight with about 2 weeks ago. EVAMARIE said JAMES NEGRON is gang or previously gang related and has a hot temper. EVAMARIE says she was at the victim's home on occasions when their child would come home from JAMES NEGRON's, all covered in bruises from JAMES beating him. EVAMARIE said JAMES NEGRON had full custody of the boy, but he couldn't afford to keep him all the time anymore, so he stayed with the victim and visited JAMES. EVAMARIE says the victim asked JAMES for money towards the boy and he had a fit and the fight broke out. EVAMARIE said she is going to call victim's cell phone company and pretend to be victim, to see if she can get a trace on her cellular phone. EVAMARIE said last Friday night, the night before victim disappeared, the RP and talked to the victim about putting off their wedding date. EVAMARIE describes victim as very routine, and cannot believe she is okay and has not called her son.

Tuesday 02/06/01 **10:04**

BOB BOLAN, legal advisor from victim's work, called. He said the victim was not at work today, although they expected her back today. She took yesterday off, because she was going to visit her mother in California. BOLAN said the victim does not use company credit cards. BOLAN said that the RP is there now, asking for victim's files. He said they weren't going to release them to him, and I said that was a good move. The RP told BOLAN that they have a joint account at U.S. Bank. BOLAN made a point of saying that the victim did not share all of her personal life with them.

Tuesday 02/06/01 **10:14**

RP called from a cellular phone of (425) 260-8004. He said that he is going to check their P.O. box for updated mail with financial statements which may show any recent activity. I asked if victim has any credit cards. He said yes, she has a Capital One Visa card, but the information on it is at victim's work. I asked for JAMES NEGRON's phone number and address. RP says he just got off the phone with NEGRON, and his home number is (206) 783-1180. RP said the victim's/NEGRON's 9 YOA son is with NEGRON. I asked how well the victim and her ex husband, JAMES NEGRON, get along. RP said they get along like typical divorced people, who try to work together because of the child, saying the two only get together to exchange their son. I asked if they have fights or arguments. RP answered just like any other divorced couple, but nothing outrageous. I asked if the victim and JAMES NEGRON had a recent fight or argument. RP said he was in the car when an argument broke out last month, but said it was not a huge deal. RP said they seem to get along unless something about the child is brought up like financial transactions between the two parents. I asked RP how he and victim had been getting along. RP said they talked about 2 weeks ago and agreed that they should not get married sometime 02/15-19/01 as planned. RP said they were both saddened by it, but felt it was the right thing to

do. I asked if they were going to continue living together or separate. RP claims they were going to continue living together. I asked how the victim ended up going to travel to California. RP said that victim felt she just needed some time off, so she decided to go see her mom for a few days. He said she was due back last night. I asked how he knew victim did not arrive in California. RP said victim's mother called and he asked how victim is. He thought victim's mother was making up that victim never arrived. I asked RP what his opinion is of what happened to victim. RP said this is so unlike her, that he thinks something happened to her or someone did something to her. RP said he asked the victim's mother to come here because of victim's disappearance.

Tuesday 02/06/01 **10:38**

Called Washington Mutual Bank. They will call back with the victim's account information.

Tuesday 02/06/01 **10:40**

Called RP. I asked for the banking information for him and victim, as he said he was headed home and I wanted him to retrieve the information. RP said most of victim's account type papers are at work, but he said they have a joint bank account at U.S. Bank. RP called the bank and they said that the victim closed this account on 2/2/01. RP said that account had less than $300 in it, but he is not sure about how much. RP said the victim handled that account. RP said the victim had a money market account where they had $6,000 to put down on their house, but he does not have access to that, also at U.S. Bank. RP thinks victim has an account at Washington Mutual, but knows no details. The victim does not have a pager. RP said that the Comm Center told him to call the hospitals and jails, prior to taking this report, so there was that delay in filing this report also. I told RP that is standard with adult missing person cases. RP again said that he begged the victim's mother to come up because of this situation.

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Tuesday 02/06/01 **11:34**

Tuesday 02/06/01 **16:57**

Called Capital One again. I accessed the victim's account using the zip code for the post office. She has had no activity since June 16, 2000, and has a zero balance.

Wednesday 02/07/01 **8:04**

Received voice mail from JENNIFER BOSTIC, Nextel, left last evening at 1719 hours. She said she needs to know if the circumstances surrounding this case consist of exigent circumstances.

Wednesday 02/07/01 **8:05**

Received another message from JENNIFER BOSTIC, Nextel, left at 0647 hours this morning. She said the account holder gave permission to release the cell phone records to me, but I need to contact her about what information I want, as there are different requirements for different details.

Wednesday 02/07/01 **8:09**

Called JENNIFER BOSTIC, Nextel. She said that the circumstances don't quite meet the standards for "exigent" circumstances, because it would have to be a case of "immediate" danger to life. I told her we certainly don't have any proof of that yet, but the case is highly suspicious. BOSTIC said to fax her the permission letter VALERIE WIEGELE faxed me, along with just a fax sheet from KCSO, stating the dates I want the info for, and said to ask for the Fraudbuster information.

Wednesday 02/07/01 **8:15**

Faxed the request for cellular phone records to JENNIFER BOSTIC at Nextel, along with the account holder's permission (Digimine.com): 877-293-9824.

Wednesday 02/07/01 **8:20**

RP called. RP said the victim's family, especially her sister SOFIA, want t
Detective DOYON to set a time, and he said 1100 hours. RP said he is a
asked him to bring some good photos of victim.

Mother + Sister state that Elaina did not want James to know where she lived. Obviously feared him.

Wednesday 02/07/01 **9:09**

Called Data Control Unit and requested that they enter the victim's vehic
Major Crimes (instead of the RP) if the victim or vehicle are found.

Wednesday 02/07/01 **9:46**

Ran victim's vehicle and found Data had updated the hold and contact pe

Wednesday 02/07/01 **11:08**

The RP (SIONE LUI), victim's sister SOFIA HARMAN, victim's mother MAF
WELCH's young daughter, and victim's friend/ex-roommate EVAMARIE G
Detective DOYON and I. Detective DOYON got all of the parties' names a
of the questions. The flight victim had reserved for was at 0815 on 2/3/01. The family claims the victim paid, but did not pick up her ticket. The flight was to Ontario, California. They kept asking if victim used her VISA, so I told them there has been no activity for some time, except payments on any of her financial accounts I am aware of. RP said the last time he knows the victim had contact with JAMES NEGRON was Friday night, 2/2/01 at about 2130 hours. Victim met JAMES NEGRON to give him their son ANTHONY. RP says the victim meets JAMES NEGRON at either where the old Denny's off 520 was or at the 76 station on 45th Street in the U-District. He is not sure which she met JAMES NEGRON at 5 days ago. The victim's mother (MARIA PHILLIPS) & sister (SOFIA HARMAN) said they meet to exchange the child because the victim did not want JAMES NEGRON to know where she lives. RP said he thinks someone "very professional did this", referring to victim being gone. I asked about the flat tires victim & RP claims they kept getting recently. RP said also, someone had keyed the victim's car. RP said the night he last saw victim, she took his truck to exchange her son with her ex, because her car had a flat and he was going to fix it for her. RP said victim was not forthright about her trip to go see her mother, but he assumed she was going to go. RP says he did not know when,

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Called Data Control Unit and requested that they enter the victim's vehicle should have a hold placed on it and to notify Major Crimes (instead of the RP) if the victim or vehicle are found.

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Ran victim's vehicle and found Data had updated the hold and contact person information on WACIC and NCIC.

Wednesday 02/07/01 **11:08**

The RP (SIONE LUI), victim's sister SOFIA HARMAN, victim's mother MARIA PHILLIPS, sister-in-law LISA WELCH and WELCH's young daughter, and victim's friend/ex-roommate EVAMARIE GORDON came to the office to meet with Detective DOYON and I. Detective DOYON got all of the parties' names and completed more notes, as he asked most of the questions. The flight victim had reserved for was at 0815 on 2/3/01. The family claims the victim paid, but did not pick up her ticket. The flight was to Ontario, California. They kept asking if victim used her VISA, so I told them there has been no activity for some time, except payments on any of her financial accounts I am aware of. RP said the last time he knows the victim had contact with JAMES NEGRON was Friday night, 2/2/01 at about 2130 hours. Victim met JAMES NEGRON to give him their son ANTHONY. RP says the victim meets JAMES NEGRON at either where the old Denny's off 520 was or at the 76 station on 45th Street in the U-District. He is not sure which she met JAMES NEGRON at 5 days ago. The victim's mother (MARIA PHILLIPS) & sister (SOFIA HARMAN) said they meet to exchange the child because the victim did not want JAMES NEGRON to know where she lives. RP said he thinks someone "very professional did this", referring to victim being gone. I asked about the flat tires victim & RP claims they kept getting recently. RP said also, someone had keyed the victim's car. RP said the night he last saw victim, she took his truck to exchange her son with her ex, because her car had a flat and he was going to fix it for her. RP said victim was not forthright about her trip to go see her mother, but he assumed she was going to go. RP says he did not know when,

but was under the impression she was leaving Friday night, not Saturday morning. RP says victim was gone when he got up. MARIA PHILLIPS spoke to JAMES NEGRON. She says he is just now acting concerned. SOFIA HARMAN said that JAMES NEGRON keeps insisting that they (SOFIA & MARIA) meet with him and give him a picture of the victim. MARIA PHILLIPS said JAMES NEGRON made the comment to her that missing women and children are common in Washington, and that Washington is known for it. MARIA and RP did not talk on the phone and compare compare notes until Monday, when they both realized the victim had not gone to California to her mother's (MARIA's), nor was victim at home. RP says that is when he called the Comm Center and was told to call the hospitals and jails before filing a report. Detective DOYON told the family that JAMES NEGRON does not have local criminal history. They said NEGRON does have one in the Riverside or Chico areas of California. SOFIA said JAMES NEGRON had a friend beat SOFIA's boyfriend, while a gun was held to SOFIA. SOFIA says JAMES NEGRON used to be associated with the East Side Longo Gang out of Long Beach. SOFIA said that JAMES NEGRON had to get out of that area, probably due to drug dealing or gang activity, so he fled with their son to Washington, even though he and victim were still married at that time. Victim found out they were here, then came up here too. SOFIA moved here to be near her husband's family for awhile too. They confirmed that JAMES NEGRON has full custody of ANTHONY, but the victim told JAMES NEGRON she was going to take him to court for child support because she has him most of the time. I asked about victim going to visit a grandmother in the hospital, in California. They all said that was not true. The RP said the victim was not too upset about the wedding being cancelled or postponed, and EVAMARIE verified victim told her that she was not ready to get married. They all said that the victim was into working out. RP said victim is very physically fit. While Detective DOYON took RP out of the room to speak to RP separately, I talked to the women. I asked if the victim has any distinguishing marks, scars or tattoos. SOFIA & MARIA said the victim has a tattoo of "James" on 1 unknown which ankle, a tattoo of "Smile now, Cry later" on the backside of 1unknown which shoulder and a pink mole on the right side of her nose, by her eye. I asked if her teeth are distinctive at all. They said victim has good teeth. I asked if they can think of anyone victim has had any problem with in the last few months. EVAMARIE said that an estranged friend of victim's who lives in victim/RP's old complex, asked if the victim/RP moved. EVAMARIE said yes, and told this friend, JAMIE(unk last), that victim is missing. JAMIE checked victim/RP's old apart
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Read Sofias Comment

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Received voice mails regarding this case, from when I was in meetings. At 1119 KIRO TV called, and it sounded like someone named ELSIE. At 1149 ALLISON RANDY from KIRO called. The MRO called a couple times, but Sergeant GATES had already handled that.

Wednesday 02/07/01 **14:43**

Called SOFIA HARMAN on her cellular phone. Told her that Detective DOYON was involved in an accident on his way to speak to JAMES NEGRON, so he cannot do it today. Asked her to inform the family not to talk to him about DOYON going to talk to him.

Wednesday 02/07/01 **14:51**

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DET: Digimin. What did she do for Digimin?

WIT: She's an executive assistant.

DET: Were you and Elaina living together at the time she was at Digimin?

WIT: No.

DET: You'd already gotten married by then and m

WIT: Correct.

DET: When Elaina moved out of 6001, was it to m

WIT: No. She moved out. The 6001 was a two-be
wanted to move in something smaller, not a
over to the ones in Kirkland, and so Sione di

o she
ed

DET: I'd forgotten about Anthony. So Anthony, w

WIT: She, well, Anthony was always there. I mea

DET: Okay, but he primarily was in the custody o

Very important. Elaina's best friend of 7 years states James hurt Anthony. And Elaina was afraid of James.

WIT: Correct, right, but he has a anger problem and he couldn't handle it. I don't if I can say this, but he'd always beat his little boy, and when Anthony would come back on Sunday nights, I'd see bruises all over him, and Elaina told me he had an anger management, and so I talked to Anthony every now and then about it, and he told me yeah, my daddy did this, my daddy did that, but see, Elaina feared him. Elaina totally feared James.

DET: Really?

WIT: And I know the son did, too, so that's why he never knew where we lived. He never came to our house.

DET: Never came to the condo?

WIT: No.

DET: Did Elaina ever discuss her marriage to James with you, while they were in California?

WIT: Did Elaina ever discuss her marriage of James to me, while they were in California?

DET: Yes.

Officer(s) Reporting	Serial No.	Unit No.	Supervisor Reviewing	Date	Copies to
Det. James H. Doyon	08103				

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WIT: Correct.

DET: When Elaina moved out of 6001, was it to move in with Sione?

WIT: No. She moved out. The 6001 was a two-bedroom condo, and it was spendy and stuff, so she wanted to move in something smaller, not as expensive for her and Anthony, so she moved over to the ones in Kirkland, and so Sione didn't move in right away at all, with them.

DET: I'd forgotten about Anthony. So Anthony, when you first met Elaina, she had Anthony?

WIT: She, well, Anthony was always there. I mean she didn't have, well yeah, basically.

DET: Okay, but he primarily was in the custody of James Negron, is that correct?

WIT: Correct, right, but he has a anger problem and he couldn't handle it. I don't if I can say this, but he'd always beat his little boy, and when Anthony would come back on Sunday nights, I'd see bruises all over him, and Elaina told me he had an anger management, and so I talked to Anthony every now and then about it, and he told me yeah, my daddy did this, my daddy did that, but see, Elaina feared him. Elaina totally feared James.

DET: Really?

WIT: And I know the son did, too, so that's why he never knew where we lived. He never came to our house.

DET: Never came to the condo?

WIT: No.

DET: Did Elaina ever discuss her marriage to James with you, while they were in California?

WIT: Did Elaina ever discuss her marriage of James to me, while they were in California?

DET: Yes.

Officer(s) Reporting	Serial No.	Unit No.	Supervisor Reviewing	Date	Copies to
Det. James H. Doyon	08103				

DET: And then she came on the phone and he was now aware that they were both together?

WIT: Right.

DET: And I've heard the phrase that he said I'm busted

WIT: Yeah.

DET: Okay. Do you know what his response [illegible] en Elaina got back home?

WIT: No, not at all.

DET: Eva, were you aware that Elaina was goi [illegible] end?

WIT: No, because I was out of town.

DET: You were out of town, so you had no adv[illegible]

WIT: Exactly. I got a phone call on Monday, an [illegible] call saying please tell me Nina's with you. She's, uh, we haven't [illegible] her. She's supposed to go to California, blah, blah, blah, blah, blah.

Who are James friends in Tacoma?
Can we question Eva Marie about this?

DET: And who was that from?

WIT: Sione.

DET: What did he call her? Nina?

WIT: Well, I just say, everybody calls her Nina.

DET: So when did he call you?

WIT: He called me about three thirty on Monday right after the mom called, and I had a problem with that. I said why did you guys wait until Monday to figure out where Elaina is? Well, evidently the mom did not have Elaina's new phone number, and Elaina did not leave mom's phone number for Sione, so they both been calling her cell phone, and so when she called her work on Monday, they gave Sione's telephone, and that's how they connected.

DET: Okay, I understand. Well, I have no other questions to ask you. Is there anything you'd like to add to the statement as long as we're on tape?

WIT: I have one question is, if they haven't ruled this out, I know that James has a tight alibi, but he does have connections, as far as knowing that Elaina planned on going out of town, picking the

LUI 002418

DET: And then she came on the phone and he was now aware that they were both together?

WIT: Right.

DET: And I've heard the phrase that he said I'm busted, or something like that?

WIT: Yeah.

DET: Okay. Do you know what his response to that was later, when the two of them, when Elaina got back home?

WIT: No, not at all.

DET: Eva, were you aware that Elaina was going to go to California the weekend, last weekend?

WIT: No, because I was out of town.

DET: You were out of town, so you had no advance knowledge of that?

WIT: Exactly. I got a phone call on Monday, an e-mail message. A panic phone call saying please tell me Nina's with you. She's, uh, we haven't heard from her. She's supposed to go to California, blah, blah, blah, blah, blah.

DET: And who was that from?

WIT: Sione.

DET: What did he call her? Nina?

WIT: Well, I just say, everybody calls her Nina.

DET: So when did he call you?

WIT: He called me about three thirty on Monday right after the mom called, and I had a problem with that. I said why did you guys wait until Monday to figure out where Elaina is? Well, evidently the mom did not have Elaina's new phone number, and Elaina did not leave mom's phone number for Sione, so they both been calling her cell phone, and so when she called her work on Monday, they gave Sione's telephone, and that's how they connected.

DET: Okay, I understand. Well, I have no other questions to ask you. Is there anything you'd like to add to the statement as long as we're on tape?

WIT: I have one question is, if they haven't ruled this out, I know that James has a tight alibi, but he does have connections, as far as knowing that Elaina planned on going out of town, picking the

EVAMARIE GORDON called. She is an ex-roommate of victim has a hostile ex-husband named JAMES NEGRON, whom victi 'AMARIE said JAMES NEGRON is gang or previously gang related the victim's home on occasions when their child would come home i AMES beating him. EVAMARIE said JAMES NEGRON had full c ı all the time anymore, so he stayed with the victim and visited J money towards the boy and he had a fit and the fight broke out one company and pretend to be victim, to see if she can get riday night, the night before victim disappeared, the RP and talked tc 'AMARIE describes victim as very routine, and cannot believe she i

Franklin is states James + Elaine J ist had a huge fight * James called that afternoon Anthony. James beat Anthony

Tuesday 02/06/01 10:04

BOB BOLAN, legal advisor from victim's work, called. He s expected her back today. She took yesterday off, because she was ...said the victim does not use company credit cards. BOLAN said that the F ..., asking for victim's files. He said they weren't going to release them to him, and I said that was a good move. The RP told BOLAN that they have a joint account at U.S. Bank. BOLAN made a point of saying that the victim did not share all of her personal life with them.

Tuesday 02/06/01 10:14

RP called from a cellular phone of (425) 260-8004. He sai d mail with financial statements which may show any recent acti yes, she has a Capital One Visa card, but the information on it is at number and address. RP says he just got off the phone with NEGI aid the victim's/NEGRON's 9 YOA son is with NEGRON. I asked h ION, get along. RP said they get along like typical divorced people, ng the two only get together to exchange their son. I asked if th any other divorced couple, but nothing outrageous. I asked if the vi ment. RP said he was in the car when an argument broke out last n seem to get along unless something about the child is brought up I asked RP how he and victim had been getting along. RP said th should not get married sometime 02/15-19/01 as planned. RP said t ht thing to do. I asked if they were going to continue living together living together. I asked how the victim ended up going to trave led some time off, so she decided to go see her mom for a few day w he knew victim did not arrive in California. RP said victim's mothe im's mother was making up that victim never arrived. I asked RP said this is so unlike her, that he thinks something happened to her or someone did something to her. RP said he asked the victim's mother to come here because of victim's disappearance.

Sign states Sign and Elaine agreed to postpone the wedding.

Tuesday 02/06/01

Called Washington Mutual Bank. T on.

Tuesday 02/06/01

Called RP. I asked for the banking aded home and I wanted him to retrieve the information. RP said m he said they have a joint bank account at U.S. Bank. RP called the int on 2/2/01. RP said that account had less than $300 in it, bu handled that account. RP said the victim had a money market acc use, but he does not have access to that, also at U.S. Bank. RI , but knows no details. The victim does not have a pager. RP sa ls and jails, prior to taking this report, so there was that delay in fili dult missing person cases. RP again said that he begged the victim'

Where is the $ Sam this money market account Since thought he gave the info to James. See Anthony. is Bank

Tuesday 02/06/01

EVAMARIE GORDON called. She is an ex-roommate of the victim's, for 2.5 years. EVAMARIE says that the victim has a hostile ex-husband named JAMES NEGRON, whom victim just had a huge fight with about 2 weeks ago. EVAMARIE said JAMES NEGRON is gang or previously gang related and has a hot temper. EVAMARIE says she was at the victim's home on occasions when their child would come home from JAMES NEGRON's, all covered in bruises from JAMES beating him. EVAMARIE said JAMES NEGRON had full custody of the boy, but he couldn't afford to keep him all the time anymore, so he stayed with the victim and visited JAMES. EVAMARIE says the victim asked JAMES for money towards the boy and he had a fit and the fight broke out. EVAMARIE said she is going to call victim's cell phone company and pretend to be victim, to see if she can get a trace on her cellular phone. EVAMARIE said last Friday night, the night before victim disappeared, the RP and talked to the victim about putting off their wedding date. EVAMARIE describes victim as very routine, and cannot believe she is okay and has not called her son.

Tuesday 02/06/01 10:04

BOB BOLAN, legal advisor from victim's work, called. He said the victim was not at work today, although they expected her back today. She took yesterday off, because she was going to visit her mother in California. BOLAN said the victim does not use company credit cards. BOLAN said that the RP is there now, asking for victim's files. He said they weren't going to release them to him, and I said that was a good move. The RP told BOLAN that they have a joint account at U.S. Bank. BOLAN made a point of saying that the victim did not share all of her personal life with them.

Tuesday 02/06/01 10:14

RP called from a cellular phone of (425) 260-8004. He said that he is going to check their P.O. box for updated mail with financial statements which may show any recent activity. I asked if victim has any credit cards. He said yes, she has a Capital One Visa card, but the information on it is at victim's work. I asked for JAMES NEGRON's phone number and address. RP says he just got off the phone with NEGRON, and his home number is (206) 783-1180. RP said the victim's/NEGRON's 9 YOA son is with NEGRON. I asked how well the victim and her ex husband, JAMES NEGRON, get along. RP said they get along like typical divorced people, who try to work together because of the child, saying the two only get together to exchange their son. I asked if they have fights or arguments. RP answered just like any other divorced couple, but nothing outrageous. I asked if the victim and JAMES NEGRON had a recent fight or argument. RP said he was in the car when an argument broke out last month, but said it was not a huge deal. RP said they seem to get along unless something about the child is brought up like financial transactions between the two parents. I asked RP how he and victim had been getting along. RP said they talked about 2 weeks ago and agreed that they should not get married sometime 02/15-19/01 as planned. RP said they were both saddened by it, but felt it was the right thing to do. I asked if they were going to continue living together or separate. RP claims they were going to continue living together. I asked how the victim ended up going to travel to California. RP said that victim felt she just needed some time off, so she decided to go see her mom for a few days. He said she was due back last night. I asked how he knew victim did not arrive in California. RP said victim's mother called and he asked how victim is. He thought victim's mother was making up that victim never arrived. I asked RP what his opinion is of what happened to victim. RP said this is so unlike her, that he thinks something happened to her or someone did something to her. RP said he asked the victim's mother to come here because of victim's disappearance.

Tuesday 02/06/01 10:38

Called Washington Mutual Bank. They will call back with the victim's account information.

Tuesday 02/06/01 10:40

Called RP. I asked for the banking information for him and victim, as he said he was headed home and I wanted him to retrieve the information. RP said most of victim's account type papers are at work, but he said they have a joint bank account at U.S. Bank. RP called the bank and they said that the victim closed this account on 2/2/01. RP said that account had less than $300 in it, but he is not sure about how much. RP said the victim handled that account. RP said the victim had a money market account where they had $6,000 to put down on their house, but he does not have access to that, also at U.S. Bank. RP thinks victim has an account at Washington Mutual, but knows no details. The victim does not have a pager. RP said that the Comm Center told him to call the hospitals and jails, prior to taking this report, so there was that delay in filing this report also. I told RP that is standard with adult missing person cases. RP again said that he begged the victim's mother to come up because of this situation.

Tuesday 02/06/01 10:45

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF SIONE LUI FOR PERSONAL RESTRAINT PETITION**

Sione Lui declares as follows:

1) I am the defendant in this case.

2) I first contacted attorney Anthony Savage in 2001 after the police questioned me about Elaina Boussiacos' death. I contacted him again after I was arrested in April, 2007.

3) Mr. Savage kept promising that he would meet with me at length, but he showed up at the jail only a few times and never for more than an hour.

4) During the trial, I would often pass notes to Mr. Savage asking why he was doing things a certain way or why he was not asking certain questions or calling certain witnesses. He never gave me any clear answers.

5) Even before his falling accident, Mr. Savage was not very alert during the trial. He dozed off several times. On the day of his accident, he seemed really out of it. He hardly talked at all.

SJ (initials)

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When he returned to court the next Monday, he said to me "I'm doing okay because I'm on medication." But he still seemed slower mentally and physically than he was before.

6) I would be willing to testify to these facts at an evidentiary hearing.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Monroe, Washington:

12-8-10
Date

Sione Lui

SJ
(initials)

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF RAY TAYLOR**

Ray Taylor declares as follows:

1) I am the owner or part owner of several companies in Orem, Utah, including Muddy Boys Dry Wall.

2) I met Sione Lui in high school and have been friends with him even since then.

3) After Sione was charged with the murder of Elaina Boussiacos I flew out to Washington several times during the pretrial proceedings to visit Sione and his wife Celese and to offer my support.

4) Sione was frustrated that his lawyer, Anthony Savage, would not come to the jail to meet with him. Sione had many things he wanted to explain.

5) I attended several meetings with Mr. Savage and Celese Lui at Savage's office. I had several specific questions for Mr. Savage, including how he planned to deal with the DNA and the dog tracking evidence. He never gave any clear answers. Sometimes in mid sentence he

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would seem to forget what we were talking about. He would give vague responses, such as, "they don't have anything on him. All they have is a big story." Sometimes, he didn't seem to recall things that we had just discussed.

6) At one point, Mr. Savage said that he didn't know much about DNA evidence. He also said that the dog tracking evidence was a "non-issue." When I pushed him about whether we shouldn't get expert witnesses regarding those matters he always answered "I don't think we need that."

7) Mr. Savage said he was taking the case for only $25,000, which he characterized as essentially "charity work." He said he was doing this case to keep himself involved in court proceedings. He felt that appropriate fees would really be somewhere between $100,000 and $150,000. He told us that he did not plan to put in more time or effort than what he had contracted to do. He seemed to view our visits as an annoyance.

8) I would be willing to testify about these points at an evidentiary hearing.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed in Orem, Utah:

Oct/7th/2010
Date

Ray Taylor

ARLEEN DAVIDSON
NOTARY PUBLIC-STATE OF UTAH
COMMISSION# 581987
COMM. EXP. 02-09-2011

Arlen Davidson
Notary Public
State of Utah
County of Utah

(initials)

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF GRANT MATTSON**

Grant Mattson declares as follows:

1) I am the father of Celese Lui. I was a vice president of Spencer Technologies, a medical device company, before I retired.

2) I attended most of Sione Lui's trial. I was present on the day that court was cancelled because Sione's lawyer, Anthony Savage, had fallen and hurt himself. Mr. Savage could hardly stand up. He seemed quite disoriented mentally. Because he had so much difficulty moving, my son Colin and I helped him through the courthouse to the street. We then waited until his assistant returned with her car, and then carefully lowered him into a seat.

3) Mr. Savage did not seem a whole lot better, mentally or physically, when court resumed the following Monday. He was still talking and moving very slowly. It was obviously very difficult for him to get into or out of a chair.

GM
(initials)

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4) Even before his accident, Mr. Savage did not look particularly alert at many points during the trial. He appeared to have difficulty following the proceedings.

5) I would be willing to testify about these points at an evidentiary hearing.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed in Woodinville, Washington:

10-5-10
Date

Grant Mattson

(initials)

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF WILLIAM HARRIS**

William Harris declares as follows:

1) I am the son of Sione Lui's sister, Paini Harris. At the time of Sione's trial, I was living with Celese Lui and helping with Sione's heating business. I am now working as a landscaper in Honolulu, Hawaii.

2) I attended much of Sione's trial. Even before his falling incident, Anthony Savage did not seem to be very alert during the trial. After his fall, Mr. Savage's speech was noticeably slower than it had been before. This was true even after the court took a break for a few days so that Mr. Savage could recover from the accident. Mr. Savage also had great difficulty moving around for the remainer of the trial.

3) I was present during Sam Taumoefolau's testimony. He spoke in broken English. He seemed to have difficulty understanding and responding to the questions from Mr. Savage.

4) I would be willing to testify about these points at an evidentiary hearing.

(initials)

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I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed in Honolulu, Hawaii:

11/8/2010
Date

William Harris

(initials)

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF JOAN BYERS**

Joan Byers declares as follows:

1) I am the mother of Celese Lui, Sione Lui's wife. I watched all of Sione Lui's trial. I was present on the day that Judge Trickey cancelled the proceedings because of Anthony Savage's accident. On that day, Mr. Savage was barely able to move, even with a walker. Grant and Colin Mattson had to help him into a car. He had great difficulty walking.

2) Mr. Savage did not seem much better when court resumed again the following Monday. He seemed to be in pain all of the time. He could barely get out of his chair for the closing arguments.

3) I would be willing to testify about these points at an evidentiary hearing.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

JB
(initials)

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Seattle, Washington 98104
(206) 623-1595

Signed in Lynnwood, Washington:

10-26-10

Date

Joan Byers

Joan Byers

(initials)

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF SEMISI TAUMOEFOLAU**

Semisi "Sam" Taumoefolau declares as follows:

1) I am a friend of the defendant, Sione Lui. My first name is Semisi but I go by the nickname of Sam.

2) Before Sione's trial, I was interviewed by defense investigator Denise Scaffidi, who prepared a written report, and by Detective Christina Bartlett and prosecutor Kristin Richardson, who took a taped statement from me that was later transcribed. The defense lawyer, Anthony Savage, did not talk with me before the day of my testimony. I did not know what questions he planned to ask me. We spoke briefly in the hallway shortly before I testified. The only guidance he gave me was that he would ask me questions and I should give truthful answers.

3) I do not feel that my testimony went well. For one thing, my first language is Tongan, just as Sione's is. I have trouble expressing myself clearly in English, especially under pressure. Tongan grammar is very different from English. I tend to use the wrong pronouns, such as

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"they" or "he" instead of "she." I also sometimes use the wrong tense of a verb, such as "was" instead of "is." Even when I use the right word, people seem to have trouble understanding my accent. Sione has similar problems with English. Another problem with my testimony was that I was asked to describe places Sione and I walked to, but the map in the courtroom did not show many of the locations. Also, I was never asked about several matters that may have been important.

4) In preparing this declaration, I have reviewed my trial testimony and my prior statements. I will go through the trial transcript and explain points that were not brought out, or that were confusing.

5) At page 1740, Mr. Savage had me start explaining where Sione and I went on Tuesday, February 6, 2001. He had me refer to trial Exhibit 91, which is attached to this declaration as Ex. A. That put me in a difficult position, because Exhibit 91 goes south only to about NE 178th Street, and west only to the Woodinville Athletic Club, which is at about 140 Ave. NE. See Ex. B for the street names. As discussed below, many of the points I had to describe were south and/or west of anything on Exhibit 91.

6) As I started to explain at page 1740, Sione and I first went to the Kinko's to have more missing person flyers made.[1] Mr. Savage asked me if I saw the Kinko store on Exhibit 91 and I answered "no." He then asked me where it would be and I said "It would be at this kitty corner on the bottom here."

7) On pages 1741-42, Mr. Savage asked me to show the route we followed. I kept having to wave my hand vaguely at places that were not on the map. I was a little flustered trying to explain where we went without being able to show the jury. I see that my testimony included the following: "We covered the business areas down in the main drag. Down – its not this

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[1] According to the transcript, I say we went to Kinko's "because we still have that alternate to pick up." I would not use the word "alternate." I probably said "order."

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picture, down below. When we come down here, we cut across to drop the order in, we keep going here because it take them a while. We come here, this restaurant across the street here and there is the finish of the business area. We cut across and come back here, over here. There is the restaurant and I kept myself at this point about the restaurant."

8) I can explain with Ex. C what I was trying to say. This Google map shows most of the area. As I will explain, some of the buildings shown here were still under construction in 2001. The key buildings and our direction of travel are shown on this map. Sione and I left his house on foot and walked south on Woodinville-Duvall road. We put up flyers at businesses on either side of the road. This main street makes a sharp turn to the west after the QFC and then becomes NE 175th Street. We continued to put up flyers at such places as the 7-11 and the Farmer's Supply. We then cut across NE 175th to the Kinko's where we dropped off the flyer so that they could make more copies. Because there was a wait for the copies, we left Kinko's with the remaining flyers we had and followed NE 175th west to the end of the business area which is at the intersection with Woodinville Snohomish Road NE. We then came back east a bit to the Mexican Restaurant. As I explained in my statement to the police, I wanted to take a good look at the Mexican Restaurant because a co-worker of mine had said he saw suspicious people hanging out there.

9) According to the transcript at page 1742, I then said: "We walked behind the restaurant. See the side street here, the side street there where the post office, and at the time this construction here. That is where we cut through to this cover, this area, and go back out to pick up the materials from the Kinko."

10) What I was trying to explain was that we walked north from the Mexican restaurant past the post office. We then headed northeast along the Woodinville Snohomish Road past a construction area, which is now the fire station. We then cut through the parking lot of the

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Woodinville Athletic Club and covered that business as well as others on the way back to the Kinko's.

11) I was not shown a picture of the Athletic Club or the parking area during my testimony. I have now been shown a copy of Trial Exhibit 34, which is Ex. D to this declaration. That shows the side of the club facing me as I approached it from the Woodinville Snohomish Road. I went directly to the entrance on that side of the building. I did not ask anyone whether that was the main entrance. We then went through the trees near the dumpster and into the next shopping area, which included the Kinko's. The line drawn on Trial Exhibit 92 shows the approximate path we took. See Ex. E to this declaration.

12) Mr. Savage did not ask me where we went after we returned to the Kinko's and picked up more flyers. Instead, he turned to a different subject. I could have explained that we then walked north out the back door of the Kinko's and into the next shopping area which included the Top Foods store, the AT&T and the Barnes and Nobles. We put up flyers throughout that area and then cut through the parking lot and onto a street that took us east through the Park & Ride. We then came out onto the Woodinville Duvall Road again and headed north to Sione's house. Ex. C shows the route we took.

13) The prosecutor asked me some more questions about the postering. I told him "If you give me a map where it is showed the whole area, it would probably help." See page 1760.

14) I was trying to explain to the prosecutor why the Mexican restaurant was important to me. According to the transcript I said: "About the Friday night dinner, a coworker would tell me that they went to have dinner at the restaurant. The restaurant is just down the street, Mexican restaurant in the main drag." Page 1761. What I was trying to say was that a co-worker told me that on Friday, February 2, he and his wife were at the Mexican restaurant and some suspicious people were there. They heard on the news about Elaina's

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19) When the prosecutor asked me, I explained that Sione and I drove again to the Kinko's on Wednesday to make more copies and then put up more flyers in the area. Page 1774-75. Again, it was difficult to show where we went because much of it was not on the map.

20) As I explained to the defense investigator before trial, Sione's right arm was badly injured around the time of Elaina's death. See Ex. F at p. 2. He broke it playing rugby in the fall of 2000. When he and Elaina moved to Woodinville, I had to help move the heavy things. I dealt with the washer and dryer. I was a little worried about Sione trying to change a tire on February 2, 2001, because his right arm was still in bad shape. He had to work the jack and with one hand. That's part of why it took so long.

21) Sione was not able to play guitar or ukulele at the time because of his injury. He had to rent a bass to play at the luau on Saturday, February 3. I was not asked about that at trial.

22) Had I been asked the appropriate questions, I would have testified to everything that is in this declaration. I would now be willing to testify to these things at an evidentiary hearing or a new trial.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SEP/21st.2009
Date and Place Bellevue, WA

Semisi Taumoefolau
Semisi Taumoefolau

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

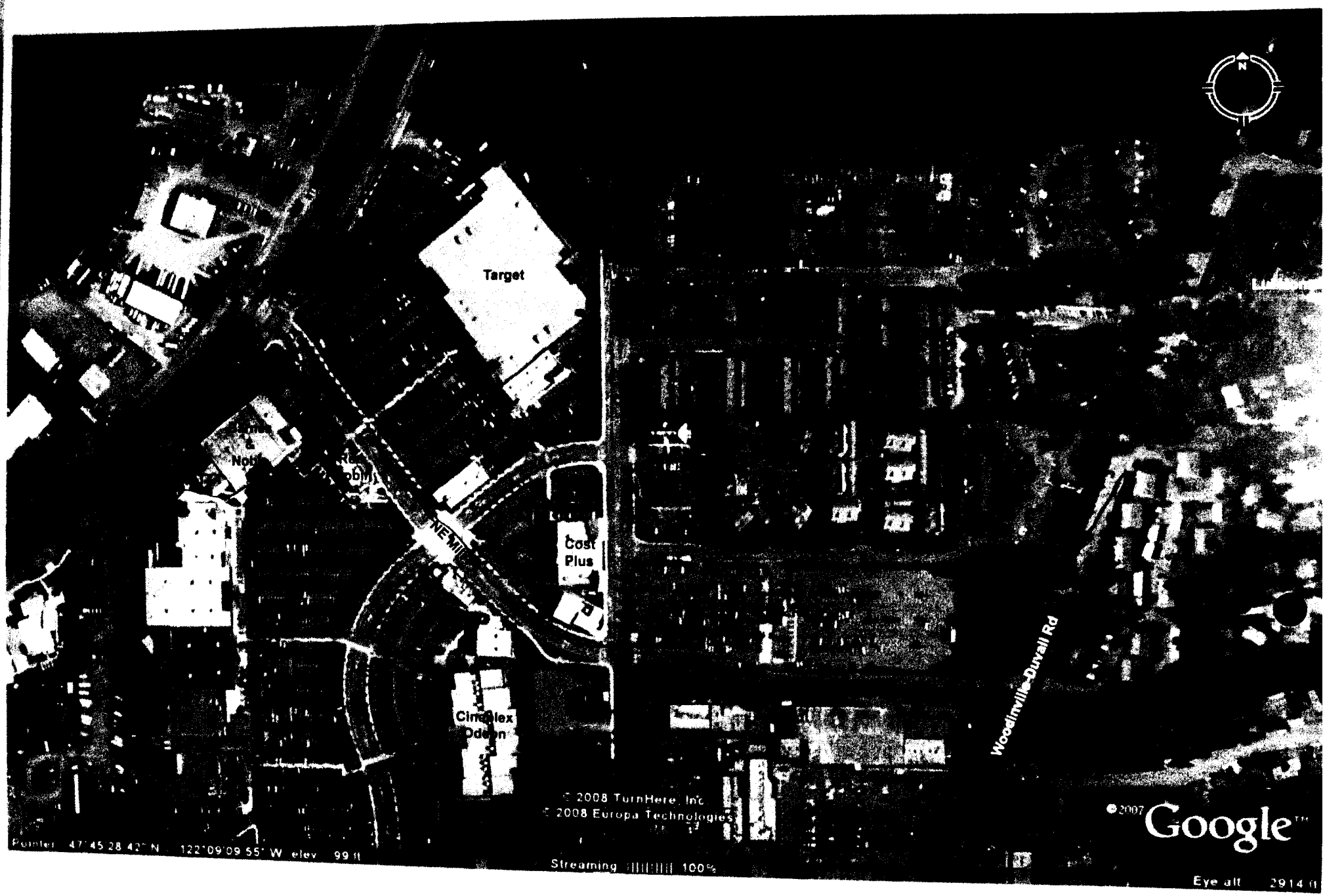

EXHIBIT A

EXHIBIT A

Google maps

Address **18600 Woodinville Snohomish Rd NE**
Woodinville, WA 98072

Get Google Maps on your phone
Text the word "GMAPS" to 466453

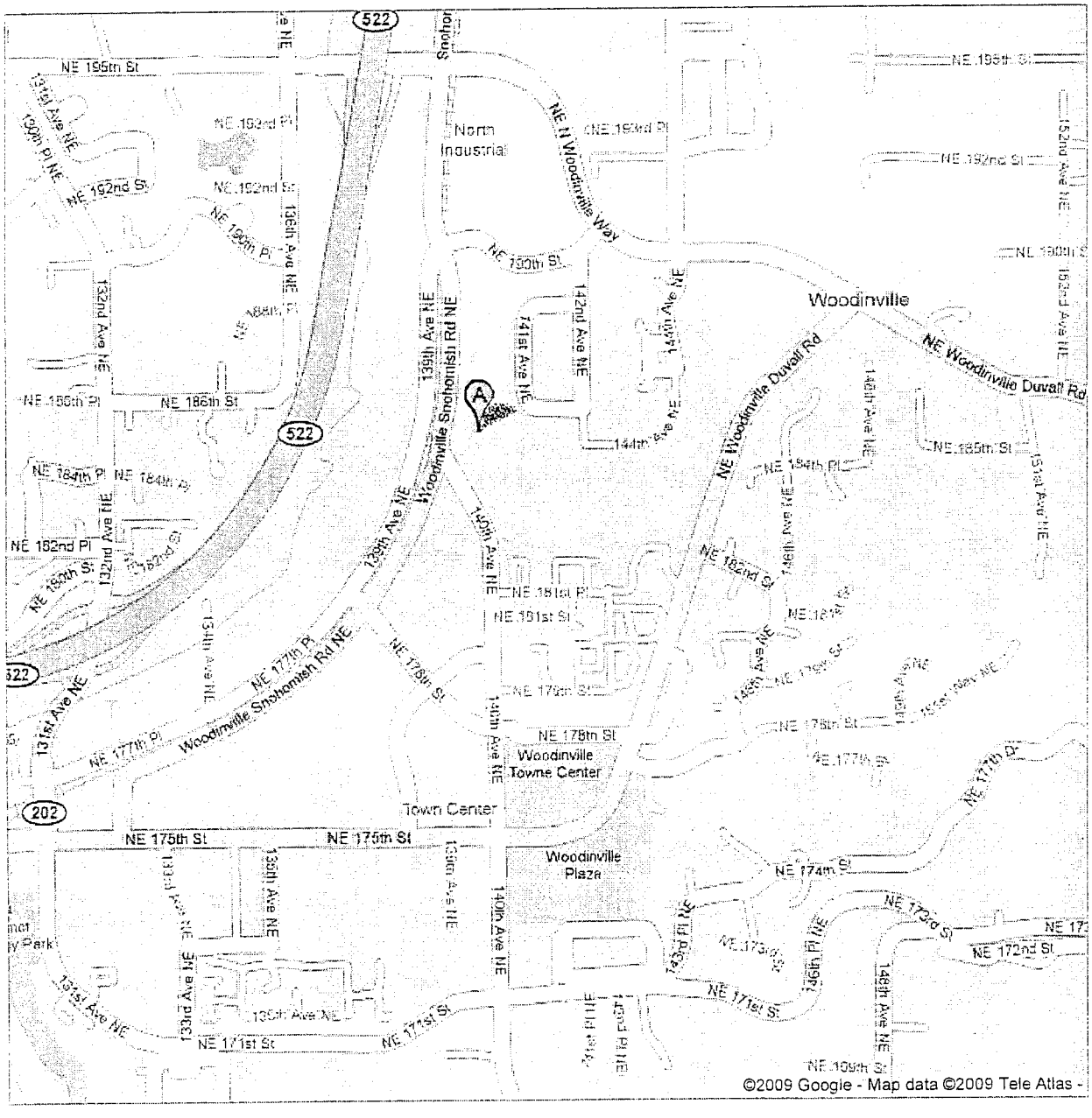

EXHIBIT B

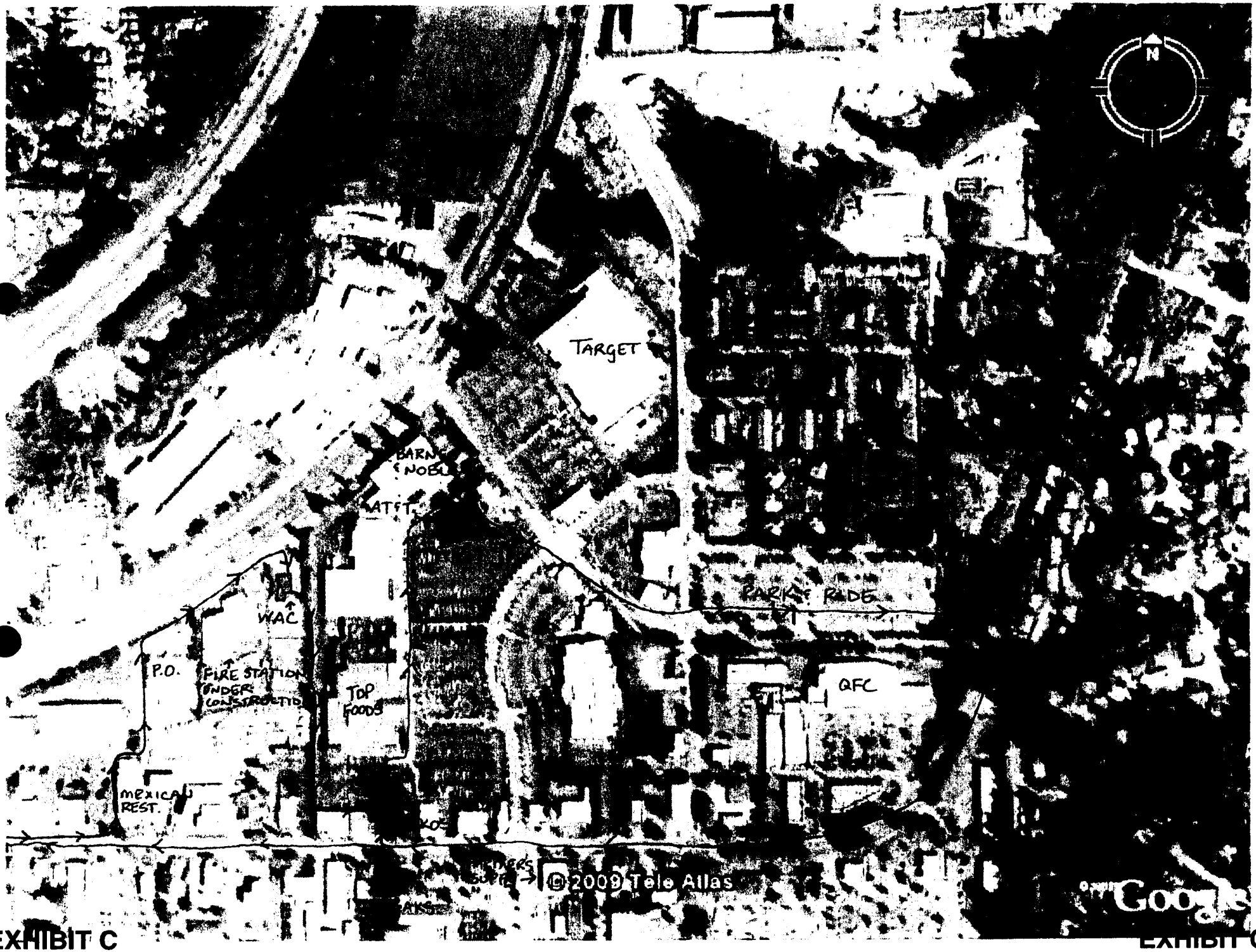

EXHIBIT C

EXHIBIT C

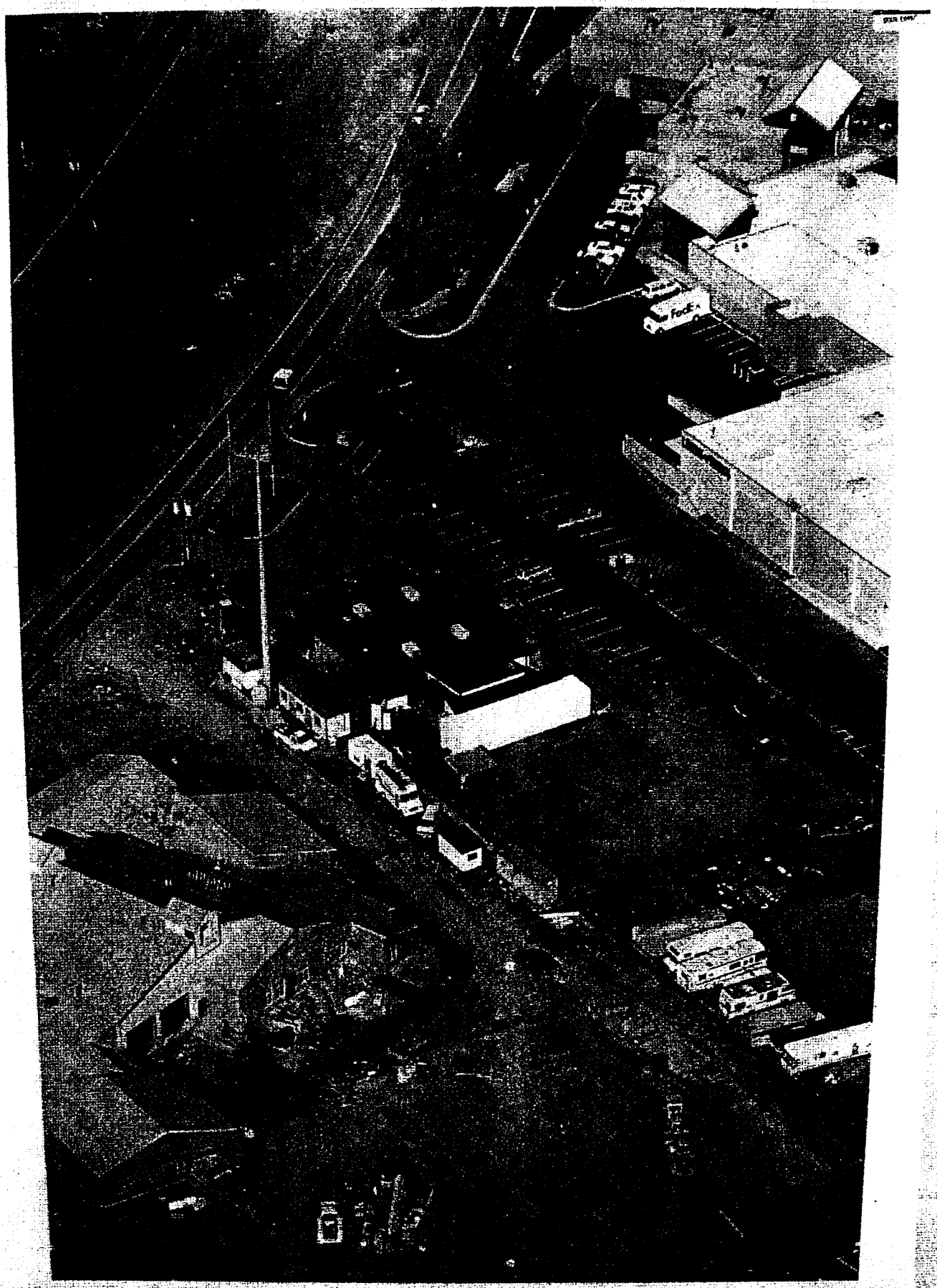

EXHIBIT E

SCAFFIDI & ASSOCIATES
PO BOX 1039
VASHON, WA. 98070
(206) 222-9205
****
****

CASE NAME: Sione Lui
CAUSE NO. 07-1-04039-7 SEA
DATE: June 6, 2007
WITNESS INTERVIEW
WITNESS: Sam Taumoefolau

On the above date I met with the witness at his home. He resides at 14212 SE 38th Street, Bellevue, WA. His home number is (425) 747-9159. His cellular number is (425) 922-6140. We had made an appointment to meet when I explained to him that I am the defense investigator working with Mr. Lui's attorney, Mr. Savage. The witness was friendly and cooperative. During the interview his wife was in the house but not involved in our discussion.

The witness stated that he has known Lui since Lui moved to the area from either Salt Lake or California, he wasn't sure which. He got to know Lui by being introduced to him by another friend Paul Finau who knew Lui from Rugby.

At the time the witness got to know Lui, Lui was married to Julie. They had a little baby at the time that he met them. They were then divorced about 10 years ago. They had been living in Kirkland and then they moved to Lynwood and it was there that the problems began in their marriage. The witness still socialized with them even after their divorce.

Asked what the problem was in their marriage, the witness said that they had some friends come to visit them from Salt Lake, a married couple. At the end of the visit, the man, whose name the witness did not know, told Julie that she would be better off without Lui. This was the beginning of the end of their marriage, but the witness did not know the specifics of the problems.

Asked if he knew anything about the break-up, the witness said all he knew was that at one point he was asked to go with Lui to pawnshops in the area to retrieve his belongings. Julie had sold or hocked some of his belongings.

The witness denied that he ever saw or heard of any abuse in that relationship and he said that Julie's mother once told the witness that the whole break-up had been Julie's fault because she spent all of their money and ran their credit cards up to the maximum. The

EXHIBIT F

witness said that after the divorce he still saw Lui regularly and he saw Julie also, who he still thinks of as a friend.

Asked when he met Elaina, the witness said that they met at the witness's church cultural hall. He is a Mormon, as is Lui. He invited Lui to his church and Lui asked if he could bring his friend along. This is when the witness met Elaina.

Asked if Lui was involved in the church at the time, the witness said that he was. He said that Lui was now living in Kirkland and he attended the church there, which the witness called his "home ward". The witness knew that Lui was involved in the church because part of the religious responsibilities is being assigned to another family inside the church. The assignment to another family is for the purpose of watching over the needs of the other family and reporting these needs to the leadership of the ward. Lui was assigned to a family and once about that time he asked the witness to go with him to meet with the assigned family, which the witness did do.

The witness was asked how long Lui was with Elaina prior to her death. he stated that he did not think it was even one year. At the time the witness met Elaina, Lui still lived in Kirkland and the witness saw them on and off there. The witness said that he does not even go 2 or 3 days at a time without at lest speaking with Lui over the phone and this has been so for a long long time.

The second time that the witness met Elaina was when she had a flat tire on her car and Lui asked him to bring his extra truck key to her. The witness brought the key to Elaina.

The third time he met Elaina was when the witness helped them to move from Kirkland up to Woodinville. Just prior to the move Lui had gone though an operation on his arm for an injury he received playing rugby and Lui was not able to lift any substantial amount of weight. The witness helped them move up and connected the washer and dryer for Lui as he was unable to do so with his injury.

Asked about this disability of Lui's, the witness said that the operation was on Lui's right arm and there is still a long scar down his forearm. He said that Lui was unable to lift the arm above his shoulder and he could not lift much weight at all. He said that Lui was in physical therapy at the time to get his arm stronger.

The witness was asked if he knew if Lui was trying to accustom Elaina to his religion and culture during the time they were together. He said that he was. He stated that Lui told him that they were talking of getting married but they had not set a date. Asked if Elaina ever spoke to him about marriage with Lui, the witness said she did not. He said that when he and Elaina moved to Woodinville there seemed to be a change in Elaina. He said that whenever he went to visit in Woodinville Elaina was never there at the house or if she was she was either coming or going, but after the move, the witness did not again sit down and talk with Elaina. He recalled only seeing her one or two times after they got to Woodinville and usually when he visited it was just Lui and the two boys, his and Elaina's.

Asked if Elaina was ever present when Lui talked of marriage, the witness said he could not think of a time that she was present.

I asked the witness if he knew anything about Lui wanting to abstain from premarital sexual relations with Elaina after their move to Woodinville. He stated that it is possible as it is against the teachings of the church to engage in sexual relations before marriage but for that matter a couple is not allowed to live together before marriage either. He said that he never spoke with Lui about such things as it is opposed to their cultural upbringing to discuss such personal matters.

Asked what he noticed about Lui's relationship with Elaina, the witness said that they seemed like they had a lot of fun and they were very happy to be with one another. He thought their work kept them somewhat apart from one another time-wise but other than that he never witnessed or heard of any troubles at all.

He witness was asked if he knew anything at all about Lui and Elaina going out clubbing or drinking with another group of friends. He did not.

Asked what he knew of Elaina's history, the witness said that one time he asked Elaina about her tattoos. She had one on her upper back near her neck and one on her calf. Elaina informed him that when she lived in California she had been a member of some Mexican gang as had the father of her son. She did not seem to be concerned with anything from the past and it seemed to the witness that she had moved on and did not have any fear of trouble from the past nor was she involved any longer in that past. The witness did not know if Elaina had been married to the father of her son or not. The witness did not know what the name of the gang was that Elaina was speaking of. She did not give him any details of her life in the gang or what she had been involved in during the time.

Asked if the witness knew anything about Elaina taking a trip to California at the time of her death, the witness said he did. He said that Lui called him up or he called Lui on Friday night, the 2nd of February. Elaina had a flat tire again on her car and Lui was changing it for her. He told the wit that Elaina was leaving at 6AM the following morning to visit her family in California and he wanted to get her tire fixed because she wanted to drive it to the airport the next day. Lui was having trouble with the jack and the witness offered to come up and help him, but Lui refused the assistance. Sometime later they again spoke and Lui still was fighting with the tire. The witness again offered to help and again Lui said he could take care of it. During those discussions the witness learned that Elaina was leaving at 6 AM to fly to California, that she was visiting her family and that she would not return until Monday when she would pick up her car and then go to her son's school to pick him up. This is all the witness knew of the trip and he said it seemed that this is all Lui knew of it. The witness thought in hindsight that this was odd because if his wife left for a trip the witness would know every detail of it and Lui did not seem to know much. The witness did not know when Lui learned of the trip, but the first he heard of it was on the 2nd.

The witness said that he was concerned about Lui straining his arm by changing the tire as his arm was still week and painful and he was still on light duty at work. He was sure he never went up to assist Lui in this task, nor did he see Lui on that Friday. The witness said that his wife works nights and on that Friday the witness was caring for his two children at home.

Asked what else they discussed on that Friday night, the witness said that they were planning a Luau at a church and Lui asked the witness if he would come and play music with him on that following Saturday. The witness said that he had to work that day but he would try to make it. The witness knew that Paul Finau was going to also be involved in that Luau.

The witness was asked if he ever suspected, knew or heard that either Elaina or Lui was having an affair with someone else during the time they lived in Woodinville. The witness said he never heard of such a thing. Asked if the witness knew anything about Lui being jealous of some other man in regards to Elaina, the witness said he knew nothing of such a thing. Asked if he ever heard or knew or suspected that Elaina wanted to get out of her relationship with Lui, the witness said he did not.

Asked when the next time was that he spoke to Lui after Friday, the witness said that it was on that next day, Saturday the 3rd. He said that he thinks that Lui again called and asked if the witness could come to the Luau. The witness said that if he could get off work he'd meet him at the Luau which was to begin at 6 or 7 that evening. The witness was not able to make it and he did not see Lui on that Saturday. He again spoke over the phone to Lui on Saturday night after the Luau. Lui told him all about it and he told him that Lui's brother-in-law and son were spending the night with Lui at his home. Asked how Lui sounded to him on that Saturday during any of the conversations, the witness said he was his usual good natured self.

The witness was asked how close he is to Lui and whether or not Lui would confide in him about personal matters. The witness said that they are very close and Lui would freely talk to the witness about anything that was upsetting or bothering him. Lui did not do so during that time.

On the following day, Sunday February 4th the witness again spoke to Lui over the phone but he did not see him. The witness recalled talking to him in them morning before church and again at night. The witness said that he probably used his cellular phone, which is (425) 922-6140. At the time his carrier was AT&T. It then was bought by Singular and today is again AT&T. The witness said that he has already ordered his phone records for us and they should arrive soon. He offered to call me when they arrive.

On Monday February 5th the witness worked all day. In the late afternoon, about 4 PM Lui called him or he called Lui. He asked Lui what he was up to and Lui told him that the school had called and that Elaina had not arrived to pick up her son so Lui had to run up

there and get him. After this, the two men talked 2 or 3 more times and Lui was trying to find out what had happened that Elaina had not arrived to get her son. Lui finally called later and said that he had called California and asked to speak with Elaina. He had called Elaina's mother. The mother told Lui that Elaina had never come to California that weekend. Lui told the witness that he thought she was just pulling his leg so he called her back and then he believed her. Lui told the mother that Elaina had left there Saturday morning to go to California to visit her. This, the witness thinks, is when everyone really began to be concerned.

The witness said that he had his children again to watch over so Lui told him that he had called his friend Paul and his friends on the Rugby team and they were going to go out and look for Elaina's car. The witness knew that they all drove to the airport to see if her car was still in the lot there and that they checked with the airlines to see if she had checked in on Saturday morning. The witness was told by Lui that she had not checked in and that the car was not in the lot.

On Tuesday, February 6th, the witness again spoke with Lui. Elaina's mother and sister were on their way to his home, the mother coming up from California and the sister from Hawaii. The witness got a baby-sitter for the children and he went up to help Lui. When he arrived the mother and the sister were already at Lui's home. They stayed at the house and the witness and Lui took off driving around looking for Elaina. The witness did not think they had any flyers regarding Elaina being missing but he thinks that they stopped at the Kinko's in Woodinville to get copies made. The witness thought that the rugby team and Lui had made up the original poster the day before.

The witness knew that on Tuesday during the day the same friends had put up a lot of the posters in the area and this time maybe he and Lui did still have some because he remembered driving around with Lui and dropping posters off at stores in the area. The witness recalled driving in and out of every parking lot and strip mall in the area combing it for her car and asking if they could post the posters in the stores.

The witness was asked where the Woodinville Athletic Club was at the time. He drew me a map (the club is now in a different location that at the time). The club was then in the same lot as the Kinko's is. The witness said that he is absolutely positive that during that day they thoroughly checked the parking lot of the strip mall where the club was and Elaina's car was not there. He said that on the poster there was a picture and/or description of the car and a picture of Elaina and if the car had been in that parking lot for two days someone would have seen the poster and called it in.

Asked if he knew of any time that Lui had walked from his house to town, especially to the mall where the gym was, the witness said that he did. He said that on Wednesday they decided to walk down from Lui's house and carry the posters to all the little stores between his house and the downtown area. They walked for abut 3 hours all around the town and then back to Lui's home. The witness said they were again in the lot where the gym was and they looked very closely for Elaina's car there and everywhere else they

went. He again said he is 100% sure her car was not in that lot. When they got back to Lui's on that Tuesday night the mother and sister were at Lui's and they asked the mother if she could think of anything else they should be doing. She suggested to them that they move out farther than downtown and this is why the two walked, so they could hit the outside areas of town posting the flyers.

On Thursday the witness was unable to help Lui but again on that Friday he went back up to help Lui. This time they decided to go north of Woodinville to Monroe because they had all gone south already over the past days. After work on Friday the witness drove up and he and Lui went up to Monroe posting flyers. He was in the passnger seat and Lui drove.

Asked how Lui was acting by Tuesday when he first saw Lui after Elaina disappeared, the witness said he was already tired and he was sad, very sad. Lui had no idea whatsoever what had become of Elaina. By that next Friday he was very depressed and just kept repeating, "Where is she!?" over and over.

When he and Lui were in Monroe, the police called Lui on his cellular phone asking to meet with him. First they told him they'd meet at the Kirkland AM/PM store where the witness thought they had met with Lui another time. They then called back and told him to meet them at the Park and Ride near Lui's house. Lui said they were on their way and while driving there, the police called a third time and told him to meet them at his house. They said they were at the off ramp and would be there in 5 minutes. When they drove up about 50 cops were there with their guns drawn. They were all in plain clothes. The witness was pulled from the passenger seat and cuffed. Lui was pulled from the driver's sear and also cuffed. After a while the witness asked one of the detectives why did they lock him for and the detective ordered him uncuffed. They then began to take off with Lui and the witness asked the officer where they were taking him. The detective said, We are just going for a ride, we'll be back." They lied, the witness said. This is the night they arrested his friend. (The witness began to cry at this time). The witness said that Elaina's sister was still at the house at this time and the police told him and the sister they could not enter the house. The sister got permission to go in and get her belongings as she was flying back to Hawaii that night. They let her do so. The witness did not know if the mother was still in town or not by then, he did not see her.

The witness went on to say that the next day he went and got Lui from jail. He brought him home and Lui's feet and lower legs were completely bruised and discolored. He asked his friend what had happened and Lui told him that the police had smashed his feet and legs again and again by kicking and kneeing him during a 6 hour interrogation of him the night before.

He witness stated that never has he suspected Lui of being involved in any way with Elaina's death. He thinks that Elaina was killed by someone else and that she was killed away from the parking lot and then the killer returned the car after Friday. The witness did not know if Elaina was a member of the gym where her car was found.

During our discussion I noticed that the witness misuses pronouns, calling a woman "he" or "we" or sometimes "they" and men "she". I asked him about this. He said that English is his second language and he had difficulty with pronouns. I asked if he also has trouble with present and past terms and he said that he does. I asked if this is also true with Lui, especially 6 years ago. He said that it is so with them both as they have difficulty with English. (I asked this because the police make a point of noting that Lui used the term "was" when talking of Elaina before her body was discovered.)

Asked if the police or any prosecutor ever spoke to the witness, he said that they did not talk to him or interview him until just recently when Lui was charged with this crime. Then a female prosecutor and a female detective came to his home. he refused to let them in and at that moment Lui called him and he told Lui that they were there. Lui convinced him to be interviewed and he then spent about 1 ½ or 2 hours with them in his home. they taped his interview. He asked to se the interview so that he could see if it was correctly transcribed and I told the witness that I would ask the attorney if this would be possible.

The witness recalled that the prosecutor's name was Kristen but he did not knew the detectives name. Asked if the witness knew why they were now charging Lui when they had not done so 6 years ago, he said that he asked them and they told him they had something new or new evidence. He also knew that a different detective was involved in the case as the first one had died.

The witness said that the two asked him about a lot of people he had never heard of and when they asked about Lui's sex life he informed them that they did not talk of such things among themselves as it opposed to their culture and their religion to do so.

I infomred the witness that I may have further qeustions of him once I ready his statement to the police and he said I was welcome to call him any time.

This concluded my interview.

CASE NAME: Sione Lui
CAUSE NO. 07-1-04039-7 SEA
DATE: June 6, 2007
WITNESS INTERVIEW
WITNESS: Sam Taumoefolau

On the above date I met with the witness at his home. He resides at 14212 SE 38th Street, Bellevue, WA. His home number is (425) 747-9159. His cellular number is (425) 922-6140. We had made an appointment to meet when I explained to him that I am the defense investigator working with Mr. Lui's attorney, Mr. Savage. The witness was friendly and cooperative. During the interview his wife was in the house but not involved in our discussion.

The witness stated that he has known Lui since Lui moved to the area from either Salt Lake or California, he wasn't sure which. He got to know Lui by being introduced to him by another friend Paul Finau who knew Lui from Rugby.

At the time the witness got to know Lui, Lui was married to Julie. They had a little baby at the time that he met them. They were then divorced about 10 years ago. They had been living in Kirkland and then they moved to Lynwood and it was there that the problems began in their marriage. The witness still socialized with them even after their divorce.

Asked what the problem was in their marriage, the witness said that they had some friends come to visit them from Salt Lake, a married couple. At the end of the visit, the man, whose name the witness did not know, told Julie that she would be better off without Lui. This was the beginning of the end of their marriage, but the witness did not know the specifics of the problems.

Asked if he knew anything about the break-up, the witness said all he knew was that at one point he was asked to go with Lui to pawnshops in the area to retrieve his belongings. Julie had sold or hocked some of his belongings.

The witness denied that he ever saw or heard of any abuse in that relationship and he said that Julie's mother once told the witness that the whole break-up had been Julie's fault because she spent all of their money and ran their credit cards up to the maximum. The

EXHIBIT C

witness said that after the divorce he still saw Lui regularly and he saw Julie also, who he still thinks of as a friend.

Asked when he met Elaina, the witness said that they met at the witness's church cultural hall. He is a Mormon, as is Lui. He invited Lui to his church and Lui asked if he could bring his friend along. This is when the witness met Elaina.

Asked if Lui was involved in the church at the time, the witness said that he was. He said that Lui was now living in Kirkland and he attended the church there, which the witness called his "home ward". The witness knew that Lui was involved in the church because part of the religious responsibilities is being assigned to another family inside the church. The assignment to another family is for the purpose of watching over the needs of the other family and reporting these needs to the leadership of the ward. Lui was assigned to a family and once about that time he asked the witness to go with him to meet with the assigned family, which the witness did do.

The witness was asked how long Lui was with Elaina prior to her death. he stated that he did not think it was even one year. At the time the witness met Elaina, Lui still lived in Kirkland and the witness saw them on and off there. The witness said that he does not even go 2 or 3 days at a time without at lest speaking with Lui over the phone and this has been so for a long long time.

The second time that the witness met Elaina was when she had a flat tire on her car and Lui asked him to bring his extra truck key to her. The witness brought the key to Elaina.

The third time he met Elaina was when the witness helped them to move from Kirkland up to Woodinville. Just prior to the move Lui had gone though an operation on his arm for an injury he received playing rugby and Lui was not able to lift any substantial amount of weight. The witness helped them move up and connected the washer and dryer for Lui as he was unable to do so with his injury.

Asked about this disability of Lui's, the witness said that the operation was on Lui's right arm and there is still a long scar down his forearm. He said that Lui was unable to lift the arm above his shoulder and he could not lift much weight at all. He said that Lui was in physical therapy at the time to get his arm stronger.

The witness was asked if he knew if Lui was trying to accustom Elaina to his religion and culture during the time they were together. He said that he was. He stated that Lui told him that they were talking of getting married but they had not set a date. Asked if Elaina ever spoke to him about marriage with Lui, the witness said she did not. He said that when he and Elaina moved to Woodinville there seemed to be a change in Elaina. He said that whenever he went to visit in Woodinville Elaina was never there at the house or if she was she was either coming or going, but after the move, the witness did not again sit down and talk with Elaina. He recalled only seeing her one or two times after they got to Woodinville and usually when he visited it was just Lui and the two boys, his and Elaina's.

Asked if Elaina was ever present when Lui talked of marriage, the witness said he could not think of a time that she was present.

I asked the witness if he knew anything about Lui wanting to abstain from premarital sexual relations with Elaina after their move to Woodinville. He stated that it is possible as it is against the teachings of the church to engage in sexual relations before marriage but for that matter a couple is not allowed to live together before marriage either. He said that he never spoke with Lui about such things as it is opposed to their cultural upbringing to discuss such personal matters

Asked what he noticed about Lui's relationship with Elaina, the witness said that they seemed like they had a lot of fun and they were very happy to be with one another. He thought their work kept them somewhat apart from one another time-wise but other than that he never witnessed or heard of any troubles at all.

He witness was asked if he knew anything at all about Lui and Elaina going out clubbing or drinking with another group of friends. He did not.

Asked what he knew of Elaina's history, the witness said that one time he asked Elaina about her tattoos. She had one on her upper back near her neck and one on her calf. Elaina informed him that when she lived in California she had been a member of some Mexican gang as had the father of her son. She did not seem to be concerned with anything from the past and it seemed to the witness that she had moved on and did not have any fear of trouble from the past nor was she involved any longer in that past. The witness did not know if Elaina had been married to the father of her son or not. The witness did not know what the name of the gang was that Elaina was speaking of. She did not give him any details of her life in the gang or what she had been involved in during the time.

Asked if the witness knew anything about Elaina taking a trip to California at the time of her death, the witness said he did. He said that Lui called him up or he called Lui on Friday night, the 2nd of February. Elaina had a flat tire again on her car and Lui was changing it for her. he told the wit hat Elaina was leaving at 6AM the following morning to visit her family in California and he wanted to get her tire fixed because she wanted to drive it to the airport the next day. Lui was having trouble with the jack and the witness offered to come up and help him, but Lui refused the assistance. Sometime later they again spoke and Lui still was fighting with the tire. The witness again offered to help and again Lui said he could take care of it. During those discussions the witness learned that Elaina was leaving at 6 AM to fly to California, that she was visiting her family and that she would not return until Monday when she would pick up her car and then go to her son's school to pick him up. This is all the witness knew of the trip and he said it seemed that this is all Lui knew of it. The witness thought in hindsight that this was odd because if his wife left for a trip the witness would know every detail of it and Lui did not seem to know much. The witness did not know when Lui learned of the trip, but the first he heard of it was on the 2nd.

The witness said that he was concerned about Lui straining his arm by changing the tire as his arm was still week and painful and he was still on light duty at work. He was sure he never went up to assist Lui in this task, nor did he see Lui on that Friday. The witness said that his wife works nights and on that Friday the witness was caring for his two children at home.

Asked what else they discussed on that Friday night, the witness said that they were planning a Luau at a church and Lui asked the witness if he would come and play music with him on that following Saturday. The witness said that he had to work that day but he would try to make it. The witness knew that Paul Finau was going to also be involved in that Luau.

The witness was asked if he ever suspected, knew or heard that either Elaina or Lui was having an affair with someone else during the time they lived in Woodinville. The witness said he never heard of such a thing. Asked if the witness knew anything about Lui being jealous of some other man in regards to Elaina, the witness said he knew nothing of such a thing. Asked if he ever heard or knew or suspected that Elaina wanted to get out of her relationship with Lui, the witness said he did not.

Asked when the next time was that he spoke to Lui after Friday, the witness said that it was on that next day, Saturday the 3rd. He said that he thinks that Lui again called and asked if the witness could come to the Luau. The witness said that if he could get off work he'd meet him at the Luau which was to begin at 6 or 7 that evening. The witness was not able to make it and he did not see Lui on that Saturday. He again spoke over the phone to Lui on Saturday night after the Luau. Lui told him all about it and he told him that Lui's brother-in-law and son were spending the night with Lui at his home. Asked how Lui sounded to him on that Saturday during any of the conversations, the witness said he was his usual good natured self.

The witness was asked how close he is to Lui and whether or not Lui would confide in him about personal matters. The witness said that they are very close and Lui would freely talk to the witness about anything that was upsetting or bothering him. Lui did not do so during that time.

On the following day, Sunday February 4th the witness again spoke to Lui over the phone but he did not see him. The witness recalled talking to him in them morning before church and again at night. The witness said that he probably used his cellular phone, which is (425) 922-6140. At the time his carrier was AT&T. It then was bought by Singular and today is again AT&T. The witness said that he has already ordered his phone records for us and they should arrive soon. He offered to call me when they arrive.

On Monday February 5th the witness worked all day. In the late afternoon, about 4 PM Lui called him or he called Lui. He asked Lui what he was up to and Lui told him that the school had called and that Elaina had not arrived to pick up her son so Lui had to run up

there and get him. After this, the two men talked 2 or 3 more times and Lui was trying to find out what had happened that Elaina had not arrived to get her son. Lui finally called later and said that he had called California and asked to speak with Elaina. He had called Elaina's mother. The mother told Lui that Elaina had never come to California that weekend. Lui told the witness that he thought she was just pulling his leg so he called her back and then he believed her. Lui told the mother that Elaina had left there Saturday morning to go to California to visit her. This, the witness thinks, is when everyone really began to be concerned.

The witness said that he had his children again to watch over so Lui told him that he had called his friend Paul and his friends on the Rugby team and they were going to go out and look for Elaina's car. The witness knew that they all drove to the airport to see if her car was still in the lot there and that they checked with the airlines to see if she had checked in on Saturday morning. The witness was told by Lui that she had not checked in and that the car was not in the lot.

On Tuesday, February 6th, the witness again spoke with Lui. Elaina's mother and sister were on their way to his home, the mother coming up from California and the sister from Hawaii. The witness got a baby-sitter for the children and he went up to help Lui. When he arrived the mother and the sister were already at Lui's home. They stayed at the house and the witness and Lui took off driving around looking for Elaina. The witness did not think they had any flyers regarding Elaina being missing but he thinks that they stopped at the Kinko's in Woodinville to get copies made. The witness thought that the rugby team and Lui had made up the original poster the day before.

The witness knew that on Tuesday during the day the same friends had put up a lot of the posters in the area and this time maybe he and Lui did still have some because he remembered driving around with Lui and dropping posters off at stores in the area. The witness recalled driving in and out of every parking lot and strip mall in the area combing it for her car and asking if they could post the posters in the stores.

The witness was asked where the Woodinville Athletic Club was at the time. He drew me a map (the club is now in a different location that at the time). The club was then in the same lot as the Kinko's is. The witness said that he is absolutely positive that during that day they thoroughly checked the parking lot of the strip mall where the club was and Elaina's car was not there. He said that on the poster there was a picture and/or description of the car and a picture of Elaina and if the car had been in that parking lot for two days someone would have seen the poster and called it in.

Asked if he knew of any time that Lui had walked from his house to town, especially to the mall where the gym was, the witness said that he did. He said that on Wednesday they decided to walk down from Lui's house and carry the posters to all the little stores between his house and the downtown area. They walked for abut 3 hours all around the town and then back to Lui's home. The witness said they were again in the lot where the gym was and they looked very closely for Elaina's car there and everywhere else they

went. He again said he is 100% sure her car was not in that lot. When they got back to Lui's on that Tuesday night the mother and sister were at Lui's and they asked the mother if she could think of anything else they should be doing. She suggested to them that they move out farther than downtown and this is why the two walked, so they could hit the outside areas of town posting the flyers.

On Thursday the witness was unable to help Lui but again on that Friday he went back up to help Lui. This time they decided to go north of Woodinville to Monroe because they had all gone south already over the past days. After work on Friday the witness drove up and he and Lui went up to Monroe posting flyers. He was in the passnger seat and Lui drove.

Asked how Lui was acting by Tuesday when he first saw Lui after Elaina disappeared, the witness said he was already tired and he was sad, very sad. Lui had no idea whatsoever what had become of Elaina. By that next Friday he was very depressed and just kept repeating, "Where is she!?" over and over.

When he and Lui were in Monroe, the police called Lui on his cellular phone asking to meet with him. First they told him they'd meet at the Kirkland AM/PM store where the witness thought they had met with Lui another time. They then called back and told him to meet them at the Park and Ride near Lui's house. Lui said they were on their way and while driving there, the police called a third time and told him to meet them at his house. They said they were at the off ramp and would be there in 5 minutes. When they drove up about 50 cops were there with their guns drawn. They were all in plain clothes. The witness was pulled from the passenger seat and cuffed. Lui was pulled from the driver's sear and also cuffed. After a while the witness asked one of the detectives why did they lock him for and the detective ordered him uncuffed. They then began to take off with Lui and the witness asked the officer where they were taking him. The detective said, We are just going for a ride, we'll be back." They lied, the witness said. This is the night they arrested his friend. (The witness began to cry at this time). The witness said that Elaina's sister was still at the house at this time and the police told him and the sister they could not enter the house. The sister got permission to go in and get her belongings as she was flying back to Hawaii that night. They let her do so. The witness did not know if the mother was still in town or not by then, he did not see her.

The witness went on to say that the next day he went and got Lui from jail. He brought him home and Lui's feet and lower legs were completely bruised and discolored. He asked his friend what had happened and Lui told him that the police had smashed his feet and legs again and again by kicking and kneeing him during a 6 hour interrogation of him the night before.

He witness stated that never has he suspected Lui of being involved in any way with Elaina's death. He thinks that Elaina was killed by someone else and that she was killed away from the parking lot and then the killer returned the car after Friday. The witness did not know if Elaina was a member of the gym where her car was found.

During our discussion I noticed that the witness misuses pronouns, calling a woman "he" or "we" or sometimes "they" and men "she". I asked him about this. He said that English is his second language and he had difficulty with pronouns. I asked if he also has trouble with present and past terms and he said that he does. I asked if this is also true with Lui, especially 6 years ago. He said that it is so with them both as they have difficulty with English. (I asked this because the police make a point of noting that Lui used the term "was" when talking of Elaina before her body was discovered.)

Asked if the police or any prosecutor ever spoke to the witness, he said that they did not talk to him or interview him until just recently when Lui was charged with this crime. Then a female prosecutor and a female detective came to his home. he refused to let them in and at that moment Lui called him and he told Lui that they were there. Lui convinced him to be interviewed and he then spent about 1 ½ or 2 hours with them in his home. they taped his interview. He asked to se the interview so that he could see if it was correctly transcribed and I told the witness that I would ask the attorney if this would be possible.

The witness recalled that the prosecutor's name was Kristen but he did not knew the detectives name. Asked if the witness knew why they were now charging Lui when they had not done so 6 years ago, he said that he asked them and they told him they had something new or new evidence. He also knew that a different detective was involved in the case as the first one had died.

The witness said that the two asked him about a lot of people he had never heard of and when they asked about Lui's sex life he informed them that they did not talk of such things among themselves as it opposed to their culture and their religion to do so.

I infomred the witness that I may have further qeustions of him once I ready his statement to the police and he said I was welcome to call him any time.

This concluded my interview.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF DENISE SCAFFIDI**

Denise Scaffidi declares as follows:

1) I am a private investigator licensed to practice in the State of Washington since 1996.

2) I began work on this case on May 2, 2007, in preparation for the trial. All of the information I gathered was provided to the defense attorney, Anthony Savage.

3) I interviewed Amber Mathwig on March 18, 2008. According to a police report dated February 10, 2001 (Bates number LUI 1319) she reported that the victim's vehicle was at the Washington Athletic Club (WAC) by 9:00 a.m. on February 7, 2001. A copy of the discovery page is attached as Ex. A. A copy of my report of the interview with Ms. Mathwig is attached at Ex. B. The report accurately reflects what Ms. Mathwig told me.

4) Ms. Mathwig reported that in 2001 she worked at the WAC only on Monday, Wednesday and Friday. She was quite sure that the victim's car was in the lot on two and only two consecutive work days. On the second of those work days, she found it strange that the car had been there for three days and reported the matter to another employee. The police ended

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up coming that same day. I am aware from the discovery and trial testimony that the police arrived and found Ms. Boussiacos's body in the car on Friday, February 9, 2001. This means that Ms. Mathwig first saw the car in the lot on Wednesday, February 7, as the police report indicates.

5) The same police report says: "[Mathwig's] coworker, who worked on 020601, says the car was *not* there when she left at 1400." So far, I have been unable to find that coworker.

6) Since the trial, I have attempted to obtain a declaration from Ms. Mathwig but she refuses to meet with me.

7) On June 6, 2007, I met with Sam Taumoefolau. My written report of that interview is attached to the declaration of Mr. Taumoefolau.

8) On June 3, 2007, I met with Paul and Lynette Finau. The portion of my report concerning Paul Finau is attached as Ex. C. Among other things, Mr. Finau told me that he went through the WAC parking lot with Sione on Wednesday, February 5, 2001, and Elaina's car was definitely not there. Mr. Finau also walked through the malls posting flyers that day with Sione.

9) On or about June 16, 2008, I received a telephone call from one of the jurors, Clare Comins, in response to my telephone message. Mr. Comins informed me that during deliberations there was discussion concerning the credibility of one of Mr. Lui's defense witnesses, a man named Sam. Comins recalled Sam testifying that both he and Mr. Lui had distributed missing person's leaflets at a particular mall. The mall was outside the area of the aerial photographs that had been introduced as exhibits in the case, but Sam described the location. During deliberations, one of the female jurors explained she had lived in Woodinville at the time of the murder and she knew that the mall described by Sam could not possibly have been leafleted in the days following Ms. Boussiacos's disappearance because the mall had

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not yet been built. The other jurors discussed how Sam's misstatement concerning the existence of the mall reflected poorly on his overall testimony

10). Mr. Comins could only have been referring to witness Sam Taumoefolau because he was the only defense witness with that first name, and his testimony concerned the areas where he and Mr. Lui posted flyers.

11) On June 23, 2009, at the request of Dr. Theodore Becker, I traveled to the Washington Corrections Center in Shelton, Washington to obtain measurements of Sione Lui's fingers and hands. I also took photographs with a ruler in the picture for verification. My accurate measurements, diagrams and photographs are attached to the declaration of Dr. Becker.

12) I would be willing to testify to any of this information at a new trial or an evidentiary hearing.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

October 10, 2009
Date and Place Vashon, WA

D Scaffidi
Denise Scaffidi

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MAJ CRIMES - DOWN

King County Department of Public Safety

Tip Sheet

Unit/Detective: MAJOR CRIMES

CASE NUMBER: 01-041133

PRIORITY: A B C

SUBJECT INFORMATION

NAME	CCN	BA

NICKNAME OR AKA	SSN	FILE NUMBER

HOME ADDRESS	CITY	ST	ZIP	HOME PHONE	FBI#

OLD ADDRESSES	GLASSES	FACIAL HAIR

EMPLOYER/ADDRESS	CITY	ST	WORK PHONE	OCCUPATION

RACE	SEX	DOB	AGE	POB	HGT	WGT	HAIR	EYES	BUILD	COMPL

OLN	ST	VEH YR	MAKE	MODEL	COLOR(S)	BODY STYLE

LICENSE	ST	CONDITION/EQUIPMENT	OTHER VEHICLE PLATES

SOURCE NAME: MATHWIG, AMBER

AKA:

RACE	SEX	DOB	HGT	WGT	HAIR	EYES	OCCUPATION/EMPLOYER

ADDRESS	CITY	ST	ZIP

HOME PHONE	WORK PHONE	CCN	B/A
360.794.6472	425.481.4334		

ADMINISTRATIVE/TIP PROCESSING INFORMATION

RECEIVED BY	SERIAL	DATE	TIME
WILLIAMS, M.	#02238	021001	0930

ASSIGNED TO	SERIAL	DATE	SUSPENSE DATE

COMPUTER CHECKS BY	SERIAL	DATE	TIME

COMPUTER CHECKS

System	Yes	No	System	Yes	No
SEAKING			MIF		
WACIC			NCIC III		
NCIC			NCIC O/L		
DOL			OTHER		

RP works at Woodinville Athletic Club.
Says the victim's veh was there by 0900 on 020701.
RP's coworker, who worked on 020601, says the
car was *Not* there when she left at 1400.

EXHIBIT A

SCAFFIDI & ASSOCIATES
PO BOX 1039
VASHON, WA. 98070
(206) 222-9205
****
****

CASE NAME: Sione Lui
CAUSE NO. 07-1-04039-7 SEA
DATE: March 18, 2008
WITNESS INTERVIEW
WITNESS: Amber Mathwig

On the above date I met with the witness at her place of business, located at 111 ½ S. Lewis Street, Monroe, WA. The witness's cellular number is (425) 232-3801. Her work number is (360) 794-8158. I had contacted the witness on numerous occasions to set up an appointment. The witness was told that I am a defense investigator working with the attorney of a man arrested in a 2001 murder case where she had provided some information.

I showed the witness a copy of a Major Crimes Subject Information form (Bates number LUI 001319). The witness had never seen the form prior to the day of our interview.

The witness refused to give me her home address. She stated that she could not recall how long she had been employed at Woodinville Athletic Club, but when she was working there, she worked in day care for the customers, not in the gym proper. She stated that usually unless the customers had children, she did not know them.

The witness worked at the gym only on Monday, Wednesday and Fridays in the morning.

The witness was shown a copy of the missing person's leaflet from discovery (Bates stamped LUI 000202). The witness stated that the woman in the picture was not familiar. She denied recalling seeing this poster inside the gym back in 2001 but does recall seeing the woman on the news or of seeing the poster at a gas station.

EXHIBIT B

I showed the witness a copy of the WACFIT Fitness Club membership prices (Bates stamped LUI 000165). The witness recognized this as being from the Woodinville Athletic Club from the time she was employed there. She affirmed that the weekday hours shown at the top were correct, however she did not know the weekend hours as she did not work there on any weekend.

Asked how the police received her information about the missing car, the witness stated that she does not know. She did know that she never spoke to the police at all about this case or about finding the victim's car although she once spoke to someone from the local newspaper. The way the witness recalls the car being discovered is that she saw the car parked next to the gym. It was near the location that the witness usually parked her own car. The witness recalled seeing it on one day of work and then seeing it again two days later, which would have been her next day of work. This drew her attention so she told an employee working the front desk of the gym about the car being there. At the time all she knew was that it was odd the car had been there now for three days, as she worked every two days and this would have been the second day at work she spotted the car parked there.

The witness was told later that the employee she talked to then told the owner of the gym about the car and the owner spoke to one of the customers who was a King County Police Officer. The witness herself never spoke to this police officer about the car. She only knew that the officer was a woman. The officer then ran the plates of the car and found that it was associated with the missing persons case.

The witness could not recall who the employee was that she reported the car to.

The witness said that the car had to have been parked next to the gym for three days. She stated that she did not know if the car was there on Monday, Tuesday and Wednesday or Wednesday, Thursday and Friday. She said it had to have been one or the other because she only worked Monday, Wednesday and Friday. If she had seen the car the first time on Friday, the car would have had to be there Friday, Saturday, Sunday and Monday before she reported it and she is sure it was not that long before she reported it.

The witness then explained the parking layout of the gym from that time. She said that the back parking lot today (of what is now part of the Fire Department) was not owned by the gym and no one parked behind the gym. The only parking for the gym was in the front (the north side) and the side (the east side). The car she reported was parked on the east side of the gym in full view of the highway. I drew a sketch of the area and she pointed out where the car was parked for those three days. She also said that the car was backed right up to a path which cut from the gym over to Linens and Things, a store to the east of the gym. (Sketch attached to this report).

The owner of the gym at the time was Jane. The witness could not recall her last name. Jane's daughter-in-law, Leslie, ran the gym. Leslie's last name might have been Wirkues (Phonetic spelling.) They are no longer associated with the new Woodinville gym.

The witness stated that she was at the gym the day that the dog tracker came with the police. She recalled that the man had a bloodhound and that they started at the victim's car and then went through the path to Linens and Things. There were more than two people in the tracking group, but she did not recall anything about them, such as if they were in uniform or who they were besides the dog handler. The witness said that she did not recall seeing the people give the dog anything to smell before the dog left the area. Later on she was told by someone at the gym that the dog had found the suspect's house. She did not know more of the issue.

The witness recalled looking into the victim's car and some point and seeing something unusual in the front passenger seat. She could not even guess today what this thing was but just recalled thinking it was an unusual item to be in the front seat at the time she saw it in 2001.

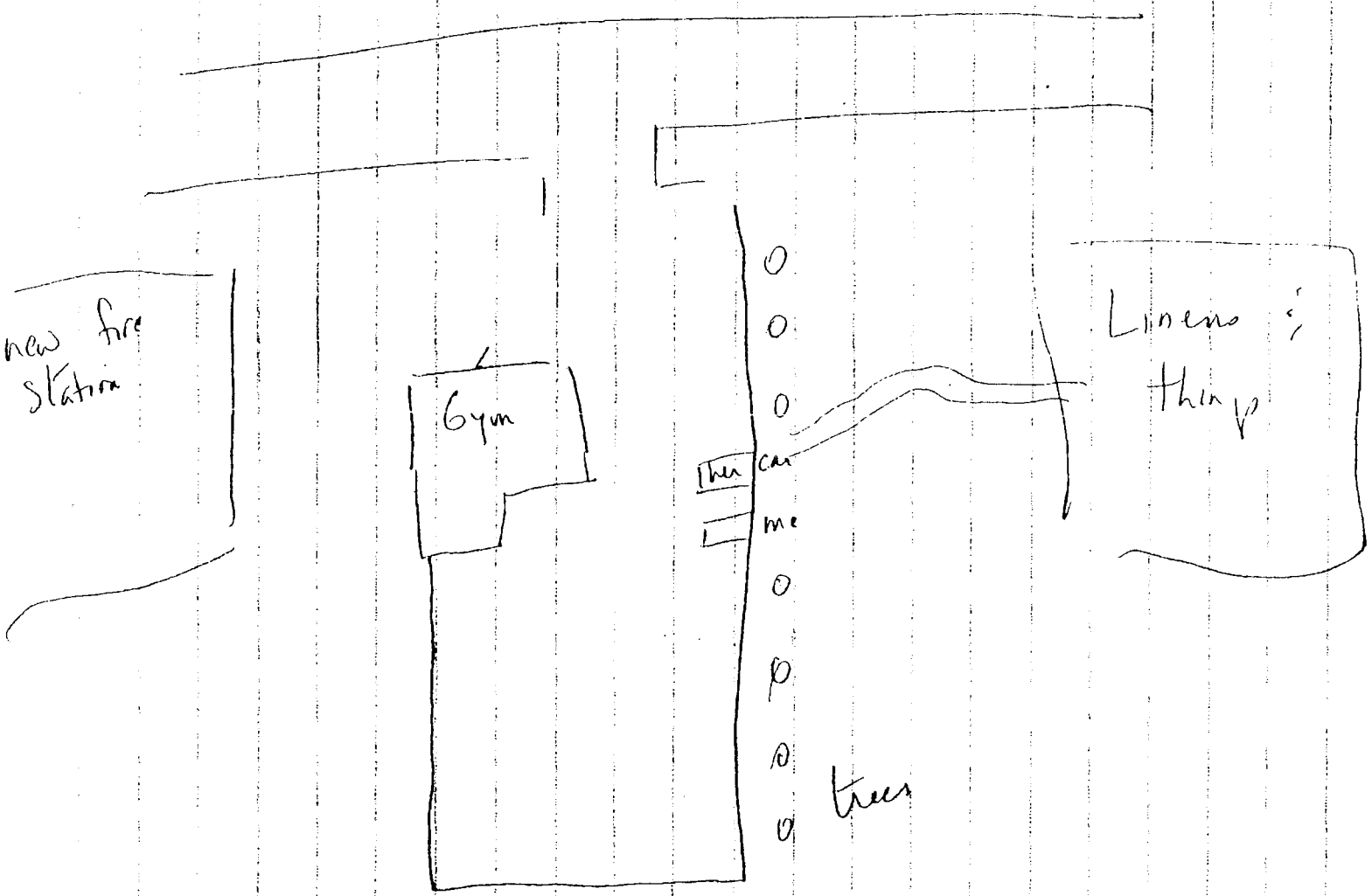
Asked how sure she was that the victim's car had not been there prior to 2/7/01 as stated on the police sheet, she said that all she knows is that she saw it on three days in a row and that the day prior to seeing it it was not there.

In the Suspect Information form it states that the "RP's co-worker, who worked on 020601, says the car was *not* there when she left at 1400." The witness did not know who this co-worker was and she further did not know who had called the police to give them any of the information on the form

(LUI 001319.) The witness denies ever speaking to the police or of reporting the car to anyone except the gym employee at the front desk. She does not know how the police filled in the form with her phone numbers and she did not know who M. Williams is that filled out the form.

The witness has never spoken to the police or the prosecutor regarding this case.

This concluded my interview.


new fire station
Gym
Linens ; things
trees

Scaffidi & Associates

A Private Investigation Agency

PO Box 1039
Vashon Island, WA 98070

Office Phone (206) 903-8227

CASE NAME: Sione Lui
CAUSE NO. 07-1-04039-7 SEA
DATE: June 3, 2007
WITNESS INTERVIEW
WITNESS: Paul and Lynette Finau

On the above date I met with the witnesses at their home. They reside at 6406 81st Dr., Marysville, WA. Their home number is (360) 658-7752. Paul's cellular number is (425) 931-5214. I contacted Paul and made an appointment to meet. At that time I explained to him that I am the defense investigator working with Mr. Lui's attorney, Mr. Savage. The witnesses were both friendly and cooperative. During the interview both the husband and the wife sat together and spoke with me. I will first make a record of what Paul told me and then what Lynette told me. Because of that, the interchange with them will not be chronological in nature.

Paul Finau:

This witness stated to me that he first met Lui in about 1994 or 95 because of a rugby meet. Lynette's brother in Utah introduced them and because they are all Polynesian they connected. Lynette's brother was good friends with Lui. They also all are of the Mormon faith. When they met, Lui and his first wife would come over for dinner at their home.

The witness stated that after meeting Lui and his wife, Julie, the Finaus moved to Arizona in 1999, but the Finaus remained in touch with Lui. This was primarily Paul, not Lynette.

In 2000 they moved back to the Pacific Northwest to Marysville and this is when the witness met Elaina for the first time. Paul had heard that Lui and Julie had split up by then, they were not yet divorced but they were separated.

EXHIBIT C

Asked about Lui and Elaina's relationship, the witness stated that they were normal people with no problems. Paul knew that they were engaged but the Finaus only knew Elaina from about late 2000 until her death.

The witness stated that he knew that Elaina was going to California. He said that all day Saturday the 3rd of February Lui was at the Finau house preparing for a Luau that was to take place later in the day. Lui arrived at their home at about 9 or 10 AM and he helped Lynette practice music for the Luau. He stayed at their house until about 4 or 4:30 PM. The witness recalls asking Lui where Elaina was and being told by Lui that she was in California. Lui then went home and he returned for the Luau at about 7 PM. The Luau lasted until about 10 PM that night. The Luau was held at their church. Paul's brother-in-law came with his son and after the Luau, Paul, his brother-in-law and the son were invited to spend the night with Lui, which they did do.

The witness was asked if he was told anything else about the trip to California and he said he was not, only that Elaina was visiting her family in California. Asked if Lui seemed upset or surprised by the trip to California, the witness said not that he noticed. Asked how Lui seemed that whole day on Saturday, the witness said that he was the same as usual and he noticed nothing different about Lui's behavior or mood.

Asked if the witness knew anything about an injury to Lui that he had suffered, the witness said that he knew that he had a severe injury to his arm or shoulder and he had had some operations but the witness was not sure of Lui's physical condition in early February of that year. He knew that Lui had to stop playing rugby for some time when he was injured.

The witness said that he was the first person that Lui called when he found out that Elaina had not arrived in California. Asked if the witness ever heard of any kind of abuse in the relationship of Lui and Elaina, the witness said there was nothing he ever saw or heard of along those lines.

On Monday, February 5th, Lui called the witness and asked Paul if he would come and help him. The last time Paul had seen Lui before that call was on Sunday when he and his brother-in-law and son had left Lui's house after spending the night. Lui called Monday and told him that Elaina was missing and asked Paul if he would help him put up flyers with him. Lui told Paul that

Elaina's family had called and that Elaina had never arrived in California and did not know where she was.

The witness said he went to Lui's house. The flyers were already copied and he and Lui drove from Marysville to every off ramp on I-405 posting the flyers. They went all the way to the airport and once there searched the entire lot for her car.

Asked how Lui seemed that day, the witness said that he was "concerned". The witness then drove with Lui the same day all through Woodinville looking for Elaina's car. He said that later he found out her car was in the parking lot by the Woodinville Athletic Club. He stated that they went all through that parking lot searching for her car and it was absolutely not there on that Monday.

The witness then stated that after helping Lui that day Lui stopped contacting the witness and his wife. They heard absolutely nothing from him for 3 years. This seemed to upset the witness as he felt he had been very close to Lui and he could not explain to himself why this had occurred.

Paul stated that he and his wife, Lynette, spoke often about this odd behavior of Lui's. Paul said that Elaina and Lui had friends that were closer to them than the Finaus who would go out to bars with them but even the friends never contacted the Finaus about what was happening. Paul tried several times to reach Lui but he never got a return call and finally Paul stopped trying. He was disturbed by this development and somewhat resentful. The witness said that even now they are not in contact with Lui and the witness was surprised that Lui had supplied their names to me to interview.

The witness said that Lui's other friends had told Paul that they thought that Lui was controlling of Elaina and that he was obsessive about her, but the witness did not see this himself.

Asked if the witness ever walked though Woodinville with Lui hanging up flyers or searching for Elaina, the witness said that they did walk all through the malls that day. Once that day was over, the witness never heard from Lui again.

The witness said that he never saw or heard that Lui was a cheater or a liar with Elaina but Lui was friends with the Finaus on a religious and cultural level and as the Finaus do not drink due to their religion, they were never around Lui and Elaina in a social setting where alcohol was served. Lui and Elaina had another group of friends that would go clubbing with them.

Asked if Lui ever talked to Paul about marrying Elaina, the witness said that Lui told him that Elaina wanted to get married but that Lui was not sure about it yet.

Asked if he knew anything about an e-mail that was sent to a man from Lui about Elaina, the witness said that he heard through a friend, David Ve'etutu that Lui sent an e-mail to one of David's friends who was involved in the bar group and that David thought it was odd, saying to Paul, "What was he doing?" Asked if the witness knew anything about Elaina or of her character, the witness said that he knows that Elaina's ex-boyfriend introduced her to Lui. The witness heard from the bar friends of Lui that Elaina was loose and that she was passed around the rugby crowd, sexually. He heard once that Lui was honored as the Most Valuable player once at a bar or a party and when he left the club he saw Elaina hugging another man and Lui smashed the trophy and had a fit about it. The witness heard of this from a friend named Jacob.

The witness went on to say that another friend of Lui's who is closer to Lui than the witness is a man who is the roommate of someone named Paola. The witness did not know this roommate's name.

Going back to the issue of whether the witness knew about Lui's commitment not to have premarital sex with Elaina once they moved to Woodinville, the witness said that although he never talked to Lui about anything along those lines, if Lui was trying to get more involved in the church and if he was teaching Elaina about his culture and religion, then it would make sense for Lui to practice abstention. The witness said that it is also important to know that just by living together, Lui was contradicting his religious beliefs.

Asked if Lui became more committed to the church after Elaina's death, the witness said he really did not know as Lui ceased communicating with the witness.

Asked if the witness knew if Lui's new wife had been brought into the church, the witness again said he did not know.

Going back to whether or not Lui ever walked from his house to downtown and back during the posting of the flyers, the witness said it is only about ¼ of a mile from the house to town and he imagined Lui very well might have taken that walk several times.

Asked if the witness ever met the people that lived downstairs from Lui at the Woodinville house, he said he never met anyone who might have lived downstairs.

This concluded the information given to me by Paul

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF DAVID ZUCKERMAN IN SUPPORT OF PERSONAL RESTRAINT PETITION**

David Zuckerman declares as follows:

1) I am the attorney for Sione Lui.

2) I obtained the discovery in this case from the trial attorney, Anthony Savage. Some of that discovery is attached to this declaration. The numbering on the documents appears to have been added by the prosecutor's office. It is all in the form of "LUI" followed by a number.

3) Many of the pages contained "post-it" notes. I have carefully preserved their location in the discovery. Mr. Lui's wife, Celese Lui, has told me that the notes were made by her. Mr. Savage has confirmed that to me. I am familiar with Ms. Lui's handwriting because I have received various handwritten communications from her. It appears to be consistent with the post-it notes. Attached to the declaration of Celese Lui are accurate copies of various discovery pages, with and without her post-it notes on them.

4) Attached as Ex. A is an excerpt from the May 31, 2001 interview of Falepaini Harris by the Honolulu police. (LUI 2454,2472-74).

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

5) Attached as Ex. B is the February 13, 2001 taped statement of Paul Finau. (LUI 2387-97).

6) Attached as Ex. C are portions of the Brief of Respondent filed in the direct appeal in this case.

7) Attached as Ex. D is an email from prosecutor Kristin Richardson to dog handler Richard Schurman dated February 15, 2001. (LUI 3924).

8) Attached as Ex. E is an email from Ms. Richardson to Mr. Schurman dated February 13, 2001. (LUI 3925).

9) Attached as Ex. F is a transcript of a February 12, 2001 interview with Evamarie Gordon. (LUI 2406-2419).

10) Attached as Ex. G is a report of detective Jim Doyon regarding James Negron. (LUI 2231-33).

11) Attached as Ex. H are transcripts of taped interviews with James Negron on February 7, 2001 and April 9, 2007. (LUI 2666-2680 & LUI 2681-89).

12) Attached as Ex. I is an excerpt of the testimony of dog handler Richard Schurman from *State v. Sherer*, King County No. 00-1-00183-1 SEA.

13) I have reviewed the superior court file and Tony Savage's correspondence file and there was no request or motion for impeachment evidence regarding Detective Denny Gulla.

14) I would be willing to testify to these facts at an evidentiary hearing or a new trial.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed in Seattle, Washington:

11/22/10
Date

David Zuckerman

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

TAPED INTERVIEW OF : PAINI HARRIS conducted by Detective ANDERSON HEE at 4338 Kahala Avenue, Honolulu, Hawai'i, on Thursday, May 31, 2001, commencing at 0810 hours and terminating at 0852 hours.

PRESENT : PAINI HARRIS A
Detective ANDERSON HEE Q
Detective MICHAEL TSUDA QQ

Transcript prepared by Police Reporter SUE ANN NAPOLEON.

----------000----------

DETECTIVE ANDERSON HEE QUESTIONING PAINI HARRIS:

Q This is Detective Anderson Hee of the Homicide Detail, Honolulu Police Department. The date is May 31st 2001, time now is 8:10 a.m. We're currently at 4338 Kahala Avenue, the home of Paini Harris. And the following will be an interview with Mrs. Harris. It's in regards to an investigation by the King County Sheriffs Office in regards to the death of Miss Elaina Boussiacos, and that's spelled B o u s s i a c o s. Also present is Detective Michael Tsuda. Paini, can you state your full name, please.

A Falepaini Harris.

Q What is that?

A Falepaini Harris.

EXHIBIT EX. A

1 Q Did you actually take that garbage and dump it in the trash
2 or did you just leave it in that--
3 A No. I don't know his (inaudible), so I didn't.
4 Q It was just left in that bin under the sink?
5 A Yeah, yeah, I used it. (inaudible)...
6 Q Did you, your brother, or anyone else take any garbage to
7 the dump?
8 A I didn't.
9 Q As far as you--
10 A Yeah--no, I don't recall, Uhm uhmm [negative].
11 Q Did you guys have any visitors while you guys were
12 there--while you were there?
13 A Yes. That same night, in the evening, his buddy...this
14 other guy, his name is Sam, I think he's in the records.
15 Q Sam?
16 A Yeah. His name--yeah, he goes by Sam.
17 Q Is he what...
18 A He's Tongan.
19 Q Tongan.
20 A Yeah. I think--
21 Q Did the police talk to him?
22 A Yeah, yeah. I think they have all his input too. He
23 stopped in to meet me 'cause we've never met before. I hear

1 about this guy, but I never met him before, so he stopped in
2 to say hello, yeah.
3 Q Anyone else stop by?
4 A No, Uhm uhmm [negative], no.
5 Q Now, who are some of Sione's closest friends.
6 A His closest friends...his buddies at--I know he plays rugby.
7 He belongs to the East Side Rugby Club.
8 Q East Side Rugby?
9 A Yeah, East Side Rugby Club. A lot of those guys called
10 because they were going up--I guess since Monday--
11 Q Do you know the names of--
12 A Oh, I (inaudible), I don't think that's his name.
13 Q Are you talking, also, in Tongan?
14 A Yes, yeah.
15 Q All right. So did Sam speak in Tongan?
16 A Yeah, yeah, yeah. A lot of phone calls from his rugby guys
17 'cause they were the ones that went out to the neighborhood
18 to pass out flyers and put up--yeah, they have--
19 Q So a lot of his friends from the rugby club assisted him,
20 passing out flyers.
21 A Yeah.
22 Q Where did you guys pass out flyers at--or where did they
23 pass out flyers?

1 A I'm not familiar with Seattle, but--
2 Q Was it right around the neighborhood or something or...
3 A Not in the neighbor--I guess they were doing the
4 neighborhood--from the house to the airport, so I don't know
5 what (inaudible).
6 Q Now, do you know if Sione ever went out in Woodenville to
7 look for Nina or--with you there or did he--
8 A Yes. 'Cause we went--we went to Kenko's to do some more--to
9 run off some more copies.
10 Q Flyers?
11 A Yes. And he pointed out--he put up the...the gas stations,
12 he put up--he pointed out the flyers that he had put up on
13 the electric poles and...yeah, yeah. The neighborhood was
14 covered, yeah.
15 Q Was there any kind of search made by he and his friends, at
16 all?
17 A Oh, since Monday night. They go out every Monday night--I
18 mean since Monday night. Even the night I was there, I was
19 sort of afraid to stay by myself, but I said, Yes, go ahead
20 and go out, I can--'cause they were going out almost every
21 night; you know, not knowing what's--where is this thing
22 going to lead to.
23 Q Now, her body was found on the 9th, you said.

A I'm not familiar with Seattle, but--

Q Was it right around the neighborhood or something or...

A Not in the neighbor--I guess they were doing the neighborhood--from the house to the airport, so I don't know what (inaudible).

Q Now, do you know if Sione ever [illegible] le to look for Nina or--with [illegible]

A Yes. 'Cause we went--w [illegible] ore--to run off some more copie [illegible]

Q Flyers?

A Yes. And he pointed out [illegible] ions, he put up--he pointed ou [illegible] p on the electric poles and... [illegible] was covered, yeah.

Q Was there any kind of sea [illegible] y he and his friends, at all?

A Oh, since Monday night. They go out every Monday night--I mean since Monday night. Even the night I was there, I was sort of afraid to stay by myself, but I said, Yes, go ahead and go out, I can--'cause they were going out almost every night; you know, not knowing what's--where is this thing going to lead to.

Q Now, her body was found on the 9th, you said.

Witness to Stone walking around Woodinville.

Continuation X Statement Officer's Witness Statement Officer's Report	SHERIFF KING COUNTY	Continuation/Statement/O.R.	Incident Number 01 – 041133
			Date 02-13-01 / Time 3:32 p.m.
WIT	Name, (Last, First, Middle) FINAU, FRANK		Residence Phone 360-658-7752 / Business Phone
Residence Address 6406 – 81st Drive NE	City Marysville	State WA / Zip 98207	Occupation / Race / Sex M / DOB 05-27-65
To Case File	Via	Subject	

DET: Uh, this is Detective JAMES H. DOYON with a tape-recorded witness statement on Case Number 01-041133. Today's date is February the 13th, Year 2001 and the time is 3:32 p.m. PAUL, would you give me your full name, please, and spell your last name?

WIT: It's PAUL FINAU, F as in Frank, I-N-A-U.

DET: Okay. And your date of birth, PAUL?

WIT: May 27, '65.

DET: May...May 27th of '65?

WIT: Yes.

DET: Okay. And could you give me your address, please?

WIT: Um, 6406 – 81st Drive NE, Marysville, 98207.

DET: And a home phone? Or a...

WIT: (360) 658-7752.

DET: Okay. And uh, Mr. FINAU, have I identified myself to you on the phone as a detective with the King County Sheriff's Office?

WIT: Uh, yes.

DET: And are you aware that our conversation's being tape-recorded?

WIT: Uh, yes.

DET: And is that with your permission?

WIT: Yes.

EXHIBIT

Officer(s) Reporting	Serial No.	Unit No.	Supervisor Reviewing	Date	Copies to
Det. James H. Doyon	08103	103			EX. B

KCP (C-102) 11/92 – DVIU 07/99
CLP 02/15/01

LUI 002387

ORIGINAL

DET: Okay. Thank you. Mr. FINAU, the reason for my call to you today is in furtherance of our investigation into the death of ELAINA...ELAINA BOUSSIACOS. Did you know her?

WIT: Uh, yes.

DET: Okay. And how long have you known her?

WIT: Uh, I met her I think, several times at rugby games. Uh, so I'd say huh! Uh, about a year?

DET: Okay. And, and how do you know her? What's the association between you and her?

WIT: I know her through my friend, SIONE.

DET: SIONE? SIONE LUI?

WIT: Yes.

DET: Okay. And how long have you known SIONE?

WIT: Uh, about five-plus years. I'm not definite.

.T: Five-plus years?

WIT: Yeah.

DET: Okay. On Satur—, on Saturday, February the 3, 2001, did you happen to see SINOE LUI?

WIT: Yes.

DET: And can you explain the circumstances—when you saw...when you saw him and what, what he was doing?

WIT: Um, he came over to my house um, Saturday. But uh, he plays in a...he plays music with my wife for our luau show. I think he was over my house about 12:30, and he brought his son EJ with him. And uh, I think uh, you know, he was out there. They were playing and singing, practicing for the show that evening. Uh, I think he left—I'm not sure of the exact time—but he might've left around 3:30. And uh, he was back at my house I believe about 4:30...uh, 5:30 because the show was at 6:30. And he showed up to my house and we all went together to the church where we had the luau, uh, about an hour earlier to go and set up the instruments and stuff.

DET: And so what time would he have...would you and he have arrived at the church?

''IT: I'd say about 6:00.

DET: Okay. And was he driving a pickup truck at the time?

WIT: Yes, he was driving a pickup truck.

DET: And did EJ return with him on the evening uh, hour...the 6 o'clock time?

WIT: Yes, he did.

DET: Okay. And how late did um...uh did he...did uh, he stay with EJ on Saturday evening?

WIT: I think they left uh, about 9:00, 9:30 I think.

DET: Okay. Have you seen or talked to him since then?

WIT: Well, I spent the night with him uh, Saturday night. Um, my brother-in-law and I went to spend the night with him.

DET: Uh, Saturday...[crosstalk]

WIT: With EJ.

DET: You mean...you mean this last...

WIT: After the show. Uh, after the show, the 3rd.

DET: Oh, after. You came down to Woodinville and stayed at his place with him?

WIT: Yeah. 'Cause I had tons of people at my house.

DET: Oh, okay.

WIT: So we went over there to spend the night.

DET: And was EJ there too?

WIT: Yeah. We all slept on the floor and...oh, we watched TV and just crashed on the floor.

DET: Okay. And uh, so it was just uh, um, SIONE, you and EJ?

WIT: And my brother-in-law.

DET: And your...and who's that?

WIT: KAT, K-A-T, SIKAHEMA, S-I-K-A-H-E-M...

DET: Okay. I'm...

WIT: ...A.

DET: I'm havin' a little bit of a hard time hearin' the letters spelled on the cell phone here. Would you run that by me real slow again?

WIT: Last name is S-I-K-A-H-E-M-A.

DET: H-E-M-A. Got it. And uh, so you stayed there Saturday night. And, and did you return back to your place on Sunday?

WIT: Yes. Uh, we...'cause we have church around 1 o'clock, so we left about uh, 10:30, 11:00 o'clock...

DET: Okay.

WIT: ...in the morning.

DET: Okay. And while you were with uh, um, SIONE on Saturday evening at his place...uh, what time did you return to his place on Saturday evening?

WIT: Uh, well, well see I went home and dropped off some equipment in my house, and we went over his place right away. So I might've...might've left my house around 10:00, 10:15, 10:30. And I don't know what time I got to his place.

DET: Okay. So you didn't come...you did <u>not</u> come back together?

WIT: No.

DET: You came back separately with your uh...

WIT: My brother-in-law.

DET: ...brother-in-law.

WIT: Because he only left with his son EJ.

DET: Okay.

WIT: So I, I went home to my house. I didn't stay long. Just went and dropped off equipment...

DET: Uh huh.

WIT: ...and went to SIONE's house.

DET: Okay. And while you were at SIONE's house on Saturday evening did, did he have any conversation with you about ELAINA? Or where she might...where she was or anything like that?

WIT: Oh, no. We were just uh, watching TV, talkin' about basketball. So...

DET: Okay.

WIT: Like norm—, what we normally do. Shoot...shootin' the breeze.

DET: Uh just...oh, shoot the breeze. Okay.

WIT: Yeah.

DET: Did...did he tell you she was uh, out of town in California?

WIT: Um, I think he told me in my house 'cause my wife asked him uh, if he ELAINA was coming. No, she asked him Friday night. And he said she was leaving town.

DET: Um hmm.

.T: And I, you know, and then I didn't know when she...when she was leavin' or where.

DET: Um hmm.

WIT: 'Cause he was also in my house Friday night, practicing.

DET: Uh, okay. So he was there Friday night also?

WIT: Yeah.

DET: Well, what time was that?

WIT: Uh, he came over my house...I didn't get home until I'd say about 4:30, 5:00 o'clock.

DET: Uh huh.

WIT: He...he came straight over from work. Uh, he had his work van and I think it was about...my wife called me and said that SIONE was at the house. It was around about 3:30 I think.

DET: 3:30 on Friday?

WIT: Yeah.

DET: Okay. And uh, how late did he stay on Friday?

WIT: Oh. 'Cause I was in the back fixing the pig and stuff. So he must...'cause he came back...he came back and talked to me before he left. I think it was about 8:30...8:00, 8:30.

DET: He would've left about 8:00 or 8:30?

WIT: Yeah. 'Cause that's when he came to the backyard and told me that he was gonna leave.

DET: Okay.

WIT: 'Cause they were inside playing.

DET: Was he with anybody then?

WIT: No, 'cause he came from work. He was by himself.

DET: Uh, in the van?

WIT: Yeah, in the van.

DET: Okay. What...what was he wearing?

WIT: Uh, just his work clothes.

DET: Okay. What...what was that? I mean, does he wear a uniform or something, or?

WIT: Uh, he's got a, a Cardinal jacket, the name of their business.

DET: Uh huh.

WIT: Uh, that's the only thing I remember him wearin'. Well, he wears that uh, lots of times.

DET: Okay.

WIT: Especially at work when it's cold.

DET: Okay. Uh, did he have on sandals, you know? Do you know? Or tennis shoes, or?

WIT: Uh, I, I don't recall. But inside my house you don't wear shoes.

DET: Yeah. Okay. And uh, was he...uh, did he...did he discuss with you on uh, Friday evening about ELAINA leaving for California?

WIT: Um, I think I overheard him talking with my wife. That's I knew how she was leaving town.

DET: Uh huh.

WIT: He called me and said that his mother...uh, I guess uh, ELAINA's mom called 'cause uh, supposedly ELAINA was going to visit with her in there, in uh, California

COPY

NO. 61804-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SIONE LUI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. TRICKEY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

EXHIBIT EX. C

Jodi Sass, a forensic scientist in the DNA unit of the Washington State Patrol Crime Laboratory ("WSPCL") examined certain items of evidence related to the case. RP 1146, 1174. After obtaining a positive result for semen on the underwear found on Boussiacos' body, Sass was able to extract a DNA profile; the male component matched Lui's DNA,[13] while the female component matched Boussiacos'. RP 1209-11, 1220-21. Sass obtained a trace male component from the shoelaces in the shoes found on Boussiacos' body, but not enough to generate a profile. RP 1228-33. While Sass could not get a full profile from the male component of the vaginal wash, Lui could not be excluded – all of the peaks that Sass was able to get lined up with his. RP 1237-38. Vaginal swab samples were sent to another lab for Y-STR testing; this technology, which targets only the Y-chromosome, was not in use at WSPCL. RP 1165, 1238-39. A blood drop from the stick shift of Boussiacos' car did not match Boussiacos, Lui, or James Negron. RP 1224, 1239-40.

The murder remained unsolved until 2007. Detective Bartlett called Lui in March 2007 and told him that she was reviewing the Boussiacos murder. RP 1313-14. Bartlett told Lui that she had information on two suspects; this was untrue, but she said it so that Lui

[13] The likelihood of the male fraction being someone other than Lui was 1 in 8.6 quadrillion. RP 1221.

would feel comfortable talking with her. RP 1314-15. Lui never asked any questions about the supposed suspects, nor did he inquire as to the status of the investigation. RP 1315. Recounting the events surrounding the death, Lui told Bartlett that he and Boussiacos had been saving money to buy a home and were planning to get married; he specifically denied that the wedding had been called off. RP 1317-19. Lui repeated his assertion that they had been abstaining from sex, perhaps for as long as two months before her death.[14] RP 1321-22. Lui said that Boussiacos was going to California to tell her mother about the upcoming marriage, and that it was an exciting time for them. RP 1322. Lui denied that his relationship with Packer was an issue. RP 1325-26, 1422-24.

Lui told Bartlett that he thought Boussiacos was killed by someone whom she knew; he said he had thought about her ex-husband, but James Negron was a born-again Christian.[15] RP 1428. Lui said that Boussiacos was very jealous, while he described himself as "very laid back." RP 1429. He speculated that perhaps she had been sneaking out to smoke, and someone had followed her. RP 1430.

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[14] In a subsequent taped statement, Lui adamantly denied that he had had sex with Boussiacos on the night before her disappearance. Ex. 169 at 63, 107.

[15] Lui alluded to James Negron's alleged gang connections in a later statement, asserting that Negron "used to kill people" and that Boussiacos was afraid of him. Ex. 169 at 27. Negron had established an alibi in relation to Boussiacos' murder. RP 1428.

Boussiacos' engagement ring was not found with her body. RP 1703. When asked, Lui said that he thought her mother had it. RP 1431. During a subsequent taped statement, Lui again denied having the ring. Ex. 169 at 50-51. He insisted that Boussiacos always wore the ring, and that he believed she was wearing it when she left for California. Id. at 80. Evidence introduced at trial established that Lui had given a ring identical to Boussiacos' ring to his current wife, who continued to wear it until police obtained it from her and placed it in evidence. RP 844-57, 1608-22, 1628-29, 1701-12.

Lui did not testify at his trial. A jury found him guilty as charged. CP 19. The trial court imposed a standard-range sentence of 200 months of confinement. CP 36-44.

C. ARGUMENT

Lui contends that his Sixth Amendment right "to be confronted with the witnesses against him" was violated by the State's introduction of scientific testimony through expert witnesses who did not themselves perform the scientific analyses about which they testified. U.S. Const. amend. VI. The Supreme Court has not addressed this type of scientific testimony since its landmark decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). However, based on

In any event, this case was never about *whether* the victim died by homicidal violence, or exactly *how* she was killed, but *who* killed her and left her body in the trunk of her car.[29] Defense counsel pointed out in closing that fingerprints found in the victim's car were "from places where the driver of the car, the killer, would put them," but "they are not his [Lui's]." RP 1868. "There is blood on the stick shift, where the killer would grab the shift in order to operate the car, on the skirt of the stick shift. It is not his. Whose is it?" RP 1868-69.

Nor did the defense ever dispute the conclusion that Boussiacos was strangled. In fact, counsel made use of that conclusion in attempting to convince the jury that Lui was not the one who killed her, arguing that a moment of irrationality born out of jealousy and anger (the prosecution's theory) would not likely lead to "steadily applied, deliberate pressure for a long enough [sic] to take somebody's life." RP 1862.

Lui nevertheless portrays the autopsy testimony as significant. He points to Dr. Harruff's response that the temperature of the body could be consistent with the victim being killed on February 2nd or February 3rd. RP 1355-56. Before agreeing with this, however, Harruff pointed out that those dates posited a six or seven-day time period between death and the

---

[29] Where evidence does not relate to a disputed issue, it is likely to be harmless. State v. Kirkpatrick, 160 Wn.2d 873, 893, 161 P.3d 990 (2007) (Sanders, J., concurring).

body temperature measurement, and that the body would warm and cool as its environment changed from day to night. RP 1354-56. Nor did the State have to prove that Boussiacos was killed on February 2nd or 3rd – the charging period was February 2 through February 9, 2001. CP 16.

Lui also points to Harruff's testimony that no nicotine was detected in Boussiacos' blood. RP 1398. Lui had told Detective Bartlett that Boussiacos would sometimes sneak out and smoke, and that maybe someone had followed her. RP 1430. Given that this was simple conjecture on Lui's part, the lack of nicotine hardly impeaches his credibility. Nor was there any testimony, on direct or cross-examination, as to how long nicotine would stay in the blood. This evidence could hardly have been significant under these circumstances.

Nor was the fact that strangulation results in little bloodshed significant for the State's case. First of all, since Lui did not come to the attention of police until days after Boussiacos' disappearance, the lack of bloodstains in his home or on his clothing was not surprising. In any event, there was no question, based solely on the testimony of detectives and scene photographs, that Boussiacos did not die from a gunshot wound, a stab wound, or anything that would produce significant bloodshed.

Finally, Lui claims that Harruff's testimony about the time it would take to kill someone by strangulation proved the intent necessary for

Other courts have similarly held that testimony such as that given by Pineda in this case does not violate the Sixth Amendment. See, e.g. United States v. Moon, 512 F.3d 359, 362 (7th Cir.), cert. denied, 129 S. Ct. 40 (2008) ("the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself");[38] United States v. Washington, 498 F.3d 225 (4th Cir. 2007) (no confrontation violation where lab director testified based on data from blood tests done by non-testifying technicians in his lab);[39] Campos, 256 S.W.3d at 765 (no confrontation violation where lab director testified in place of analyst and used DNA profiles to draw her own inferences and conclusions, which were subject to cross-examination); Rawlins, 884 N.E.2d at 1035 (supervising witness familiar with lab's requirements could illuminate on cross-examination whether protocol was followed).

As an expert witness, Pineda properly relied on data generated by others under ER 703 as well. See argument in §C.1.c., supra.

d. Any Error Was Harmless.

Any error in admitting the DNA results through Pineda's testimony was harmless. Lui lived with Boussiacos. The fact that his DNA was on

---

[38] Moon was a "plain error" case, but the court resolved the issue on the merits.

[39] Washington has filed a petition for certiorari in the United States Supreme Court (No. 07-8291). The Court has neither accepted nor denied the petition, apparently holding it in abeyance pending the Court's decision in Melendez-Diaz, supra.

her shoelaces, along with the DNA of her son, was not in itself very damning. Nor was the fact that he had recently had sex with her particularly incriminating; it was unclear why he chose to hide that.

Like many circumstantial cases, this one was more than the sum of its parts – no one piece of evidence was dispositive, but the picture as a whole convinced the jury beyond a reasonable doubt that Lui was guilty of strangling Elaina Boussiacos.

D CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Lui's conviction for Murder in the Second Degree.

DATED this 10th day of June, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Deborah A. Dwyer
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Subj: **RE: bloodhounds**
Date: 02/15/2001 9:48:20 AM Pacific Standard Time
From: Kristin.Richardson@METROKC.GOV (Richardson, Kristin)
To: RichardSchurman@aol.com ('RichardSchurman@aol.com')

Thank you so much! It is going to be the best piece of evidence we have. KR

From: RichardSchurman@aol.com[SMTP:RichardSchurman@aol.com]
Sent: Wednesday, February 14, 2001 11:23 PM
To: Kristin.Richardson@metrokc.gov
Subject: Re: bloodhounds

Ms. Richardson:

SARA and I performed a scent trail for Detective Gulla of MCU. SARA trailed the scent from the car's location to the subject's residence. Thank you for this referral.
Call if you have questions. My cell is 425-260-4097 and always carry it.
My wife uses my line as a fax line during the day but forgets to turn it off.
Regards,
Rick Schurman

---------- Headers ----------
Return-Path: <Kristin.Richardson@METROKC.GOV>
Received: from rly-zc05.mx.aol.com (rly-zc05.mail.aol.com [172.31.33.5]) by air-zc04.mail.aol.com (v77_r1.21) with ESMTP; Thu, 15 Feb 2001 12:48:20 -0500
Received: from keyimc.metrokc.gov (keyimc.metrokc.gov [146.129.177.160]) by rly-zc05.mx.aol.com (v77_r1.21) with ESMTP; Thu, 15 Feb 2001 12:48:09 -0500
Received: by KEYIMC with Internet Mail Service (5.5.2650.21)
id <16969J7K>; Thu, 15 Feb 2001 09:48:06 -0800
Message-ID: <14CF911276E1D31187C700805FE6DEA9014142BD@kcmail4.metrokc.gov>
From: "Richardson, Kristin" <Kristin.Richardson@METROKC.GOV>
To: "'RichardSchurman@aol.com'" <RichardSchurman@aol.com>
Subject: RE: bloodhounds
Date: Thu, 15 Feb 2001 09:48:05 -0800
MIME-Version: 1.0
X-Mailer: Internet Mail Service (5.5.2650.21)
Content-Type: multipart/alternative;
boundary="----_=_NextPart_001_01C09777.73836B0E"

EX. D

Subj: **bloodhounds**
Date: 02/13/2001 3:38:56 PM Pacific Standard Time
From: Kristin.Richardson@METROKC.GOV (Richardson, Kristin)
To: richardschurman@aol.com ('richardschurman@aol.com')

Mr. Schurman - I have just picked up a case where I think bloodhounds might do valuable work, but the drop-off date of the body is about 10 days ago. I can't remember from Sherer how much time had passed, but is it worthwhile to try to get a track when that much time has passed?

Thanks. (I tried your home number but I must have gotten it wrong because I get a fax machine).
Kristin Richardson (206)296-9519

---------- Headers ----------
Return-Path: <Kristin.Richardson@METROKC.GOV>
Received: from rly-yh05.mx.aol.com (rly-yh05.mail.aol.com [172.18.147.37]) by air-yh05.mail.aol.com (v77_r1.21) with ESMTP; Tue, 13 Feb 2001 18:38:56 -0500
Received: from keyimc.metrokc.gov (keyimc.metrokc.gov [146.129.177.160]) by rly-yh05.mx.aol.com (v77_r1.21) with ESMTP; Tue, 13 Feb 2001 18:38:28 -0500
Received: by KEYIMC with Internet Mail Service (5.5.2650.21)
id <169686ND>; Tue, 13 Feb 2001 15:38:27 -0800
Message-ID: <14CF911276E1D31187C700805FE6DEA9014142B8@kcmail4.metrokc.gov>
From: "Richardson, Kristin" <Kristin.Richardson@METROKC.GOV>
To: "'richardschurman@aol.com'" <richardschurman@aol.com>
Subject: bloodhounds
Date: Tue, 13 Feb 2001 15:38:23 -0800
MIME-Version: 1.0
X-Mailer: Internet Mail Service (5.5.2650.21)
Content-Type: multipart/alternative;
boundary="----_=_NextPart_001_01C09616.0EBBF0FE"

EX. E

Continuation	King County Sheriff	Incident Number	
X Statement **WITNESS**	SHERIFF KING COUNTY	0 1 — 0 4 1 1 3	
Officer's Witness Statement	Continuation/Statement/O.R.	Date 02/12/01	Time 11:18 a.m.
Officer's Report			

Name, (Last, First, Middle)	Residence Phone	Business Phone
GORDON, EVAMARIE J.	360-658-1223	425-703-7669

Residence Address	City	State	Zip	Occupation	Race	Sex	DOB
8318 77th Avenue NE	Marysville	WA	98270			F	05/21/

To	Via	Subject

DET: This is Detective James H. Doyon with a tape recorded witness statement on case number 01-041133. Today's date is February the twelfth, year 2001, and the time is 11:18 a.m. This will be the statement of Evamarie Gordon. Ms. Gordon, would you give me your full name please and spell your last name.

WIT: Evamarie J. Gordon. G-O-R-D-O-N.

DET: Your age, Ms. Gordon?

WIT: Thirty-seven.

DET: And your date of birth?

WIT: 05/21/63.

DET: And a current address?

WIT: It's 8318 77th Avenue Northeast in Marysville, Washington 98270.

DET: Home phone number?

WIT: 360-658-1223.

DET: Do you have a work phone or business phone?

WIT: 425-703-7669.

DET: Thank you. Are you aware that I'm a detective with the King County Sheriff's Office?

WIT: Yes I am.

DET: Are you aware our conversation is being tape recorded?

WIT: Yes I do.

DET: And is that with your approval?

WIT: Yes.

LUI 002406

EX. F

Officer(s) Reporting	Serial No.	Unit No.	Supervisor Reviewing	Date	Copies to
Det. James H. Doyon	08103		[signature]	2-14-01	

KCP (C-102) 11/92

DET: Okay. Thank you, Eva. Ms. Gordon, the reason for my phone call this morning is in furtherance of our investigation into the death of your friend Elaina Boussiacos.

WIT: Boussiacos.

DET: Boussiacos, and I'll probably mispronounce that throughout the talk. Now, I met with you last week at my offices at the RJC. Is that correct?

WIT: That's correct.

DET: And at that time you identified yourself to me as a friend and former roommate of Elaina's, is that correct?

WIT: That's correct.

DET: How long ago did you first meet Elaina?

WIT: I met her, I would say, six, seven years ago.

DET: Okay, and she had moved up here from California?

WIT: Correct, and she got the job at the athletic club and so did I, and we met and we needed a roommate, and so we ended up living together.

DET: What club was that?

WIT: Hart's Athletic Club in Kirkland.

DET: In Kirkland, okay. And where was she living at that time, when you first met her?

WIT: She was living just a few blocks away from me in the Redmond area. She was renting a room, I think, from somebody.

DET: And you suggested to her that you needed a roommate, and she was agreeable to that?

WIT: Correct.

DET: And you moved in where?

WIT: At the 6001 Condos in Redmond.

DET: How long did you guys room together?

WIT: About three and a half years.

DET: Three and a half years?

WIT: Mm-hm.

DET: Okay, and at that time, where were the both of you working?

WIT: Actually at Hart's Athletic Club. Both of us actually were just working at Hart's Athletic Club. Yeah. I wasn't at Microsoft yet.

DET: What did she do at Hart's?

WIT: She was a sales rep. She sold the packages, the deals. Tried to get members to sign up.

DET: When you moved in together, were there any other roommates?

WIT: No.

DET: Just the two?

WIT: Correct.

DET: That was in what year?

WIT: Oh dear lordy, lordy. Uh, oh, you know what, I can tell you really quick. I have, I think I have a lot of the paperwork on line here from my old landlord. Okay, let's just think about it this way. Uh, 95, 96, (whispering) it must have been 97.

DET: 1997?

WIT: (whispering numbers) I have to do my math. Well, let's, I moved out. Okay, I got married in March of 99, and, maybe put that on hold if you want me to do my math. March of 99, so it must have been in 88, so 88, or 98, I'm sorry, 98 is when. 'Cause we bought our house in June of 99. Oh, so if we bought our house in June 99, hello, then we were still roommates until actually August. Okay, August of 99 I moved out. It came to me. I'm sorry.

DET: Okay. Now, in that time that you and Elaina lived together, was she seeing, or dating, at that time, anybody in particular?

WIT: Yeah. Just a few months prior to us moving out, her and Sione were seeing each other.

DET: Okay, so you know who Sione Lui is?

WIT: Yeah.

DET: Where did Elaina meet Sione?

WIT: You know, I think, I think at the gym. That's usually where she meets, but I could be wrong. I'm not certain on that.

DET: Before Sione, was she dating other men at that time? You know, in the time prior to meeting Sione.

WIT: Oh, you mean while she was living with me?

DET: Yes.

WIT: Oh, yeah.

DET: Anybody in particular? Any steady kind of relationships?

WIT: Well, Ty, but I don't remember Ty's name. He was a creep, but uh, anyways I'm sorry. Ty, and who, I mean yes, she had a few.

DET: Are you familiar with a guy named Ryan Brown?

WIT: Yeah, yeah, yeah. Ryan. He strictly, uh, platonic friends. You know, she confided in him monthly, and I guess the Thursday before she was supposed to leave, they were supposed to have dinner on Friday night.

DET: Can you relate anything to me about Elaina's habits? Did she have any drug habits, alcohol, anything like that?

WIT: No. No, we were total social drinkers. I noticed that her smoking did increase. She tended to go out a lot on the deck at night and just sit and think and smoke, so that's the only habit that's, you know.

DET: Okay, and eventually you went to work at Microsoft?

WIT: Mm-hm.

DET: What about Elaina?

WIT: She stayed at Hart's until Twenty-four Hour Fitness bought them out. Twenty-four Hour Fitness bought them out, and she stayed there for, I would say, another year and a half maybe, and then got hired on at Centex, and she stayed there, I think, only about a year.

DET: And then moved on to?

WIT: Digimin.

DET: Digimin. What did she do for Digimin?

WIT: She's an executive assistant.

DET: Were you and Elaina living together at the time she was at Digimin?

WIT: No.

DET: You'd already gotten married by then and moved away?

WIT: Correct.

DET: When Elaina moved out of 6001, was it to move in

WIT: No. She moved out. The 6001 was a two-bedroom
wanted to move in something smaller, not as exper
over to the ones in Kirkland, and so Sione didn't mc

Very important. Elaina's best friend of 7 years states James beat Anthony. And Elaina was afraid of James.

DET: I'd forgotten about Anthony. So Anthony, when you

WIT: She, well, Anthony was always there. I mean she di

DET: Okay, but he primarily was in the custody of James

WIT: Correct, right, but he has a anger problem and he c
but he'd always beat his little boy, and when Anthor
see bruises all over him, and Elaina told me he had
Anthony every now and then about it, and he told n
that, but see, Elaina feared him. Elaina totally feared James.

DET: Really?

WIT: And I know the son did, too, so that's why he never knew where we lived. He never came to our house.

DET: Never came to the condo?

WIT: No.

DET: Did Elaina ever discuss her marriage to James with you, while they were in California?

WIT: Did Elaina ever discuss her marriage of James to me, while they were in California?

DET: Yes.

Officer(s) Reporting	Serial No.	Unit No.	Supervisor Reviewing	Date	Copies to
Det. James H. Dovon	08103				

DET: Digimin. What did she do for Digimin?

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DET: Were you and Elaina living together at the time she was at Digimin?

WIT: No.

DET: You'd already gotten married by then and moved away?

WIT: Correct.

DET: When Elaina moved out of 6001, was it to move in with Sione?

WIT: No. She moved out. The 6001 was a two-bedroom condo, and it was spendy and stuff, so she wanted to move in something smaller, not as expensive for her and Anthony, so she moved over to the ones in Kirkland, and so Sione didn't move in right away at all, with them.

DET: I'd forgotten about Anthony. So Anthony, when you first met Elaina, she had Anthony?

WIT: She, well, Anthony was always there. I mean she didn't have, well yeah, basically.

DET: Okay, but he primarily was in the custody of James Negron, is that correct?

WIT: Correct, right, but he has a anger problem and he couldn't handle it. I don't if I can say this, but he'd always beat his little boy, and when Anthony would come back on Sunday nights, I'd see bruises all over him, and Elaina told me he had an anger management, and so I talked to Anthony every now and then about it, and he told me yeah, my daddy did this, my daddy did that, but see, Elaina feared him. Elaina totally feared James.

DET: Really?

WIT: And I know the son did, too, so that's why he never knew where we lived. He never came to our house.

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Officer(s) Reporting	Serial No.	Unit No.	Supervisor Reviewing	Date	Copies to
Det. James H. Doyon	08103				

WIT: Uh, we talked about how he'd fight, how they'd fight. He had no hesitance as far as hitting a woman, but it sounded like it wasn't very good. They were young kids and lots of anger. I guess he had a very bad anger management.

DET: Okay. Coming up to the more recent past, Eva, what has your contact been with Elaina? Sporadic?

WIT: No, we talked pretty regularly. I wouldn't say weekly. I would say more a couple, two or three times a month. Kind of keeps me updated on what's going on with her relationship and stuff.

DET: What was going on with her relationship, that you're aware of?

WIT: The last time I talked to her, before I went on my trip, probably January sixteenth, she said that they, she just was confused and didn't know what she wanted to do as far as being married, but prior to that, they got into a little tiff fit in front of Anthony, and he was mad at her and grabbed her jaw, and called her a bitch in front of Anthony. He was yelling at her. So they had a little, that's the first tiff they had, she told me, as far as him touching her, and she broke up with him.

DET: That was around January the sixteenth?

WIT: Well, no that was probably in, I'd say, November or Dec

DET: Of last year?

WIT: Yeah, yeah, yeah.

DET: They were living at the house in Woodinville, correct?

WIT: No. When she broke up with him, they were living at the only been in Woodinville for a month.

DET: Okay, that's right. You just refreshed my memory there. area. Did she call the police at that time?

WIT: I don't think she did, no. Because I don't think she, she just said that's it, you're out of here. You never lay a hand on me and yell in front of my child like that.

DET: And so, did he leave?

WIT: Uh, I, where did he go? I know they broke up, but it didn't last very long, because within a couple weeks, she said, they were back together. I'm like what are you doing? So that's usually what happens. That was the most extreme that they had.

DET: Do you know what that was over?

confirmation that Steve and Elaina had broken up. He willingly went his own way but they got back together

LUI 002411

WIT: Uh, we talked about how he'd fight, how they'd fight. He had no hesitance as far as hitting a woman, but it sounded like it wasn't very good. They were young kids and lots of anger. I guess he had a very bad anger management.

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DET: That was around January the sixteenth?

WIT: Well, no that was probably in, I'd say, November or December.

DET: Of last year?

WIT: Yeah, yeah, yeah.

DET: They were living at the house in Woodinville, correct?

WIT: No. When she broke up with him, they were living at the apartment in Kirkland. 'Cause they've only been in Woodinville for a month.

DET: Okay, that's right. You just refreshed my memory there. So they were living in the Kirkland area. Did she call the police at that time?

WIT: I don't think she did, no. Because I don't think she, she just said that's it, you're out of here. You never lay a hand on me and yell in front of my child like that.

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WIT: Uh, I, where did he go? I know they broke up, but it didn't last very long, because within a couple weeks, she said, they were back together. I'm like what are you doing? So that's usually what happens. That was the most extreme that they had.

DET: Do you know what that was over?

LUI 002411

WIT: Well, it's a money thing. Elaina's very, very tightwad, and she was mad because she's spending all this money, and getting groceries. It's a stupid argument. Mental things. Some money issues and the son, and you know, things were just boiling up and got out of hand. I mean he only just called her a bitch and grabbed her, because of whatever she was complaining about. She was very private to him. Didn't tell him a lot of things.

DET: So it was over money and he had grabbed her around the, or by the jaw?

WIT: Yeah, the cheek, you know, underneath your chin?

DET: Yeah.

WIT: And just kind of squeezed her, and just, uh,

DET: So kind of around the neck?

WIT: No, you know.

DET: Just at the jaw line?

WIT: The chin. You know where our chin is, like if I'm sitting here going hum, h-m-m,

DET: Yeah.

WIT: Like that.

DET: Was that painful to her? Did she suffer any injuries from that?

WIT: No, no, no. She just said he grabbed, you know, it's the idea that he touched her and yelled at her like that in front of her child, not that she was hurt or anything, you know what I'm saying, physically.

DET: Are you aware of any other abusive issues in their relationship, mental, sexual, physical?

WIT: No. No, she would tell me, 'cause we talk about all that kind of stuff, and I mean she was so in love with this guy in the beginning. I remember when we lived together, she was like this is him, I think he's the one I'm going to marry, blah, blah, blah, blah. You know, and then they've had their spats on and off, just like any other couple does.

DET: Do you know if Elaina was seeing other men at the time that she was, you know, early on, dating Sione?

WIT: In the beginning?

LUI 002412

DET: Yes.

WIT: Well, you know what, she, Seahawk players, everybody was after her, but she's the kind that, her self esteem is not up there like it should be, and so she would just get numbers and that's it, and don't call them or anything, but you know, she always worked out at the gym, so she had probably friends that wanted to go out with her, but she's turned a lot of guys down.

DET: You say she worked out at the gym? You mean she remained at Hart's?

WIT: Twenty-four Hour Fitness, yeah. She always worked out, and she jogged, went jogging a lot, too.

DET: Okay.

WIT: But you know what, now that I think about it too, she, we might want to verify if, about the gym. They also had at the cabana there a little place to work out as well, so I think she used that as well.

DET: At the apartment in Kirkland?

WIT: Kirkland, right.

DET: Do you know the names of those apartments offhand?

WIT: Is it Woodbridge?

DET: I don't know.

WIT: I just know that it is the second complex on your right past QFC. It's the first driveway. There's one complex.

DET: You mean in Rose Hill area there?

WIT: No, Kirkland off of 124th across the street from Olive Garden.

DET: Oh, okay. Now, getting a closer to the recent past, last week, did you have any contact with Elaina?

WIT: No, I came home from Hawaii the day before.

DET: So from January sixteenth to then you'd been in Hawaii?

WIT: Yeah.

DET: Have you had any contact with Sione since then?

WIT: Yeah, yeah, her bedroom, and you know saw her clothes. They kind of looked scarce to me, but she did always, not that scarce.

Continuation

Statement

Officer's Witness Statement

Officer's Report

King County Sheriff

Continuation/Statement/O.R.

Accident Number: 0 1 - 0 4 1 1 3 3

Date	Time
02/11/01	0900

R/O	Name, (Last, First, Middle)	Residence Phone	Business Phone
	DOYON, JIM		206-205-7809

Residence Address	City	State	Zip	Occupation	Race	Sex	DOB
RJC				DETECTIVE			

To	Via	Subject
CASE FILE	DIRECT	CASE ASSIST

02/07/01 0800 I met with our missing person clerk, Ms. JAN RHODES. She advises that she has been working on a missing person case involving an adult female under suspicious circumstances. With the concurrence of Sgt. GATES I have been asked to review the file material gathered to date by Ms. RHODES and to sit in on a conference with family members of the missing person. That meeting has been set for 1100 hours this date. I was supplied copies of Ms. RHODES follow up and did read through the material.

02/07/01 1100 I attended a meeting at the RJC with family members and friends of the missing person, ELAINA BOUSSIACOS. Attending this meeting were, MARIA PHILLIPS, mother of the missing person who had flown in from her home in California; SOPHIA HARMON, sister of the missing person who had come in from her home in Colorado; EVA MARIE GORDON, she describes herself as "best friends" of the missing person and someone who had lived with the missing person for at least two years; SIONE LUI, he is the current boyfriend of the missing person and shares a residence with her, he has known the missing person for at least two years; LISA HARMON-WELCH, she is the sister in law of the missing person, and JASON KERIVANEK.

All parties implied a concern for the welfare and whereabouts of Ms. BOUSSIACOS. In summary, we were advised it on Monday or Tuesday of last week, the missing person had booked a flight on Alaska Airlines for an 8:15 AM ght to the Ontario Airport in California. The family has contacted the airlines and confirmed that the missing person was scheduled to take flight 464 leaving SeaTac at 0815 and scheduled to arrive at the destination at 1056 hours. The family had the ticket number available which was 0272134928042, the ticket was paid for. According to Mrs. PHILLIPS she had gone to the airport to pick up her daughter, waited through several flights for her. She never arrived, nor did the daughter make any phone contact to explain her delay or any possible change of plans.

The family told KCSO that with regard to Ms. BOUSSIACOS' movements last week, that she had worked on Friday the 2nd, apparently confirmed with the employer. According to the LUI subject Ms. BOUSSIACOS was to take her son ANTHONY (from a previous marriage) to meet with his father for his weekend visiting schedule. According to Mr. LUI, he has had conversations with the child's father identified as JAMES NEGRON. Those conversations suggest that the missing person met with Mr. NEGRON at a location near No. 45th street just off I-5 in North Seattle. He mentioned a Union 76 station near that location. Mr. NEGRON is purported to have told LUI that he took his son to a restaurant to eat. According to Mr. LUI, Ms. BOUSSIACOS returned to their home in the Woodinville area at around 2215 hours. That he repaired a flat tire on her vehicle, watched TV until just after 2300 when the missing person went to bed. Mr. LUI states he slept on the sofa that night, woke up at around 7:00 AM and noted that his girlfriend was gone. He assumed she had left for the airport. According to family members and friends of the missing, they are suspect of the former husband, Mr. NEGRON because there was apparently some discussion between NEGRON and BOUSSIACOS regarding modifying their parenting plan and child support. Their feeling are that this would be a motive for Mr. NEGRON to "get rid" of ELAINA.

EX. G

Officer(s) Reporting	Serial No.	Unit No.	Supervisor Reviewing	Date	Copies to

KCP (C-102) 11/92

ORIGINAL

After approximately forty-five minutes of discussion, I asked to speak with Mr. NEGRON alone, and did go to a separate interview room with him. At this interview, I asked him to provide for me as close a possible a time line for the known movements of the missing person on Friday and Saturday of last week. He described the following:

At 2100 hours JAMES NEGRON called their home and arranged to meet ELAINA in the U-District to pick up ANTHONY;

At 2130 hours plus or minus LUI states that BOUSSIACOS left the residence with ANTHONY driving LUIS' Toyota pick up truck, because the NISSAN SENTRA belonging to BOUSSIACOS had a flat tire. He added that over the prior several weeks he and Ms. BOUSSIACOS have experienced flat tires, and suspect's vandalism directed at them.

At 2200 hours, plus or minus he reports that BOUSSIACOS returned home. He states that she had stopped to purchase a can of tire repair, but does not know where she actually bought it. After BOUSSIACOS arrived home, LUI states that rather than use the pressurized tire repair kit that he elected to just change the flat and install the spare tire. He told me that he insisted that ELAINA take his truck to the airport on Saturday because he didn't trust her driving on the "donut spare". However, LUI claimed that ELAINA told him that she found it difficult to drive his 4 X 4 truck and preferred to take her own car.

At 2300 hours LUI states he completed changing the tire and came inside the house to clean up and wash his hands. He reports that ELAINA put on her bedclothes and the two of them sat on the sofa watching the 11:00 o'clock news. He recalled that the weather report was suggesting that it would be cold and wet over the weekend. LUI then said that ELAINA told him that she was going to visit her mother in California. Although he knew in advance that ELAINA was taking the trip to California, this is the first time she has actually told him who she was going to visit. He told this detective that that made him feel "more at ease" knowing that she was going to see her mother, she added that she needed "time out". LUI then told me that ELAINA said "good bye" to him and went to bed.

Between 2330 and 0100 LUI states that he watched TV and tried to sleep on the sofa. That somewhere in that time period, his sister called from Hawaii. Her name is PAINI HARRIS. LUI stated that he slept on the sofa all night.

At 0700 hours on Saturday, LUI woke up and looked out the window and saw that ELAINA's car was gone. He doesn't recall the exact time, but reports he called his boss GARY ERICKSON to discuss ERICKSONS moving. He provided the phone numbers for Mr. ERICKSON. They are 425-827-9997 B/P and 206-621-9321 R/P.

LUI reports that his first effort to get in touch with ELAINA was on Sunday. He states that he dialed her cell phone number but believes "the phone is off". At this point, I returned LUI to a conference room where friends and family of BOUSSIACOS were still speaking with Mr. RHODES.

Before the group left, they wanted me to be sure that I understood that JAMES NEGRON used to be a gang member in the Riverside, California area, a group called the East Side Longos', and that he currently runs or is associated with the "VICTORY OUTREACH CHURCH" in the Burien area. The telephone number for that organization is 244-8184. They also informed me that JAMES has a "new white car", but they don't know where he gets his income. He lives in the Ballard area of Seattle, at the address of 2031- NW 58th street. They did not have his phone number.

02/07/01 1410 While en-route to the JAMES NEGRON address for an interview (not scheduled) I was involved in an auto accident and had to postpone me plans to meet with him unannounced.

Officer(s) Reporting	Serial No.	Unit No.	Supervisor Reviewing	Date	Copies to

KCP (C-102) 11/92

ORIGINAL

02/07/01 1930 I contacted at the JAMES NEGRON residence in Ballard and met with Mr. NEGRON, his wife JESSICA and met ANTHONY NEGRON. I obtained a taped statement from both JAMES and JESSICA and had an opportunity to speak with ANTHONY. Refer to the statements for details.

IN SUMMARY; Mr. NEGRON told me that he and ELAINA met and married in California in 1987, that they divorced in 1993. He has had primary custody of ANTHONY since that time. He did acknowledge that recently ELAINA had spoken to him about changing the parenting plan and child support, but says things had never gotten beyond the talking stage. I was shown the divorce papers relating to their separation. I was told that while they lived in California, ELAINA used "speed", and often would not come home at night. He felt that she was partying and spending time with other men. However, he says that since their divorce, he feels that ELAINA seems to have "cleaned up her life" and feels that he could trust her with having ANTHONY more often.

Regarding the activities of Friday and Saturday, Mr. NEGRON told me that he had picked up ANTHONY on Friday at about 9:45 PM in the parking lot of the PetCo store just east of the I-5 freeway on 45th street. He told me that ELAINA had driven SIONES white pick up truck. He said that when he went to pick up ANTHONY he had with him, his wife JESSICA, her daughter, and another adult male identified as WILLIAM ALLEN. He said that he did not speak with ELAINA, that ANTHONY just "jumped" out of her truck and got into his car, that the five of them went to a pizza restaurant in the U-district, ate and then went home where they stayed all night and up until late Saturday morning. Mr. NEGRON has not seen or spoken to ELAINA since that time. He feels that it is highly unusual that she has not called ANTHONY or checked in with him on ANTHONY's welfare.

I had an opportunity to speak with ANTHONY at this time. I found the boy to be very polite and respectful. He understood that I'm a police officer and that I was looking into his mother's absence. He is ten years of age. Regarding Friday, ANTHONY told me that he and his mother drove to meet JAMES at about 9:30 PM. He recalled that ELAINA car had a flat tire, and recalled that it was the right front tire. He said that he was told by his mother that he was going to California to visit her "uncle" and would be back by Monday to pick him up from school in the afternoon. ANTHONY said that he and his mother did not speak much during the ride. ANTHONY confirmed that after he got into JAMES' car that they went for pizza, and then to JAMES and JESSICA house and stay all weekend. He said that JAMES was there Saturday morning when he got up. I asked ANTHONY if SIONE and his mother ever argued or got into fights. He said that SIONE sometimes yelled at her because she complained about the smells in the house when he was cooking, it "bothered her". He says that he had never seen SIONE hit his mother. No taped statement was taken from ANTHONY. I left the NEGRON residence at about 2045 hours.

02/08/01 1200 I placed a phone call to the cell phone belonging to SIONE LUI. The purpose of the call was to ask him to come to the RJC for a formal interview and taped statement. Additionally, I also reminded him that yesterday I had asked if he would be willing to submit to a polygraph examination and he had replied that he would be willing. I asked if he was still agreeable to a polygraph examination, he replied he would cooperate. We arranged for a 1300 meeting at my office. He is currently at SeaTac airport picking up his sister PAINI, who has apparently just arrived from Hawaii. He will have to bring her with him. I made contact with Polygraphist NORM MATZKE and arranged for him to be available at 1300.

02/08/01 1300 Mr. LUI arrived at the office, and I escorted him to Mr. MATZKES office. I had previously spoken with NORM MATZKE about the relevant questions that I would like asked of SIONE approximately forty minutes prior to his arrival. We agreed on three relevant questions.

At the end of the examination, Mr. MATZKE informed me that Mr. LUI had scored a minus three on the examination, which is in the inconclusive range. He suggests a retest at a later time.

Officer(s) Reporting	Serial No.	Unit No.	Supervisor Reviewing	Date	Copies to

Statement
WITNESS

This is Detective James H. Doyon with a taped recorded witness statement on case number 01-041133. Today's date is February 7, 2001 and the time is 7:48 PM.

DET: JAMES, will you give me your full name please and spell your last name?

WIT: JAMES PATRICK NEGRON, N-E-G-R-O-N.

DET: And how old are you JAMES?

WIT: I'm 32.

DET: And your home address is?

WIT: 2031 NW 58th Street Seattle, Washington 98107.

DET: And do you have a home phone number here?

WIT: Yes, 206-783-1180.

DET: And your date of birth?

WIT: 7-27-68.

DET: And are you employed?

WIT: Ah... yes.

DET: And what do you do for a living?

WIT: Ah... I'm ah... rehab director.

DET: And do you have a business phone number?

WIT: Yes, 206-781-1655.

DET: JAMES, are you aware I'm a Detective with the King County Sheriff's Department?

WIT: Yeah.

EX. H

DET: Are you aware our conversation is being taped recorded?

WIT: Yes.

DET: And is that okay with you?

WIT: Yes.

DET: And JAMES, the reason I'm here tonight is in furtherance of our investigation into the disappearance of a woman known as ELAINA BOUSSIACOS. Do you know ELAINA BOUSSIACOS?

WIT: Yes.

DET: How do you know her, what is your relationship with her?

WIT: Ah... I was married with her I think it was 98... 89 sorry. 89 we got married, we met and stuff so we lived together for awhile then got divorced.

DET: And that was in July of 93 you got divorced?

WIT: Yes.

DET: And were there any children from that relationship?

WIT: Yes.

DET: And who were they?

WIT: Ah... just one, his name is JAMES ANTHONY NEGRON

DET: And where does he live, where is he currently right now?

WIT: Right now he's staying with me.

DET: He's the young man I've seen tonight in the back room h

WIT: Yes.

DET: And are you currently married?

WIT: Yes.

DET: And your wives first name is?

WIT: JESSICA.

DET: And she's the young lady just over my shoulder here is that correct?

I know through divorce attorney Richard Pope that James forged Elaina's name on divorce documents He then had a false marriage he owes $23,000.00 in back child support -

DET: Are you aware our conversation is being taped recorded?

WIT: Yes.

DET: And is that okay with you?

WIT: Yes.

DET: And JAMES, the reason I'm here tonight is in furtherance of our investigation into the disappearance of a woman known as ELAINA BOUSSIACOS. Do you know ELAINA BOUSSIACOS?

WIT: Yes.

DET: How do you know her, what is your relationship with her?

WIT: Ah... I was married with her I think it was 98... 89 sorry. 89 we got married, we met and stuff so we lived together for awhile then got divorced.

DET: And that was in July of 93 you got divorced?

WIT: Yes.

DET: And were there any children from that relationship?

WIT: Yes.

DET: And who were they?

WIT: Ah... just one, his name is JAMES ANTHONY NEGRON.

DET: And where does he live, where is he currently right now?

WIT: Right now he's staying with me.

DET: He's the young man I've seen tonight in the back room here?

WIT: Yes.

DET: And are you currently married?

WIT: Yes.

DET: And your wives first name is?

WIT: JESSICA.

DET: And she's the young lady just over my shoulder here is that correct?

WIT: Yes.

DET: And where did you marry ELAINA BOOUSSIACOS?

WIT: BOUSSIACOS. Um... I married her at San Bernardino County, California.

DET: Were you divorced in California or divorced up here?

WIT: Ah... actually divorced here in Washington.

DET: And you showed me...

WIT: The finale yeah... the finale...

DET: you showed me your divorced papers tonight is that correct?

WIT: Yes.

DET: I've had a chance to review them?

WIT: Yes sir.

DET: And basically speaking your divorced filed July of 93, showed that you had custody of ANTHONY during the weekdays...

WIT: Uh huh, (yes).

DET: up until Friday evening when ELAINA has ANTHONY every other weekend – is that basically correct?

WIT: Yes sir.

DET: Now coming up to recent times, you're aware that ELAINA is missing right now is that correct?

WIT: Yes sir.

DET: And did you have anything to do with her disappearance Friday night?

WIT: No.

DET: When was the last time you saw ELAINA?

WIT: It was ah... Friday about 9:30.

DET: Can you just relate to me the circumstances leading up to that visit?

WIT: Ah... I just came out of church Friday ah... service in Seattle from my church – and ah... it was about 9:10... 9:15 I think around that time not exactly. I called her to meet with her so

we could ah... exchange ANTHONY. And ah... that's what we did we called and went and drove to... to where we meet at and we exchanged ah... ANTHONY.

DET: Before we went on tape JAMES, you and I discussed this leading up to this meeting. Actually about a week or so before you had a phone call from ELAINA is that correct?

WIT: Yes sir.

DET: And what did she ask you or what did she tell you about her up coming plans?

WIT: She said that ah... she was going to ah... California to go visit a sick uncle.

DET: And do you know where that might have been?

WIT: Um... around Orange County.

DET: Okay.

WIT: Orange County.

DET: What else did she say?

WIT: She said ah... for me ah... to ah... we're going to me to drop him off Monday morning at school and school she'll pick him up after work.

DET: And we're talking about last Friday which would h correct?

WIT: Yeah correct.

DET: About February 2nd last Friday February 2nd?

WIT: Yeah.

DET: Now she had called you on the phone about a week before that and advised you of this trip to go see a sick uncle?

WIT: Yeah.

DET: And she had asked you to take ANTHONY...

WIT: Uh huh, (yes).

DET: and you were gonna meet Friday night about what time?

WIT: About 9... 9:30.

according to James Elaina had her trip planned for a week prior. How could Sara and hers busting Stone have anything to do with her trip? Why is she telling James there's a sick uncle? *

we could ah... exchange ANTHONY. And ah... that's what we did we called and went and drove to... to where we meet at and we exchanged ah... ANTHONY.

DET: Before we went on tape JAMES, you and I discussed this leading up to this meeting. Actually about a week or so before you had a phone call from ELAINA is that correct?

WIT: Yes sir.

DET: And what did she ask you or what did she tell you about her up coming plans?

WIT: She said that ah... she was going to ah... California to go visit a sick uncle.

DET: And do you know where that might have been?

WIT: Um... around Orange County.

DET: Okay.

WIT: Orange County.

DET: What else did she say?

WIT: She said ah... for me ah... to ah... we're going to meet Friday night after service -- and for me to drop him off Monday morning at school and that she'll pick him up Monday after school she'll pick him up after work.

DET: And we're talking about last Friday which would have been about the 2nd I believe is that correct?

WIT: Yeah correct.

DET: About February 2nd last Friday February 2nd?

WIT: Yeah.

DET: Now she had called you on the phone about a week before that and advised you of this trip to go see a sick uncle?

WIT: Yeah.

DET: And she had asked you to take ANTHONY...

WIT: Uh huh, (yes).

DET: and you were gonna meet Friday night about what time?

WIT: About 9... 9:30.

DET: And the meeting spot as you explained it to me was just off I-5 just east of I-5 at the Petco store on 45th?

WIT: Around the parking lot around 45th yeah.

DET: Of the Petco store or some other store?

WIT: Around that area. I don't...

FEM: Unintelligible.

WIT: Yeah around there – it's just a plain parking lot.

DET: It's just a plain parking lot?

WIT: Parking lot yeah.

DET: It's near a Petco store?

WIT: Yeah.

DET: And have you ever met her there before?

WIT: Yeah, and every Friday.

DET: Every Friday? Alternate every Fridays?

WIT: Yeah alternate.

DET: When you... as you explained it to me crossed over the bridge...

WIT: Yeah.

DET: to drop ANTHONY or to pick ANTHONY up on alternate weekends – where do you meet there it's on 520 where?

WIT: 520 I think it's off ah... Lakewood or Lakeview off ramp -- and we meet ah... there's a restaurant. I don't know the name of the restaurant, but it used to be a Denny's... a Denny's Restaurant right next to it so. Will meet right there.

DET: And that's every other weekend?

WIT: Yes.

DET: Basically just to be fair. She comes over across the bridge one weekend and you go over the next week?

WIT: Yeah, yeah.

DET: And Friday night, this last Friday night who arrived first at this parking lot?

WIT: I did.

DET: And how long did you have to wait for her?

WIT: Ah... about 10 minutes, 10, 15 minutes.

DET: Was anybody with you in your car?

WIT: Yes sir.

DET: And who was that?

WIT: My wife JESSICA and ah... a brother from my church his name is BILL ALLEN and my um... my stepdaughter SELENA.

DET: SELENA was with you. How old is she?

WIT: Ah... she's five-(5).

DET: Five-(5) years old. And you were in what car?

WIT: I was in my ah... 99 Contour.

DET: Was she aware of the car that you had and there was no mistaking that?

WIT Yes sir.

DET: Now when she pulled up about what time was that?

WIT: I would say about 9:45 or 9:50, close to 10:00.

DET: And what was she driving?

WIT: She was driving a pick-up truck.

DET: Do you remember the color?

WIT: I think it was white yeah.

DET: White pick-up. Did she get out of the car or did you get out of your car?

WIT: Ah... I didn't get out of the car and she didn't get out of the car either.

DET: And how did ANTHONY get into your vehicle then?

WIT: He just got out of the car and came into my car.

DET: So ANTHONY is nine-(9) years old -- he opens the door by himself?

WIT: He's 10.

DET: 10. He opens the door by himself and walks over and knows who you are...

WIT: Yeah.

DET: opens the door and gets into the car with you?

WIT: Yeah, yeah.

DET: Did you exchange any words with ELAINA at that time?

WIT: No.

DET: Did you see anything wrong with the truck at that time?

WIT: No.

DET: Was anybody with her?

WIT: No.

DET: How long would you actually say that you were right there in that parking lot that whole time?

WIT: I'd say about three-(3) minutes, four-(4) minutes.

DET: Once she pulled up the whole exchange took ...

WIT: Yeah.

DET: took two-(2), three-(3), four-(4) minutes.

WIT: Yeah boom boom.

DET: And where did you go right after that?

WIT: Right after that we went to ah... eat some pizza.

DET: And where was that?

WIT: Ah... down on 45th is called Olympia, Olympia pizza.

DET: Olympia Pizza.

WIT: Yeah.

DET: Is it right around where you picked up...

WIT: Yeah.

DET: Right around there?

WIT: Yeah.

DET: Did you see which direction ELAINA left in?

WIT: No.

DET: Okay.

WIT: I... I left first.

DET: After the pizza where did you go?

WIT: And then I came home.

DET: Here?

WIT: Here.

DET: Now you said you came home?

WIT: Yeah.

DET: Just you?

WIT: Yeah we came home.

DET: We came home, meaning your wife JESSICA?

WIT: Yeah.

DET: Your stepdaughter and ANTHONY?

WIT: And BILL.

DET: And BILL. And did you remain here all Friday night?

WIT: Yes sir.

DET: Never left the house?

WIT: No.

DET: Was your family with you that whole time...

James keeps mentioning Bill his brother. Besides that his answers are very short - Yes sir, No sir.

DET: Is it right around where you picked up...

WIT: Yeah.

DET: Right around there?

WIT: Yeah.

DET: Did you see which direction ELAINA left in?

WIT: No.

DET: Okay.

WIT: I... I left first.

DET: After the pizza where did you go?

WIT: And then I came home.

DET: Here?

WIT: Here.

DET: Now you said you came home?

WIT: Yeah.

DET: Just you?

WIT: Yeah we came home.

DET: We came home, meaning your wife JESSICA?

WIT: Yeah.

DET: Your stepdaughter and ANTHONY?

WIT: And BILL.

DET: And BILL. And did you remain here all Friday night?

WIT: Yes sir.

DET: Never left the house?

WIT: No.

DET: Was your family with you that whole time...

WIT: Yes sir.

DET: Friday night?

WIT: Yes sir.

DET: And did you have any calls from ELAINA?

WIT: No sir.

DET: Did you have any calls from anybody Friday night or Saturday morning regarding ELAINA?

WIT: No sir.

DET: And Saturday morning what was your routine – this last Saturday morning -- what time did you get up?

WIT: Ah... I got up about um... 7... 7:00 in the morning around that time prayed for an hour -- and stuff and then ah... with one of the guys next door I do every morning -- and fellowship with the guys a little bit and getting ready for the day. I was getting for the day. We were going planning... we're planning to go to um... a warming... house warming for our pastor that day so we had a lot of stuff doing that day, we're busy.

DET: Who's your pastor?

WIT: PASTOR JOHNNY HEREDIA.

DET And would you know his phone number off hand or how I can get in touch with him -- just to verify your activity and time you were there?

WIT: I don't have it with me.

DET: We'll get it off tape, we'll get it off tape.

WIT: Okay.

DET: And his name is HERRERA, H-E-R-R-E-R-A something like that?

FEM: H-E-R-E-D-I-A.

DET: H-E-R...

FEM: E-D-I-A.

DET: E-D-I-A. Thank you.

FEM: Uh huh, (yes).

DET: And so you remained basically involved all day Saturday?

WIT: Yeah.

DET: And back home Saturday night with your family?

WIT: Yeah.

DET: When were you made aware that something was wrong with ELAINA?

WIT: Ah... actually it was Monday around 5:00. Monday around 5:00.

DET: And who made you aware of that?

WIT: Actually my son called... called the house and left a message saying that ah... that I... if I heard from ELAINA.

DET: Okay, let me back up for just a second -- you were with you son ANTHONY Saturday...

WIT: Uh huh, (yes).

DET: Sunday, and what did you do on Monday?

WIT: Monday I went ah... dropped my wife off ah... to work about 9:00 and then I took him to school. I took ANTHONY to school.

DET: And where does ANTHONY go to school?

WIT: Ah... Redmond.

DET: So you drive across...

WIT: E.G. BELL ELEMENTARY.

DET: E.G. BELL like B-E-L-L-

WIT: Yes.

DET: Elementary in Redmond?

WIT: Yeah in Redmond.

DET: What time did you drop him off there?

WIT: Ah... I was a little bit late it was 9:14... it was 9:14 she wrote it down the lady.

DET: Okay. And the plan was what?

WIT: For me to drop him off there and ah... that ELAINA will pick him up right after he goes to the YMCA, Boys & Girls Club and picks him up and takes him home.

DET: How does he get to the YMCA at the Boys & Girls Club?

WIT: Ah... right after school he goes and takes the bus that go... the YMCA... the Boys & Girls Club have a bus to go there and picks him up and takes him.

DET: And ELAINA was supposed to pick him up at what time?

WIT: Right after work.

DET: After her work?

WIT: Yeah.

DET: And then you got a phone call that night from ANTHONY?

WIT: Ah... yeah, I got a phone call from ANTHONY first ah... and... and I didn't get the phone where he left a message saying something if I heard from you know his mom.

DET: What time was that phone call around?

WIT: Around 5.

DET: Okay.

WIT: Around 4:45, 5.

DET: Okay.

WIT: Cuz I was getting ready to go pick her up so.

DET: And so you had a voice mail message on your answering machine?

WIT: Uh huh, (yes).

DET: When did you actually talk to somebody about ...

WIT: Right about ...

DET: ELAINA'S disappearance?

WIT: Right about... right about 5 minutes after the phone call, ah... SIONE called me.

DET: Okay.

WIT: And he said if I heard anything about you know, if ELAINA called me or anything else. "You know I don't know what's going on". I said, "No, she hasn't called me or anything". And ah... he says somethin about ah... "I don't know where she's at. She never made it".

DET: Never made it to California?

WIT: California to the airport or anything. I don't know what's going on so he told me, "I can pick up ANTHONY and take him to my house". I said, 'No, it's all right I'll pick up ANTHONY and I'll take care... I'll take care of him, don't worry about it". So I did. I called my wife and I told her, "Hey, I'm gonna have somebody pick you up cuz I gotta go pick up ANTHONY".

DET: How did SIONE sound to you – did he did sound concerned or distressed or what?

WIT: Um... kinda like a little bit upset but yet worried a little bit. You know a little bit upset me like you know this is not... this is not her kinda like you know.

DET: Do you remember his exact discussion with you – anything he said about particulars?

WIT: He said ah... he said something about um... ah... he said, "I don't know what's going on. She never made it over there. Um... this is not like her. She never... you know she don't do this" um... and ah... that was it and I said, "Well I know". So I go pick up ANTHONY, and then I picked him up and he wanted me like... he kinda like wanted to keep him -- you know kinda like "I'll... I'll stay... I can pick him up for you and keep him there to help you out whatever".

DET: And have you had any other phone calls with SIONE?

WIT: Ah... yeah, yeah ah... he called me um... he called me again just to... to make sure that I had ANTHONY and if I heard from ELAINA...

DET: Okay

WIT: and stuff and then I called... I called him back and talked to him.

DET: Do you have any idea where ELAINA might have gone?

WIT: I have no clue.

DET: When you were married to ELAINA, was she prone to take off for a day or two-(2) occasionally?

WIT: Probably at night.

DET: At night?

WIT: One night or you know.

DET: Over night and what would she normally do?

WIT: Go out and party.

DET: Go out and party?

WIT: Yeah.

DET: Was she seeing a lot of different mean at that time?

WIT: Ah... behind my back yeah.

DET: Did she have any drug or alcohol abuse issues?

WIT: Ah... yes.

DET: And can you just give me a brief idea what those were?

WIT: She was ah... using ah... it's called speed.

DET: Okay.

WIT: She was doing that and alcohol also so.

DET: Do you think she's still doing that now?

WIT: I have no... no clue of that.

DET: No clue.

WIT: No. To me she looked... she looked ah... healthy.

DET: She looked healthy?

WIT: Yeah.

DET: In recent times she's healthier than she used to when she was doing speed?

WIT: Yeah.

DET: Got a good job apparently?

WIT: Yeah. She was doing great, she was doing good.

DET: And you've been divorced since 93?

WIT: Yeah.

DET: And basically your only contact with ELAINA is in relationship to ANTHONY... anything to do with ANTHONY?

WIT: Anything that has to do with ANTHONY we... we talked.

DET: Okay. One other question, in cases like this you know often... often times we have to ask people because we're not mind readers.

WIT: Yeah.

DET: You know we're sitting here telling me your side of the story -- and honestly you know I don't know whether you are telling me the truth and I think you're telling me the truth. But let me ask you this – would you be willing to submit to a lie detector or a polygraph examination with regard to ELAINA'S disappearance?

WIT: Will I what?

DET: Would you be willing to take a lie detector test?

WIT: Yeah.

DET: Have you ever had one before?

WIT: No.

DET: And do you know what they do? Do you know what a lie detector is?

WIT: Yes you know, like in TV and stuff.

DET: Okay so we would ask you if you're telling us the truth or the last time you saw ELAINA and was she alive. But it could probably be a question like that.

WIT: Yeah.

DET: You'd be willing to do that?

WIT: Yeah no problem.

DET: Okay very good. I'm going to do something a little unusual here – I'm going to ask...

WIT: JESSICA.

DET: JESSICA, could I talk to you just for one second on tape? Okay, I'm going to continue the tape but this is going to be JESSICA and last name is...

FEM: NEGRON.

DET: NEGRON. Friday night, last Friday night you were with your husband JAMES when he picked up ANTHONY is that correct?

FEM: Yes I was.

DET: And there was a fellow in the car name BILL...

FEM: Yes.

DET: BILL ALLEN, and your daughter?

FEM: My daughter, uh huh, (yes).

DET: Last Friday night you were with JAMES all Friday night is that correct?

FEM: Yes I was.

DET: And how about Saturday?

FEM: Yes. Um... the only time I separated from my husband is in the morning time it was about 10:45, almost 11:00 and I walked down to H & R Block to file my taxes.

DET: And have you heard or seen from ELAINA since Friday night about 9:45 when she dropped off ANTHONY at the parking lot that JAMES described earlier?

FEM: Yes.

DET: I have no other questions to ask you. Thank you very much.

THIS WILL END THE INTERVIEW WITH JAMES AND JESSICA AT THIS POINT IN TIME. IT IS FEBRUARY 7TH, 2001 AND THE TIME IS 8:06 PM. THIS IS DETECTIVE JAMES H. DOYON, SERIAL NUMBER 08103.

DET: 78, unit number 183. Case number: 01-041333. This is a witness statement of JAMES NEGRON. And JAMES, are you aware I'm tape recording this?

WIT: Yes.

DET: Okay. And today's date is 4-9-2007. Time now is 10:07 hours. And ELAINA BOUSSIACOS was your wife at, at some point, correct?

WIT: At some point.

DET: You were married to her and divorced, and you have just one child in common.

WIT: Yeah. Yeah.

DET: And that's ANTHONY.

WIT: Yes.

DET: And in 2001 where was ANTHONY living? Was it shared or how?

WIT: Yeah. It was shared.

DET: Okay. And at that time were you aware that she was living with SIONE LUI?

WIT: That she was living with somebody at the time.

DET: Okay.

WIT: Yeah.

DET: Did you know who she was living with?

WIT: Not, not, not that I remember. She, she didn't mention who she was living with. Basically she would live with some guy and move on to the next one, so I, I wasn't aware who, who she was living with.

DET: Okay. And were there any times when ANTHONY told you about being afraid of anybody she was living with or?

WIT: No.

DET: Any incidents between his mom and anybody?

WIT: Not that he, he never, my son never mentioned (unintelligible) incidents or.

DET: Being afraid or?

WIT: Afraid.

DET: Does he talk much about his mom?

WIT: Now, ah, rarely, and, and if he does, talks about it, he gets real emotional about it, upset and stuff like that. So we try to, you know, we talk to him, talk to him and stuff like that, but mother's day, you know, he'll get upset and stuff and stuff like that.

DET: Okay. And have you talked to SIONE since ELAINA's death? Has he kept in contact, or had you talked to him before that time?

WIT: Before, I, I, I, I remember at a baseball, baseball game that my son had or something like that, basketball game, he was involved in a lot of activity. I think he was there one time, but I never officially, you know.

DET: Met him or.

WIT: Yeah, just eye contact, picked him up, seen him, see the game, left and stuff, and that's it. I wasn't, you know, person, that was it, you know. Me and her are separated, so it wasn't like, okay who's, who's this guy or so forth? That's her life, so I just picked up my son, make sure my son was okay and took him. That's it. That was basically, that was my relationship with ELAINA.

DET: Okay. And then after ELAINA disappeared, did you have an opportunity to talk with SIONE?

WIT: I think I talked to him twice. It was ah, I believe it was that Monday 'cause she had told me Friday that she was going to California to drop my son off at her, at his school, and then that she'll pick him up at the school, or the YMCA picks him up, and then she'll pick him up after work, so I did that. And then ah, um, at ah, the YMCA, he was at the YMCA. Then my son called me and say, mom's not here. What should I do? I said, well, wait; she should be there. Just wait and see what happens, and I called, and then that's when SIONE called me, about 15 minutes later that he was at the YMCA, and that's when he called me. So when he called me, told me ELAINA, you know, she's not back yet or so forth and so on. You want me to take your son to the house? And I said, no. It's okay. I'll go pick him up. And, and that was it after that. Then I think that when they find out that she was missing, missing and stuff, he called

me at the house saying that, you know, she was missing and stuff, and they were doing flyers and stuff like that, looking for her. I think that was the second time (unintelligible)

DET: Have you.

WIT: Actually the third time he called me about his stuff, about my son's stuff.

DET: Tell me about that, everything you remember about that conversation.

WIT: Yeah, because he said that ah, that this, well, after that, he said that, you know, do you want your kid's stuff? You know, he has a whole bunch of stuff here and stuff. You want me to drop it off and so forth? And, and I guess the house was on investigation, so it was on hold or something like that. So after it got released, you know, ah, he, that's when he called me and asked me if I wanted any of his basketball stuff and his toys and stuff like that.

DET: Did he give you any of ELAINA's things?

WIT: No. No.

DET: Did he ask you if you wanted any, if maybe ANTHONY wanted anything of his mother's?

WIT: No. He didn't, he didn't ask me. I remember asking me or nothing like that.

DET: Did SIONE give you $6,000 for ANTHONY?

WIT: No.

DET: Did SIONE ever give you any money?

WIT: No.

DET: Of, in any denomination?

WIT: No.

DET: Are you aware of SIONE ever set up a trus

Sione did not say he set up an account for Anthony. He just gave games Elaina's account info. That account had $6,000.00 in it.

WIT: No. He told me, he told me, at the time he account for my son, that ah, that our, that I number or whatever it was, and then he er his stuff. He say, here's the account number. But that was the account number that I set up a trust fund my son. That was my stuff. That was my thing. I did that. That wasn't ELAINA, and it wasn't somebody else. It's my thing, so he

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WIT: No.

DET: Are you aware of SIONE ever set up a trust fund for ANTHONY?

WIT: No. He told me, he told me, at the time he told me that ELAINA set up an account for my son, that ah, that our, that he was gonna give me the account number or whatever it was, and then he end up giving me, well, he turned in all his stuff. He say, here's the account number. But that was the account number that I set up a trust fund my son. That was my stuff. That was my thing. I did that. That wasn't ELAINA, and it wasn't somebody else. It's my thing, so he

turned in, actually gave me my own account number, you know, that she had there from Bank of America.

DET: Okay. But he never.

WIT: I set, I set up that stuff. He never, yeah. He said that ELAINA had an account set up for him, so forth and so on. When he told me about, when he told me about ah, giving me back ANTHONY's toys and stuff, yeah, you know, ELAINA. I was like, oh, all right. Said, I'll give you, I'll give you the ah, account number. So he gave it to me. He just gave me back my paper, my, my account number that I already set up for my son a long time ago so.

DET: Okay.

WIT: So I was like, what is this? Okay. It's mine. So then, you know, I, I, you know, so I been out there in the streets too, so I was like, all right, what's, what up with this guy, you know? This guy (unintelligible) stuff and stuff, so I was like, hey, I don't want nothing to do with you so.

DET: Did he ever try and keep in contact with ANTHONY?

WIT: He tried, yeah. He, he, he wanted to pick him up for whatever reason, you know. I, I'm talking about the time he wanted to turn in the, the his stuff and said, you think I can, you know, be around ANTHONY? I said, no. Don't be around ANTHONY, around, that's why when I (unintelligible) to school, I make sure that it was no contact with nobody else. I go talk to the principal and stuff like that 'cause I, I really suspect that he did something, and he wanted to finish the job, myself, you know, so, yeah. So I (unintelligible) I talked to the principal he was at and the (unintelligible) was there. I said, hey, you know, nobody picks him up except me and my wife, and that's it so.

DET: What do you suspect happened to ELAINA? Do you, can you think of anybody that you suspect, or is there anybo

Interesting ↑
Opinion

WIT: I don't know 'cause when she was t
moved our relationships, you know.
then another, month later she was,
she had another guy so I really didr
that, you know, she was supposed
(unintelligible) And the reason ah, I
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(unintelligible)

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DET: What do you suspect happened to ELAINA? Do you, can you think of anybody that you suspect, or is there anybody that you suspect?

WIT: I don't know 'cause when she was here, when she moved over here, she just moved our relationships, you know. She one time she was with this guy, and then another, month later she was, she had another guy, and a month later she had another guy so I really didn't, I have no idea, you know. But I know that, you know, she was supposed to get married with ah, SIONE or engaged (unintelligible) And the reason ah, I know that because she had mentioned to me something like that, you know, but not in any detail or nothing like that (unintelligible)

DET: Do you remember what she said?

WIT: (unintelligible) she, she kind of mentioned something like you know, I'm like I'm getting engaged to this guy maybe. I don good. It wasn't like, you know, long, you know remember. It was and usually we'll talk Thurs ANTHONY Friday nights, so that's the only ti or Thursday, or she have plans 'cause we ha see him on the weekends, and I have him the She kept him on the week, and I get the wee

Is this the conversation that others stated that Elaina told James she was getting married and was going to get custody of Anthony. And get back child support from James. He words it quite differently. Anthony lived with Elaina during the week. Not James

DET: When, that Friday night when you guys met, night?

WIT: That we met?

DET: That you met.

WIT: Yeah (unintelligible) I go to church Friday night, so our church usually starts at 7:30 and usually we're done some, you know, fellowship and stuff "til about 10:30 or 11 at night, usually, and that's my out. Then when we get out, take off. So usually we'll have problems that they connecting me and ELAINA ah, because it's late, you know. So that night she had told me she got, (unintelligible) I told you I'm leaving tomorrow. late, so forth, you know. What's going on? I sa I gotta take care of the church. I can't just slee there. We'll meet at the same spot that we me that we'd meet on 45th, 45th Avenue by the U. on ah, ah, 45th and that corner there's a parki So that's our meeting spot, you know. So tha went there, picked him up. Wouldn't, I didn't e She just pulled up. Here it is. See ya later, by (unintelligible) That's the only thing that, that that I went to pizza place on the corner down (unintelligible) my son, and that was the last. or anything like that. She, like hey, here he is talk (unintelligible) conversation.

James did not see Elaina. He does not know what she was wearing.

DET: That was normal?

WIT: Normal, that was normal.

DET: (unintelligible) Okay.

WIT: Yeah. I just pulled up. Here, see you later, bye. Here's the backpack. So I didn't see.

DET2: Do you remember the vehicle she was in that night?

WIT: (unintelligible) she, she kind of mentioned something, like you know, I'm like, I'm getting engaged to this guy maybe. I don't know, stuff. I was like, all right; good. It wasn't like, you know, long, you know, long conversation like that that I remember. It was and usually we'll talk Thursday because ah, I pick up ANTHONY Friday nights, so that's the only time we connect, either that Friday or Thursday, or she have plans 'cause we had joint custody, so, so she would ' see him on the weekends, and I have him the week, and then we swapped. She kept him on the week, and I get the weekends so.

DET: When, that Friday night when you guys met, do you remember the last Friday night?

WIT: That we met?

DET: That you met.

WIT: Yeah (unintelligible) I go to church Friday night, so our church usually starts at 7:30 and usually we're done some, you know, fellowship and stuff "til about 10:30 or 11 at night, usually, and that's my out. Then when we get out, take off. So usually we'll have problems that they connecting me and ELAINA ah, because it's late, you know. So that night she had told me she got, (unintelligible) I told you I'm leaving tomorrow. I need you to pick him up. It's late, so forth, you know. What's going on? I said, well, I'm in church; I gotta go. I gotta take care of the church. I can't just sleep and stuff like that, but I'll be there. We'll meet at the same spot that we meet, you know. We had a spot that we'd meet on 45th, 45th Avenue by the U.W. you know, off I 5 north, get off on ah, ah, 45th and that corner there's a parking lot there, and we'll meet there. So that's our meeting spot, you know. So that's my wife (unintelligible) me. We went there, picked him up. Wouldn't, I didn't even know what she was wearing. She just pulled up. Here it is. See ya later, bye. She took off, and (unintelligible) That's the only thing that, that happened the day. Actually after that I went to pizza place on the corner down the street, and we ate pizza (unintelligible) my son, and that was the last. She didn't look upset at anybody or anything like that. She, like hey, here he is, bye, boom. You know, we didn't talk (unintelligible) conversation.

DET: That was normal?

WIT: Normal, that was normal.

DET: (unintelligible) Okay.

WIT: Yeah. I just pulled up. Here, see you later, bye. Here's the backpack. So I didn't see.

DET2: Do you remember the vehicle she was in that night?

WIT: Her car, it's the, I don't know which kind of car she has. I think she had a Hyundai or something like that. I don't, I don't know what kind of car she had. I think it was black or something like that.

DET: Do you think, did she, did you ever see her drive a truck?

WIT: Ah, I, I don't remember.

DET: Okay.

WIT: (unintelligible)

DET2: What about, you traveled with her during your relationship when you had to take airplanes. Is that true? Did you guys ever travel back and forth anywhere?

WIT: Who?

James can't even remember what she was driving.

DET2: You and ELAINA.

DET: When you were together.

WIT: That's a long time ago. I don't remember t

DET: Going out.

WIT: Oh, yeah, probably.

DET: Like when she would go out, if you guys w

WIT: Yeah.

DET: Or she would go out.

WIT: Um hum.

DET: How would you describe her dress? Would she just go out in like sweats, or would she look nice?

WIT: No, nice.

DET: Would she.

WIT: Yeah, both. When I met her and stuff, we were.

DET: In California.

WIT: Her car, it's the, I don't know which kind of car she has. I think she had a Hyundai or something like that. I don't, I don't know what kind of car she had. I think it was black or something like that.

DET: Do you think, did she, did you ever see her drive a truck?

WIT: Ah, I, I don't remember.

DET: Okay.

WIT: (unintelligible)

DET2: What about, you traveled with her during your relationship when you had to take airplanes. Is that true? Did you guys ever travel back and forth anywhere?

WIT: Who?

DET2: You and ELAINA.

DET: When you were together.

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DET: Going out.

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DET: Like when she would go out, if you guys would go out.

WIT: Yeah.

DET: Or she would go out.

WIT: Um hum.

DET: How would you describe her dress? Would she just go out in like sweats, or would she look nice?

WIT: No, nice.

DET: Would she.

WIT: Yeah, both. When I met her and stuff, we were.

DET: In California.

WIT: California, and we would, I'd dress up. It was big pants, baggy pants, and her makeup. That was dress up for us, so I don't know.

DET2: But what if she went on an airplane like to visit, what would you suspect she would wear? Would she be in sweats, or would she dress nice?

WIT: I, I have no idea how she would 'cause we, when we travel, we, we went to Vegas on our honeymoonm we just regular. She never wear sweats that I know of, that you know, just (unintelligible) she real picky on how she looked so.

DET: How about?

WIT: I know she'll take hours in, in the bathroom just getting ready just to go to, to the store, so I don't know.

DET: How about her hygiene?

WIT: Hygiene?

DET: Yeah. Would she shower daily or?

WIT: Oh, yes.

DET: When you knew her.

WIT: Yes. When I knew her, she had a shower before she even went to the store, get ready and (unintelligible) went out somewhere I'd let her know two hours earlier if we were going somewhere 'cause she'll take those two hours just to go somewhere so, you know.

DET: In all the times when you would meet to drop her off, did you ever see her come in sweats that you recall?

WIT: Well, she, I guess she was, she worked in a gym, so I don't know. I know she worked at a 24 Hour Fitness so I don't remember. I can't say, you know, but I know she worked at a nice place 'cause she would like dress up and stuff, but I don't remember seeing her in sweats or.

DET: Okay.

WIT: (unintelligible)

DET2: How much did you have in your Bank of America account? Do you remember during that time period?

WIT: (unintelligible) I still got the same thing. It's 500 bucks.

DET2: 500.

WIT: It's been the same since I put it in there, interest so.

DET2: We, we may have to get that account nu verify.

WIT: Yeah. Yeah. I just got a statement two d

DET2: Okay.

PROS: Do you remember what time ANTHONY

WIT: Out of school, no. The time he called m

PROS: And he was calling to tell you that she h

Sione Again was there because the mother had called him and said Elaina never showed. Siones first concern was for Elaina's son.

WIT: Yeah.

PROS: Okay.

WIT: Yeah. I guess one of the staff told, told him to call. He was worried about her.

PROS: Did he mention anything about SIONE in that conversation? Do you remember?

WIT: Yeah. SIONE was here to ah, watch ah. SIONE was here to pick me up and stuff so.

DET: Would he, had he ever called you before when SIONE, if SIONE had come to pick him up?

WIT: No.

DET: Okay.

PROS: And it sounds like you had told him you're not to accept a ride with strangers. If it's not your mommy, don't go with 'em, right?

WIT: Ah, me?

PROS: Yeah.

WIT: (unintelligible) I still got the same thing. It's 500 bucks.

DET2: 500.

WIT: It's been the same since I put it in there, interest so.

DET2: We, we may have to get that account number and statement from you just to verify.

WIT: Yeah. Yeah. I just got a statement two days ago so.

DET2: Okay.

PROS: Do you remember what time ANTHONY got out of school?

WIT: Out of school, no. The time he called me it was around 5 o'clock.

PROS: And he was calling to tell you that she hadn't shown up.

WIT: Yeah.

PROS: Okay.

WIT: Yeah. I guess one of the staff told, told him to call. He was worried about her.

PROS: Did he mention anything about SIONE in that conversation? Do you remember?

WIT: Yeah. SIONE was here to ah, watch ah. SIONE was here to pick me up and stuff so.

DET: Would he, had he ever called you before when SIONE, if SIONE had come to pick him up?

WIT: No.

DET: Okay.

PROS: And it sounds like you had told him you're not to accept a ride with strangers. If it's not your mommy, don't go with 'em, right?

WIT: Ah, me?

PROS: Yeah.

WIT: Yeah.

PROS: Yeah.

WIT: 'Cause if specific, you know, mom's gonna pick you up, so unless she told him.

PROS: Right.

WIT: You know, I don't know, but that's, that was.

PROS: Yeah.

WIT: Yeah.

DET: Okay. Is everything you've told us today true and correct to the best of your knowledge?

WIT: To the best of my knowledge, yes.

DET: Okay. And if asked to testify in a court of law, would you be willing to do so?

WIT: Sure.

DET: Okay. That concludes our statement. Today's date is 4-9-2007. Time now is 10:23 hours.

End of Statement
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DEPARTMENT OF
JUDICIAL ADMINISTRATION

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)	VERBATIM REPORT OF
Plaintiff,	)	THE PROCEEDINGS
vs.	)	Cause No. 00-1-00183-1SEA
STEVEN SHERER,	)	COA No. 47074-4-I
Defendant.	)	ORIGINAL

TRANSCRIPT

of the proceedings had in the above-entitled cause before the HONORABLE Anthony P. Wartnik, Superior Court Judge, on the 23rd day of May, 2000, reported by Michelle Vitrano, Certified Court Reporter.

FILED
2000 OCT 24 AM 9:23

APPEARANCES:

FOR THE PLAINTIFF: MARILYN BRENNEMAN,
HENRY CORSCADDEN &
KRISTIN RICHARDSON
Deputy Prosecuting Attorneys

FOR THE DEFENDANT: PETER MAIR & PETER CAMIEL
Attorneys at Law

22

EX. I

ENT'D.

1 RICHARD SCHURMAN, III,
2 Called as a witness at the request of the
3 Defendant, being first duly sworn according to
4 law, did testify as follows herein:
5
6 DIRECT EXAMINATION
7 BY MR. CAMIEL:
8 Q Sir, could you state your full name and spell
9 your last name for us.
10 A My name is Richard H. Schurman, III. Last
11 name is spelled S-C-H-U-R-M-A-N.
12 Q How are you presently employed, Mr. Schurman?
13 A I'm the manager information technologist for
14 a local aerospace manufacturer in Redmond.
15 Q How long have you been doing that?
16 A Two and a half years now.
17 Q Back in the early '90's, were you involved
18 with Northwest Bloodhound Search and Rescue?
19 A Yes, I was.
20 Q What is that outfit?
21 A That is a nonprofit citizens organization
22 that obtains and trains bloodhounds for assisting
23 law enforcement in locating missing persons and
24 evidence.
25 Q When did you first get involved with

1 A In bag number 2, I indicate a woman's blouse
2 that came from the closet, presumably off the
3 floor.
4 THE CLERK: State's exhibit 140 is marked
5 for identification.
6 Q (BY MS. BRENNEMAN) I'm going to ask you to
7 take a look at what's been marked for
8 identification as State's exhibit 140 and look
9 inside that bag marked number 2 and see if that's
10 what you took on October 6th.
11 A It has my original markings on the outside,
12 and it appears to be a white woman's blouse.
13 Q Is that what you remember taking on October
14 6th?
15 A I do.
16 Q And where did you get the items in bag number
17 3?
18 A Bag number 3, the items came out of a laundry
19 basket that was in the bedroom that contained
20 clothing from what I presume to be all members of
21 the family. There were male clothing, female
22 clothing, and I believe some small child's
23 clothing in there.
24 Q First off -- I'm sorry. I skipped ahead. As
25 regards bag number 2, did the dogs take a chance

1 and scent on this?
2 A We did not use bag number 2.
3 Q Okay. Let's go ahead to bag number 3.
4 THE CLERK: State's exhibit 141 is marked
5 for identification.
6 Q (BY MS. BRENNEMAN) Were there any limits in
7 the kind of clothing you could take from the
8 residence?
9 A I was specifically instructed by the officer
10 that I could only take clothing that belonged to
11 the missing person.
12 Q And so why did you go to the laundry to take
13 clothing, sir?
14 A Because that gives me a mix scent article in
15 the event that a family member is involved in the
16 disappearance; it gives me an additional scent to
17 work from.
18 Q And specifically the items you took from the
19 laundry, did you have to move any clothing to get
20 to the things you took out?
21 A I had to move a pair of men's trousers.
22 Q I'm going to show you what's been marked as
23 State's exhibit 141 and ask you to look in bag
24 number 3 and see if it's the things you took
25 underneath the men's trousers from the laundry.

1 A And the bag is marked with my markings, and
2 yes, they are a pair of pantyhose, some socks, and
3 I can't tell, without disturbing the scent
4 articles, and it indicates on the bag that they
5 came from a family laundry.
6 Q You talked about a mixed scent, sir. Would
7 you tell the jury what a mixed scent is.
8 A Okay. A mixed scent is a combination of
9 scents from different persons, and we use several
10 different techniques to isolate those scents. For
11 example, in the case of bag number 1, which we
12 believe to be belonging to the missing person, and
13 not worn by anyone else, one can presume that that
14 has only the scent of that person on it. When we
15 use the dogs to scent that, the dogs showed no
16 interest in that article when working around the
17 car. Now, we take a combination scent article
18 that has two or more scents on it, and presumably
19 since it's female clothing, it belongs to the
20 victim, and the dogs have already eliminated the
21 victim's scent and will now pursue the scent that
22 is remaining, because that's the missing person to
23 them, and so they will pursue the male scent that
24 was on there.
25 Q And what happened when the dogs were given

1 the scent from the mixed scent clothing taken from
2 under the male pants in the laundry hamper at the
3 victim's residence?
4 A The dogs began to work and ended up
5 indicating I-5 southbound.
6 Q Roughly the same location as the day before?
7 A Roughly the same location.
8 Q How long did they work on it?
9 A Well, on bag number 1, which only contained
10 the scent of the missing -- the original missing
11 person, they only worked I believe a couple of
12 minutes and gave up on that scent. But then
13 according to the times, the scent on bag number 3,
14 the mixed scent article was started at 9:39 and
15 ended at 10:13. So in excess of 30 minutes.
16 Q It's a fair conclusion, is it not then, that
17 the dogs were tracking the mixed scent, they were
18 tracking the male scent when they were tracking
19 from bag 3?
20 A That would be my conclusion.
21 Q The male scent in the home of the victim was
22 that of the defendant in this case, right, Steven
23 Sherer?
24 A I assume so, yes.
25 Q And so when the dogs were tracking that male

1 scent on October 6th, they were tracking the scent
2 of the last person to have been in that vehicle,
3 because it was the same scent they had been
4 tracking on October 5th?
5 A That would be my considered opinion, yes.
6 MS. BRENNEMAN: The State would move to
7 admit State's exhibits 130 --
8 THE CLERK: 139.
9 MS. BRENNEMAN: I'm sorry. 139, 140, and
10 141.
11 MR. CAMIEL: No objection.
12 THE COURT: Exhibits numbers 139, 140 and
13 141 are admitted.
14 Q (BY MS. BRENNEMAN) I just want to clarify
15 one other item. How does the -- how does the
16 scent get mixed? I mean you've talked about scent
17 coming from skin scales and bacteria that feeds on
18 that. Is that because the skin scales fall from a
19 pair of pants say that my husband puts in the
20 laundry mat, falls from something I put in the
21 laundry?
22 A Yes. We refer to that as scent transfer, and
23 scent transfers very easily, because the skin
24 cells or the scurfs, shards of skin are very
25 lightweight and can easily be transferred to other

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF PAUL FINAU**

Paul Finau declares as follows:

1) I first met Sione Lui in about 1994 or 1995 at a rugby meet. We became friends. I also got to know Elaina Boussicos by around 2000, after she became involved with Sione.

2) On Saturday, February 3, 2001, Sione spent much of the day at my house preparing for a luau, which took place that evening at my church. After the luau, I spent the night at Sione's home, along with my son and brother-in-law. I understood that Elaina was in California. I did not observe anything unusual about Sione's behavior or mood that day or evening.

3) On Monday, February 5, 2001, Sione called me and said that Elaina had not arrived in California as planned. He asked me to help him put up missing person flyers.

4) I went to Sione's house where the flyers were already copied. We drove to every off-ramp on I-405 posting flyers. We also searched the entire lot at the airport.

5) We also walked around Woodinville that day looking for Elaina's car and putting up flyers. I later learned that her car was found in the lot of the Woodinville Athletic Club. When I

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heard that, it struck me that her car was not in that lot on February 5, 2001. We went through that lot carefully on February 5 and her car was definitely not there. We also walked through the mall to the east of the athletic club.

6) A defense investigator interviewed me in June, 2007. I was cooperative with her. I told her everything that is in this declaration. I would have been willing to testify at trial had I been called as a witness, but I never heard from the defense again after the interview. I would now be willing to testify at a new trial or an evidentiary hearing.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

9-1-09, My office
Date and Place Marysville, WA

Paul Finau

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF FALEPAINI HARRIS**

Falepaini Harris declares as follows:

1) I am the sister of the defendant Sione Lui. I go by the nickname Paini.

2) I testified at the trial of this case in 2008. I had previously given a taped statement to the Honolulu Police on May 31, 2001. I have reviewed the transcript of that statement and my trial testimony before giving this declaration.

3) As I testified at trial, I live in Honolulu, Hawaii. Sione called me after Elaina disappeared and asked me to come to Washington to help him. He picked me up at Seatac airport early in the morning on Thursday, February 8, 2001. Before we could get home, Sione received a call from the police asking to meet with him, so we went there first.

4) Later that day, we drove to the Kinko's copy shop in a mall near Sione's house so that he could make more copies of missing person flyers. He pointed out to me posters he had put up throughout the neighborhood. I see that I explained this to the Honolulu police when they interviewed me.

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5) I was aware that Sione had been going out with his friends postering and searching every night since Monday. I remember him going out on Thursday, the first night I was there, because I was a bit afraid to stay in the house by myself. But I told him he should go out anyway because it was important to find Elaina. I told this to the Honolulu police as well.

6) At the time I gave my statements to the Honolulu police in March, 2001, I knew nothing about any dog tracking evidence in Sione's case. I had left Seattle a day or two after Elaina's body was found. I did not know why the Honolulu police were asking me questions about Sione putting up flyers.

7) I recall the police coming to search Sione's home while I was staying there. I do not remember them asking my permission for the search, or telling me that I had a right to refuse the search. If they had said anything like that to me, I would have told them that I was the wrong person to ask. I was only a guest in Sione's home and I would not have felt it was my place to decide who could or could not come into the home. I would have left such decisions to Sione.

8) Before I testified at trial, I had only one brief conversation with Sione's lawyer. That took place in the hallway outside the courtroom, shortly before I testified. The lawyer asked me some questions about my upbringing. The male prosecutor spent more time interviewing me in his office before I testified.

9) Had I been asked about these things at trial, I would have testified consistently with this declaration. I would testify to the same things at a new trial or an evidentiary hearing.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

8/31/09 Honolulu, HI
Date and Place

Falepaini Harris
Falepaini Harris

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF DENISE SCAFFIDI FOR PERSONAL RESTRAINT PETITION**

Denise Scaffidi declares as follows:

1) I am a private investigator licensed to practice in the State of Washington since 1996.

2) On May 2, 2007, Anthony Savage assigned this case to me. At that time he could provide me only with the certification for determination of probable cause. He said that Sione and Celese Lui would go through the certification and prepare their responses to it. Unusually, the arrangement in this case was that I would bill the client and his family directly rather than getting paid by Mr. Savage.

3) On May 17, 2007, I sent a preliminary investigation plan to Mr. Savage. Ex. A. It included recommendations to contact a dog tracking expert, and to interview Eva Marie Gordon and Elaina Boussiacos's mother. Mr. Savage was not interested in having me follow up with those tasks.

DAS
(initials)

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4) On May 18, we had our first conference meeting at Mr. Savage's office with Celese and Sione (who was out of custody at the time). Mr. Savage told me that not to follow up on the dog expert. My notes for that meeting include the following: "Anthony Savage doesn't care about the K-9. Dog end of list." Shortly after that meeting, I interviewed Sam Taumoefolau and Paul Finau.

5) From then on, my work on the case was mainly with Celese Lui, her mother Joan Byers and her mother's husband Rickie Byers. Mr. Savage gave me very little direction. He generally discouraged the investigative ideas that I and the family came up with.

6) On February 12, 2008, I sent a memo to Mr. Savage summarizing some further work that Celese and her parents wished to have me perform. This included, among other things, locating the gym employee who first reported seeing the victim's car in the lot; locating a defense dog tracking expert; and investigating the current status and reputation of detective Denny Gulla.

7) I was aware that significant impeachment information on Denny Gulla was available. I had investigated his credibility and history of misconduct in at least two other cases. Mr. Savage was not interested.

8) Although Mr. Savage did not direct me to do this, I did end up contacting dog expert Van Bogardus. He would have testified that it was very unlikely that a dog could follow a scent through an urban area 11 days after the fact. I prepared a report on this and provided it to Mr. Savage. I gave Mr. Bogardus the phone number for Mr. Savage and then contacted Mr. Savage to explain the witness' availability for court and what the witness would testify to, which would completely contradict Mr. Schurman's story of tracking Mr. Lui many days after the body was found. The family was prepared to pay Bogardus's fees and I checked that his schedule permitted him to testify at trial. Mr. Savage declined to follow up with that.

DS
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He told me that he did not believe that the State's dog tracking expert would have any sway with the jury.

9) Throughout the pretrial period, Celese would often talk with me about her concerns regarding Anthony Savage. She was questioning whether he was the right attorney for the job. She was particularly concerned about his disinterest in the investigation that Celese believed needed to be done. I encouraged her to discuss these concerns with Mr. Savage.

10) In my declaration dated October 9, 2009, I set out information provided to me by juror Clare Comins. He was not willing to sign a declaration confirming that information. I attempted to contact other jurors but was able to reach only two others. I explained to Mr. Zuckerman that I would need accurate contact information to locate the remaining jurors.

11) I would be willing to testify at a new trial or an evidentiary hearing.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington:

10/11/2010

Date and Place

Denise Scaffidi

(initials)

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CASE NAME: Sione Lui
CAUSE NO. 07-1-04039-7 SEA
DATE: May 17, 2007
INVESTIGATION PLAN

After reviewing the clients comments regarding the Certification and Information, I recommend that the following investigation be conducted:

1. Go to scene, photograph, measure distances between health club, copy center, the client's home and any other locations that the client patronizes in the immediate area.
2. Research weather, temperature and rain/snow fall between February 2, 2001 and February 14, 2001.
3. Contact a K-9 expert regarding the probability of tracking a scent 9-12 days after an incident taking into account that the subject of interest lives in the neighborhood.
4. Carefully review discovery concerning evidence collected and the exact object of clothing where the client's DNA was located. Interview the scientist involved in these tests and determine the source (bodily fluid, hair, etc.) of the DNA and if possible, ascertain the age of the source.
5. Interview witness Sam (last name unknown), Eva Marie and Elaina's mother.
6. Ascertain whether or not Elaina was a member of the health club where her car was located and whether or not she went to the gym on the morning of February 2, 2001 prior to her plans to drive to the airport. If so, attempt to ascertain her demeanor and the clothes she was wearing at the gym, particularly whether the shoes she wore that day might have been worn at the gym. The second bag inside Elaina's car is possibly a gym bag used after work-outs.
7. Further work as determined by Mr. Savage after review of complete set of Discovery.

EX. A

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF JAMES HA, Ph.D.**

Dr. James Ha declares as follows:

1) I have a Master's degree in Biology from Wake Forest University and a Ph.D. in Zoology with a specialization in animal behavior from Colorado State University. I am currently a Research Associate Professor of Psychology at the University of Washington. My CV is attached.

2) I have participated in a number of legal cases over the last several years in King County, as well as cases in Yakima WA and Coeur d'Alene ID. My cases have involved both civil cases (e.g., court suits involving medical damages) and criminal cases, in several cases involving appropriate interpretation of Seattle PD police dog scent-tracking evidence. My expert witness testimony has also been accepted in courts in Denver and Dallas.

3) I have reviewed and am familiar with the following case documents:

   a) Cover letter from David B. Zuckerman;

   b) Mission Summary for Bloodhound Track:

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c) Aerial Photo Exhibit 91;

d) Portions of testimony re: dog track from Detective Denny Gulla;

e) Testimony of Richard Shurman, dog handler in this case;

f) Testimony of Richard Schurman in State v. Sherer, King County No. 00-1-00183-1SEA.

4) It is my understanding from the documents which I have reviewed that a crime scene was established at the Woodinville Athletic Club (WAC), where the body of Elaina Boussiacos was found in the trunk of a car. A bloodhound tracking team was brought in 11 days after the victim's disappearance to conduct a scent-based tracking search. This search led to the home of the victim and defendant (Sione Lui) who lived just outside of town. It is my understanding that this evidence was used by the prosecution as evidence of guilt.

5) I have been asked to express an opinion on the significance of the bloodhound scent tracking evidence in this case.

6) There is very little hard, scientific data on the length of time and accuracy of dog, or specifically bloodhound, tracking accuracy. The best work on scent identification in dogs, including bloodhounds, is being done in the Netherlands by Dr. G.A.A. Schoon; her work suggests an overall accuracy of about 75% for individual identification of scents of humans ("The Effect of the Ageing of Crime Scene Objects on the Results of Scent Identification Line-ups Using Trained Dogs." *Forensic Science International*). This is after minimal delay (minutes to hours). The commonly-used rule of thumb is that this accuracy decreases by 10% for each day of delay following the establishment of the scent track. However, this rule is experience-based and has not been formally established in the scientific literature. If accurate, this would produce a range of accuracies as depicted in the following graph:

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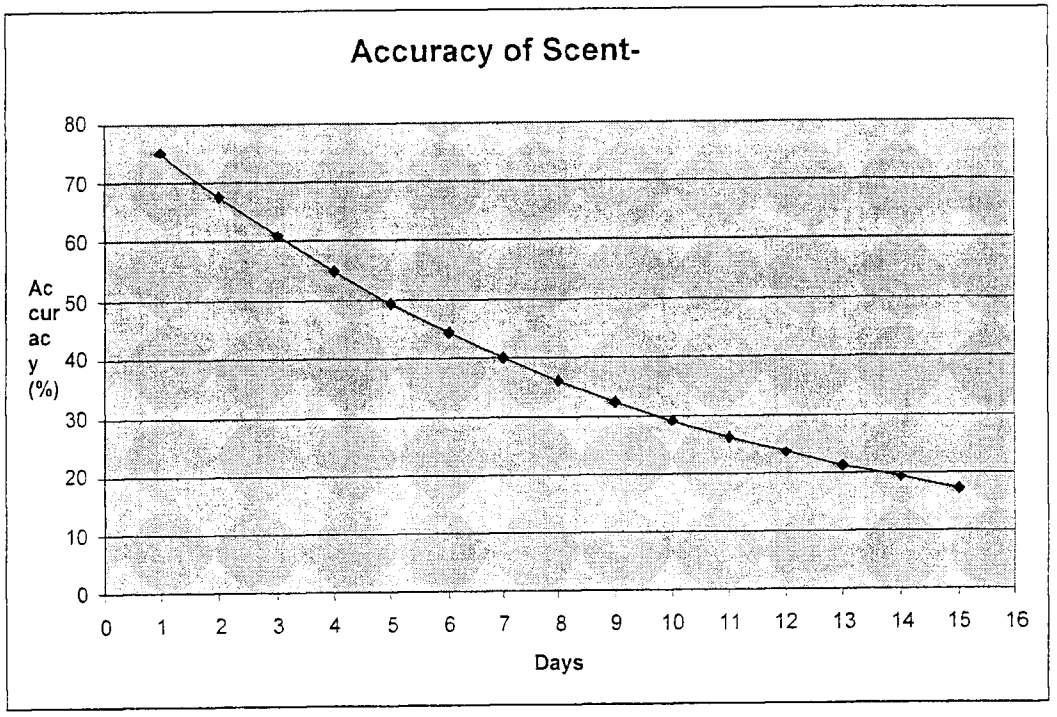

7) These results accurately reflect other published observations: Kristofeck ("A Study of Attitudes, Knowledge and Utilization of Canine Teams by the Louisville Division of Police." Louisville, KY: University of Louisville, 1991) suggests that 48 hours is a long delay for an accurate bloodhound or scent-dog track (the rule of thumb would suggest only a 67% accuracy) and Hunt ("The Benefits of Scent Evidence." *FBI Law Enforcement Bulletin*, pp.15-18, 1999) suggests that scent-dogs, including bloodhounds, can accurately track for up to 10 days (a rule-of-thumb accuracy of about 28%). Authors Catherine Brey and Lena Reed, in their book The Complete Bloodhound, report on the oldest documented successful scent track, 322 hours or 13 days old. This successful track, for missing persons, required three dogs tracking simultaneously, which increases sensitivity and accuracy. These results are confirmed and supported by many anecdotal observations of successful tracks within hours of an event, but with decreasing accuracy and success in the days following the establishment of a track. Many bloodhound trackers will not attempt a track after 48 hours because of the low chance of success.

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8) In view of the low probability of a dog following an 11-day-old trail, it is much more likely that Mr. Schurman's dog was following scent that had been laid down more recently.

9) Weather conditions, including moisture (dew, rain) but especially wind, even a light wind, can affect tracking ability dramatically. A bloodhound can detect a person's scent only if some biological material from the person's body comes in contact with the dog's scent organ. This material may consist of microscopic particles of skin, body oils or sweat. Such materials can easily move about after they leave a person's body. For example, a tiny droplet of sweat might land on a speck of dust lying on the ground. That dust speck could be blown a great distance in even a light breeze. For these reasons, a bloodhound that is following a person's scent is not necessarily following a person's trail. It is merely detecting the current position of the scent particles.

10) Further, a dog cannot tell *when* scent particles left a person's body. If a person has been in a particular area more than once, the dog cannot tell when it is following scent laid down on the first visit and when it is following scent laid down during a later one. The path the dog follows could be based on scent particles left on different days and in different areas, as long as the various areas visited by the person are sufficiently close together that the dog does not lose the scent entirely.

11) Generally, a bloodhound is trained to follow a scent gradient, meaning that it will move from areas where the scent is weaker to areas where the scent is stronger. As discussed above, however, the strength of the scent does not necessarily correlate with the path taken by a person. There might be more scent particles in one place rather than another because the person spent more time there, because the person engaged in some activity there that caused more scent particles to leave his body (such as scratching his head), because the person was there more recently, or simply because wind caused many scent particles to collect in that place.

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12). Although Exhibit 91 seems to depict a mostly straight line path, Mr. Schurman's testimony indicates that his dog was moving about in various directions as it attempted to follow the scent. For example, although the dog apparently went some distance into a condominium complex near the Park and Ride before coming back out, Mr. Schurman acknowledged that the most likely explanation was that some of the scent had blown in there, rather than that the suspect had actually walked into that area. Similarly, Mr. Schurman acknowledged that his dog probably detected the scent in the parking lot near a Target store, but it was not safe to trail through that area.

13) If we assume that Mr. Schurman and his dog were following Mr. Lui's scent as they moved from the WAC parking lot to his home, that in no way proves that Mr. Lui ever followed such a path, or even that he was ever in that WAC lot. His scent could have blown into the lot if he was in the adjacent mall or on a nearby street. In fact, if it is true that Mr. Lui changed a tire on the victim's car shortly before she disappeared, his scent particles would undoubtedly have gotten onto the tire and surrounding areas of the car. I do not think we can rule out the possibility that his scent may have transferred from the car to the ground. Further, if Mr. Lui spent some time in the mall containing the Target store, and in the Park and Ride, his scent particles could easily travel to adjacent lots and roads. Finally, if he was coming in and out of his home, he would presumably leave a large quantity of scent particles in that area. Some of these could easily travel out into the nearby streets through wind or through the disturbance of a car. One would expect a bloodhound to track to the home once it was anywhere near it, since a person's scent gradient would normally point strongly towards his own home. Mr. Lui could have left his scent at the various places where it was detected at different times. For example, he could have been in the mall one day, the Park and Ride another day, and outside his home on a third day.

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14) As Mr. Schurman testified in this case, he could not say whether his dog was in fact following Mr. Lui's scent since he did not gather the scent article himself. I understand that a detective testified that he gathered some items of men's clothing. If those items came into contact with the victim or her clothing, however, they would have contained some of her scent as well. According to his testimony in State v. Sherer, Mr. Schurman believed such a transfer had taken place in that case. If the victim in this case had recently been in the area of the Target mall and the Park and Ride, we cannot rule out the possibility that Mr. Schurman and his dog were following her scent.

15) In addition to the documents reviewed above, I depend on the professional literature in the science of biology and animal behavior. It is this body of empirical research and theory that informs my professional opinions regarding dog behavior.

16) The above-stated expert opinions are made with at least reasonable scientific certainty. They are widely accepted by virtually all experts in the fields of applied animal behavior, ethology, and canine cognition. I am not aware of any dispute, much less a significant one, by qualified experts in these germane scientific communities concerning the theories and methodologies employed by me in drawing these conclusions.

17) Had I been contacted prior to the trial in this case, I would have testified to the same information contained in this declaration. I will testify to these matters at an evidentiary hearing or a new trial.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

27 Sept 2009 Seattle WA

Date and Place

James C. Ha, Ph.D.

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James C. Ha, PhD, CAAB

Short Biography

My background includes a Bachelor's degree in Biology from Millersville University (1980), a Master's degree in biology from Wake Forest University (1983) and a Ph.D. in zoology, with a specialization in animal behavior, from Colorado State University (1989). At the University of Washington since 1992, I am currently a Research Associate Professor in Psychology (Animal Behavior Program) where I teach and conduct research in complex social behavior and cognition of several animal species. I am also one of only about 20 PhD-level Full Certified Applied Animal Behaviorists in the country.

During my graduate training, I worked with Dr. Philip Lehner (Colorado State University) and was active in his behavior consulting business in Colorado. I started my own consulting business in companion animal behavior, Animal Behavior Associates of Washington in 1999, and reformed this enterprise into Companion Animal Solutions, LLC in 2007. In addition to in-home consulting on behavior issues in dogs, cats and parrots, I have participated in several court cases as an expert legal witness. I have been involved with the development of the professional certification program for applied animal behaviorists through the Animal Behavior Society (www.animalbehavior.org) and have served as a member of the Animal Behavior Society's Executive Committee for many years.

Animal behavior has been a scientific discipline since the mid-1800's, and today the Animal Behavior Society consists of over 2300 professional scientists who focus their work on the behavior of organisms, and who work primarily in the Western Hemisphere (there is a comparable organization for the Old World). Of those 2300+ animal behavior professionals, only about 50 have submitted their materials for review and received professional certification as full (PhD) or associate (MA/MS) Certified Applied Animal Behaviorists. Certification guarantees that I have completed professional academic training in modern animal behavior principles and research and have completed appropriate levels of advanced training (usually a minimum of two years) specifically in the issues of companion animals such as dogs, cats, and horses. In addition, re-certification is required every five years so that continued training and experience is maintained and assured.

JAMES C. HA
RESEARCH ASSOCIATE PROFESSOR
CERTIFIED APPLIED ANIMAL BEHAVIORIST
UNIVERSITY OF WASHINGTON

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Education

1980 B.A. Biology cum laude, Millersville University, Millersville, PA.

1983 M.A. Biology, Wake Forest University, Winston-Salem, NC.
Thesis title: Food Supply And Home Range In The Fox Squirrel (Sciurus niger).

1989 Ph.D. Zoology (Behavioral Ecology), Colorado State University, Fort Collins, CO.
Dissertation title: The Effects Of Time And Metabolic Requirement On Foraging Behavior Of Captive Gray Jays.

Professional Experience

1982-1983 Research assistant, Wake Forest University.

Fall 1983-Spring 1988 Teaching assistant, Department of Zoology/Biology, Colorado State University. Courses taught: Mammalogy, Vertebrate Biology.

Summers 1984-1987 Instructor in computer science, Larimer County Vocational- Technical Center, Colorado. Courses taught: Introductory BASIC Programming, Introduction to LOTUS 1-2- 3, Computer Literacy.

Spring 1986 Instructor for Vertebrate Biology, Zoology Department, Colorado State University.

Fall 1988-Spring 1989 Instructor for Principles of Animal Biology (freshman majors/non-majors lab course), Biology Department, Colorado State University

Fall 1989-Fall 1990 Temporary Assistant Professor for Principles of Animal Biology (all semesters), Vertebrate Biology (fall), and Graduate Seminar in Behavior: Evolution of Social Systems and Behavior (spring), Biology Department, Colorado State University.

1990-1992 Research Scientist III, University of Washington Regional Primate Research Center.

1991-1992 Lecturer, Psychology Department, University of Washington, Seattle.

1992-1999 Research Assistant Professor, Department of Psychology and Washington National Primate Research Center, University of Washington.

- 1993-present Research Affiliate, Child Development and Mental Retardation Center, University of Washington.

1996, 1998 Visiting Scientist, Population Genetics Laboratory, Southwest Foundation for Biomedical Research, San Antonio TX.

- 1999-present Research Associate Professor, Department of Psychology and Washington National Primate Research Center, University of Washington.

- 2001-present Data Management Director, Infant Primate Research Laboratory, University of Washington.
- 2004-present Credentialed as a Certified Applied Animal Behaviorist by the Animal Behavior Society (www.animalbehavior.org)
- 2006-present Head of the Colony Demographics and Genetics Program, Washington National Primate Research Center

Research Grants

1979 Research grant from Millersville University Alumni Foundation's Niemeyer Student Research Fund.

1980 Grant for travel expenses from Millersville University Alumni Foundation's Niemeyer Student Research Fund.

1984 Research grant: Harris and Eliza Kempner Foundation (with S.D. Farley) for "Risk-sensitive foraging by gray jays in a closed economy."

1987 Colorado Mountain Club Foundation Research Fellowship for "Foraging behavior in free-ranging gray jays."

1992 Active contributor to budget, drafting, submission, and review process for 5-year Regional Primate Research Center Core Grants, including development of new programs in both Basic and Colony Health-Related Research categories.

1997, 1998 Supervised grant-writing and award process for graduate student grants awarded to Renee Robinette from the Animal Behavior Society Research Grants Program and Sigma Xi.

1997, 2002 Active contributor to budget, drafting, submission, and review process for 5-year Regional Primate Research Center Core Grants, including development of new programs in both Basic and Colony Health-Related Research categories.

2003 Active contributor to budget, drafting, submission, and review process for 5-year Center for Human Development and Disability Core Grant.

2003 Contract from Northwest Fisheries Research Center, NMFS: Proposal to the National Marine Fisheries Service, Northwest Fisheries Research Center: Social Behavior and Affiliation Patterns in Southern Resident Orca (Orcinus orca), $16,000.

2004 Contract from Northwest Fisheries Research Center, NMFS: Proposal to the National Marine Fisheries Service, Northwest Fisheries Research Center: Social Behavior and Affiliation Patterns in Southern Resident Orca (Orcinus orca): Year 2, $35,000.

2005 Co-PI, with Dr. Linda Jones (Northwest Fisheries Research Center, NOAA), Proposal to the National Marine Fisheries Service, Northwest Fisheries Research Center: Social Behavior and Affiliation Patterns in Southern Resident Orca (Orcinus orca): Year 3, $50,000.

2005 Co-PI, with Dr. Renee Ha, Contract from Division of Wildlife, Commonwealth of the Northern Mariana Islands, Proposal to Study the Decline of the Mariana Crow (*Corvus kubaryi*) and the Rota Bridled White-eye (*Zosterops rotensis*) on the Pacific Island of Rota, $179,808.

2006 Co-PI, with Dr. Renee Ha, Contract from Division of Wildlife, Commonwealth of the Northern Mariana Islands, Proposal to Study the Decline of the Mariana Crow (*Corvus kubaryi*) and the Rota Bridled White-eye (*Zosterops rotensis*) on the Pacific Island of Rota, $205,000.

2007 Co-PI, with Dr. Renee Ha, Contract from Division of Wildlife, Commonwealth of the Northern Mariana Islands, Proposal to Study the Decline of the Mariana Crow (*Corvus kubaryi*) and the Rota Bridled White-eye (*Zosterops rotensis*) on the Pacific Island of Rota, $200,000.

2007 Active contributor to budget, drafting, submission, and review process for 5-year Regional Primate Research Center Core Grants, including development of new programs in both Basic and Colony Health-Related Research categories.

2008 Co-PI, with Dr. Renee Ha, Contract from Division of Wildlife, Commonwealth of the Northern Mariana Islands, Proposal to Study the Decline of the Mariana Crow (*Corvus kubaryi*) and the Rota Bridled White-eye (*Zosterops rotensis*) on the Pacific Island of Rota, $185,000.

Scientific Publications

Zegers, D.A. and J.C. Ha. 1981. Niche separation of Peromyscus leucopus and Blarina brevicauda. J. Mammal. 62:199-201.

Farley, S.D., J. Ha and P. Lehner. 1988. An inexpensive microcomputer and interface for control and data acquisition in the operant arena. Physiological Ecology Section Newsletter, Ecological Society of America. 1:4-6.

Ha, J.C., P.N. Lehner and S.D. Farley. 1990. Risk-prone foraging behavior in captive gray jays (Perisoreus canadensis). Anim. Behav. 39:91-96.

Weigl, P.D., L. Sherman-Jones, M.A. Steele, J.C. Ha and T. Sharpe. 1990. The ecology of the fox squirrel (Sciurus niger) in North Carolina: implications for survival in the southeast. Bull. Tall Timbers Res. Sta. 24:1-93.

Ha, J.C. and P.N. Lehner. 1990. Notes on gray jay demographics in Colorado. Wilson Bull. 102:698-702.

Ha, J.C. 1991. Risk-sensitive foraging: the role of ambient temperature and foraging time. Anim. Behav. 41:528-529.

Luhring, K.A., J.C. Ha and P.N. Lehner. 1992. Agonistic displays of the gray jay (Perisoreus canadensis): a comparison with other corvids. Northwestern Naturalist 73:22- 24.

Kimpo, C., J. Ha, S. Sulzbacher, and H. Ochs. 1994. The analysis of incomplete longitudinal data sets. Clinical Research 42:107A.

Ha, J.C., C. Nosbisch, J.D. Unadkat, S.H. Conrad, G.C. Ruppenthal, G.P. Sackett, and J. Abkowitz. 1994. Fetal toxicity of zidovudine (azidothymidine) in Macaca nemestrina: preliminary observations. Journal of A.I.D.S. 7:154-157.

Kimpo, C., J. Ha, G. Sackett, and H. Ochs. 1994. Developmental effects of prenatal exposure to SIV and HIV virus in infant pig-tailed macaques (Macaca nemestrina) and HIV exposure in human subjects. J. Medical Primatology 23:256.

Robinette, R., J. Ha, C. Kimpo, and G. Sackett. 1995. Gross motor development in infant Macaca nemestrina using a new climbing apparatus. Amer. J. Primatology 35:319-326.

Conrad, S., J.C. Ha, C. Lohr, and G. Sackett. 1995. Ultrasonic assessment of fetal growth in the pigtailed macaque (Macaca nemestrina). Amer. J. Primatology 36:15-35.

Ha, J.C. 1996. Book review: Alpha Males: An Early History of the Regional Primate Research Centers, by W.R. Dukelow. Animal Behaviour 52:1059-1060.

Knapp, L.A., J.C. Ha, and G.P. Sackett. 1996. Parental MHC antigen sharing and pregnancy wastage in captive pigtailed macaques. J. Reproductive Immunology 32:73-88.

Ha, J.C., C.L. Kimpo and G.P. Sackett. 1997. Multiple-spell discrete-time survival analysis of developmental data: object concept in pigtailed macaques. Developmental Psychology 33:1054-1059.

Robinette, R.L. and J.C. Ha. 1997. The significance of fishing behavior by Northwestern crows. Wilson Bulletin 109:748-749.

Unis, A.S., M.D. Roberson, R. Robinette, J.C. Ha and D.M. Dorsa. 1998. Ontogeny of human forebrain dopamine receptors: I. Differential expression of [3H]-SCH23390 and [3H]-YM09151-2 specific binding. Developmental Brain Research 106:109-117.

Ha, J.C., C. Nosbisch, J.L. Abkowitz, S.H. Conrad, N.K. Mottet, G.C. Ruppenthal, R. Robinette, G.P. Sackett, and J.D. Unadkat. 1998. Fetal, infant, and maternal toxicity of zidovudine (azidothymidine) administered throughout pregnancy in Macaca nemestrina. Journal of Acquired Immune Deficiency Syndrome and Human Retrovirology 18:27-38.

Heath-Lange, S., J.C. Ha and G.P. Sackett. 1999. Behavioral measurement of temperament in male nursery-raised infant macaques and baboons. American Journal of Primatology 47:43-50.

Ha, J.C., R.L. Robinette and G.P. Sackett. 1999. Social housing and pregnancy outcome in captive pigtailed macaques. American Journal of Primatology 47:153-163.

Ha, J.C., R.L. Robinette, and A. Davis. 2000. Survival and reproduction in the first two years following a large-scale primate colony move and social reorganization. American Journal of Primatology 50:131-138.

Robinette, R.L. and J.C. Ha. 2000. Beach-foraging behavior of Northwestern crows as a function of tide height. Northwestern Naturalist 81:18-21.

Nair, S., J.C. Ha and J. Rogers. 2000. Nineteen new microsatellite DNA polymorphisms in pigtailed macaques (Macaca nemestrina). Primates 41:343-350.

Ha, J.C., R.L. Robinette, and G.P. Sackett. 2000. A demographic analysis of the Washington Regional Primate Research Center pigtailed macaque colony, 1962-1997. American Journal of Primatology 52: 187-198.

Robinette, R.L. and J.C. Ha. 2001. Social and ecological factors influencing vigilance by Northwestern crows (Corvus caurinus). Animal Behaviour 62:447-452.

Ha, J.C., R.L. Robinette, L. Almasy, and B. Dyke. 2002. Heritability of birthweight in pigtailed macaque monkeys. American Journal of Primatology 56:207-213.

Robinette, R.L., P. Bentzen, J.L. Marsh and J.C. Ha. 2003. Kin discrimination in food stealing by Northwestern Crows (*Corvus caurinus*). Bird Behavior 15: 65-75.

Ha, R.R. and J.C. Ha. 2003. Effects of prey type, prey density and energy requirements on the use of alternative foraging tactics in crows. Animal Behaviour 66: 309-316.

Ha, J.C. and R.R. Ha. 2005. Book review: The genesis of animal play. Integrative and Comparative Biology, 45, 952-953.

Sellinger, R.L. and J.C. Ha. 2005. The effects of visitor density and intensity on the behavior of two captive jaguars (Panthera onca). Journal of Applied Animal Welfare Science 8: 233-244.

Agness, A.M., J.F. Piatt, J.C. Ha, and G.R. VanBlaricom. 2007. Effects of vessel activity on the near shore ecology of the Kittlitz's murrelet (Brachyramphus brevirostris) in Glacier Bay, Alaska. Accepted, Auk.

Papers Submitted

Ha, J.C., J. Buckley, and R.R. Ha. Forest Bird Abundances and the Potential for Typhoon Impact on Bird Populations on the Island of Rota, Northern Mariana Islands. Wilson Journal of Ornithology.

Publications in Preparation: These are papers for which complete manuscripts are undergoing in-house editorial revision before submission. This list does not include data for which no manuscript has been prepared.

Kremer, S., J. Ha, J.B. Cruz and V.A. Camacho. Results of Roadside Bird Surveys, Saipan, Commonwealth of the Northern Mariana Islands 1991-2005.

Gray, J. and J.C. Ha. Black-White Discrimination and Hamilton Search Learning in Infant Pigtailed Macaque Monkeys.

Alloway, H, and J.C. Ha. The Effect of Aggression on Reprductive Outcome in Pigtailed Macques (Macaca nemestrina).

Marsh, J.A., D.S. Ha, and J.C. Ha. Historical analysis of association patterns in southern resident killer whales (Orcinus orca).

Noren D.P., Larson A., Marsh J., Ha J. Southern Resident killer whale behavioral responses to vessels (in prep, for submission to Canadian Journal of Zoology)

Butler, A. and J.C. Ha. Age-specific Survival and Population Viability of the Mariana Crow (Corvus kubaryi) on Rota, CNMI.

Noren D.P., Larson A., Marsh J., Ha J. Southern Resident killer whale behavioral responses to vessels (in prep, for submission to Canadian Journal of Zoology)

Agness, A.M., J.F. Piatt, J.C. Ha, and G.R. VanBlaricom. Using at-sea observations of fish-holding Kittlitz's murrelet (Brachyramphus brevirostris) to depict breeding phenology and chick diet.

Agness, A.M., K.N. Marshall, J.F. Piatt, J.C. Ha, and G.R. VanBlaricom. Using computer simulation models to assess the impact of vessel disturbance on the Kittlitz's murrelet (Brachyramphus brevirostris).

Hinde, K., J.C. Ha, and L. Newell-Morris. Spontaneous abortion as a reproductive strategy in captive macaques of compromised maternal condition.

Ha, S.J. and J.C. Ha. Geographic differences in call structure among Pacific Northwest crow populations.

Books and Book Chapters

Ha, J.C. 1996. Microcomputers: an overview for ethologists. In: Lehner, P.N. Handbook of Ethological Methods. Cambridge University Press, NY. 512 pp.

Ha, J.C. and A.E. Davis. 2006. Data management for the nonhuman primate nursery. Pp. 49-64. In: Sackett, G.P., G.C. Ruppenthal, and K. Elias. Nursery rearing of nonhuman primates in the 21st century. Developments in Primatology: Progress and Prospects, Springer, NY. 602 pp.

Worlein, J.M., J.C. Ha, C. Harris, J. Leigh, K. Stratton, and R.J.R. Ho. 2006. Special challenges of rearing infant macaques infected with lentivirus (SIV, HIV, SHIV). Pp. 169-190. In: Sackett, G.P., G.C. Ruppenthal, and K. Elias. Nursery rearing of nonhuman primates in the 21st century. Developments in Primatology: Progress and Prospects, Springer, NY. 602 pp.

Ha, R.L. and J.C. Ha. In preparation. Textbook: Integrative Statistics for Behavior Science. McGraw-Hill, Inc.

Scientific Presentations: Invited Paper Presentations, National or International Meetings

Ha, J.C. Preliminary Analysis of the WaRPRC Nemestrina Colony. AAAG/SFBR Workshop on Anthropological and Primate Genetics, Southwest Foundation for Biomedical Research, San Antonio TX, November 1998.

Ha, J.C., B. Dyke, and G.P. Sackett. Heritability of behavioral milestones in infant pigtailed macaque monkeys. Annual meeting of the Behavior Genetics Association, Vancouver Canada, July 4-7, 1999.

Scientific Presentations: Contributed Presentations, National or International Meetings

Zegers, D.A. and J.C. Ha. 1980. Niche separation of Peromyscus leucopus and Blarina brevicauda. Annual meeting of the American Society of Mammalogists, June 8-12, 1980.

Ha, J.C. and P.D. Weigl. 1981. The southeastern fox squirrel - unknown and endangered? Annual meeting of the American Society of Mammalogists, June 7- 11, 1981.

Weigl, P.D., P. Williams and J.C. Ha. 1981. Body size as an adaptive strategy in the fox squirrel (Sciurus niger). Annual meeting of the American Society of Mammalogists, June 7-11, 1981.

Weigl, P.D. and J.C. Ha. 1982. Comparative ecology of eastern and western populations of the fox squirrel (Sciurus niger). Annual meeting of the Ecological Society of America, August 8-12, 1982.

Ha, J.C., P.D. Weigl and T. Sharpe. 1983. Food availability and home range in the fox squirrel (Sciurus niger). Annual meeting of the American Society of Mammalogists, June 19-23, 1983.

Ha, J.C., S.D. Farley and P.N. Lehner. 1987. Gray jay (Perisoreus canadensis) responses to changes in food density within a closed economy laboratory simulation: temporal patterns and risk sensitivity. Annual meeting of the Animal Behavior Society, June 21-26, 1987.

Arguello, S.H. and J.C. Ha. 1987. EVENT: Inexpensive microcomputer recording of rapidly changing, simultaneous observation data. Annual meeting of the Animal Behavior Society, June 21-26, 1987.

Ha, J.C. 1988. Foraging behavior in captive gray jays (Perisoreus canadensis): response to altered foraging time and metabolic requirements. Annual meeting of the Animal Behavior Society, August 7-12, 1988.

Luhring, K.A., P.N. Lehner and J.C. Ha. 1988. Agonistic behavior in gray jays (Perisoreus canadensis): a comparison to other corvids. Annual meeting of the Animal Behavior Society, August 7-12, 1988.

Ha, J.C. and P.N. Lehner. 1990. Survivorship, movements, and group composition of gray jays in Colorado. Annual meeting of the Animal Behavior Society, June 11- 15, 1990.

Ha, J.C. and A. Cepaitis. 1991. The role of harmonic and arithmetic means in risk- sensitive foraging by gray jays (Perisoreus canadensis). Annual meeting of the Animal Behavior Society, June 1-6, 1991.

Ha, J.C. and G.P. Sackett. 1992. Paternal and nonpaternal male influences on pregnancy outcome in captive pigtail macaque monkeys (Macaca nemestrina). Annual meeting of the Animal Behavior Society, June 13-18, 1992.

Ha, J., R. Robinette, C. Kimpo, and G. Sackett. 1992. The climbing tube: a new measure of motor control in infant pig-tailed macaques. Annual meeting of the American Society of Primatologists, June 19-21, 1992.

Nosbisch, C., J.D. Unadkat, J.C. Ha, S.H. Conrad, G.C. Ruppenthal, and G.P. Sackett. 1992. Fetal toxicity of zidovudine. VIII International Conference on AIDS, July 19-24, 1992.

Bowden, D., M. Agy, D. Anderson, C. Kimpo, J. Ha, G. Sackett et al. 1993. Neurobehavioral AIDS induced by SIV_{Mne} or HIV-1 in infant pig-tailed macaques (Macaca nemestrina). IX International Conference on AIDS, June 7-11, 1993.

Novak, M.F.S.X., J.C. Ha, and G.P. Sackett. 1993. Heritability and captive breeding effects on physical and psychological traits of infant pigtailed macaques. Annual meeting of the Animal Behavior Society, July 25-29, 1993.

Kimpo, C.L. and J.C. Ha. 1993. The effects of nursery-rearing on the social behavior of immature captive baboons. Annual meeting of the Animal Behavior Society, July 25-29, 1993.

Heath, S., J. Lockard, J. Ha, and R. Farrow. 1993. Puzzle solving abilities in captive long-tailed macaques: pregnancy and drug treatment effects. Annual meeting of the American Society of Primatologists, August 18-22, 1993.

Novak, M.F.S.X., J.C. Ha, G.C. Ruppenthal, G.P. Sackett. 1994. Rearing infant monkeys in pairs: rotating partners. Annual meeting of the Animal Behavior Society, July 23-28, 1994.

Heath, S. and J.C. Ha. 1994. Behavioral measurement of temperment in nursery-raised infant macaques and baboons. Annual meeting of the Animal Behavior Society, July 23-28, 1994.

Lange, S.K., C. Kimpo, J. Kimpo, K. Morris, and J.C. Ha. 1994. Habitat selection and home range of mountain beaver (Aplodontia rufa). Annual meeting of the Animal Behavior Society, July 23-28, 1994.

Robinette, R., J.C. Ha, and G.P Sackett. 1994. Social contact with pregnant females affects pregnancy outcome in captive pigtail macaque monkeys. Annual meeting of the Animal Behavior Society, July 23-28, 1994.

Sackett, G.P. and J.C. Ha. 1994. Life span ponderal growth in captive M. nemestrina. XVth Congress of the International Primatological Society, August 3-8 1994.

Morris, K., C. Kimpo, G. Morris, and J.C. Ha. 1995. The influence of proximity to humans on population density and home range size of mountain beaver (Aplodontia rufa). Annual meeting of the Society for Northwestern Vertebrate Biology, March 1995.

Ha, J.C. and S.J. Ha. 1995. Significant differences in call structure among Pacific Northwest crow populations. Annual meeting of the Animal Behavior Society, July 8-13, 1995.

Robinette, R. and J.C. Ha. 1995. Beach foraging behavior of American crows as a function of tide height. Annual meeting of the Animal Behavior Society, July 8-13, 1995.

Kimpo, C., J.C. Ha and G. Sackett. 1995. Object concept in pigtailed macaques. Annual meeting of the Animal Behavior Society, July 8-13, 1995.

Robinette, R. and J.C. Ha. 1996. The relationship between tide height, prey density, foraging efficiency in beach-foraging American crows. Annual meeting of the Animal Behavior Society, August 3-9, 1996.

Sackett, G.P. and J.C. Ha. 1996. Multiple spell survival analysis as a method for studying low rate behaviors over sessions. Int'l Conference on Measuring Behavior, Netherlands, October 14-18, 1996.

Kroeker, R., J.C. Ha, and G.P. Sackett. 1997. Analysis of neurobehavioral assessments in pig-tailed macaques using survival methods. Society for Research in Child Development, Washington D.C., April 1997.

Ha, J.C. and R.L. Robinette. 1997. Beach foraging crows I: Ecological and behavioral determinants of patch departure. Annual meeting of the Animal Behavior Society, June 21-26, 1997.

Robinette, R.L. and J.C. Ha. 1997. Beach foraging crows II: Social foraging. Annual meeting of the Animal Behavior Society, June 21-26, 1997.

Robinette, R.L. and J.C. Ha. 1998. Evidence for multiple factors influencing vigilance. Annual meeting of the Animal Behavior Society, July 18-22, 1998.

Robinette, R.L. and J.C. Ha. 1998. Successful scrounging by beach-foraging Northwestern Crows (Corvus caurinus). Foraging/98: Nervous Systems to Ecosystems, July 21-24, 1998.

Ha, J.C. and R. Jacobs. 1999. Visitor effects on the behavior of two captive jaguars. Annual meeting of the Animal Behavior Society, June 26-30, 1999.

Nicholson, T.M., J.S. Lockard, J.C. Ha, C.G. Walker-Gelatt, and M.F.S.X. Novak. 1999. Initation and reciprocation as a function of group composition in laboratory-reared infant Macaca nemestrina. Annual meeting of the American Society of Primatologists, August 12-16, 1999.

Ha, J.C., R. Robinette Ha, and B. Dyke. 2002. Heritability of physical, cognitive, and social development in infant pigtailed macque monkeys. Annual meeting of the Animal Behavior Society, July 13-17, 2002.

Marsh, J.A. and J.C. Ha. 2003. Historical analysis of association patterns in southern resident killer whales (Orcinus orca). Annual meeting of the Animal Behavior Society, July 19-23, 2003.

Skypeck, V.K., L. Newell-Morris, and J.C. Ha. 2003. Epidemiology of high birth weight in the pigtailed macaque (Macaca nemestrina). Annual meeting of the American Society of Primatologists, July 31-Aug 3, 2003.

Bentson, K.L., C.M. Crockett, and J.C. Ha. 2003. A rapid home cage procedure for assessing individual and group differences in behavioral reactivity of monkeys. Annual meeting of the American Society of Primatologists, July 31-Aug 3, 2003.

Bentson, K.L., C.M. Crockett, H.B. Montgomery, and J.C. Ha. 2004. Cage level has little effect on behavior of macaques (M. fascicularis, M. nemestrina, and M. mulatta). Annual meeting of the American Society of Primatologists, June 8-12, 2004.

Alloway, H. and J.C. Ha. 2005. Aggression in pigtail macaque (*Macaca nemistrina)* breeding groups and its effects on pregnancy outcome. Annual meeting of the Animal Behavior Society, August 6-10, 2005.

Colon, M., J.C. Ha, and R.R. Ha. 2006. Relationships of forest birds on Rota, Mariana Islands. North American Ornithological Conference, Veracruz Mexico, October 30, 2006.

Ha, RR., J. Ha, L. Berry, and J. Morton. 2007. Nest site selection in the endangered Mariana crow. Annual meeting of the Animal Behavior Society, July 21-25, 2007.

Scientific Presentations: Departmental Seminars, Invited Lectures, and Short Courses

Why Mice Climb Trees, or Niche separation of Peromyscus leucopus and Blarina brevicauda. Departmental seminar, Biology Dept., Millersville University. November 1979.

Home Range and Food Supply in the Southeastern Fox Squirrel. Departmental seminar, Biology Dept., Wake Forest University. Spring 1983.

Searching Biological Literature by Computer: A Workshop. Departmental seminar, Zoology Dept., Colorado State University. December 1986.

How to Search 19 Years of Literature in 10 Minutes. Departmental seminar, Fisheries and Wildlife Biology Dept., Colorado State University. March 1988.

Measurement of Physiological Stress in Free-Ranging Animals. Workshop on Aircraft/Wildlife Interactions. U.S. Fish and Wildlife Service and U.S Air Force, Estes Park, CO 12 April 1988.

The Effects of Foraging Time and Metabolic Requirements on Foraging Behavior and Metabolic Rate of Captive Gray Jays (Perisoreus canadensis). Departmental seminar, Biology Dept., Colorado State University. April 1989.

Gray Jays: Field Biology and Animal Behavior. Public lecture: Colorado Department of Parks and Recreation, Colorado State Forest. 14 July 1990.

Guest lecturer, Animal Behavior Course. Biology Dept., Colorado State University. 1987, 1988, 1989.

Guest lecturer, Ethological Methods Course. Biology Dept., Colorado State University. 1988, 1990.

Thermoregulation and Behavior of Gray Jays: Past, Present, and Future Studies. Guest lecture, Comparative Physiology Course. Biology Dept., Colorado State University. September 1989.

Guest lecturer, Vertebrate Biology Course. Biology Dept., Colorado State University. February 1990.

Guest lecturer, Psychology as a Natural Science Course. Psychology Dept., University of Washington. 1992, 1993.

Guest lecturer, Developmental Psychology Seminar. Psychology Dept., University of Washington. 1991, 1992, 1993, 1994, 1995, 1996, 1998, 2000.

Guest lecturer, Methods of Data Analysis Workshop Series. Child Development and Mental Retardation Center, University of Washington. 1992.

Guest lecturer, Statistical Methods in Longitudinal Research Course. Psychology Dept., University of Washington. 1993, 1994, 1995, 1997, 1999, 2000, 2002.

Ecology of the Gray Jay in the Rockies. Invited Seminar, Biology Department, Millersville University, Fall 1993.

Infant Primate Research Laboratory: Ethology and Psychology. Invited Seminar, Biology Department, Millersville University, Fall 1993.

Invited workshop participant: Methods in Genetic Epidemiological Analysis, Southwest Foundation for Biomedical Research, San Antonio TX, October 1995.

Guest lecturer, Comparative Animal Behavior. Psychology Department, University of Washington. Summer 1996.

Social Housing and Pregnancy Outcome in Captive Pigtailed Macaques. Invited seminar, UW Regional Primate Research Center, August 1998.

Social Housing and Pregnancy Outcome in Captive Pigtailed Macaques. Invited seminar, UW Psychology Department, August 1998.

Recent Research on the Northwestern(?) Crow: Foraging, Acoustics, and DNA. Meeting of the Washington Ornithological Society, March 1999.

The Social Behavior of Highly Cognitive Animals: Examples from Crows, Monkeys, and Orca Whales. Invited seminar, Laboratory of Ornithology, Cornell University, Ithaca NY, 30 October 2000.

Invited Workshop Participant: Colony Records Analysis. Southwest Regional Primate Research Center and National Institutes of Health (NCRR), Jan 12, 2001.

Invited Workshop Participant: Colony Records Analysis II. Jackson Laboratories and National Institutes of Health (NCRR), Jun, 2001

Heritability of Cognitive and Reflex Development in Infant Pigtailed Macaques: Preliminary Results and Future Directions. Invited seminar, Oregon National Primate Research Center, Beaverton OR, 24 September 2001.

Invited Workshop Participant: Ethoinformatics. Indiana University's Center for the Integrative Study of Animal Behavior and National Science Foundation, April, 2002.

The Social Behavior of Highly Cognitive Animals: Examples from Crows, Monkeys, and Orca Whales. Invited seminar, Department of Biology, Boise State University, Boise ID, 19 October 2002.

Chair of Workshop: Colony Records Analysis III. NIH-National Center for Research Resources, San Antonio, TX November 2002.

The Social Behavior of Highly Cognitive Animals: Examples from Crows, Monkeys, and Orca Whales. Invited seminar, Behavioral Ecology Institute, National University of Mexico, Mexico City Mexico, 14 December 2002.

Invited Workshop Participant: Ethoinformatics II. Cornell University's Laboratory of Ornithology and National Science Foundation, Feb 2003.

The Social Behavior of Highly Cognitive Animals: Examples from Crows, Monkeys, and Orca Whales. Invited course lecture, Animal Behavior course, North Seattle Community College, Seattle WA, 13 Mar 2003.

Invited Workshop Participant: National Marine Fisheries Service Review of Research Needs for Southern Resident Killer Whales: I, Whale-watching and II, Food Supply. Northwest Fisheries Research Center, May 2003.

Invited Workshop Participant: National Marine Fisheries Service Review of Research Needs for Southern Resident Killer Whales 2004. Northwest Fisheries Research Center, Jan 2004.

Social Behavior of Resident Inshore Killer Whales in the Pacific Northwest: Natural and Human Influences, Invited seminar, Psychology Department, New College of the University of South Florida, 17 Mar 2004.

Organizer and Chair of National Marine Fisheries Service workshop on Behavior Coding of Killer Whales, 20 April 2004.

Colony Records Analyses of the WaNPRC Pigtailed Macaque Colony, Invited lecture, Oregon National Primate Research Center, 5 May 2004.

The Sensory Systems of Sharks. Invited course lecture, Animal Behavior course, North Seattle Community College, Seattle WA, 9 Jun 2004.

The Social Behavior of Highly Cognitive Animals: Examples from Crows, Monkeys, and Orca Whales. Invited seminar, Biology Department, Millersville University of Pennsylvania, 21 Sep 2004.

Social Behavior of Resident Inshore Killer Whales in the Pacific Northwest: Natural and Human Influences, Invited seminar, Biology Department, Millersville University of Pennsylvania, 22 Sep 2004.

Co-Chair of Workshop: Colony Records Data-sharing Initiative. NIH-National Center for Research Resources, San Antonio, TX 1-4 November 2004.

Cat Behavior and Misbehavior, Invited talk, Seattle-King County Humane Society, 16 Nov 2004.

A Quick Introduction to the U.W. Infant Primate Research Laboratory, Invited lecture, Oregon National Primate Research Center, Animal Model of Gestational Diabetes Workshop, 6 December 2004.

The Sensory Systems of Sharks. Invited course lecture, Animal Behavior course, North Seattle Community College, Seattle WA, 11 Feb 2005.

Social Behavior of Resident Inshore Killer Whales in the Pacific Northwest: Natural and Human Influences, Invited seminar, St. Andrews University, Scotland. 1 September, 2005.

Basic and Applied Behavior: Social Foraging and Conservation of Crows, Invited seminar, St. Andrews University, Scotland. 1 September, 2005.

Cat Behavior and Misbehavior, Invited talk, Seattle-King County Humane Society, 8 Nov 2005.

Behavior and Ecology of Forest Crows in Washington and Micronesia, Invited talk, Northwest Exotic Bird Society, 19 January 2006.

Cat Behavior and Misbehavior, Invited talk, Seattle-King County Humane Society, Nov 2006.

Social Behavior of Resident Inshore Killer Whales in the Pacific Northwest: Natural and Human Influences, Invited seminar, Lincoln Park Zoo, Chicago, March 2007

The Social Behavior of Highly Cognitive Animals: Examples from Crows, Monkeys, and Orca Whales. Invited seminar, Department of Biological Sciences, Purdue University, West Lafayette, IN, March 2007.

Short Course. An Introduction to Basic Statistics. University of Brasilia, Brasilia, Brazil. April 14-19, 2008.

Short Course. An Introduction to Basic Statistics. Sao Paulo State University, Sao Jose do Rio Preto, Brazil. April 22-25, 2008.

Biologists In Need Of Mathematicians: A Few Examples of Mathematics in Animal Behavior, Invited seminar, Department of Computing and Statistics, Sao Paulo State University, Sao Jose do Rio Preto, Brazil. April 28, 2008.

Social Behavior of Resident Inshore Killer Whales in the Pacific Northwest: Natural and Human Influences, Invited seminar, Department of Biological Sciences, Sao Paulo State University, Sao Jose do Rio Preto, Brazil. April 28, 2008.

Social Behavior of Resident Inshore Killer Whales in the Pacific Northwest: Natural and Human Influences, Invited seminar, Haller Lake Community Center. May 1, 2008.

Honors and Awards

1980 Awarded undergraduate departmental honors. Thesis title: "Application of radiotelemetry to the study of the southern flying squirrel (Glaucomys volans).

1980 A.G. Breidenstine Award for excellence in undergraduate research, Millersville U.

1980-1982 Graduate academic scholarship: Wake Forest University.

1987 Teaching Fellowship Award for Excellence in Undergraduate Teaching: Colorado State University.
1997 Alpha Phi Sorority Faculty of the Year Award: University of Washington.
1998 Founders' Memorial Poster Award for "Evidence For Multiple Factors Influencing Vigilance." With R.L. Robinette, annual meeting of the Animal Behavior Society, July 18-22, 1998.
2008 Fellowship as Visiting Scientist, Brazilian Research Council.

Societies
Animal Behavior Society
American Society of Primatologists
Association of Field Ornithologists
Sigma Xi (National Research Honor Society)

Service to Department
1982-83 Graduate student representative to faculty: Biology Dept., Wake Forest U.
1984-86 Member (1984), Chairman (1985): Colloquium in Life Sciences Committee, Zoology Department, Colorado State University.
1986-Spring 1989 Graduate student liaison to C.S.U. Morgan Libraries: Zoology/Biology Department, Colorado State University.
1987-1990 Implemented and maintained departmental account for computer bibliographical database access (BRS AfterDark, primarily Biological Abstracts), including presenting training seminars and workshops for faculty and students.
1989-1990 Computer and Statistics Consultant, Biology Department, Colorado State University. Resource person for microcomputer users in department. Statistics resource person for graduate students in Biology, Fisheries and Wildlife, and Psychology Departments.
1991-present Serve on various National Primate Research Center committees: Colony Modeling Committee, Animal Records System Committee, Breeding Colony Advisory Group, and IPRL New Computing Resources Committee. Currently serve on Animal Record System Advisory Committee.
1998-1999 Served on annual review and renewal committee for Laura Little, Lecturer, Psychology Department
2000-2003 Appointed as Animal Behavior Area Representative, Graduate Training Committee, Psychology Department.
2000-2005 Elected Faculty Senator from Psychology Department
2006 Served on Distinguished Graduate Student Teaching Award selection committee.
2007 Served on Distinguished Graduate Student Teaching Award selection committee.

Service to Profession
1988-1996 Developed, maintained ABSnet, a professional electronic mail network.
- 1989-present Ad-hoc reviewer for Animal Behaviour

1990-1996 Appointed to Public Affairs Committee, Animal Behavior Society.
- 1991-present Ad-hoc reviewer for American Journal of Primatology

1991-1994 Appointed to Education Committee, American Society of Primatologists.
1992-1994 Local Host for 1994 Animal Behavior Society meeting at the University of Washington.
1995 Appointed to chair ad-hoc Conservation Committee, Animal Behavior Society.

1996-1997 Statistics advisor to Editorial Board of Animal Behaviour.
1996-1998 Appointed as first chair of Conservation Committee, Animal Behavior Society

- 1996-present Appointed as Internet/Web Site (ABSnet) Manager, Animal Behavior Society

1998-2001 Elected Member-at-Large, Executive Committee, Animal Behavior Society
1999 Ad-hoc reviewer (twice) for Natural Sciences and Engineering Research Council of Canada research proposals
2000 Ad-hoc reviewer for National Science Foundation
2001-2003 Elected Senior Program Officer, Executive Committee, Animal Behavior Society
2002 Member, National Science Foundation/Animal Behavior Program Doctoral Dissertation Improvement Grant Review Panel
2002-2005 Co-Chair National Institutes of Health/National Center for Research Resources Colony Records Analysis Working Group
2002-2005 Local Host for 2005 Animal Behavior Society meeting: Snowbird Ski Resort, Utah.
2003 Member of four-person Animal Behavior Society Central Office site visit team
2004-2007 Appointed Director of Animal Behavior Society's Central Office

- 2005-2009 Appointed Editor, Animal Behaviour
- 2006-2009 Elected Treasurer, Animal Behavior Society

Also occasional reviewer for International Journal of Primatology; Zoo Biology; Institute for Laboratory Animal Research; Behavioral Research Methods, Instruments, and Computers; Journal of Comparative Psychology

Other Professionally-related Activities
Author of EVENT-PC software for recording behavioral data by computer. EVENT-PC is currently being used at over 35 research facilities. Also authored SEQ-PC for sequential analysis of behavioral data. Author of several custom software packages for researchers in North and South America. In 2003, I developed a Palm PDA-based program for collecting behavioral data, now in use in 5 labs at the University of Washington, as well as 2 labs at Indiana University and at a Kenyan baboon research field site for UCLA.

Partner in Companion Animal Solutions LLC, a private clinical practice in applied animal behavior and the treatment of companion animal behavior problems. Prior to 2007, operated Animal Behavior Associates of Washignton. 1999-present.

Co-Founder of Companion Animal Behavior Connection, a local organization of accredited professional pet behavior specialists with the goal of providing educational resources and professional access to both local veterinarians and the public.

Collaborators
Publications with U Washington collaborators: Kimpo, C; Sackett, GP; Robinette, RL; Unis, AS; Roberson, MD; Dorsa, DM; Nosbisch, C; Abkowitz, JL; Conrad, SH; Mottet, NK; Ruppenthal, GC; Unadkat, JD; Heath-Lange, S; Davis, A; Novak, MFSX; Walker-Gelatt, CG; Bentzen, P; Kroeker, R; Jacobs, R; Nicholson, T; Lockard, JS.

Publications with Southwest Foundation for Biomedical Research collaborators: Nair, S; Rogers, J; Almasy, L; Dyke, B.

Graduate Advisors: Weigl, PD (Wake Forest U); Wunder, BA & Lehner, PN (Colorado State U)

Advisees: Kimpo, C; Robinette, RL; Hawks-Johnson, S; Marsh, JL; Skiver Thompson, R; Alloway, H; Colon, M.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF THEODORE J. BECKER, Ph.D.**

Dr. Theodore J. Becker declares as follows:

1) I have a Ph.D. from Indiana University in the field of Human Performance. This includes the study of biomechanics, anatomy, growth, and motor development. I was the head trainer for the United States Olympic Swim Team in 1984. I founded Everett Pacific Industrial Rehabilitations, LLC in 1985 and continue to run that business. My work includes evaluation of physical capacity and disability. I have served as an adjunct faculty member at Western Washington University, Oregon State University, Central Washington University, and Seattle University. I have authored numerous research and clinical publications in the field of biomechanics. My CV is attached as Ex. A.

2) I have testified as an expert witness in Alaska, California, Colorado, Hawaii, Idaho, Illinois, New Mexico, Nevada, Oregon, Utah, Washington, British Columbia, and Manchester, England. My testimony in Washington includes 17 superior courts, the U.S. District Court for the Western District of Washington, and the Board of Industrial Insurance Appeals. In

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King County Superior Court Case No. 07-2-13861-7SEA, Judge Andreas Darvas wrote: "Dr. Becker is well credentialed and experienced in performing PCE's which objectively measure the ability of an injured person to perform various tasks, and document the level of disability."

3) I have been asked to give an opinion concerning Sione's Lui's physical ability to commit the crime charged in this case. In forming my opinion, I have reviewed the following materials:
   a) Medical and physical therapy records of Sione Lui concerning a right radius (forearm) fracture on September 30, 2000, a left thumb fracture in April, 2000, and a left radius fracture in October, 1997.
   b) Trial testimony of medical examiner Dr. Richard Harruff.
   c) Discovery from the medical examiner's office.
   d) The signature page of the judgment and sentence with Mr. Lui's fingerprints.
   e) A CD with digital copies of autopsy photos.
   f) Measurements and photos of Mr. Lui's hand taken by investigator Denise Scaffidi.
   g) Rental agreement for bass guitar and biomechanical analysis of ukelele, guitar, and bass guitar.
4) Based on my review of these materials, it is my opinion that Lui could not have been the killer of Elaina Boussiacos.
5) Lui suffered a right radial shaft (forearm) fracture on September 30, 2000. He underwent surgery October 5, 2000. A plate was fixed over the radius with six screws. A long arm upper extremity fiberglass cast was applied on October 11, 2000. It was removed on November 13, 2000. The forearm muscles will atrophy significantly after a month in such a cast.
6) Boussiacos's wounds are consistent with an attack from a man whose right hand grasp was stronger than his left. According to the medical examiner, dissection of Boussiacos's neck

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muscles revealed hemorrhages of 0.4" on the right side and 0.6" on the left. This means that there was more pressure exerted by the attacker's right hand versus the left. Lui's right hand, however, would have been significantly weaker than his left as of early February, 2001. This is confirmed by the physical therapy notes from March 2, 2001, which indicate that his right arm grasping strength at that time was only 46 pounds, while his left hand strength was 83 pounds. Lui was then five months post-surgery. His right hand strength would have been significantly less at the beginning of February, which was only four months after surgery, and only three months after the cast was removed.

7) In fact, Lui would not have been able to maintain any grasp on Boussiacos's neck if she was fighting back. The typical female gross grasping strength is 32-62 pounds for the left hand and 38-67 pounds for the right. Boussiacos is reported to have been a young and highly physically fit woman, which would put her towards the high end of these estimates even if she was relatively small. Lui's right hand grasping strength would have been at the low end of the female range at the beginning of February. Boussiacos could have easily pulled Lui's right hand off her neck with her left hand.

8) Several of Boussiacos's injuries are clearly caused by the hands of her attacker. To determine whether Lui's hands could have caused these injuries, I requested precise measurements of multiple aspects of Lui's hands and fingers. Investigator Denise Scaffidi met with Lui and prepared the diagrams and measurements set out in Ex. B. She also provided verification of these measurements by taking digital photographs of Lui's hands with a ruler in the picture. Ex. C.

9) According to the autopsy report: "On the inferior aspect of the right chin, 1.4 inches to the right of midline is a superficial, horizontal abrasion which measures 0.7 x 0.35 inches. There is a rather symmetric-appearing abrasion seen in the same location on the left side of the chin and measures 0.7 x 0.3 inches." This is consistent with a bilateral pressure abrasion from the

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pressure over the carotid artery, caused by the thumb tips of the attacker. That these bruises are caused by thumb tips is also consistent with the bruise discussed in the next paragraph, which is in the shape of the thenar eminence. The two sets of bruises are aligned in a manner corresponding to the relative positions of thumb tips and thenar eminences. Lui's thumb tips, however, measure 1.5 x 0.94 inches, which is much larger than the thumb tips of the assailant.

10) The autopsy report continues: "More inferior on the lateral right neck is a somewhat angle-shaped area of contusion which has a faint triangular shape to it. The medial base measures 1.7 inches across. The lateral base as it extends upward measures 1.2 inches in length. Superiorly, the margin of this triangle which is horizontal measures 1.7 inches." These measurements are consistent with a male thenar eminence, a body of muscle on the palm of the human hand just beneath the thumb. The gap between the bruise over the carotid artery and and inferior bruise corresponds to the gap of area for the proximal phalangeal (base segment) of the thumb. The thumb would have flexed at the distal interphalangeal joint (first knuckle) leaving a gap until the thenar eminence is reached. The upper portion of the attacker's thenar eminence measured 1.7 inches. The corresponding measurement on Lui's left hand is 2 and 3/8 inches (2.375) which is not even close.

11) The autopsy report indicates that Boussiacos's fingernails were "irregularly trimmed." I have been informed that several witnesses testified that Boussiacos generally devoted great care to her appearance. The autopsy report indicates that her toe nails were well cared for. This suggests that her fingernails were damaged in an attempt to fight off her attacker. If there was no evidence of cuts or scratches on Lui, that would further tend to exclude him as the attacker.

12) I have been informed that Mr. Lui was unable to play his usual musical instruments, ukelele and guitar, at the beginning of February, 2001, and therefore rented a bass for a performance

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at a luau on February 3, 2001. That information is consistent with the status of Mr. Lui's right arm injury as of that date.

13) To evaluate the effect of such an injury on the ability to play a strummed instrument, I consulted with a professional musician and had him demonstrate the hand and arm movements involved. Photographs of this demonstration are attached as Ex. D.

14) The ukelele is played with repetitious long finger flexion position. The strumming is a repetitious wrist radial and ulnar deviation. There is identified index finger MCP (metacarpal phalangeal) flexion in combination with thumb extension. Predominant axis response for motion involves the medial and lateral compartments which involves the musculature across the interosseous ligament between the radius and ulna. There is force response contraction of the muscles of the forearm, which would be the extensor brevis and longus, brachioradialis, and thumb musculature across the interosseus membrane.

15) The guitar is played with strumming across the strings and with picking. The strumming is repetitious wrist radial and ulnar deviation. There is no forearm rotation. The forearm musculature shows definitive contraction at the lateral epicondyle attachment. Both the strumming and picking have 'free floating' hand motion across the strings, which requires forearm endurance. There is prominent contraction of the extensor digitorum, and extensor carpi radialis longus and brevis (forearm muscles). Wrist flexion shows force loading across the interosseous membrane of the forearm from the simultaneous finger flexion for pinching. There is wrist extension with simultaneous finger flexion to pinch in the upper extremity biomechanics of the forearm. There is agonist/antagonist contraction in repetition for the flexor and extensor compartments of the forearm, indicating endurance requirement across the interosseous section of the forearm. There is noted rotation of the forearm for supination on the strumming upstroke. The 'picking' technique shows more predominate force loading from the origin to insertion for the extensor forearm compartment muscles. There is

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significant contraction function of the brachioradialis (a muscle which makes the elbow flex and extend) and general muscles of the forearm.

16) The bass instrument provides a biomechanical presentation that is different from the ukulele and guitar, in that either the thumb or the digit 4 & 5 are providing a contact load controlling point on the surface of the instrument. Due to the contact loading/controlling point of the radial or ulnar hand section there is stability to the forearm loading in both the rotation of the forearm, and the wrist ulnar/radial deviation. When the thumb is loaded for the 'pivot' there is noted wrist/forearm alignment across the interosseous forearm structure. The thumb loading also shows the forearm extensor musculature to be observed in a less contractile state as compared to the guitar and ukulele playing function. The brachioradialis shows contractile presentation, however, the general extensor forearm compartment muscle has less contractile prominence than with the other two instruments. The flexor elbow position is in a relatively stable 90 degrees position, whereas the other two instruments have greater elbow flexion positions. The bass instrument playing shows a near neutral wrist and/or forearm position alignment, and the wrist radial and ulnar deviation axis is nearly neutral at all times. There is a significant difference in the wrist axis position in the bass versus the other two instruments.

17) Lui's choice of the bass for a performance on February 3, 2001, would be consistent with marked weakness in his right forearm. The repetitious agonist/antagonist lateral compartment responses required for guitar and ukelele would require greater strength and endurance in the right forearm. The bass requires far less effort from the muscles and connective tissues of the forearm.

18) I understand that a witness testified at trial that Lui moved a heavy dresser by himself in 2000. She apparently recalled that taking place in either November or December. That timing is not possible because Lui would have either been in a long arm cast or had it

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recently removed. In either case, he could not have applied sufficient grasping force to lift a heavy, bulky object. If Lui lifted a heavy dresser in the year 2000, it must have happened before September 30.

19) Had I been contacted prior to the trial in this case, I would have testified to the same information contained in this declaration. I will testify to these matters at an evidentiary hearing or a new trial.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

9/1/09
Date

Theodore J. Becker, Ph.D.

Signed in Everett, Washington

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CURRICULUM VITAE

THEODORE J. BECKER PH.D., R.P.T., C.E.T., C.E.A.S., C.D.E., C.D.A., C.C.I.

11627 H. AIRPORT ROAD, EVERETT, WA 98204
(425) 353-9300 (425) 290-3688 Fax

SPECIALTY: Human Performance/Physical Capacity/Disability Evaluation

SUB-SPECIALTY: Shoulder Evaluation & Rehabilitation
Work Tolerance/Employment Evaluation

EDUCATION:

Ph.D—Indiana University—1984
School Of Graduate Studies
Areas of Study: Biomechanics, Anatomy
Growth & Motor Development
Human Performance

M.S.—Indiana University—1975
School of HPER
Areas of Study: Sports Science/Sports Medicine

B.S.—University of Maryland—1973
School of Medicine
Areas of Study: Physical Therapy/Physical Education

HONORS AND AWARDS:

National Easter Seals Scholarship—1972
National Athletic Trainers Association--1984
Outstanding Research Award
United States Swimming Olympic Team--1984
Head Trainer Los Angeles Olympic Games
United States Olympic Committee—1985
Faculty for International Symposium on Overuse Injuries
NADEP—2000
Sandell Research Award

PROFESSIONAL ASSOCIATION PAST & PRESENT:

American Society of Biomechanics
National Athletic Trainers Association
American College of Sports Medicine
American Physical Therapy Association

EXHIBIT A

Appendix to PRP
part 2 of 2

72478-9

PROFESSIONAL ASSOCIATION CONTINUED:

National Association of Disability Evaluating Professionals
United States Swimming Sports Medicine Society
Association for Advancement of Automotive Medicine
Human Factors Society
American Board of Disability Analysts
North American Society of Gait and Posture-Charter Member
Industrial Rehabilitation Association of Washington
Occupation Injury Prevention Rehabilitation Society
American College of Forensic Examiners
Society of Automotive Engineers
American Society of Shoulder & Elbow Therapists
International Association of Rehabilitation Professions

LICENSURE AND CERTIFICATION:

Physical Therapy Licensure:
Connecticut—1973; Indiana—1973; Illinois—1976;
Maryland—1973; New Jersey—1973; Texas—1982;
Washington—1984

Certified Athletic Trainer NATA—1975
Cardiac Exercise Technologist ACSM—1977
Diplomate and Certified Senior Disability Analyst
American Board of Disability Analysts—1995
Fellow of The American College
Of Forensic Examiners Institute—2007
Certified Disability Examiner NADEP—2000
Certified Ergonomic Assessment Specialist
Certified as Educational Provider to Commission for Case Management
Certified Clinical Instructor—American Physical Therapy Association

EMPLOYMENT HISTORY:

Everett Pacific Industrial Rehabilitations, LLC—1985 to Present
(Physical Capacity Evaluation/Work Hardening)

Fankhauser Physical Therapy—1985
Contract Physical Therapy
(Shoulder Rehabilitation & Evaluation)

Washington Orthopedic and Fracture Clinic—1984
Director of Rehabilitation Services

University of Texas Health Sciences Center—1982
Assistant Professor & Research Associate;
(Allied Health Sciences; Human Anatomy;
Orthopedic Research/Low Back Pathology)

EMPLOYMENT HISTORY CONTINUED:

Staff Builders Home Health Care—1982
(Amputee Home Rehabilitation)

Monmouth County Organization for Social Services—1983
(Home Care Physical Therapy)

Indiana University—1980
Faculty Lecturer
(Research Techniques for Biomechanics;
Adapted Physical Education/Motor Development;
Gross Human Anatomy; Sports/Work Physiology)

Bloomington Hospital—1978
Staff Physical Therapy
(Burn/Stroke/Cardiac Units)

University Of Illinois—1976
Assistant Professor
(Rehabilitation Education Center; Applied Life
Studies Faculty; Director of Exercise Therapy
Clinic; Originator of Lower Back Rehabilitation
Program)

Indiana University—1974
Staff & Lecturer
(Director of Gross Motor Development: Speech
And Hearing Center/Director of Program Development:
Morgan County Multiple Handicapped School/Assistant
Athletic Trainer/Faculty Lecturer-Sports Medicine)

Bloomington Hospital—1973
Staff Physical Therapy (Orthopedic/Cardiac Units)

Morgan County Hospital—1973
Staff Physical Therapy

Riverview Hospital—1973
Staff Physical Therapy

AVOCATIONAL INTERESTS:

Elite Amateur Swimming—United States Swimming Head Trainer
Rehabilitation Consultant to Professional Baseball Athletic Training Staff
Previous: New York Yankees; Oakland Athletics
Current: St. Louis Cardinals

PRESENTATION/PUBLICATION/PROFESSIONAL CONTRIBUTIONS ADDENDUM

PRESENTATIONS:

1975—United Cerebral Palsy of Indiana
"Adapted Physical Education During The Early Learning Years"

1976—Indiana State Podiatry Conference
"Biomechanics For Clinical Evaluations"

1978—Indiana State Swim Coaches Association
"Etiology And Prevention Of Swimming Injuries"

1978—The Vital Corporation
"The Mechanics Of Jogging And Prevention Of Injuries"

1979—Indiana University Swim Coaches Clinic
"Strength & Flexibility In Competitive Swimming"

1980—The Vital Corporation
"Musculoskeletal Considerations For Cardiac Rehabilitation Compliance"

1980—IAHPERD
"Anatomical And Anthropometric Characteristics Of The World Class Swimmers"

1980—Taiwanese National Swim Coaches Tour
"Dry Land Exercise Program For The Competitive Swimmer"

1981—IAHPERD
"Anatomical And Anthropometric Characteristics Of The World Class Swimmer"

1982—Illinois State Swim Coaches Meeting
"The Musculoskeletal Disabilities Inherent In Swimming And How To Prevent Them"

1982—National Athletic Trainers Association Meeting
"Screening The Competitive Adolescent Swimmer For Participation"

1982—American Swim Coaches World Clinic
"Identifying And Dealing With Swimming Injuries"

1983—Ohio State Swim Coaches Association
"Effective Means For Dealing With Swimming Injuries"

PRESENTATIONS CONTINUED:

1983—Texas Faculty Task Force
"Prospective On Quantified Testing In Low Back Research"

1984—American Swim Coaches Association World Clinic
"The Coaches Guide To Bicipital Tendonitis"

1984—United States Swimming Coaches College
"Workshop On Identifying And Dealing With Overuse Swimming Injuries"

1984—Olympic Scientific Congress: Eugene, Oregon
"The Implications of Landing Impact on the Stress Fractures of Dancers"

1985—International Symposium On Sports Sciences—Japan
Keynote Speaker
"Musculoskeletal Adaptations In Swimming: The Relevant Relationship Between Vertebral And Shoulder Function"

1985—Sports Medicine Congress And Exposition Faculty
"Competitive Swimming Medicine"

1986—United States Swimming Coaches College
"Treatment And Clinical Care For Overuse Injuries Of The Upper Extremity And Lower Back"

1986—Washington State Vocational Rehabilitation Assoc.
"Quantified Evaluation Assessment For Physical Capacity Testing"

1988—Saint Joseph's Hospital, Bellingham Physician Inservice
"Upper Extremity Sport & Work Overuse Injuries Evaluated"

1989—Pan Pacific Masters Scientific Conference
"Human Performance And The Aging Process For High Levels Of Mechanical Function"

1990—Washington State Professional Vocational Counselors
"The Quantified Performance Based Physical Capacity Evaluation"

1991—Washington State Self Insured Claims Examiners
"Physiological & Biomechanical Work Hardening-Predicting Outcomes"

1992—Washington State Vocational Counselors
"Panel On Quantifying Effort In The PBPCE"

PRESENTATIONS CONTINUED:

1992—The Annual International Industrial Ergonomics And Safety Research Conference
Conference Section, "Hand Biomechanics"
Conference Chairman, Shamar Dumar, Ph.D
Invitation For Contribution Of Presentation
"Tenosynovitis In Overuse Cumulative Trauma"

1994—Washington Association Of Chiropractic Physicians
"Quantifying Dysfunction Of Spinal Injuries"

1995—OSC Vocational Consultants—Private Firm
"Physiology & Biomechanics Of The Performance Based Physical Capacity Evaluation"

1996—Brain Injury Association Annual Seminar
"Quantifying Deficits Of Mildly Afflicted Brain Injured Clients"

1996—Northern Florida Swim Coaches Annual Meeting
"Overuse Training As A Precursor To Tendon And Soft Tissue Inflammatory Process"

1997—Brain Injury Association Annual Seminar
"The Use Of Physical Capacity Evaluations"

1998—Brain Injury Association Of Utah
"The Use Of Physical Capacity Evaluations To Determine Vocational Loss"

1999—Washington State Trial Lawyers Association
"Physical Capacity Evaluation"

1999—Intellicus Program For Advanced Life Care Planning/ University Of Florida
"The Use Of Physical Capacity Evaluations To Determine Vocational Loss Of Post-Concussion Syndrome Cases"

2000—Washington Association Of Chiropractic Physicians
"Disability Examination Using The Performance Based Physical Capacity Evaluation"

2000—Brain Injury Association Of Washington
"Safety, Fitness And Recreation For The Brain Injured: Life Initiatives Family Training"

2000—Brain Injury Association Of Washington
"Physical Capacity Evaluation Determination Of Impairment From Traumatic Brain Injury"

PRESENTATIONS CONTINUED:

2000—Washington State Trial Lawyers Association
"Capacity Evaluation Tests/Reliability And Validation Testing"

2003—Seattle Claims Adjuster Association Tacoma Claims Adjuster Association
"Biomechanics of the Shoulder / Normal & Abnormal Function Due To Trauma Both Gross and Discrete"

2004—University of Florida Medipro
"Home Based Employment Work Tolerance and Barriers to Special Populations"

2004—International Association of Rehabilitation Professionals —Forensic Conference
"Interpreting Capacity Evaluation Test Results for Vocational Assessment"

2004—Brain Injury Association of Oregon—"Physiological Measurement of Fatigue Following Brain Injury"

2004—Professionals in Workers Compensation
"Physical Capacity Evaluations: Methodologies and Models"

2005—Washington Association of Independent Medical Examiners "Capacity Evaluation Science Review"

2005—Everett Trial Attorneys Round Table
"Performance Based Physical Capacity Evaluations"

2005—IAM C.R.E.S.T. (Corporation for Re-Employment and Safety Training)
International Association of Machinists and Aerospace Workers, AFL-CIO
President Michael J. Flynn
National Conference
"Performance Based Capacity Evaluations, Job Analyses and Data Collection"

2006—Biomechanics and Medicine in Swimming, the World Commission of Sports Sciences; Porto, Portugal
10th International Symposium
"Bilateral and Anterior-Posterior Muscular Imbalances in Swimmers"

2007—International Brain Injury Conference: Vancouver, Canada
"Medical Aspects of Work Re-Entry / Applications of Work Physiology"

2008—IARP (International Association of Rehabilitation Professionals)
Conference: Los Angeles, California "Applications of Work Physiology Science to Capacity Test Predictions to Full Time Work – Eight Hour Work Day Explained"

PRESENTATIONS CONTINUED:

2009—National Rehabilitation Education Conference: San Antonio, Texas
"Rehabilitation Educators Guide for Work Task and Activity of Daily Living: Using the Science of Full Time Work"

PROFESSIONAL CONTRIBUTIONS:

1976—Illinois Committee for Tennis Research
"Lateral Epicondylitis/Extensor Carpi Radialis Longus & Brevis Involvement To Tennis Elbow"

1976—United States Swimming Olympic Trials

1977—NCAA Track & Field Championships

1978—NCAA Track And Field Championships

1980—AAU Women's Water Polo Championships

1982—US vs. USSR Intentional Dual Meet

1982—Indiana University Natatorium—Indianapolis
(Venue Coordinator and Host Trainer)

1982—USS Long Course Championships

1983—International Invitational

1983---NCAA Men's Championships

1983---USS Short Course Championships

1983---Junior Olympic National Championships

1983---Masters National Long Course Championships

1984—NCAA Women's Championships

1983---US Olympic Swimming Trials

1984—United States Swimming Olympic Team

1984—Member United States Swimming Executive Council
For Sports Medicine

1984 Thru 1993—Associate Editor for The Journal Of Swimming Research

PROFESSIONAL CONTRIBUTIONS CONTINUED:

1986—Head Trainer 1986 World Aquatic Championships

1988—United States Swimming Olympic Team

1988—NCAA Men's And Women's Swimming Championships

1990—United States Swimming Medical Control Goodwill Games

1991—Adjunct Faculty Western Washington University

1992—Adjunct Faculty Central Washington University

1993—Adjunct Faculty The Union Institute; Cincinnati

1998—Adjunct Faculty Western Washington University

1999—Adjunct Faculty Central Washington University

2000—The Foundation For Rehabilitation Education And Research/Southern Illinois University
"Rehabilitation Instrument Outcome Studies"

2001—'The Biomechanics and Physiology of Capacity Validation' staff and physicians of Group Health Cooperative, Occupational Medicine

2001—'Understanding Capacity Evaluations" Faculty and Students, University of Washington School of Medicine; Department of Occupational & Environmental Medicine

2001—"Validation of Capacity Evaluation Data for Impairment Determination', National Association of Disability Evaluating Professionals

2002—'Biomechanics and Physiological Foundations of Capacity Evaluations", National Association of Disability Evaluating Professionals

2002—"Quantification Techniques for Data Collection utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition." "Foundations of Validity and Reliability in Capacity Evaluation Testing." Queen Elizabeth Medical School, Faculty and Staff: Southeast Asian Community. (Note: Scheduled Presentation Postponed Due to Public Health Related Issues in Southeast Asia)

2002—"The Biomechanics of Shoulder Impingement Syndromes and Suggested Treatment Regimes"
Inservice presentation to the staff of Concentra Integrated Services and Johnston & Culberson, Inc.

2003—Adjunct Faculty Western Washington University

PROFESSIONAL CONTRIBUTIONS CONTINUED:

2003—'Understanding Capacity Evaluations" Faculty and Students, University of Washington School of Medicine; Department of Occupational & Environmental Medicine

2004—Adjunct Faculty, Western Washington University

2004—Clinical Internship Site For University of Puget Sound Graduate Physical Therapy Program

2004—"Objective Quantification Techniques for Determination of Impairment Procedures Utilizing The AMA Guides to The Evaluation of Permanent Impairment, 5th Edition." National Association of Disability Evaluating Professionals

2004—"Work Physiology and MTM Principles." Independent Disability Employment Assessment Specialists.

2004—"Evaluating Tolerance For Full Time Work Using The Principles of Work Physiology." Signal Administrators Conference

2004—"Work Physiology and Quantification Procedures Related to Capacity Evaluation Tests." Washington State Department of Labor and Industries Claims Management Staff and Professional Staff

2004—"Work Physiology and Quantification Procedures Related to Evaluation Tests," and "Shoulder Biomechanics Related to Injury Prevention and Rehabilitation." Boeing Corporation Professional Medical Staff and Professional Vocational/Disability Staff.

2005—Western Washington University—Measurement and Evaluation Class Lecture/Seminar: "Science, Theory, and Applications of Human Performance Measurement and Evaluation"

2005—Broadspire
Nurse Case Managers and Claims Adjusters (CEU Certified)
"Work Physiology Science and Practical Application for Physical Capacity Evaluations"

2005—Adjunct Faculty Oregon State University

2005—Adjunct Faculty Western Washington University

2005—Kent Martin Productions; Ron Arnone President, Tarzana California Television Documentary Series, "SportsTech"; Advisory Board

2005—University of Southern California Women's Swim Team; Coach Mark Schubert Rehabilitation Consultant

PROFESSIONAL CONTRIBUTIONS CONTINUED:

2006—Adjunct Faculty Central Washington University

2006—Seattle University Center for the Study of Sports and Exercise Advisory Board

2007—Adjunct Faculty Western Washington University

2007—Department of Labor and Industries – Case Manager In-service Biomechanical Applications to Work

2008—Approach Management Services, Retro Participants' Brain Trust, "A Forum for Brainstorming Solutions to Problem Claims" – Introducing Forensic File & Video Review in Worker Compensation

2008—Department of Labor and Industries – Case Manager In-service Biomechanical Applications to Work

2008—University of Puget Sound Department of Exercise Science Human Performance – Senior Class Seminar – Practical and Professional Applications in the Field of Biomechanics

PUBLICATIONS TO TEXT:

Scientific Aspects of Swimming; Edited By J. Troup

The Competitive Swimming Guide—Japanese; Edited By N. Taguchi

Clinics In Sports Medicine; Published By W.B. Saunders January 1984—Edited By G. Ciullo
"The Etiology of Scoliosis Related To Swimming"

Quantification Techniques of Data Collection Utilizing the AMA Guides to the Evaluation of Permanent Impairment: Comparing the 4th and 5th Editions-The National Association of Disability Evaluating Professionals. Inclusion to the 2nd Edition of "Guide to Functional Capacity Evaluation with Impairment Rating Applications"

Hatherleigh Press: Directions in Rehabilitation Counseling. Managing Editor- Ms. Stacy M. Powell. Textbook Chapter- "Functional Capacity Evaluations: The work physiology component for predicting full time work." 2007; 18 (16): 177-186.

PUBLICATIONS TO NEWSLETTERS:

The Lone Stars Masters Newsletter—Staying Healthy

PUBLICATIONS TO NEWSLETTERS CONTINUED:

The Sports Medicine Guide—Young Athletes
Published By The Mueller Athletic Company

Sports Medicine Swimming News—United States Swimming Editor: Ted Becker

PUBLICATIONS TO JOURNALS:

Swim Magazine—Health And Fitness Column
RMS Publications, Los Angeles California

PHOTO PUBLICATIONS:

Swimming World Publications—Commercial Advertisement
The Councilman Company 1981, 1982

Kinesiology By Cooper And Morehouse—Technical Application Of Photography For Sequential Biomechanics In Clinical Disability Evaluation

RESEARCH & CLINICAL PUBLICATIONS:

Biomechanical Assessment Of Motor Ability In Normal And Motor Impaired Children
Co-authors with J. Cooper, W. Leimohn
Biomechanics V., University Park Press 1975

Abduction/Adduction Device For Hand Rehabilitation
Physical Therapy 1975

Relationship Of Body Composition To Swimming Performance In Female Swimmers
Co-Authors With J.M. Stager, L. Cordain
J. Swimming Research 1984

Differences In Body Density And Somatotypic Characteristics Of Women As A Function Of Exercise And Menarche
Co-Authors With D.K. Howell, J.M. Stager, D. Robertshaw Federation Proceedings 1984

PVC Pipe Aerobic Exercise Equipment
Clinical Management 1985

"Musculoskeletal Adaptations in Swimming: The relevant relationship between vertebral and shoulder function."
Proceedings of the International Symposium on Sports Sciences: Nagoya, Japan 1985

RESEARCH & CLINICAL PUBLICATIONS CONTINUED:

Quantification Of Lumbar Function: Isometric And Multi-Speed Isokinetic Trunk Strength Measures In Sagittal And Axial Planes In Normal Subjects
Co-Authors With S. Smith, T. Mayer
Spine 1986

Increases In Age Of Elite U.S. Women Swimmers From 1972-1984
Co-Authors With J.M. Stager, J.E. Edwards
Medicine And Science In Sports 1988

Submitted For Publication--Bilateral Gross Grasp Test.
"The Use Of Higher Order Motor Skills For Test Validation"

In Process: Quantification Reliability of Hand Grasp and Finger Pinch Strength Gauges

In Process: Current Research of Diastolic, Systolic and Heart Rate Measures and Response Patterns to Physiological Work, Stress and Pain.
Co-Authored with Dr. V. Robert May, RHD, Richmond, Virginia. Journal of Forensic Vocational Analysis

Bilateral and Anterior-Posterior Muscular Imbalances in Swimmers
Co-Authored with Rod Havriluk
Biomechanics and Medicine in Swimming X
J.O. Vilas-Boas, F. Alves, A. Marques (eds.)
Portuguese Journal of Sport Sciences, June 2006 Volume 6, Supl. 2, pgs.327-338

Applications of Work Physiology Science to Capacity Test Prediction—Full Time Work / 8 Hour Work Day.
Journal of the International Association of Rehabilitation Professionals
November 2008, The Rehabilitation Professional 15(4) pgs. 45-56

COPYRIGHT PUBLICATION:

Human Performance Monitoring/Programming For Physiological Reconditioning 1991

Human Performance Bibliography 1989
(Citations As Of January 2007—25,000)

Physical Capacity Evaluation Software For Online Data Collection, HDP, 2000, 2004, 2007 (Trademark Pending)

PATENT PENDING:

Stereoscopic Gross Grasp Device—A Quantified Device For Determination Of The Effects Of Carpal Tunnel

PATENTED:

Field Calibration Device For Hand Dynamometers—Patent Number 5,945,590

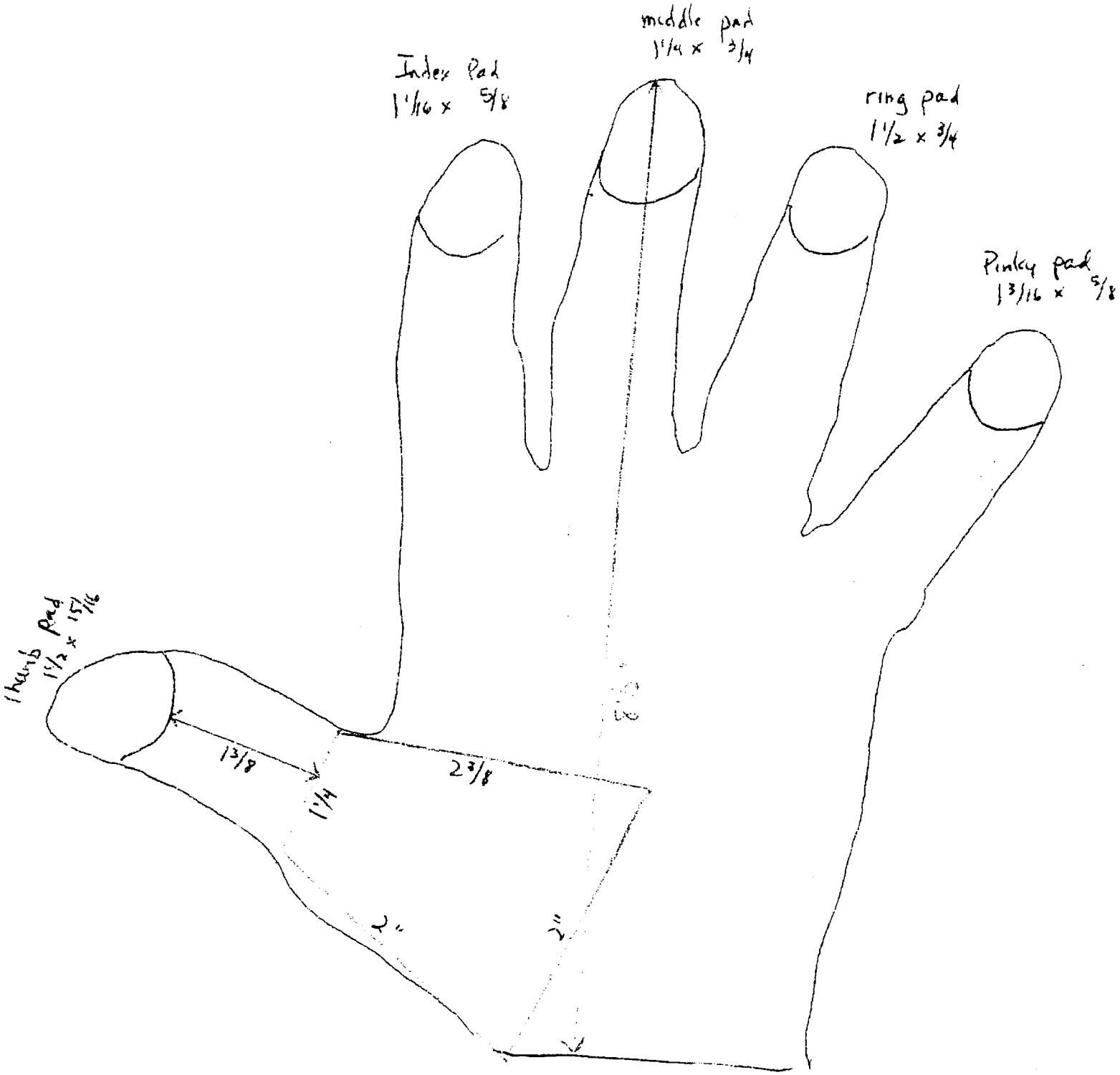
PATENTED CONTINUED:

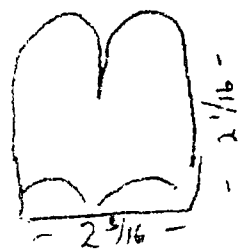
Pinch Grip Dynamometer Field Testing Calibration Stand—Patent Number 6,868,710j

TRADEMARKS RELATED TO PROFESSIONAL CAPACITY EVALUATING PRODUCTS:

-'TRADEMARK REGISTRATION: EVALUATION INNOVATION RESEARCH REHABILITATION'
-'CALI-GRIP'
-'CALI-PINCH'
-TRADEMARK REGISTRATION: HDP / HARD DATA PROTOCOL
-TRADEMARK: BEC BIOMECHANICAL

Revised 2/2009

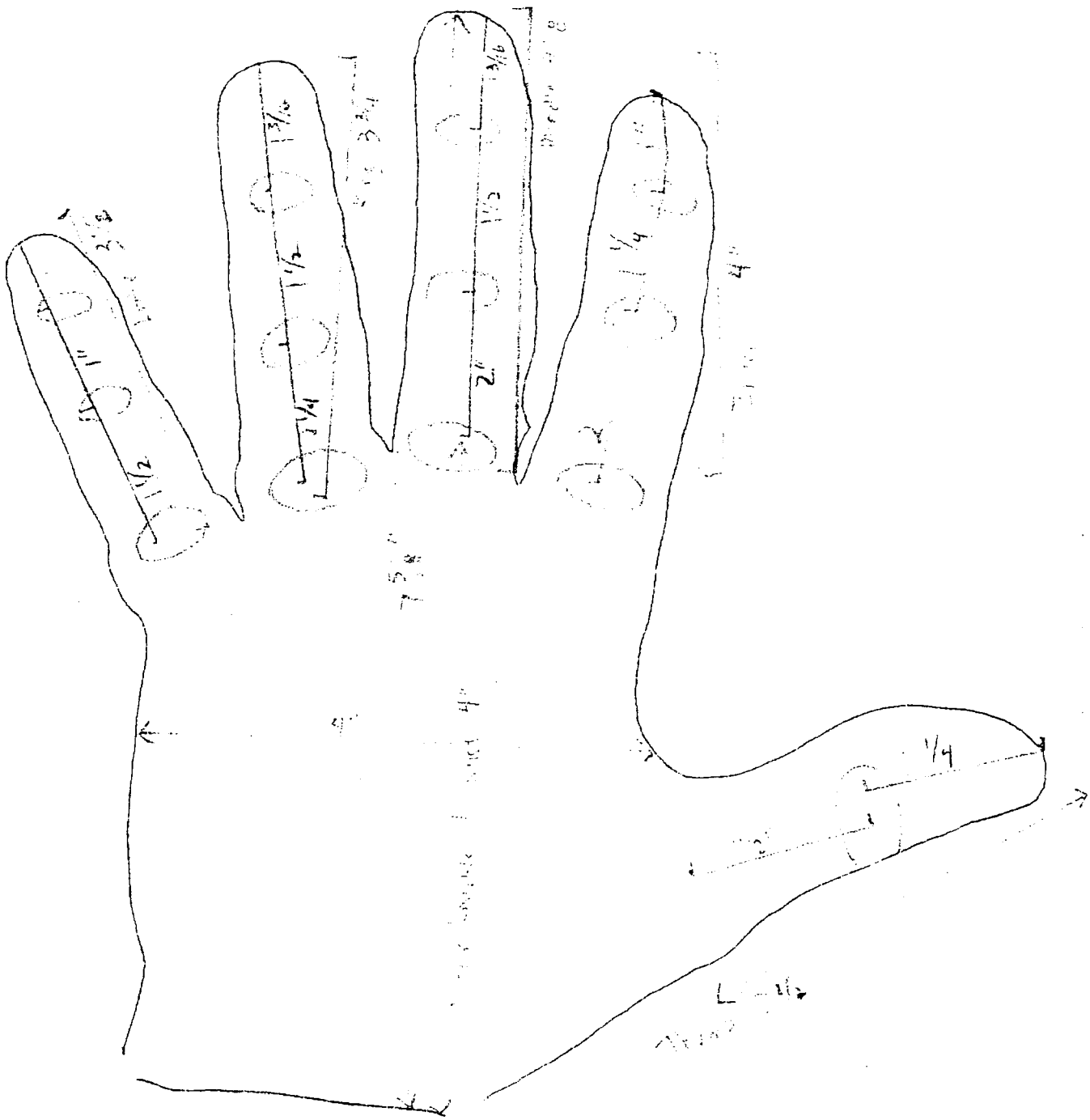




Kandle Square

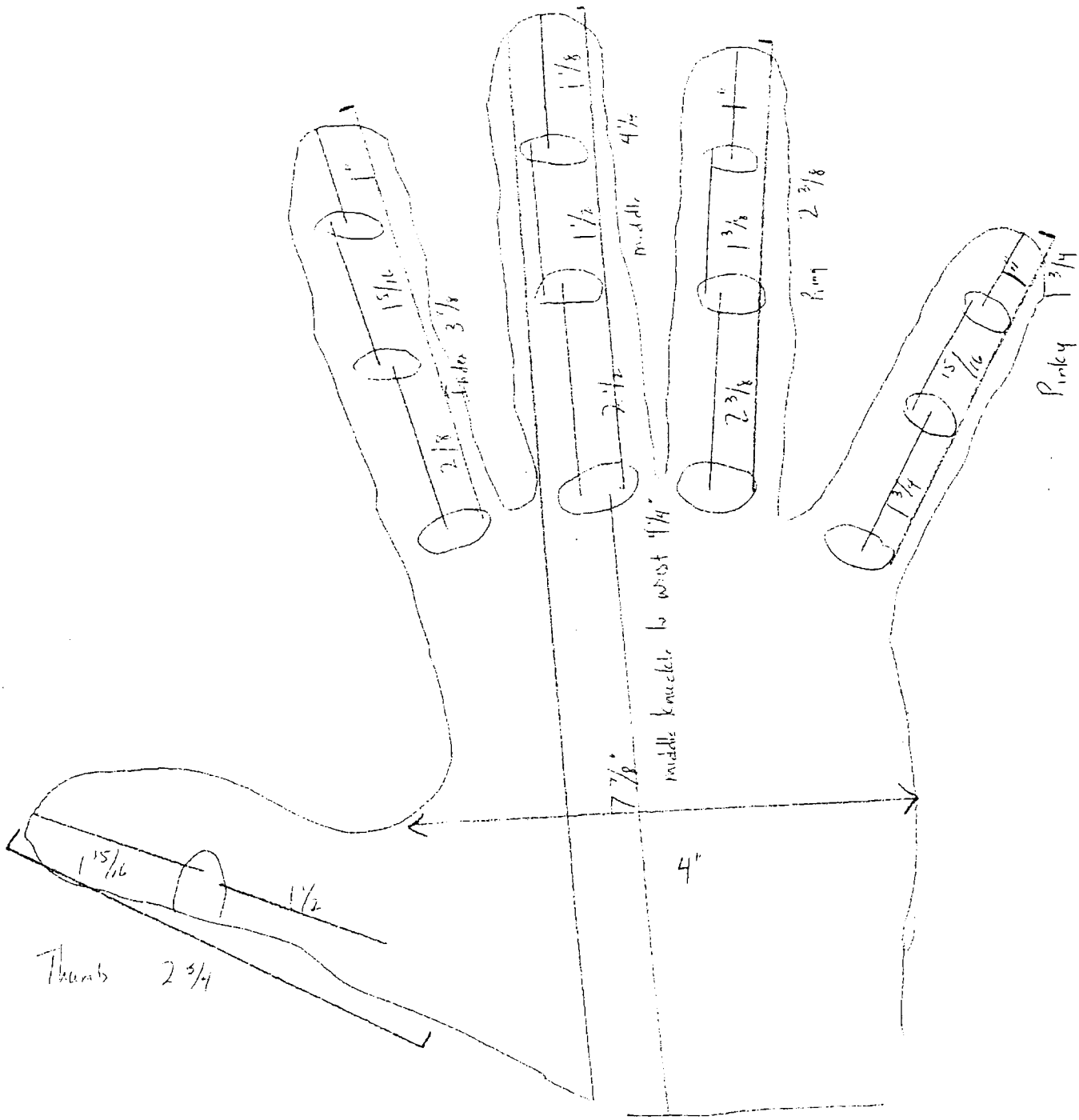
EXHIBIT B

left Palm



Fist ~~[illegible]~~ x 2 3/4
3 3/4

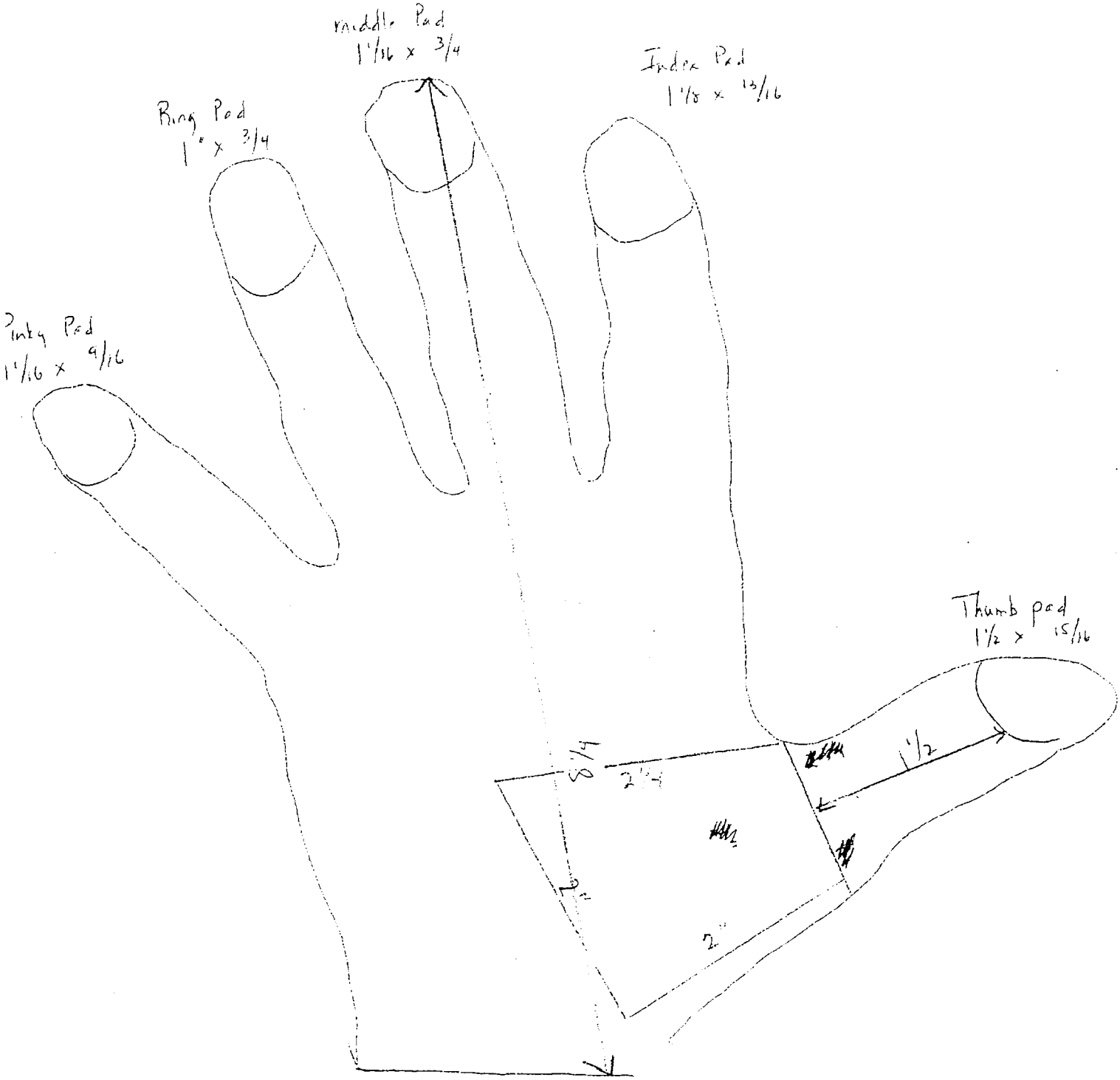
Left Back



Fist 3 9/16 x 2 1/4

Knuckle Square

Right Hand Back


Middle Pad
1 1/16 x 3/4
Index Pad
1 1/8 x 13/16
Ring Pad
1" x 3/4
Pinky Pad
1 1/16 x 9/16
Thumb pad
1 1/2 x 15/16
1 1/2
2 1/4
2"
2"

Right Palm

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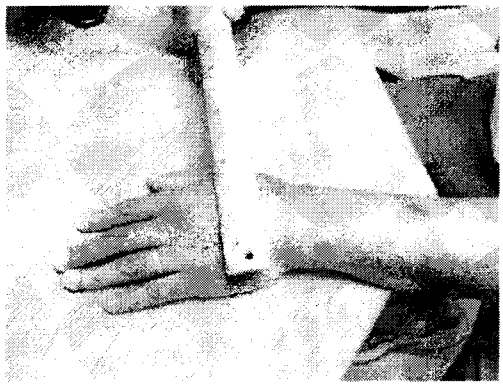
1A



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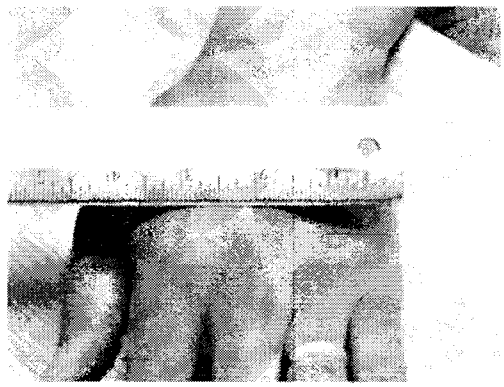

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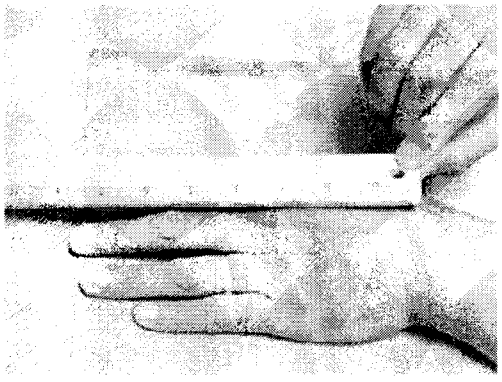

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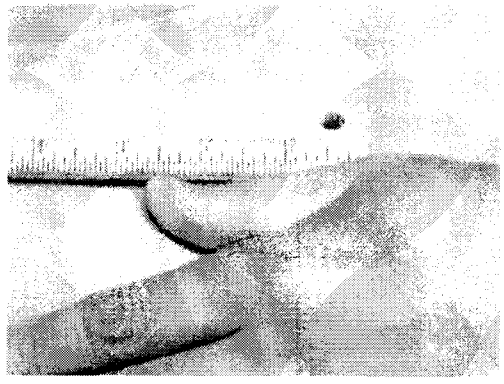

EXHIBIT C

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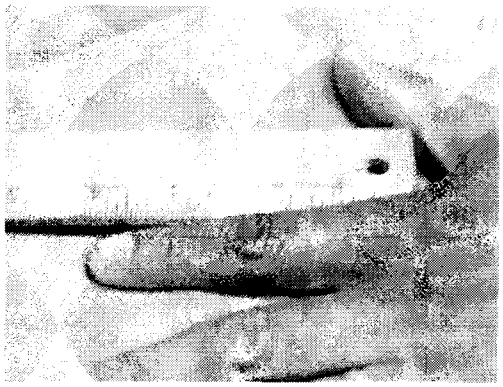

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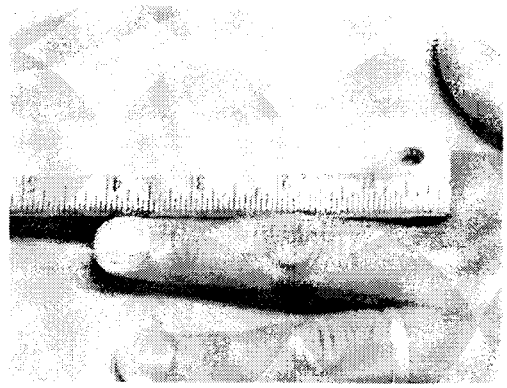

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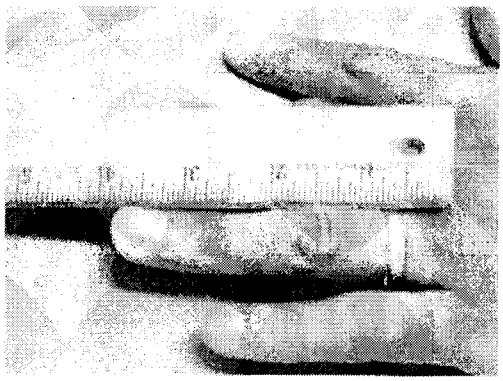

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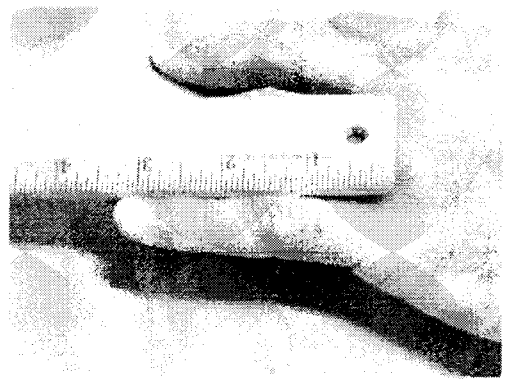

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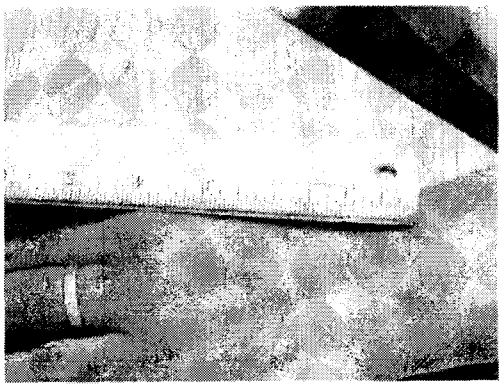

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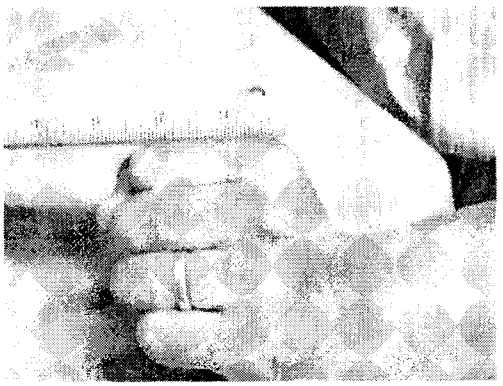

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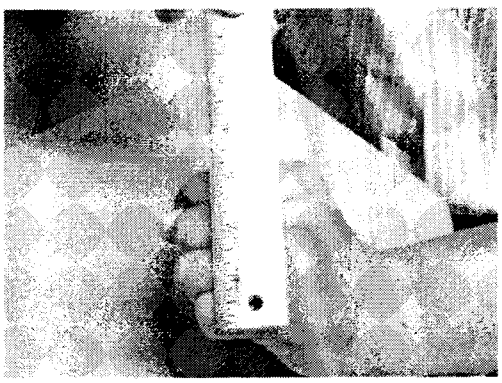

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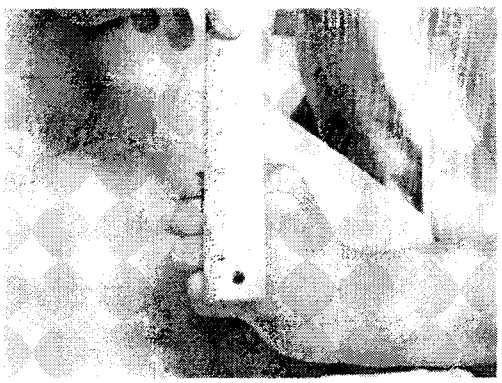

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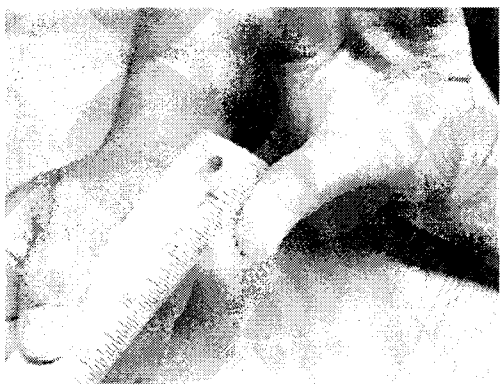

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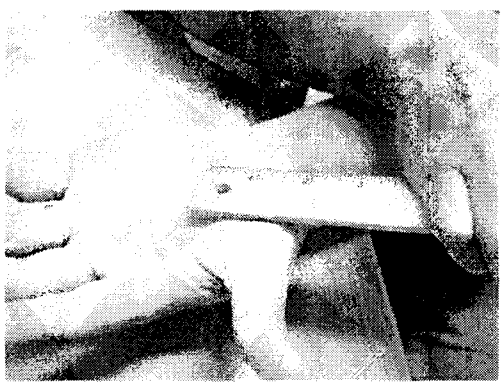

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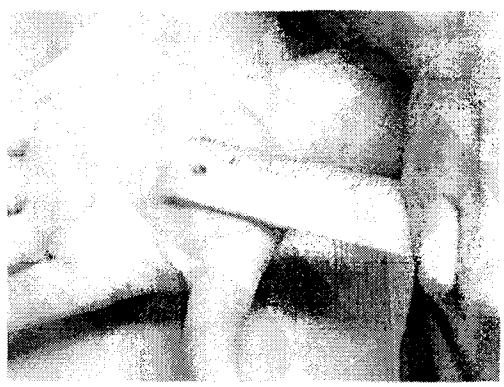

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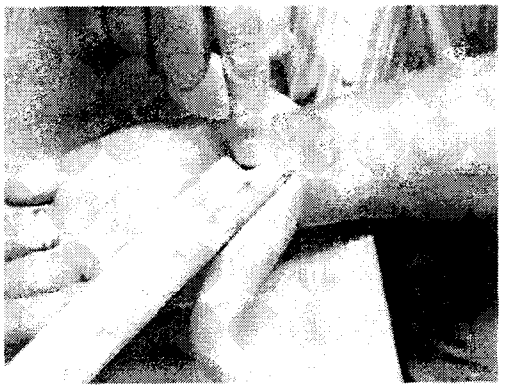

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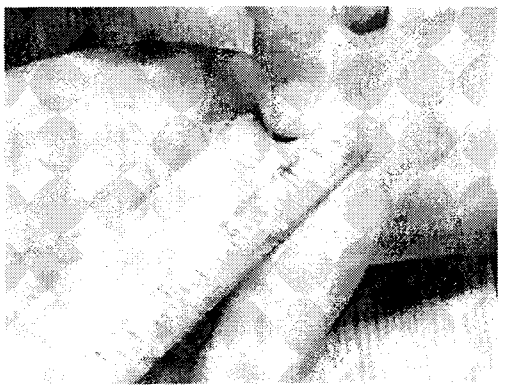

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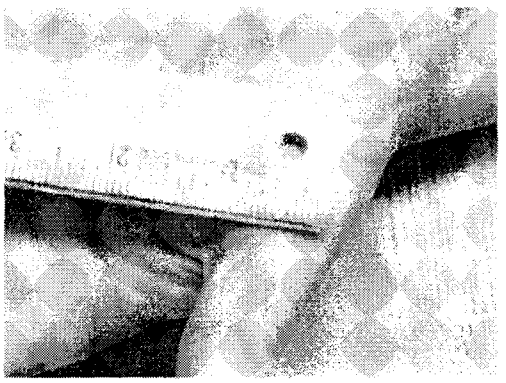

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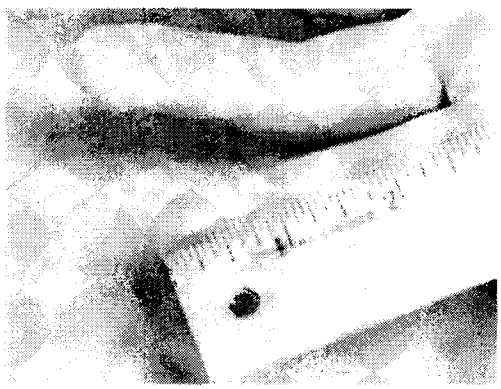

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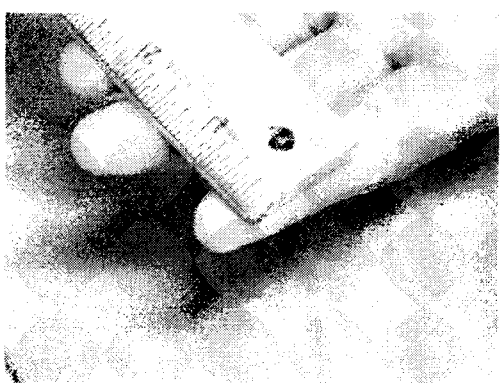

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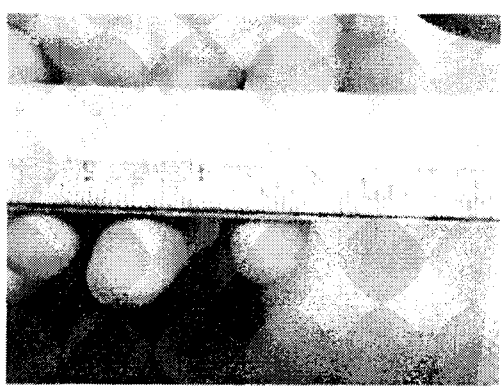

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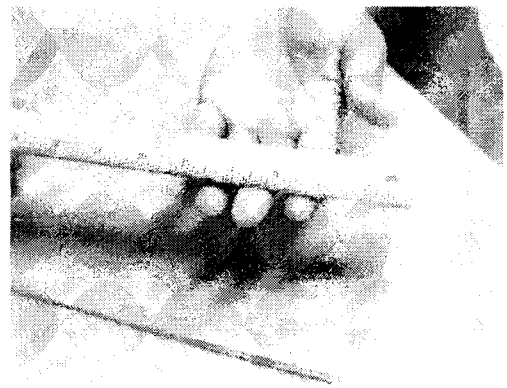

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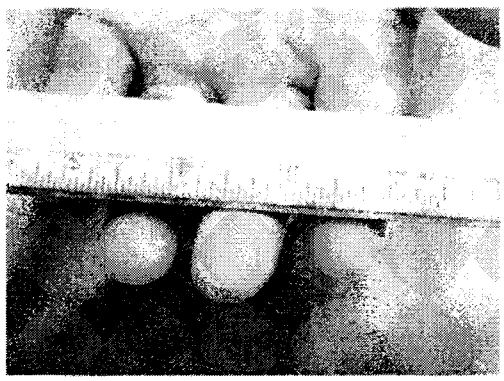

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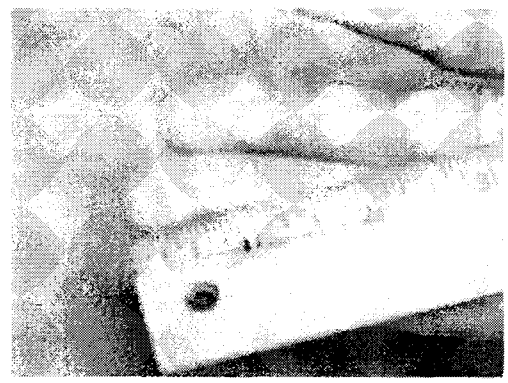

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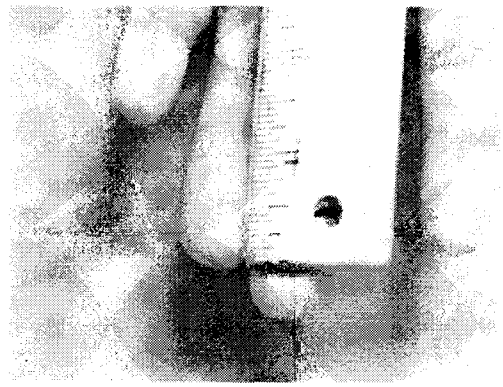

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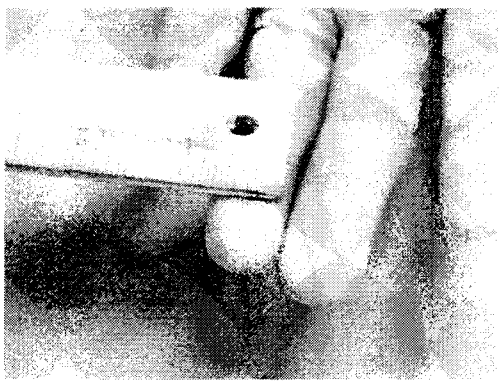

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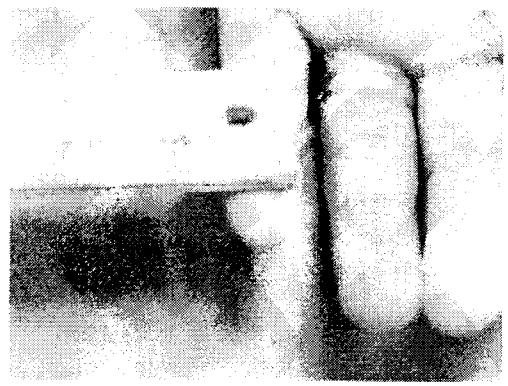

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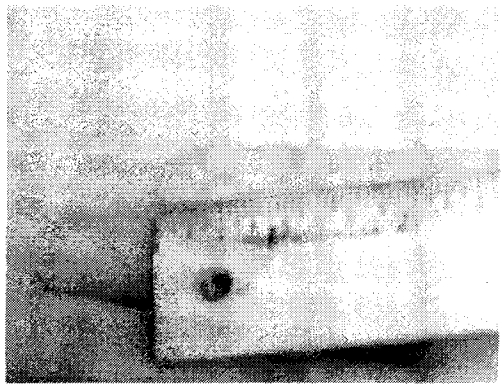

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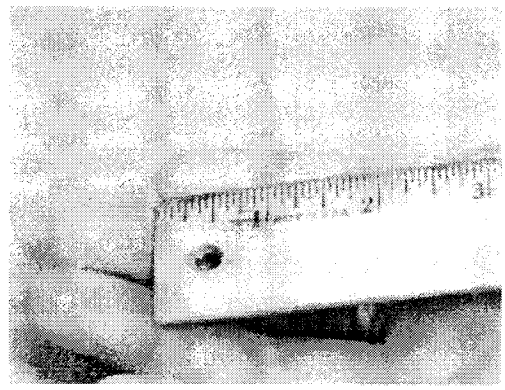

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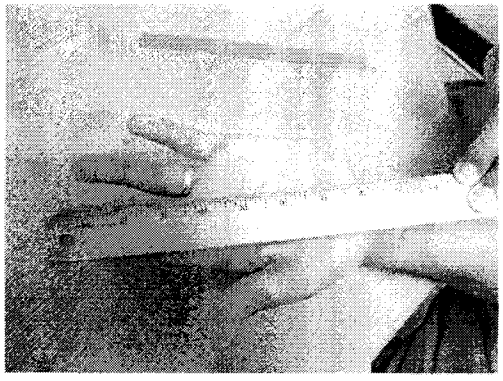

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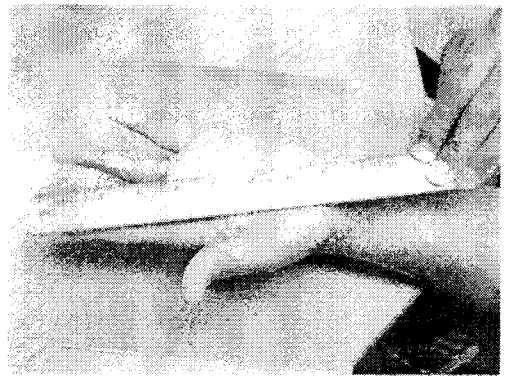

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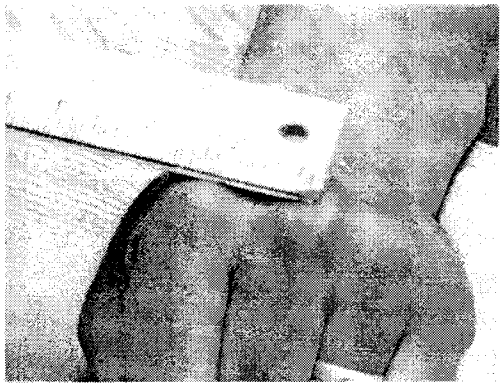

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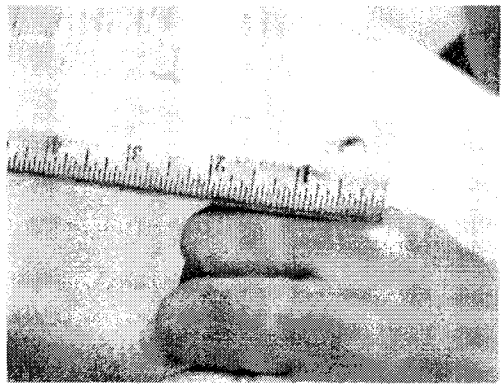

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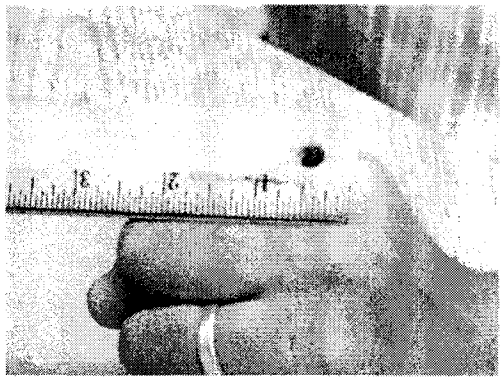

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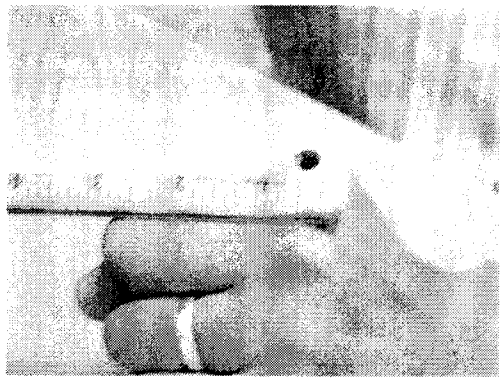

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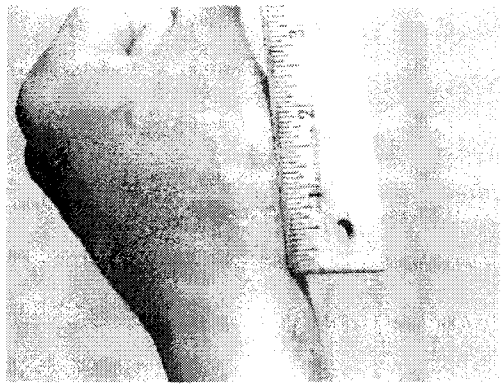

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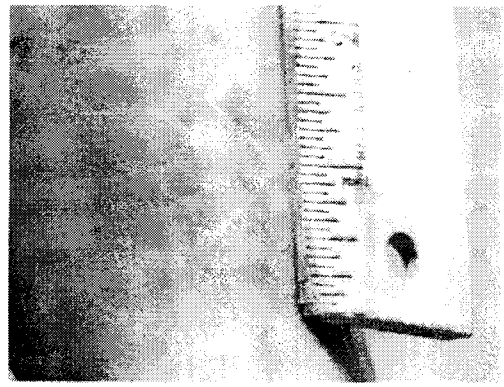

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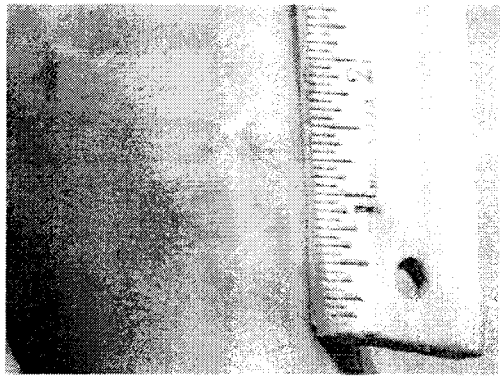

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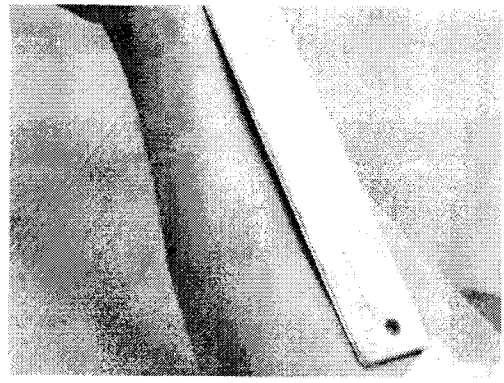

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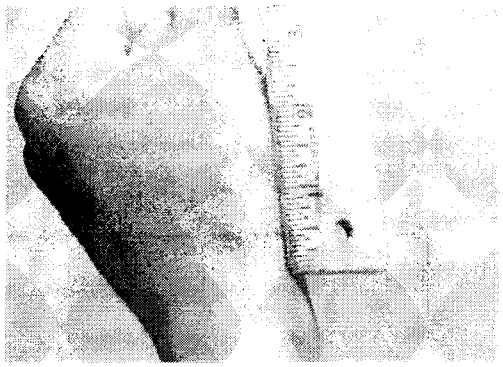

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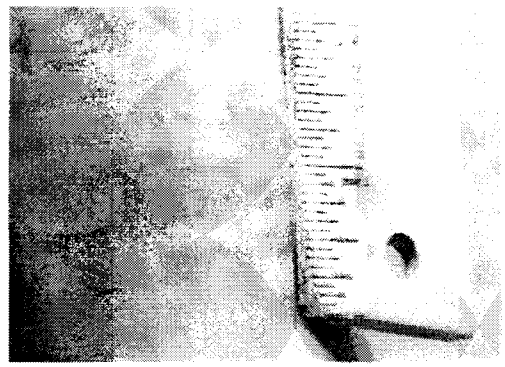

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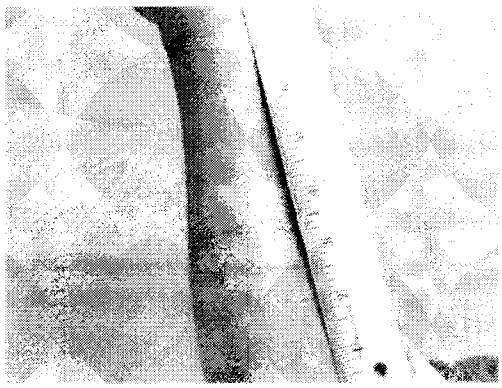

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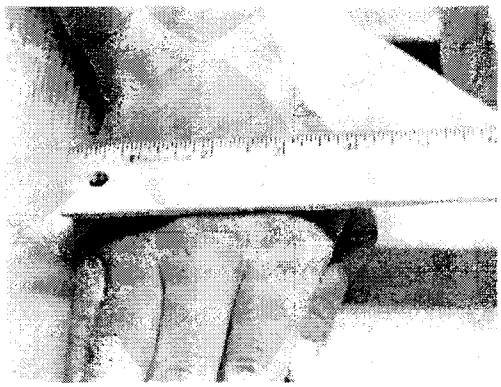

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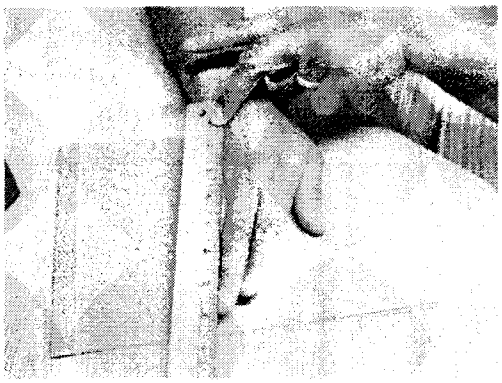

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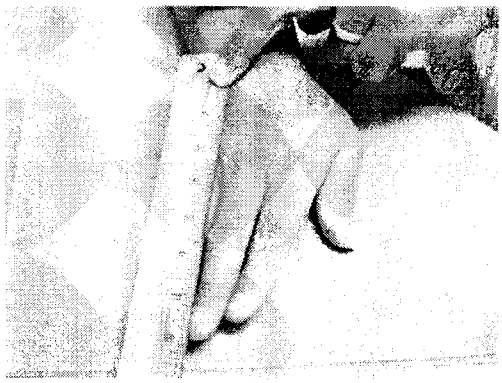

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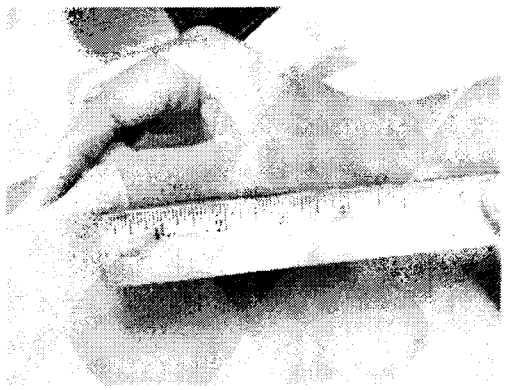

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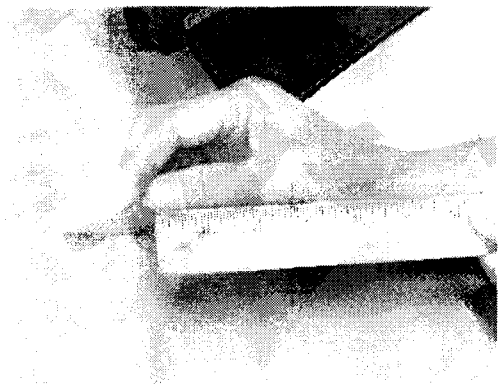

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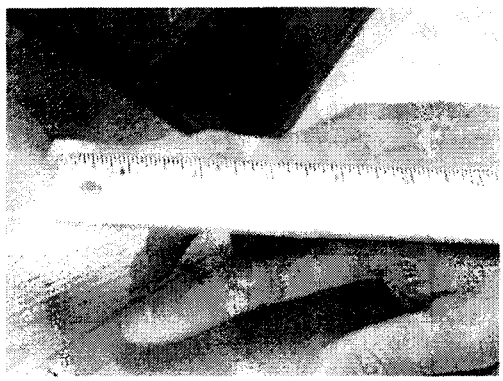

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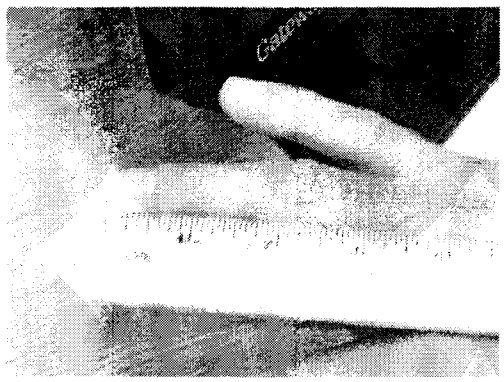

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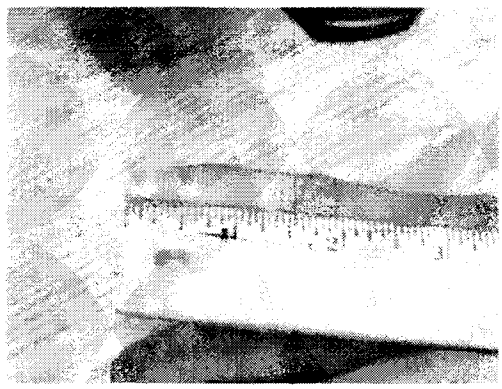

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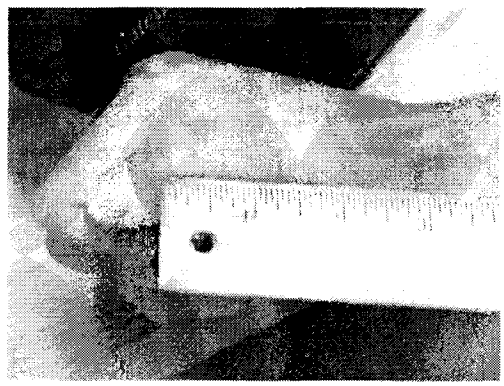

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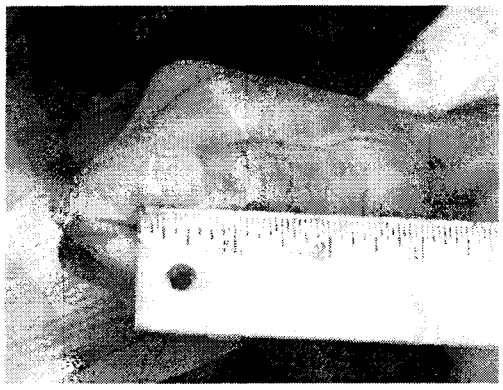

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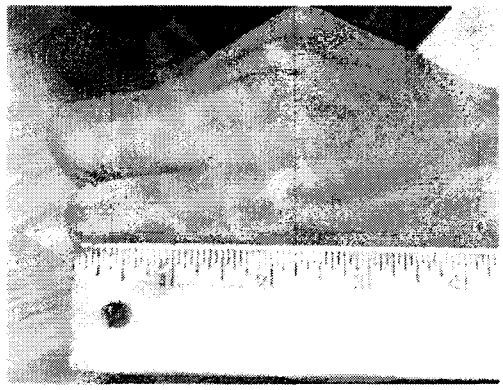

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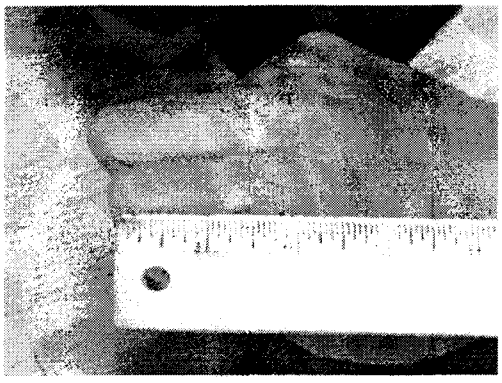

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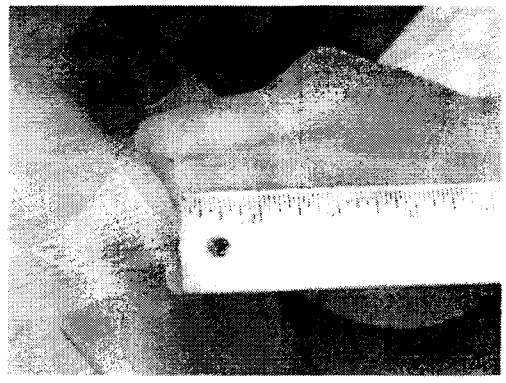

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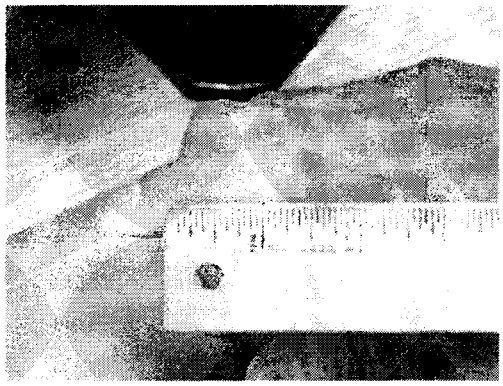

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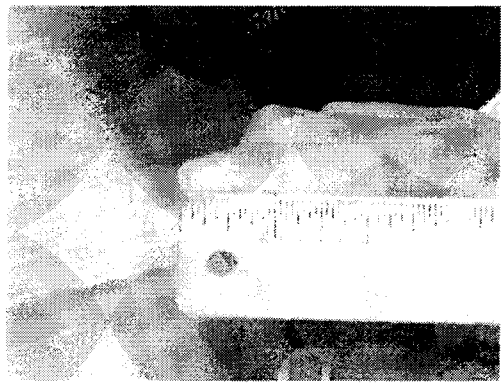

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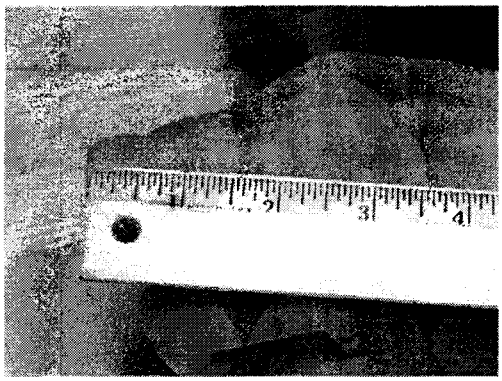

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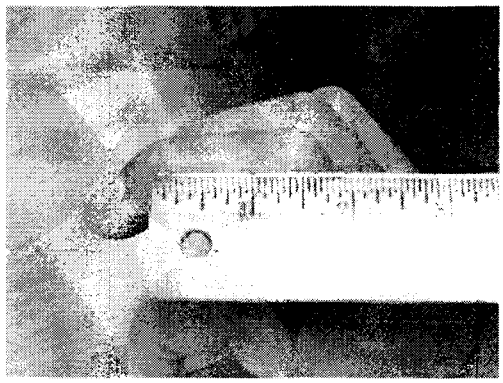

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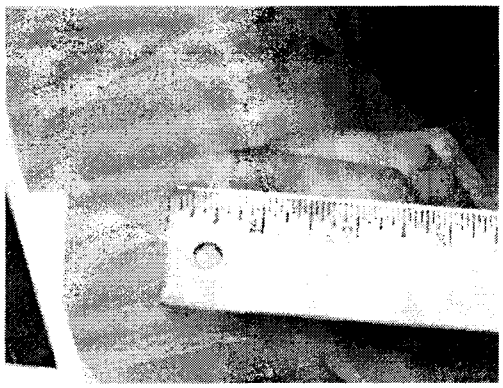

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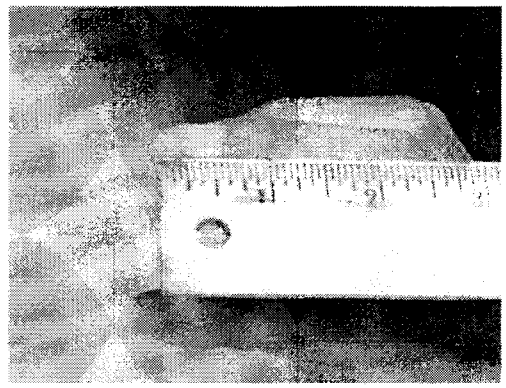

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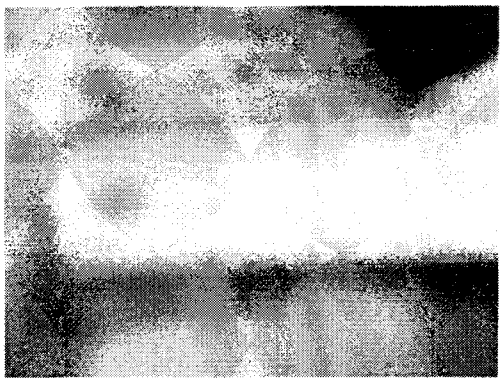

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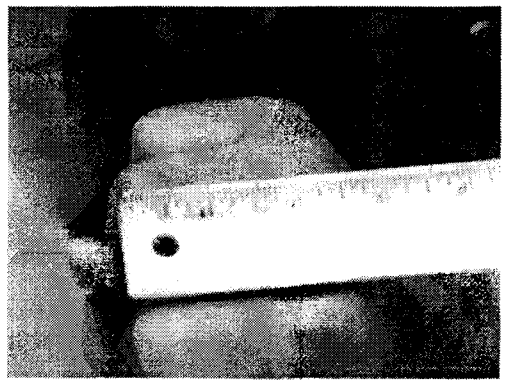

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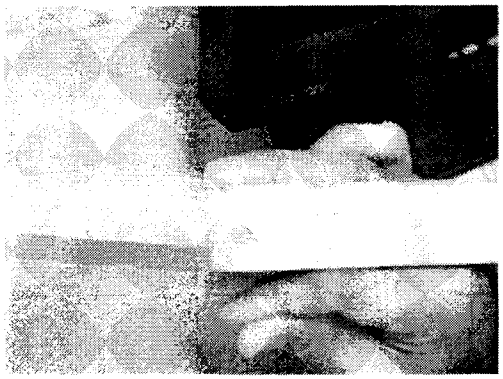

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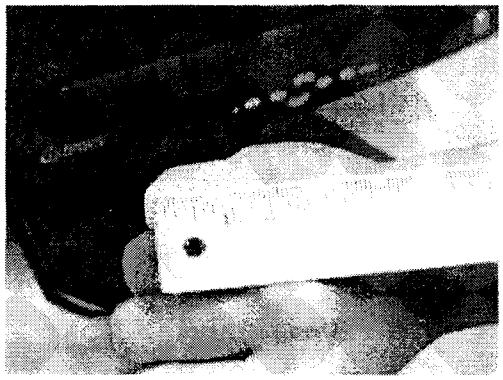

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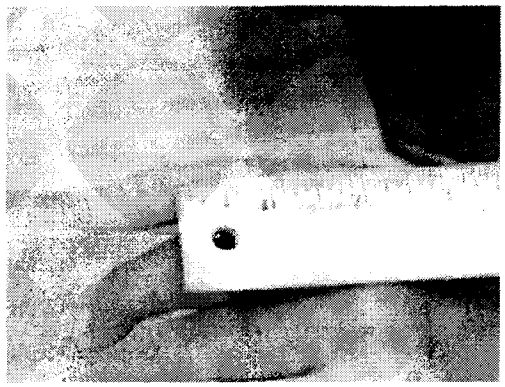

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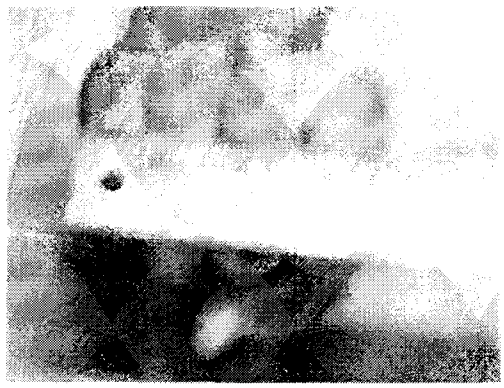

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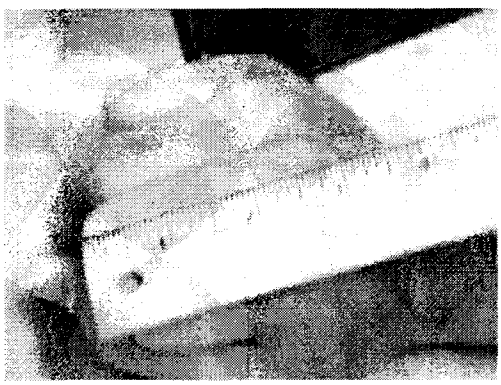

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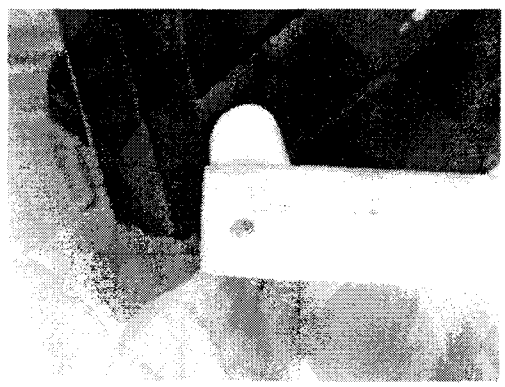

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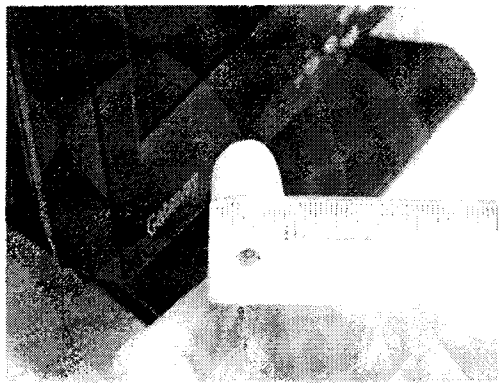

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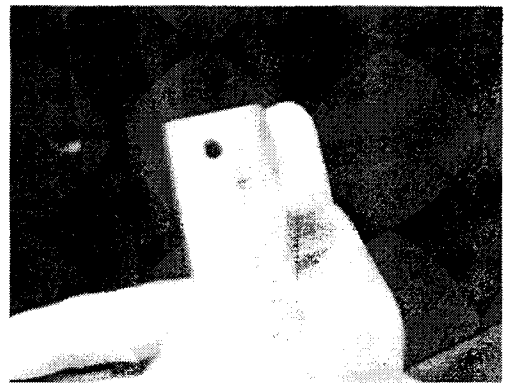

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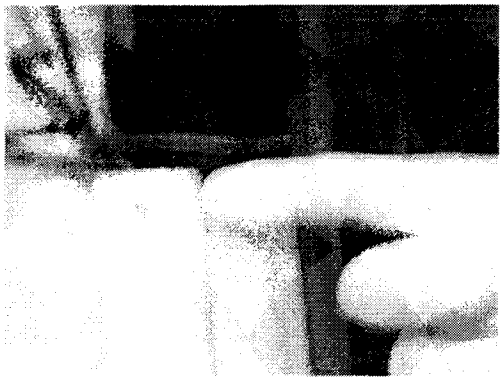

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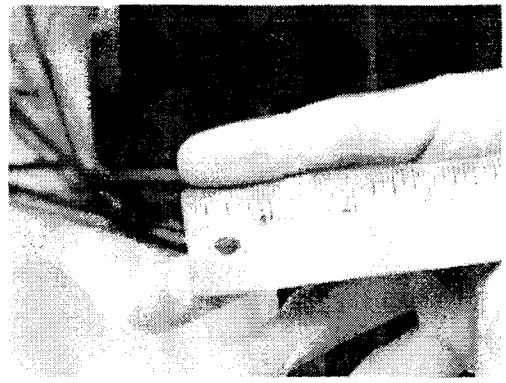

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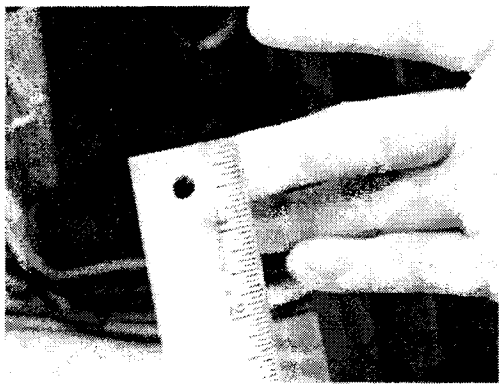

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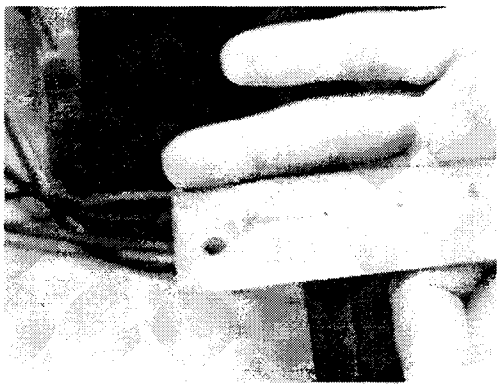

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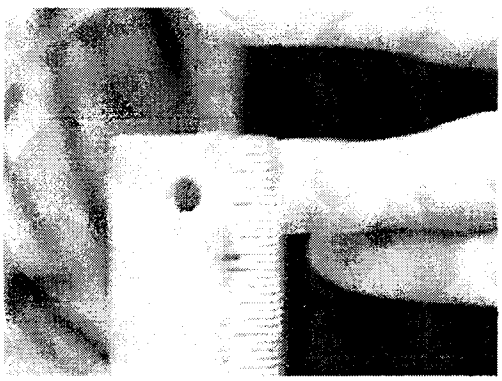

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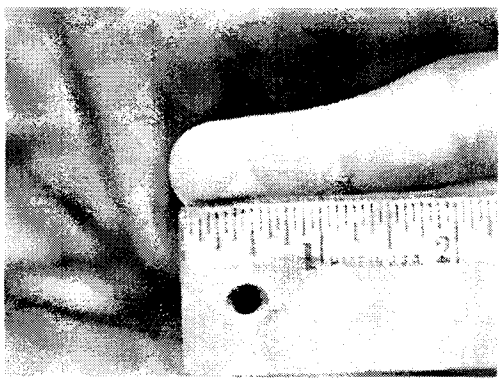

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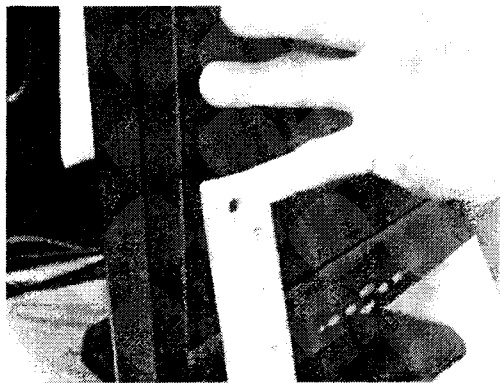

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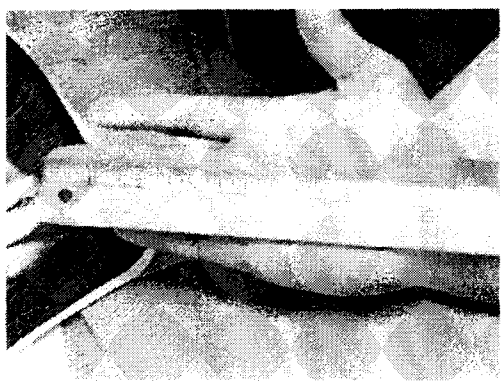

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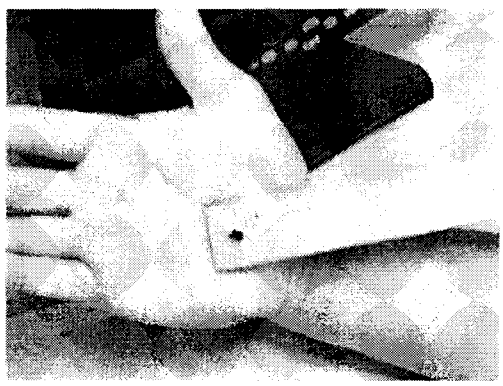

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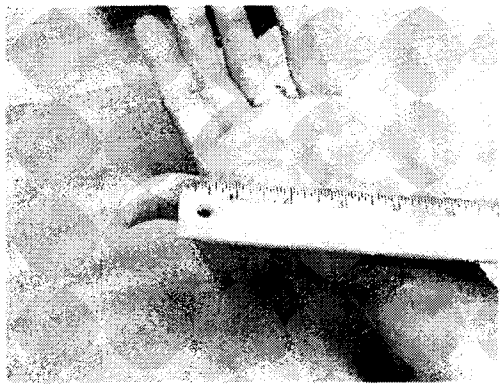

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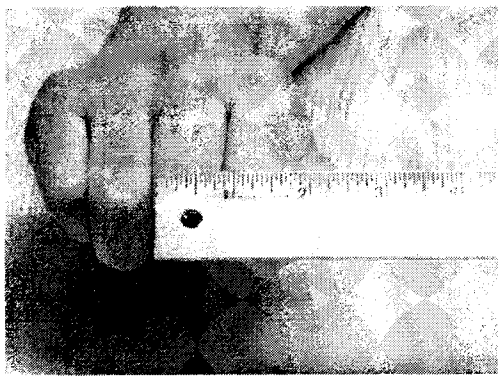

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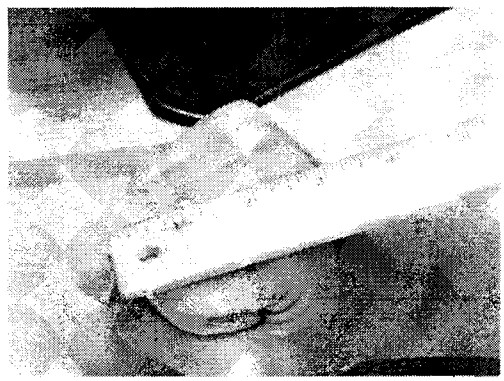

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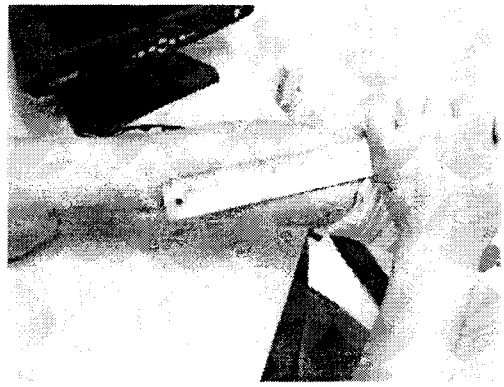

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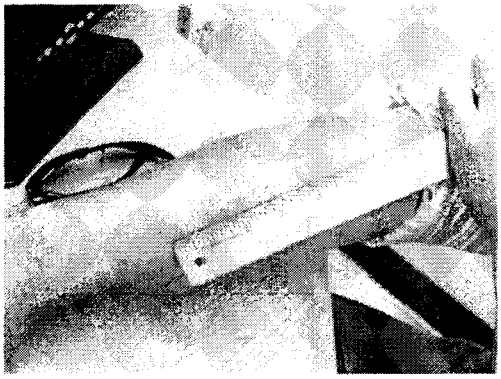

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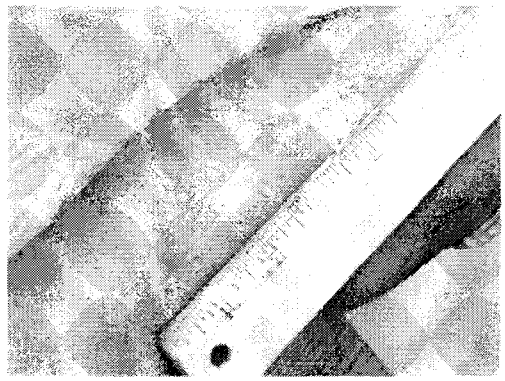

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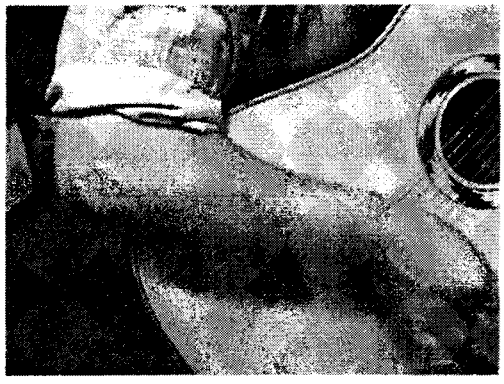

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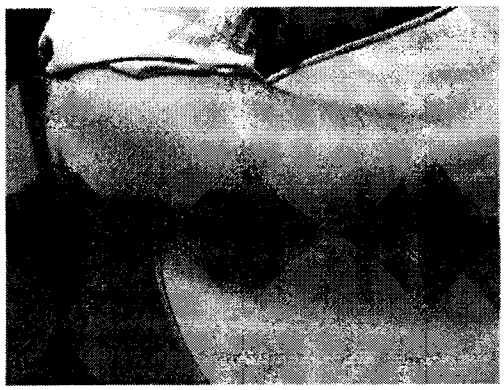

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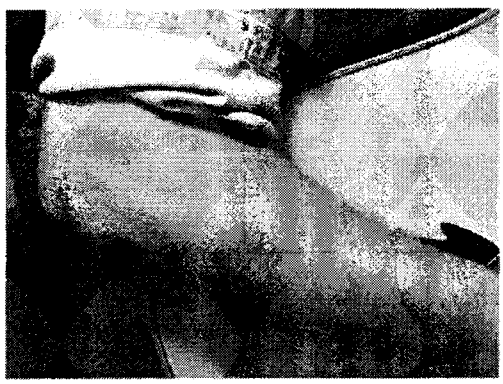

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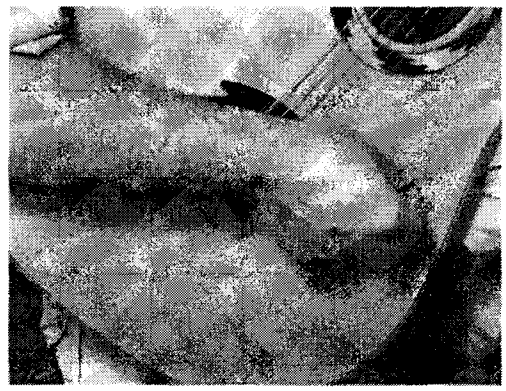

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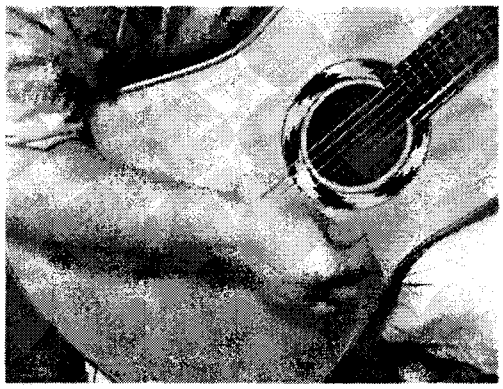

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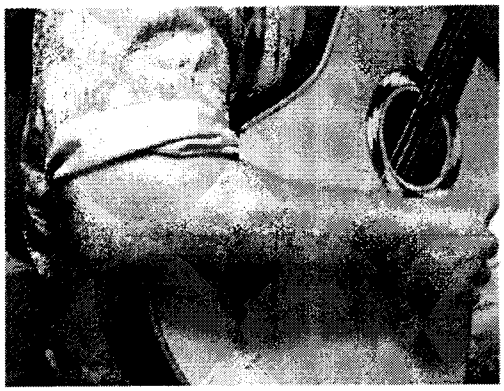

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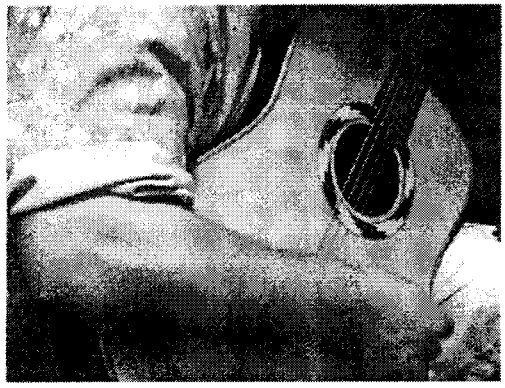

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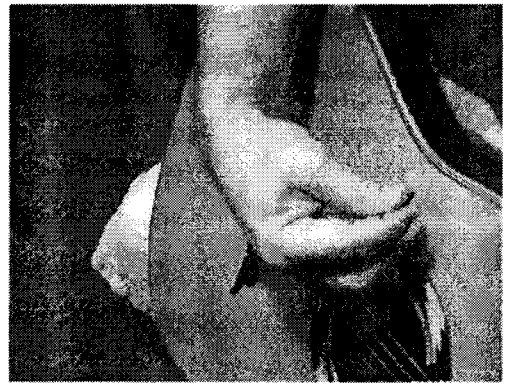

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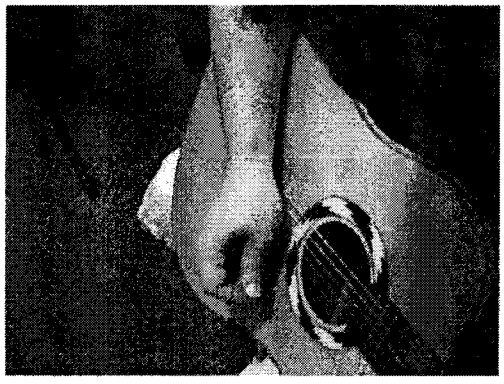

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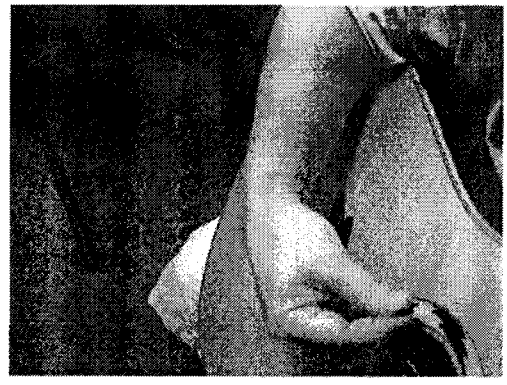

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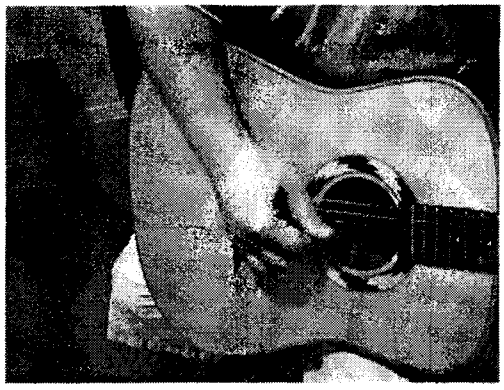

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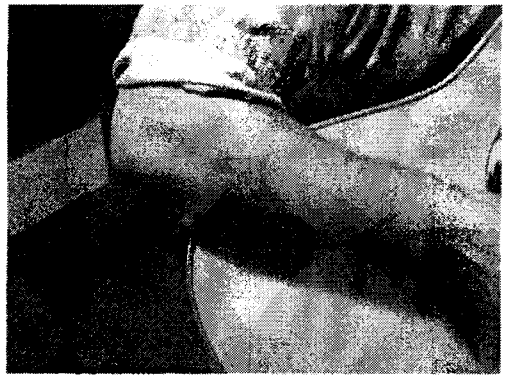

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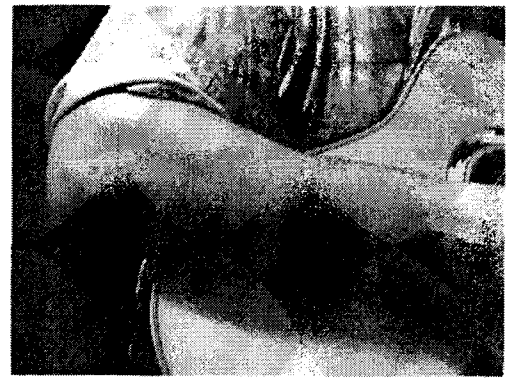

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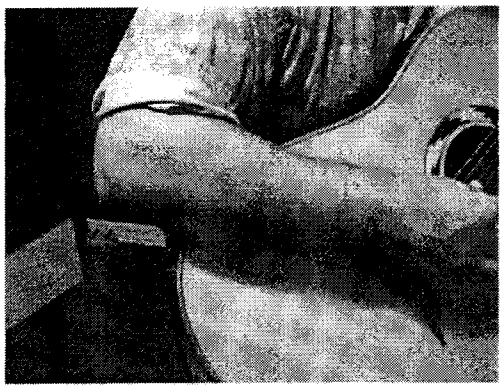

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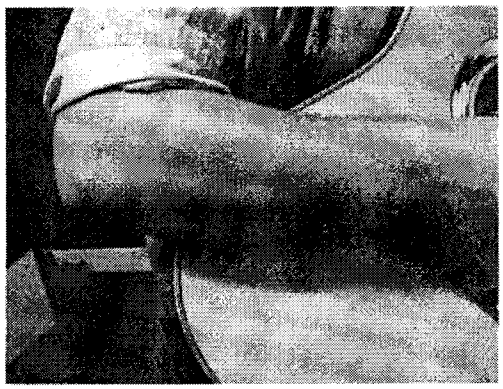

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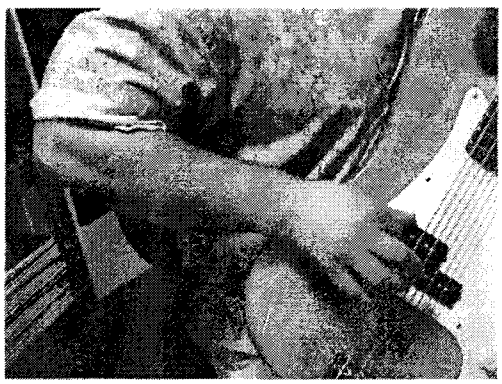

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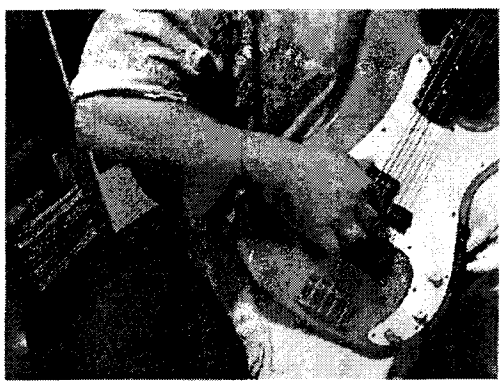

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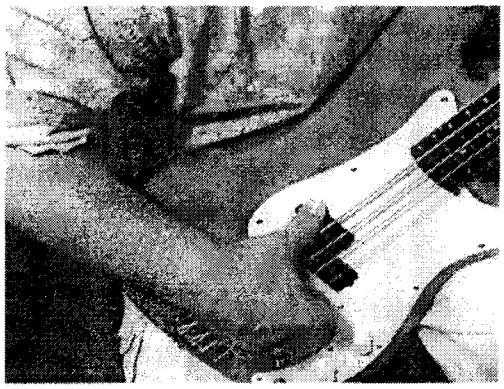

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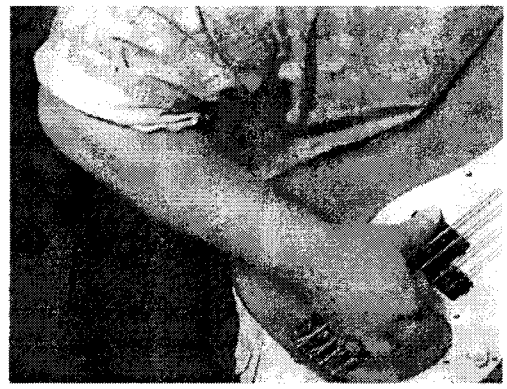

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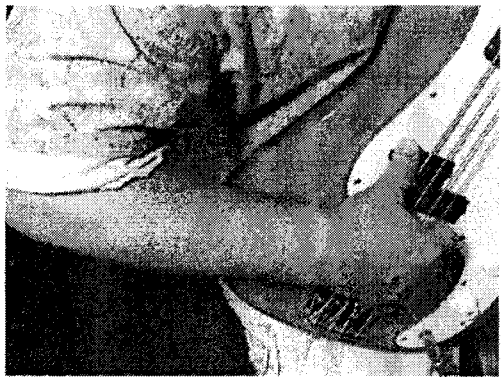

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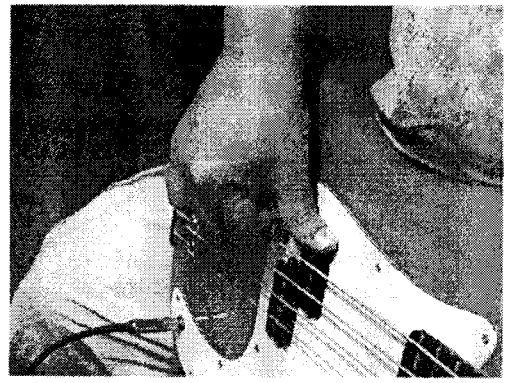

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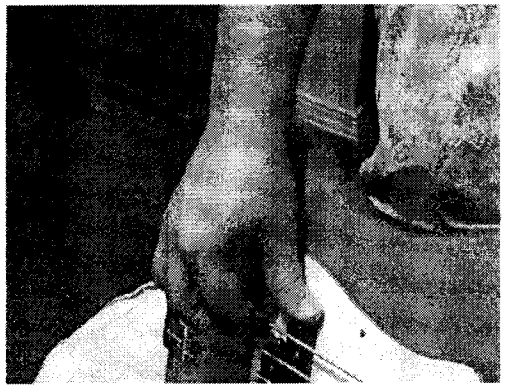

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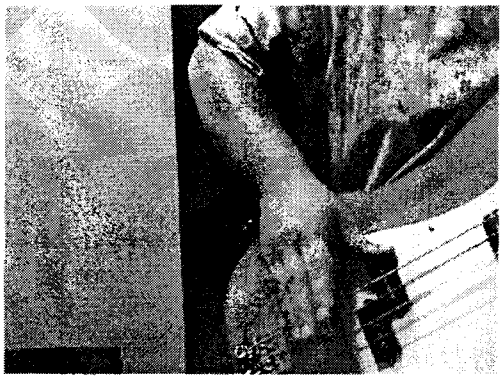

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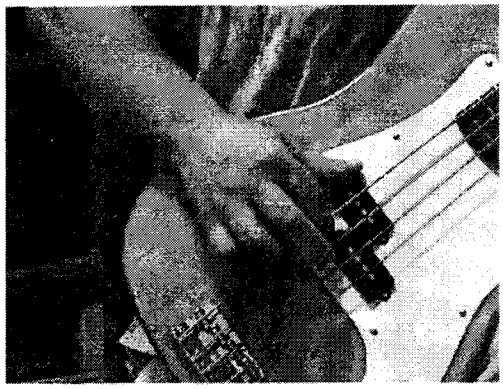
Simone Lui 2

1III



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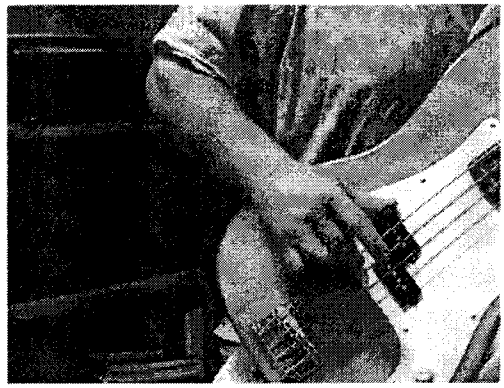

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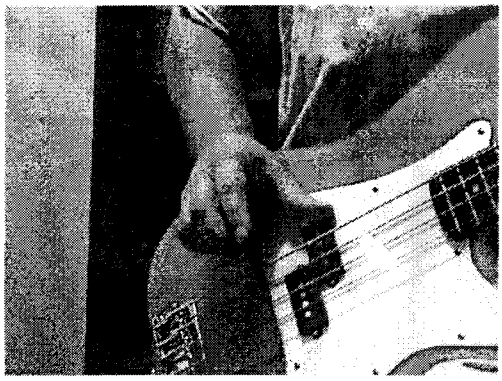

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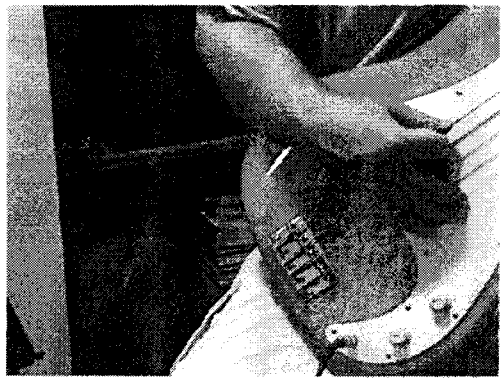


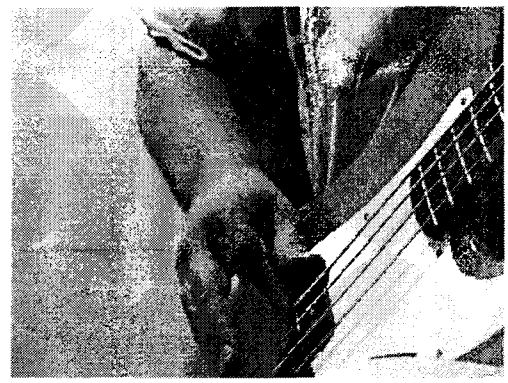
Simone Lui 2

1MMM

1NNN

1OOO

1PPP



Simone Lui 2

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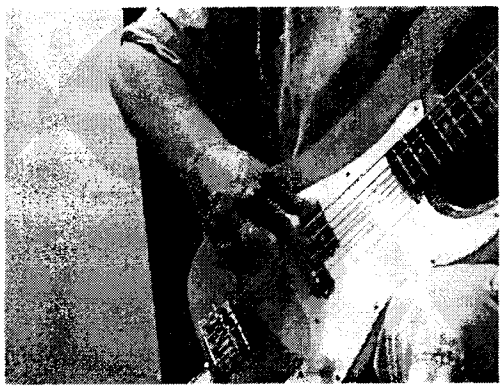

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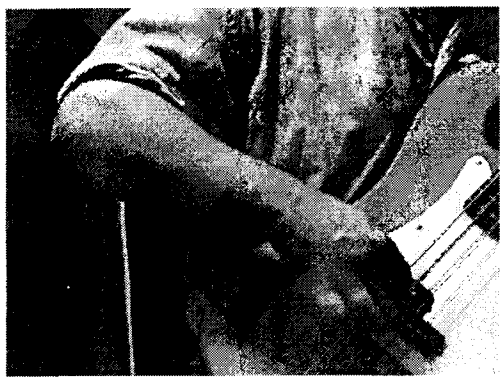

Simone Lui 2

ITTT

IUUU

Simone Lui 2

2A

2B

Simone Lui

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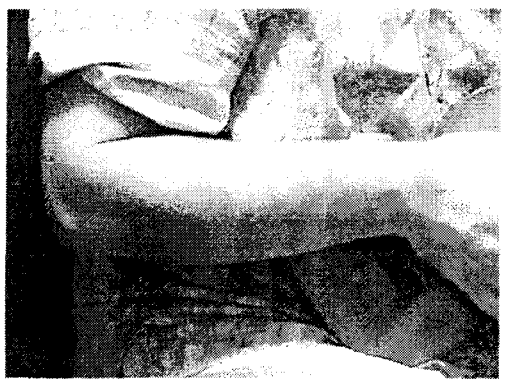

1P

Simone Lui

1Q

1R

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Simone Lui

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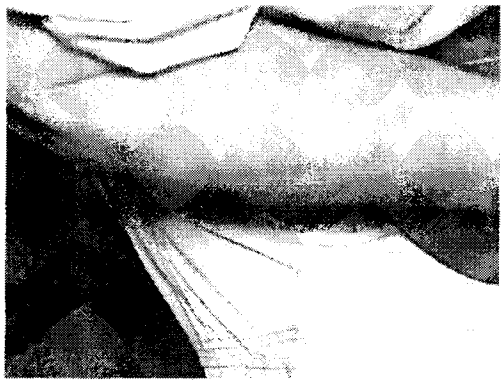

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF SIONE LUI**

Sione Lui declares as follows:

1) I am the defendant in this case.

2) On September 30, 2000, I badly fractured my right arm while playing rugby. After surgery, my arm was put in a cast. When the cast was removed in the middle of November, my arm muscles were noticeably smaller. My right arm was very weak.

3) At my trial, Jaimee Nelson testified that I helped her move a heavy dresser in November or December, 2000. She was mistaken about that. I could not have lifted anything with my right arm while I was in a cast, and that arm was too weak for heavy lifting for many months after the cast was removed.

4) On Saturday, February 3, 2001, I played music at a Luau at the church of my friends, Paul and Lynette Finau. This event had been planned for some time. As the date approached, I realized that I could not play guitar or ukulele as I normally would. My right arm could not take the strain of strumming those instruments.

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DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

5) Instead, I rented a bass for the Luau because my arm could tolerate bass playing. The bass did not fit in as well with the Luau style of music, but it was the best I could do at the time. Attached as exhibit A is a copy of the receipt for the rental of the bass from Bellevue American Music on January 26, 2001.

6) I would be willing to testify to these facts at an evidentiary hearing or a new trial.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed on McNeil Island, Washington:

10-20-09
Date

Sione P. Lui
Sione Lui

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

BELLEVUE AMERICAN MUSIC
14340 NE 20TH
BELLEVUE, WA 98007
425 641-5005

ALL SALES FINAL
NO CASH REFUNDS

Ticket#617196 Cus#163423 Jan 26 01
Usr 006 Slp 077 Rg#709 Dr#703 Time 05:01

Item Number	Qty	Price	Ext
*10	1	20.00	20.00
MILESTONE/MICROBASS			
Subtotal			20.00
Tax			1.72
Total sale			21.72
077:100	1		
CHECK			21.72

STONE LUI
719 KIRKLAND AVE
KIRKLAND, WA 98033

Thank you for shopping at
Bellevue American Music

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF ROBERT TALBOTT**

Robert Talbott declares as follows:

1) I am a general contractor. I know Sione Lui because he was the heating subcontractor on some of my projects.

2) In the summer of 2006 I hired Sione to play at a wedding reception for my son. He brought a couple of other musicians with him. Sione played ukulele, guitar, and keyboards. I do not recall seeing him play bass.

3) I would be willing to testify to these facts at an evidentiary hearing or a new trial.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed in Redmond, Washington:

10/5/09
Date

Robert Talbott
Robert Talbott

APP. 17

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, **Defendant/Appellant.**	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF MARC JENSEN**

Marc Jensen declares as follows:

1) I am an electrical engineer. I work for Hewlett Packard as a liaison to Microsoft. My office is on the Microsoft Campus.
2) I know Sione Lui because we attended the same church in the Bothell/Woodinville area. Our sons were both involved in the Cub Scouts.
3) On February 15, 2005, our Cub Scout troop held a "blue and gold banquet" with a luau theme. Sione showed up with a small group of musicians. He played a keyboard. I did not see him play a bass.
4) I would be willing to testify to these facts at an evidentiary hearing or a new trial.

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DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Oct 7, 2009 Woodinville, WA

Date and Place

Marc Jensen

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF JULIA MAKOUS**

Julia Makous declares as follows:

1) I know Celese and Sione Lui because Sione's son, Enoch ("E.J."), played on the same baseball team as my son.

2) In late August of 2005 I helped arrange an open house for Serial Solutions, the company with which I worked at the time. The event had an Island theme. I hired Sione and his father-in-law to play music.

3) I recall seeing Sione play a keyboard at this event. He may also have had a ukulele with him. I do not recall him playing bass.

4) I would be willing to testify to these facts at an evidentiary hearing or a new trial.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

10-22-09 Bothell, WA
Date and Place

Julia Makous

LAW OFFICE OF
DAVID B. ZUCKERMAN
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705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **DECLARATION OF RICHARD POPE**

Richard Pope declares as follows:

1) I represented Sione Lui in his divorce from Julie Lui. I also represented Elaina Boussiacos in her divorce from James Negron. At the time, I was an attorney licensed to practice in the State of Washington.

2) When I learned that Sione Lui had been charged with the murder of Elaina Boussiacos, I sent an email to Anthony Savage informing him that I had information that would be useful to his case. An accurate copy of that email, dated April 25, 2007, is attached as Exhibit A. Mr. Savage responded by letter, assuring me that he would sit down and talk with me as soon as he had received discovery. An accurate copy of his letter, dated April 26, 2007, is attached as Exhibit B. Mr. Savage never did contact me.

11/18/2010
RZP
(initials)

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

Primary issues are over the parenting plan. My client is still undecided over primary custody, but would probably favor it continuing to be with your client, provided certain concerns were addressed. One major worry is that your client might suddenly move far away, as was done two years ago. This was detrimental to the child then and would be now as well. She also believes that your client's girlfriend is doing most of the parenting and the environment would be much less favorable if that relationship terminated. There would need to be long-term flexibility -- for example, if my client remarried or otherwise, she would have much better ability to spend time with the child, as opposed to being a single working adult as is presently the case. I would point out my client still has major concerns about your client as a parent, given the history of incidents with violence and police.

I do think these matters could be worked out. One thing that makes it difficult is the problems with communications that appear to be the case between our clients. I will try to respond with more specific proposals in the very near future.

Thank you for your careful attention in this matter.

Very truly yours,

Richard L. Pope, Jr.

cc: Elaina M. Negron

July 16, 1996 – Mr. Abolofia sends me a reply to my July 13, 1996 letter.

July 23, 1996 – Mr. Abolofia sends me a letter stating that the trial date will be assigned on August 2, 1996, instead of July 26, 1996, as judge will not be available.

August 1, 1996 – Desiree Irene Dibene leaves James Patrick Negron and takes their daughter with her. This event would have happened on or before this date, as this is the starting date for James' child support obligation in the January __, 2002 paternity order.

August 16, 1996 – Mr. Abolofia sends a follow up letter to myself, saying that the only real issues are the parenting plan and child support. He requests that I send him a proposed parenting plan and for the parties to exchange financial information.

September 5, 1996 – Probable date that I sent undated proposed parenting plan signed by Elaina to Mr. Abolofia. The document properties show the WORD file was last modified on "Thursday, September 05, 1996, 4:29:22 PM".

October 16, 1996 – Mr. Abolofia sends me an original and one copy of his proposed Decree of Dissolution, and Findings of Fact/Conclusions of Law. Requests that I either sign them and return them to him, or contact him if there are any disagreements.

November 21, 1996 – Mr. Abolofia sends follow-up to his October 16, 1996 letter.

December 5, 1996 – Mr. Abolofia schedules hearing for December 13, 1996 to enter uncontested dissolution decree, and mails and faxes notice to myself. (fax sent about 9:59 a.m.) Obviously, Mr. Abolofia is in receipt of the Decree of Dissolution and Findings & Conclusions, which I have signed and mailed back to his office.

December 13, 1996 – Mr. Abolofia has agreed Decree of Dissolution, Findings & Conclusions, and Parenting Plan entered by the Commissioner Johnson, and sends copy of them to me with a cover letter. Parenting Plan gives James Patrick Negron primary custody, with Elaina getting every other weekend. There is no child support order, with Decree and Findings saying Elaina doesn't have to pay child support. Mr. Abolofia says that Commissioner Johnson said a child support order was needed, and that he would draft that document and send it to me the following week for approval. Mr. Abolofia never does this, and it wasn't something that I thought was important at all to have done. Note that final decree (drafted by Abolofia) changes Elaina's last name to **Boussakios**.

May 29, 1999 – Desiree Irene Dibene is apparently back in San Bernardino County, California by this point in time. She gets multiple traffic violations in Case No. 217072DD on this date, including not using a seat belt, not using a child restraint, not having insurance and not having her license in her possession. However, she does not appear in court to answer these charges until January 16, 2002. Desiree agrees to do 180 hours of community service, in lieu of paying a $1,078.00, within a year, which she does.

January 31, 2000 – Juli Kathleen Lui filed Petition for Dissolution of her marriage to Sione Pisumu Lui in King County Superior Court No. 00-3-01358-6SEA. Sione signs an Acceptance of Service, which is filed with the petition for dissolution. Juli uses attorney Merrill Wayne Boyack, and Sione is initially pro se. Trial is set for December 18, 2000.

February 1, 2000 – James Patrick Negron and Jessica Manzo (born June 20, 1978 in Stockton, California) applying for King County Marriage License 20000201700900.

February 12, 2000 – James Patrick Negron and Jessica Manzo are married by Pastor Johnny C. Heredia of Victory Outreach Church, which was then located at 149 South 140th Street, Burien, WA 98168. This church is now located at 10821 – 1st Avenue, South, Burien, WA 98168, and Johnny and Kathy Heredia are still the pastors. This denomination consists of about 600 congregations through the world, with the website address of www.victoryoutreach.org. Completed marriage certificate filed on February 23, 2000 under King County Recording No. 20000223755600. "Reverend James & Jessica Negron" are now Associate Pastors of their Seattle congregation, and can be found on their Seattle website at www.victoryoutreachseattle.org/ministries.htm.

May 25, 2000 – Mr. Boyack faxes Sione 15 or 16 pages of paperwork, which apparently is a proposed parenting plan and child support order. While fax is addressed to "Sione Lui, Cardinal Heating", it is faxed to 425-635-7799, which is the fax number at Centris, the place where Elaina Boussiacos works. Unclear when Mr. Boyack faxed this.

May 26, 2000 – Elaina Boussiacos faxes Mr. Boyack's paperwork to my fax number of 206-365-3464. My fax machine says it was received 22:33 to 22:39, while Elaina's fax machine (imprinted "4256357799 Centris") says it was sent 22:25 to 22:31. Elaina's fax totals 20 pages, from the page numbers in my file (also from my fax log), and presumably includes several pages that were not in Mr. Boyack's fax to Sione of the previous day. I talked with Elaina about Sione's case before she sent this fax to me. Elaina introduced Sione as a client and did practically all of the communication on Sione's behalf.

June 7, 2000 – Elaina Boussiacos faxes 7 pages to my fax number of 206-365-3464. My fax machine says it was received 14:16 to 14:18, while Elaina's fax machine (imprinted "4256357799 Centris") says it was sent 14:07 to 14:08. This consists of the Petition for Dissolution filed by Mr. Boyack (5 pages), and a blank "Response to Petition" form (2 pages) – which Elaina may have gotten from the paralegal referred to in her last fax.

June 8, 2000 – Elaina Boussiacos faxes 1 page to my fax number of 206-365-3464. My fax machine says it was received at 16:39, while Elaina's fax machine (imprinted "4256357799 Centris") says it was sent at 16:30. This is the "Order Setting Original Case Schedule" (first page only). I recall asking Elaina to send me the case schedule.

June 9, 2000 – Elaina Boussiacos faxes 2 pages to my fax number of 206-365-3464. My fax machine says it was received at 17:30, while Elaina's fax machine (imprinted "4256357799 Centris") says it was sent at 17:21. This is a proposed "Response to Petition", using the same form that Elaina had faxed to me two days earlier. Elaina and I discussed whether the proposed Response was appropriate. This day was a Friday, and the court file shows that Sione filed his Response on Monday, June 12, 2000.

June 24, 2000 – Elaina sends handwritten one page letter to me on Centris stationery (10900 NE 4th Street, Suite 2300, Bellevue, Washington 98004 ph 425.635.7700 fax 425.635.7799 e-mail: info@centris.net). It is signed "Thank you, Sione Lui & Elaina", but is in Elaina's handwriting. Elaina enclosed $500.00 (which may have been in the form of a money order). This letter was definitely mailed to me, as I recall receiving it in the e-mail, and the letter has two folding marks, just like you normally fold 8.5" X 11" paper into a # 10 mailing envelope. I agreed to $500.00, if they were no court hearings.

June 27, 2000 – Mr. Boyack faxes Sione 11 pages of paperwork, which apparently is a proposed parenting plan. While fax is addressed to "Sione Lui, Personal", it is faxed to 425-635-7799, which is the fax number at Centris, the place where Elaina Boussiacos works. Fax imprint indicates that Mr. Boyack faxed this from 08:53 to 08:58 a.m.

Elaina then either mailed or delivered this paperwork to me. It was accompanied by a letter signed "Thank you, Elaina & Sione", which was in Elaina's handwriting, on a 8" x 10.5" yellow pad (NOT 8.5" x 11"). Can't recall which method of delivery was used.

June 30, 2000 – My Microsoft MONEY file indicates that I deposited $500.00 from Sione Lui on this date. I often waited a while before depositing checks in the bank.

July 5, 2000 – I send Mr. Boyack a Notice of Appearance for Sione (which also states I will be out of town July 5, 2000 to July 23, 2000), along with a cover letter. This is mailed to the court at the same time, which shows they received it on July 6, 2000.

July 5, 2000 to July 23, 2000 – I am out of the country on vacation.

August 2, 2000 – Mr. Boyack sends me a 13 page fax. This has some day care expense information, a July 25, 2000 non-compliance letter from Family Court Services, and a proposed parenting plan. My fax machine says it was received 09:51 to 09:56, while Mr. Boyack's fax machine says it was sent 08:50 to 08:54. Presumably, Mr. Boyack's fax machine clock is one hour behind, due to failure to adjust to Daylight Savings Time.

I believe I met with Sione and Elaina for the first time on the evening of August 2, 2000. My fax log does not show sending a copy of this fax to Elaina or Sione at any time. My letter to Mr. Boyack of the next day says I talked to Sione the next morning. In reality, I would have talked with him the previous evening, but didn't want to make it look like I was meeting with clients at really late hours. Also, this would make sense as to how I got a copy of this fax to Sione and Elaina (as I obviously reported on their comments to it).

It was my impression that Elaina and Sione were living together at the time I first met them. I also had the impression that Anthony was living primarily with Elaina, and was

attending school where Elaina lived. I would have certainly asked Elaina how things were going with Anthony and with his father. I remember asking Elaina if she wanted to modify custody, since the parenting plan had Anthony living with his father, and get child support. It is possible I asked Elaina this question the second time I met her and Sione. Elaina seemed reluctant to deal with James and the parenting plan, but indicated she might want to do this once Sione got his divorce finalized and she had married Sione.

It was a bit late in the evening, since they would have come to my place after Sione and Elaina were both off from work and the traffic had died down. I was working out of my home at the time, and only myself and my father were living there at the time.

August 3, 2000 – I send Mr. Boyack a letter about the parenting plan and child support issues. While it says I talked with Sione that morning, I am pretty sure Elaina and Sione had come over to my home the previous evening. I include proposed child support worksheets with my letter. This letter was apparently sent to Mr. Boyack only by mail.

August 7, 2000 – Sione faxes me apparently the only fax that he ever personally sent to me. This is the one page July 25, 2000 non-compliance notice from King County Family Court Services. Fax imprint is "4258275339 Cardinal Heating Inc" – at least appears to be that, given the top holes punched in my file copy. My fax machine says received at 06:59, while Sione's fax imprint says sent at 05:56 – daylight savings time again!

August 10, 2000 – Mr. Boyack sends letter with proposed parenting plan. Also says that $2,000.00 income for Juli for child support purposes would just be too high.

August 14, 2000 – Mr. Boyack send letter with proposed Joint Status Report.

August 28, 2000 – Family Court Services dismisses mediation – neither party cooperated.

September 13, 2000 – Sione sends typed letter with his signature, commenting on the August 10, 2000 letter from Mr. Boyack. Especially Juli's income and day care costs.

September 20, 2000 – Mr. Boyack sends follow-up letter about parenting plan, etc.

September 28, 2000 – I met with Sione a second time before sending this letter, since I send back a proposed parenting plan with Sione's signature on it to Mr. Boyack, along with a cover letter. I also note that Sione will pay $286.25 per month in child support if Juli's income is $1,800.00, versus $285.79 per month with Juli making $2,000.00. I send the child support worksheets based on Juli making an income of $1,800.00 as well.

October 2, 2000 – Mr. Boyack sends letter thanking me for receiving parenting plan, and says he will have Juli sign it. He says he will provide information on Juli's earnings from her new job, as well as day care arrangements, as soon as he gets this information. He also sends me another copy of the proposed Joint Status Report.

October 3, 2000 – I sign and return proposed Joint Status Report to Mr. Boyack. Court docket shows this document was filed on October 5, 2000.

October 13, 2000 – Friday! Pre-trial conference by telephone with Judge Richard McDermott. Mr. Boyack and I estimate a 1 day trial over child support issues.

Mr. Boyack sends me a letter that same day, stating that Juli is making $2,021.00 per month gross from her new employment. He also wants day care to be paid directly to Juli, alleging that Sione has supposedly failed to pay his share of this amount in the past.

November 28, 2000 – Mr. Boyack sends me proposed witnesses and exhibits for trial, along with cover letter.

December 13, 2000 – Sione agrees to pay day care to Juli, instead of directly to day care provider. However, child support payment is supposed to be adjusted automatically, up or down, based on changes in day care payment. I send Mr. Boyack, by mail and fax, the proposed child support order. Evidently, we had talked and agreed upon this.

December 15, 2000 – Mr. Boyack faxes proposed decree of dissolution and findings of fact/conclusions of law.

December 18, 2000 – Mr. Boyack and Juli appear in court to enter agreed final orders.

February 2001 – Elaina Boussiacos disappears and is later found dead.

Sometime in 2001 – King County Prosecuting Attorney files paternity lawsuit against James Patrick Negron on behalf of minor child Desiree I. Negron (born September 19, 1995) under King County Superior Court No. 01-5-02099-5SEA. Mother's name is Desiree O'Neill, now living in California – i.e. would be the former Desiree Irene Dibene.

November or December 2001 – King County Prosecuting Attorney would have filed a motion for summary judgment, with 28 days or more notice to James Patrick Negron and Desiree O'Neill, to resolve the paternity lawsuit.

January 10, 2002 – Hearing in the paternity lawsuit summary judgment motion. James Patrick Negron appears in person. Desiree O'Neill (living in California) does not. James is ordered to pay current support of $269.00 per month, starting in February 2002, and back support of $17,754.00 for the period August 1, 1996 to January 31, 2002 (66 months at $269.00 per month). James shows gross income of $1,500 per month, according to the child support worksheets. No parenting plan entered , because California would have jurisdiction over any child custody issues, as the child is living down there.

January 14, 2002 – The orders and judgments from the paternity hearing on January 10, 2002 are filed with the court. (The King County Prosecuting Attorney's office usually tends to hold onto court order for a few days before formally filing them with the clerk.

March 6, 2002 – DSHS files a child support lien against James Patrick Negron in the amount of $17,754.00 (same amount as above judgment) under King County Recording No. 20020306003205.

FILED
2007 DEC 24 PM 12: 02
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 07-1-04039-7 SEA
vs.	)	STATE'S TRIAL MEMORANDUM
SIONE LUI, Defendant.	)	

I. CHARGE

The defendant has been charged with Murder in the Second Degree, under the intent prong, for the death of Elaina Boussiacos.

II. TIME ESTIMATE

This jury trial is estimated to last approximately three weeks.

III. POTENTIAL WITNESSES

Det. Sue Peters	Det. Christina Bartlett	Det. Jon Holland
Det. Malcolm Chang	Det. Laura Hoffenbacker	Det. Brad Smith
Deputy Denny Gulla	Deputy Christy Marsalisi	Sgt. Mark Toner
Jan Rhodes	Joseph Winters	Dr. Richard Harruff
Grant Fredericks	Jaimee Nelson	Maria Phillips
Sina Packer	Sofia Harman	Heidi Scott

[*continued on next page*]

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

POSTED

[Potential witnesses, continued:]

Ryan Brown	Lee Hoerster	James Negron
Siegfried Kohl	Lisa Welch	Leslie Wozow
Cathy Wozow	Sam Taumoefolau	EvaMarie Gordon
Jackie Diteman	Richard Schurman	David Barrott
Anthony Negron	Jessica Negron	Paini Harris
Juli Lui	Jodi Sass, WSP Crime Laboratory	Gina Pineda, Reliagene Technology

IV. FACTS

The essential facts are set forth in the Certification for Determination of Probable Cause. Additional facts relevant to pretrial issues will be addressed below.

V. PRETRIAL RULINGS

There have been no substantive pretrial hearings in this case.

VI. EVIDENTIARY ISSUES

1. THE DEFENDANT'S STATEMENTS ARE ADMISSIBLE.

The State requests a hearing pursuant to CrR 3.5. The defendant made several statements to police over the course of the investigation of this case:

Feb. 5, 2001 – Call to 911 by defendant

Feb. 6, 2001 – Untaped telephone conversations with Jan Rhodes, missing person investigator for the King County Sheriff's Office (KCSO)

Feb. 7, 2001 – Untaped statements during meeting with Boussiacos family, Jan Rhodes, and Det. Jim Doyon

Feb. 8, 2001 – 9:46 a.m. – Untaped telephone conversation with Jan Rhodes
1:00 p.m. – Pre-polygraph interview with Norm Matske of KCSO
1:42 p.m. – Taped statement to Det. Doyon
8:25 p.m. – Taped statement to Det. Doyon consenting to search

Feb. 9, 2001 – Untaped statement to Norm Matske and Det. Gulla

March 14, 2007 – Untaped telephonic statement to Det. Bartlett with Det. Peters listening in

April 6, 2007 – Taped statement to Det. Bartlett and Det. Peters

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April 13, 2007 – Untaped statements to Det. Bartlett and Det. Peters

To admit a defendant's statement to a police officer in the State's case-in-chief, the State must prove by a preponderance of the evidence that the statement was made voluntarily. State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973); State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). Warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) – right to silence, right to counsel – are required only if the defendant is undergoing custodial interrogation.

Custodial Interrogation

Miranda warnings were designed to protect a defendant's right not to make incriminating statements while in police custody. Only when a statement is 1) custodial and 2) the result of police interrogation must an officer first advise the defendant of his Miranda rights as a criterion for admissibility. State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986). It is well-settled that when the police are in the investigatory stages of a crime, they may question a suspect without first issuing Miranda warnings. Questioning of a routine, general investigation in which the defendant voluntarily cooperates but is not yet charged does not trigger the Miranda safeguards. State v. Short, 113 Wn.2d 35, 775 P.2d 458 (1989); Harris, 106 Wn.2d 784. This is so even if the interviewee is a suspect, and even if the questioning occurs at a police station. State v. Rotko, 116 Wn.App. 230, 241, 67 P.3d 1098 (2003).

"Custody" for Miranda purposes requires formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. State v. Lorenz, 152 Wn.2d 22, 37, 93 P.3d 133 (2004); State v. Post, 118 Wn.2d 596, 606, 826 P.2d 172, 837 P.2d 599 (1992). There must be objective facts indicating the defendant's freedom of movement was restricted; the defendant's psychological state at the time of the questioning is irrelevant. Post, supra at 606-07; State v. Sargent, 111 Wn.2d 641, 650, 762 P.2f 1127 (1988). It also is irrelevant whether the

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suspect was the focus of the investigation or there was probable cause to arrest. Berkemer, 486 U.S. at 442; State v. Short, 113 Wn.2d 35, 40, 775 P.2d 458 (1989).

To amount to "interrogation" the questioning must contain a degree of compulsion in a coercive atmosphere beyond what is inherent in custody itself. State v. Warner, 125 Wn.2d 876, 884, 889 P.2d 479 (1995); State v. Richmond, 65 Wn. App. 541, 545, 828 P.2d 1180 (1992). Interrogation occurs only with express questions that police should know are likely to elicit an incriminating response from the suspect. Richmond, supra at 544 (quoting Rhode Island v. Innis, 466 U.S. 291, 301, 64 L. Ed 2d 297, 100 S. Ct. 1682 (1980)).

The State will address each date's statement(s) separately.

Feb. 5 – 6, 2001

The defendant called 911 to report Elaina missing on Feb. 5. The following day, he talked to KCSO's missing persons investigator, Jan Rhodes, seven times by telephone. Rhodes was collecting information she thought might help find the missing woman and, at the time, the defendant was providing her information in his role as a distraught fiancé.

These statements are not subject to Miranda because they did not involve custodial interrogation. A telephone conversation is non-custodial and, by definition, non-coercive because the defendant can hang up the phone; an officer is not physically present and the defendant is free to terminate the conversation at any time. State v. Mahoney, 80 Wn.App. 495, 497-498, 909 P.2d 949 (1996); State v. Denton, 58 Wn.App. 251, 258, 792 P.2d 537. Further, the statements were not the result of interrogation. Custodial interrogation does not include general questioning of citizens in the fact-finding process. Warner, 125 Wn.2d 876. The defendant was providing information as a fact witness and complainant, not a suspect in custody.

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Feb. 7, 2001

Boussaicos's family members, their friend Lisa Welch, and the defendant met with Jan Rhodes and Det. Jim Doyon in a conference room at the KCSO in the RJC. At that time, Boussiacos remained missing. The meeting was to update the family, collect potentially relevant information, and try to create a timeline that might be helpful in the search for her. The defendant, as well as the family members and friends, made statements during the meeting. All left the RJC when it was completed. These statements were non-custodial and not the result of interrogation. Everyone was free to go, and they did. The defendant was offering and exchanging information, not responding to questions designed to elicit an incriminating response.

Feb. 8, 2001

Telephone statement: The defendant called Jan Rhodes to "update" her with his activities related to Elaina's disappearance. This telephonic statement, as with the Feb. 6 statements to Rhodes mentioned above, by definition was not custodial.

Pre-polygraph statement: At the conclusion of the family meeting, Det. Doyon asked if the defendant would be willing to voluntarily submit to a polygraph test. The defendant indicated he would. He returned to the RJC the following day along with his sister, who had just arrived in town. Polygrapher Norm Matske did a brief pre-test interview to determine what questions would be relevant for the polygraph. The defendant then took the test and scored in the "inconclusive" range.[1] Because the defendant appeared tired, Matske said it might be helpful and more accurate to do another test at a later time.

Post-polygraph statements: Doyon took a taped statement from the defendant after the polygraph test. At the conclusion of the statement, Doyon continued to interview the defendant

[1] The State will not be seeking to admit any results of polygraph testing.

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off-tape. The defendant then left the RJC with his sister. Doyon and Det. Gulla talked with him at his house a few hours later. The defendant gave a brief taped statement stating that he had consented to a search of his house. The detectives left after the search.

None of these statements involved Miranda warnings because they were not custodial interrogations. As noted, mere suspicion before sufficient facts are developed to charge is not enough to turn routine investigation questioning into custodial interrogation. State v. Short, 113 Wn.2d 35, 775 P.2d 458 (1989); State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986); State v.Hilliard, 89 Wn.2d 430, 573 P.2d 22 (1977). The defendant voluntarily drove to the RJC for the polygraph with his sister in tow. His sister stayed in the lobby while the defendant spoke separately with Matske and Det. Doyon.[2] At that point, Elaina's body had not yet been found. There was no known crime and no known suspect. At no time was the defendant restrained. At no time did the defendant ask for counsel or to remain silent, nor did he ask if he could leave. Lui gave the detectives permission to search his house and later told Rhodes the detectives did a "great job" with it. He left the office with his sister after the interviews. He then said on tape, at his house, that the detectives had permission to search the house. The detectives then left. A reasonable person would not have felt he was under arrest in either situation. The statements were non-custodial and did not involve interrogation.[3]

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[2] When a criminal investigation is under way and there is a known suspect, it is standard procedure among KCSO detectives to conduct interrogations as a team, i.e., two detectives are involved in questioning. Det. Doyon interviewed the defendant alone.

[3] Det. Doyon died before this case was charged. The State will not attempt to introduce any of the off-tape interviews conducted solely between the defendant and Det. Doyon because, obviously, there is no one to relate what the defendant said in those meetings. The taped interview with Det. Doyon, however, is in the defendant's own voice. The statement was voluntary and not custodial and thus admissible should the State decide to use it at trial.

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Feb. 9, 2001

The victim's body was found about 6:50 p.m. on Feb. 9. About 9:10 p.m., Det. Doyon called the defendant's cell phone. The defendant said he was out searching for Elaina (although he apparently lied about exactly where he was) and said he would meet the detectives at his house. When he arrived, the detectives asked if he would be willing to voluntarily come to the RJC for the repeat polygraph they had discussed. They did not tell him that they had found the body, nor that he was a suspect. The defendant said he was tired but agreed that everyone needed to work "around the clock on this." He called his sister to ensure her whereabouts and felt comfortable leaving because his friend Sam was willing to stay with her.

The defendant showed "extreme deception" when asked if Elaina was in a car trunk, or had been strangled. Norm Matske and Det. Gulla questioned the defendant but did not take a statement.

March 14, 2007

Detective Christina Bartlett talked with the defendant by telephone. Det. Sue Peters heard part of the conversation on the phone extension at her desk. As with the previous telephonic statements, this was non-custodial and therefore not subject to Miranda. At no time did the defendant ask to remain silent or ask for an attorney. He was not restrained, no officer was with him, and he could have hung up the phone at any time.

April 6, 2007

Det. Bartlett and Det. Peters met with the defendant at the Shoreline KCSO precinct, selected because it was nearest his house, at a mutually agreed time. The defendant provided a taped statement. Again, the defendant was free to leave and did so at the conclusion of the interview. At

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no time was he restrained, nor did he ask for an attorney or to remain silent. In fact, at the end he agreed to take another polygraph test at a later date.

In both her interactions with the defendant, Det. Bartlett told him that she was working to eliminate him as a suspect. The defendant appeared to believe he could continue to talk his way out of trouble. At the end of this last interview, he said, "[I]t's all about Elaina ... that's the drive that brought me here." Nothing in any of these encounters indicates he felt he was not free to leave or under restraint to the degree associated with formal arrest.

None of these interviews involved custodial interrogation.[4]

April 13, 2007

Police arrested the defendant April 13. Det. Bartlett twice advised him of his rights and the defendant indicated he understood them. She advised him again when they arrived at the Arlington Police Department. The defendant again indicated he understood, and he asked for a lawyer. When asked to sign a statement of rights, the defendant said he did not understand. Det. Bartlett went through each one and he said he understood. Neither detective questioned him. Anything said by the defendant was spontaneous, i.e., not in response to a question. A statement made spontaneously is not in response to interrogation and is admissible. State v. Ortiz, 104 Wn.2d 479, 706 P.2d 1069 (1985); State v. Miner, 22 Wn.App. 480, 591 P.2d 810 (1979).

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[4] The defendant's attorney sent a letter to Dets. Doyon and Gulla dated Feb. 12, 2001, stating that he represented the defendant's interests as a "person of interest" and asking that further contact with the defendant be through him. There can be no "anticipatory" invocation of rights, see State v. Warness, 77 Wn.App. 636, 893 P.2d 665 (1989), and the letter did not attempt to do so. The sixth amendment right to counsel had not attached, and would not until charges were filed. Kirby v. Illinois, 406 U.S. 682, 689 (1972). See, e.g., State v. Earls, 116 Wn.2d 364, 805 P.2d 211 (1991); State v. Kalakosky, 121 Wash.2d 525, 852 P.2d 1064 (1993). The fifth amendment right to counsel had not attached because the defendant was not being interrogated while in custody. See cases cited above and, e.g., State v. Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002); State v. Stewart, 113 Wn.2d 462, 478, 780 P.2d 844 (1989); State v. Harris, 106 Wash.2d at 790.

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2. "OTHER SUSPECT" EVIDENCE DOES NOT APPLY.

The threshold standard on other suspects is that before such evidence can be received, there must proof of a connection with the crime or circumstances that tend clearly to point out someone else as the guilty party. State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932); see also State v. Kwan, 174 Wash. 528, 25 P.2d 104 (1933); State v. Briggs, 55 Wn. App. 44, 66, 776 P.2d 1347 (1989). The defendant must show not only that the accused third person had the ability to place himself at the crime scene, but "some step taken by the third party that indicates an intention to act on that ability." State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992).

The defense has indicated that it does not intend to offer or argue evidence of an "other suspect" in our case. That should include argument that police failed to pursue other potential suspects. See Rehak, supra. The State will provide further briefing should this become an issue.

3. STATEMENTS BY ELAINA BOUSSIACOS ARE ADMISSIBLE.

Statements of intent by Elaina are admissible under the Hillmon doctrine. See Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892); State v. Terrovona, 105 Wn.2d 632, 716 P.2d 295 (1986). Pursuant to State v. Mason, 160 Wn.2d 910, 162, P.3d 396 (2007), the State also intends to offer other statements[5] made by Elaina prior to her death. If the court decides they are hearsay, they still would be admissible under the doctrine of forfeiture by wrongdoing. Under Mason, the State may offer such statements it the court finds that they were made by a witness who is unavailable as a result of the defendant's actions. Mason, at 926-27. Specifically, the court held, "in deciding whether to apply the doctrine of forfeiture by wrongdoing, the trial court must decide whether the witness has been made unavailable by the wrongdoing of the accused based upon evidence that is

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[5] The State will provide the defendant and this court with a more specific list of these statements prior to trial.

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clear, cogent, and convincing." Id. The State will rely upon its opening statement as the offer of proof to support this finding. [6] See State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002) (regarding ER 404(b) evidence, the court held that, in order to avoid having a lengthy mini-trial before the trial, the trial could rely on the State's oral offer of proof as to the defendant's prior bad acts as its basis for ruling on the admissibility of those acts).

4. **EVIDENCE OF PURPORTED POLICE MISCONDUCT IN UNRELATED CASES IS INADMISSIBLE.**

In 2005, the Seattle Post-Intelligencer ran an article that included information about Det. Gulla, who is now a patrol officer. The story involved allegations of misconduct through inappropriate contact with underage girls (including an incident 23 years ago!), threatening behavior with the husband of a girlfriend, allowing gang members to assault another member who consented as part of an initiation, and rough handling of a suspect (20 years ago). There is reference in the article to Gulla being found to have "lied twice to investigators" in the incident from 23 years ago. None of these alleged incidents ever resulted in criminal charges. The State has received nothing related to the "lying" allegation or anything else in the article.

While arguably titillating, information derived from the newspaper expose' is not admissible in our trial as impeachment or for any other reason.

HEARSAY

Everything contained in the article would be double hearsay in a court of law.

[6] Obviously, the State will not refer to the statements in question during the opening statement, so as to prevent the jury hearing the statements prior the court's ruling.

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ER 404

Even if information in the article was not hearsay, ER 404 generally prohibits the use of character evidence, which is understood to be evidence "of a person's disposition and general tendencies." 5 Karl B. Tegland, Washington Practice: Evidence § 404.1, at 380 (4th ed.1999):

> (a) **Character Evidence Generally**: Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except: ... (3) Evidence of the character of a witness, as provided in rules 607, 608, and 609.

ER 404(a)(3). As well, ER 404 (b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

This rule is frequently invoked as a prohibition from showing a defendant was a "bad person." But it also restricts the defendant from using propensity evidence against a non-party police officer to show he was a "bad cop." Evidence under 404(b) might be admissible to prove motive, intent, opportunity, and the like, but these exceptions refer to the crime charged, e.g., to show that the non-party is an "other suspect" and may have committed the crime.[7] Tegland, §404.13, at 409-10. ER 404(b) permits character evidence only if probative on "a disputed, material issue." Tegland, §404.17, at 423. Nothing about Det. Gulla's past indiscretions, if true, relate to the crime charged in our case.

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[7] The "other suspect" issue does not apply in this case, as discussed supra.

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ER 608

When prior misconduct is offered for impeachment rather than substantive evidence, admissibility is governed instead by Rules 607 (impeachment generally), 608 (prior misconduct), and 609 (criminal convictions)." Tegland, § 404.15, at 415. See also § 608.2, at 352-53.

ER 609 is inapplicable because Gulla has never been convicted of a crime.

ER 607 provides that the credibility of a witness may be attacked by any party.

ER 608 deals with *how* credibility may be attacked -- using either reputation evidence or a limited inquiry into specific instances of misconduct. But it prohibits extrinsic evidence of prior conduct, which these reported events involving Gulla would be.

The first part of the rule provides:

> (a) **Reputation Evidence of Character**. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked...

A defendant may impeach with evidence of a witness's reputation for truthfulness, but he would have to abide by the usual two-question script required for reputation witnesses.[8] Tegland, § 608.3, at 356. Additionally, the reputation cannot be remote in time. State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991)(reputation in prison 2 ½ months before too remote in time).

The defendant in our case has not endorsed any reputation witnesses. Should such witnesses be endorsed, the State will file additional briefing regarding the propriety of their

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[8] Q: Do you know the general reputation at the present time of [the person] in the community in which he lives for truth and veracity?
A: Yes.
Q: What is that reputation?
A: It is good / It is bad.

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proffered testimony and request to voir dire the witnesses. It is difficult to imagine reputation evidence that is not remote in time and meets the stringent limitations of such testimony.

The second section of ER 608 states:

> (b) **Specific Instances of Conduct**. Specific instances of the conduct of the witness, for the purpose of attacking or supporting the witness's credibility, ...may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness. . .

Restrictions on extrinsic evidence of misconduct serve two purposes. The first is to prevent distracting mini-trials that simply confuse the actual issue to be decided by the jury. Warren v. Hynes, 4 Wn.2d 128, 136-37, 102 P.2d 691 (1940). The second is to prevent undue harassment of witnesses. State v. Belknap, 44 Wash. 605, 610, 87 P.2d 934 (1906)("It would be absolutely intolerable that a man, by being brought into court as a witness, should be bound to submit all the acts of his life to the exposure of malice, under the pretense of testing his credibility").

ER 608(b) is complemented by ER 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. As one commentator has said: "[The trial judge] has the responsibility to see that the side show does not take over the circus." McCormick on Evidence, Vol. 1, §39, at 176 (6th ed. 2006).

ER 608(b) does not allow inquiry on cross-examination into specific instances of a witness's conduct for the purpose of attacking the witness's credibility unless the court finds the conduct is probative of truthfulness or untruthfulness. ER 608(b). "The trial court may consider whether the instance of the witness's misconduct is relevant to the witness's veracity *on the stand*

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and whether it is germane or relevant to the issues presented at trial." State v. O'Connor, 155 Wash.2d 335, 349, 119 P.3d 806 (2005)(emphasis added). "[T]here are limits to this rule. The instances must be probative of truthfulness and not remote in time; further, the court should apply the overriding protection of ER 403[.]" State v. Wilson, 60 Wn.App. 887, 891-93, 808 P.2d 754 (1991).

In the instant case, none of Gulla's alleged past misbehavior had anything to do with his truthtelling abilities, especially as they relate to his testimony on the stand in our case. Assuming there is proof that Gulla lied to investigators (a big assumption; the State has seen nothing to prove that), it is a collateral issue from a different setting and, according to the newspaper, occurred *20 years ago.* It is the very definition of "remote in time." Testimony about it would be automatically excludable under ER 609 even if it had been a criminal conviction for lying, because the time limit for that evidence is 10 years. There is nothing here that implicates Gulla's role in the circumstantial proof of this crime or, more to the point, his testimony at trial. Its admission would be collateral to the issues at trial, a waste of time, and confusing to a jury that must only decide whether the defendant killed his fiancé. The evidence is not admissible.

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VII. CONCLUSION

This memorandum has been prepared solely to acquaint the trial court with the issues as they will be presented at trial. Supplemental briefing will be provided if needed.

DATED this 21st day of December, 2007.

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Seattle Post-Intelligencer

http://www.seattlepi.com/local/248384_gulla15.html

Deputy accused of molestations, abuse

BEST AVAILABLE IMAGE POSSIBLE

Denny Gulla still carries gun and badge

Tuesday, November 15, 2005

By PAUL SHUKOVSKY
SEATTLE POST-INTELLIGENCER REPORTER

Editor's note: This story has been changed since it was originally published. The King County Sheriff Office's Precinct 3 has headquarters in Maple Valley and does not include Covington as the story originally stated.

Kay Quall was 14 when she learned never to trust a cop.

She was on a date when the car ran out of gas. King County sheriff's Deputy Denny Gulla offered Quall and her boyfriend a ride home. Gulla dropped the young man off first. Then, Quall says, he got in the back seat of his patrol car with her, slid his hand under her shirt and thrust his tongue into her mouth.

zoom Dan DeLong / P-I

Kay Quall, now 35, says she was sexually abused by King County sheriff's Deputy Denny Gulla when she was 14.

Quall is 35 now. She is one of three women who say they still carry memories from their encounters with Gulla when each was 14. One of the others is brain-damaged now from an apparent suicide attempt and the third is in jail, struggling with her own demons. But one fact binds them all:

Denny Gulla is still on patrol with a badge and a gun.

The file on his 23-year career is fat with other complaints of abuse -- assaulting a prisoner, making a pass at a high school senior, videotaping a gang beating he could have prevented and, most recently, pulling over his lover's husband and threatening to shoot him in the "mother-f---ing face."

Gulla

King County Sheriff Sue Rahr admits that the department should have fired Gulla a long time ago. She says every disciplinary step has been diluted or thwarted entirely by the powerful union that represents deputies and sergeants. The union's attorney calls that claim "silly."

For whatever reason, no sheriff has even tried to fire Denny Gulla.

Gulla is the third King County sheriff's officer spotlighted by the Seattle Post-Intelligencer whose record reflects a lack of accountability. The others are former Detective Dan Ring, who was charged with several crimes but managed to escape trial, ending up with a cash payment and an enhanced retirement; and Deputy Ferenc Zana, whose live-in lover is charged with stealing Zana's gun and killing a convenience-store clerk with it.

'I will kill you'

Mike Kelly and his friend Ferrell Johnston were on a slow drive through Buckley in January 2004 when off-duty King County sheriff's Sgt. Denny Gulla, who was having an affair with Kelly's wife, turned on the flashing lights and pulled them over. Kelly watched through his rearview mirror as cars from the Buckley and Wilkeson police departments also arrived.

zoom Scott Eklund / P-I

Mike Kelly says Gulla threatened to kill him.

Buckley Officer Ryan Boyle wrote in his report that he asked Gulla the reason for the stop. He got no answer, and noticed that Gulla was upset, so he went to speak with Kelly.

As they talked, Gulla came over, leaned into Kelly's window and began to yell at Kelly and Johnston. According to Boyle's report, Gulla screamed, "You looking for my house mother-f---er? You better not be. If you're looking for my house I will kill you."

Boyle would later tell his chief that Gulla repeatedly said, "I will blow your f---ing brains out, do you understand me? I will take my pistol and I will shoot you in the f---ing head."

Spit was flying from Gulla's mouth onto Kelly's face.

Kelly -- 6 feet 4 inches and 235 pounds -- was so terrified that the 5-foot 9-inch Gulla would shoot him that he wet his pants.

Gulla said he had a gun in his trunk seized from a crack head, "a nobody, and that's what he'd use to shoot me in my mother f---ing face. And these two cops here will collaborate (sic) whatever story he says and I'll be gone," according to Kelly.

Then, as Boyle watched, Gulla took Kelly out of the vehicle with his hands behind his back as though he was arresting him.

"I'm standing there with my fingers interlocked behind my back ... and he's just trying to get me to do something," Kelly told investigators. "He's making comments on my wife, just all kinds of garbage. He said something about, yeah, I'm the one f---ing your wife. ... He's just on and on about my kids, you're never gonna see your kids again. He was trying to get me to make a move or something. He wanted an excuse and he wanted it bad. I really felt like he was trying to get me to talk back. I thought he was gonna shoot me right there. I honest to God thought that this is it, I'm done."

Two weeks later, Kelly told King County detectives: "Every night I come home, I go through the house with my gun."

A criminal investigation of Gulla by the Pierce County Sheriff's Department on suspicion of harassment lasted several weeks before the case was forwarded to Kevin Benton, a Pierce County deputy prosecuting attorney, who declined to charge Gulla.

Asked to explain why the case against Gulla was dropped, Benton said he could not comment because he has been prosecuting a murder trial and has not had time to review the file.

King County settled a claim for damages with a $30,000 award to Kelly and $10,000 to his friend

Johnston.

During an internal investigation by the King County Sheriff's Office, Gulla admitted to threatening to kill Kelly. He defended his actions by asserting that Kelly was looking for his Buckley home and had told other people he wanted to kill him. Gulla's attorney submitted a letter to Benton saying that Gulla's threats to shoot Kelly were simply statements "that he would exercise his right of self-defense if necessary."

Gulla also contended that Kelly was behind a series of vandalism incidents against the property of police officers that live in his Buckley neighborhood. But the Buckley police chief rejected that, saying the vandals had been identified.

On May 19, 2004, Rahr, then chief of operations, recommended to Sheriff Dave Reichert, now a member of Congress, that Gulla be suspended for five days without pay and that he be returned to the rank of deputy.

Rahr refused to comment for this story. But several weeks ago, she made clear to a P-I reporter that she doesn't believe Gulla should have a badge. Asked why she hasn't fired him, she said: "I have tried to deal with Denny Gulla, and he is consistently supported by the union. I've done everything I could do within the confines of the labor contract."

"Silly," said Christopher Vick, a lawyer with the King County Police Officers Guild. "The sheriff has complete control over who they discipline and how."

Reichert ruled that Gulla had abused his power by making the traffic stop without cause. He ordered Gulla returned to the rank of deputy and suspended him for one day without pay.

Two weeks later, guild President Steve Eggert filed a grievance over the one-day suspension and demotion. "We do not believe there was just cause for the finding or discipline. We believe the proper remedy in this matter would be to nonsustain the allegations against Deputy Gulla and rescind any discipline associated with this investigation including his loss of rank."

Eggert repeatedly failed to return calls for comment. Reichert also chose not to comment for this story.

Gulla, in two brief telephone conversations and a short e-mail, refused to comment for this story. He mentioned during one call that he has yet to serve his one-day suspension. He is assigned to patrol, working out of Precinct 3 in Maple Valley. [**Editor's Note:** The original version of this article incorrectly stated the location of Precinct 3.]

Not long after the incident, Kelly left King County. "I moved out ... for one reason: He and many of his cop friends were on my ass like I've never seen. I couldn't go anywhere without being followed. I would get pulled over.

"I didn't want one dime of money, I just wanted his badge. I am appalled that he is still a cop."

A troubled 14-year-old

Ten years ago, Wassena George was a troubled 14-year-old girl living on the Muckleshoot Indian Reservation. Gulla was working off duty, providing security at a tribal housing complex called Skopabsh Village.

Gulla "would pick me up and make sexual remarks," George said in an interview. "He would pick me up as a runaway, but he wouldn't bring me home."

Twice he picked her up when she was intoxicated and "there was a lot of improper touching," said George, who was interviewed recently at the Yakima County Jail. She is serving a sentence on an old charge of being a minor in possession of alcohol and breaking a window.

His "hands were going up my shirt," touching her breasts, she said.

George's mother, Norma Eyle, said recently that Wassena told her about the attacks right after they occurred.

"I think it kind of messed her up," said Eyle. "She got kind of goofy after that. ... She never used to do drugs, but she's into drugs now. We tried to get her into counseling, rehab."

George and several other Muckleshoot reservation residents and former tribal officials assert that Gulla molested another young girl on the reservation.

Gulla "was having a relationship with one of my friends," George said. "He would drop me off sometimes and pretty soon he would come back and pick her up. He made her give him" oral sex.

The P-I is not naming the girl because she later suffered brain damage after being struck by a car in an apparent suicide attempt. Though she is now an adult, her capacity to give informed consent to being identified as a victim of alleged sexual abuse is questionable.

That 14-year-old girl, like George, was struggling with alcohol and drug abuse and problems in her family. Gulla groomed her for sex, plying her with presents such as an expensive leather jacket, said friends and neighbors.

Mike Starr Sr. is a fisherman and Muckleshoot tribal youth worker. Like many people on the reservation, he acknowledges having hard feelings toward Gulla not only because of the deputy's alleged penchant for young girls, but because he has arrested members of the Starr family.

"He'd come riding along and he'd have young girls in his car," Starr said.

"Wassena George was one. But (the unnamed girl) was the main one he messed with quite a bit. When he was messing around with her, she'd come up to the house and talk to the kids."

Starr was staying in Skopabsh Village one night when his daughter "watched Gulla go in the window. He ... took (the girl) away in handcuffs. She was home the next morning. She was 13 or 14 at the time."

One close friend of the girl asked that her name not be used because she feared it could threaten her job. The girl told her that she was sexually intimate with Gulla.

The P-I did not interview the girl because her guardian denied access. But the girl's friend said that even now, she talks about Gulla.

"After the accident, she said: 'I know you didn't like me messing around with Gulla,' " the friend said.

"If you weren't giving in, he would tell you 'I'm going to make you miserable, put you in jail,' " said the

friend. "If you wouldn't go with him he would be an asshole."

"I wasn't one of those girls that would give in," the friend said. The girl "was giving in until her accident."

The friend said the girl was vulnerable because "she was on her own. The mom lived there, but she was drunk."

The girl's mother, when asked if she knew if her child had been sexually abused by a police officer, said: "Is it Gulla? I'm not really sure if he was trying to mess with her. She said something to that effect."

She said Gulla was often "around all the young girls." But she said she could remember little else about that time period.

Gary Starr used to hang out with the girl.

"I knew he was messing around with (the girl). She told me," he said. "She was saying Gulla was ... trying to be a weirdo, a perv, and he was threatening to take her to jail if she didn't do what he wanted."

Lolita "Lolly" Fulgencio was also one of the girl's friends.

"He used to go around and harass people without any reason -- just drive up on us," Fulgencio said. "There was one incident where me and (the girl) were going to go out and we were leaving from her house and he pulled right up and said, 'Hey, how you girls doing tonight?'

"He was coming on to us. And I was, 'Ooh. Gross.' But (the unnamed girl) responded to him and said 'Good, Denny. How you doing?' She pulled out a cigarette and he lit her cigarette for her. ...

"Then we went to a party. I went home and went to sleep. I got up at 4 or 5 in the morning, opened up the window and saw (the girl) running up the road. There was a car parked up there, and it was Denny's car. He was parked up there at the first speed bump waiting for her. She ran up to his car, jumped in and they drove off. That was the first time we got an indication she was messing around with him."

Michele McCloud was part of that group of friends, too. She recently called the girl "one of my best friends."

Gulla "bought her a nice leather parka," McCloud said. "She didn't want to admit it. She just told us that he bought her a coat. She would sneak around with him."

"Denny was Denny around here," McCloud said. "Nobody could do anything about it. He was a cop, and we were a bunch of native kids that nobody was going to listen to."

But one tribal council member did listen -- William "Sonny" Miller.

"When I was on the council, (Gulla) was messing around with young girls, taking them, threatening them and having his way with them," Miller said. "There were probably three or four girls ... he did that with."

"He more or less drove around here like no one could touch him. He was threatening people: 'I won't haul you in if you do this and this and this.' "

Miller became the catalyst on the tribal council to do something about Gulla.

It was about that time that the girl almost lost her life in a traffic accident.

On Nov. 13, 1996, at about 11:45 p.m., Muckleshoot tribal member Joseph Allen was driving along Auburn-Enumclaw Road when "she just jumped out in front of me," Allen said in a recent interview. "When I was driving by -- she was trying to commit suicide."

"There were people who were with her when she got hit, and they said she was out there jumping in front of cars," the friend who requested anonymity said.

Finally, more than a year after the accident, the tribal council took action. A complaint about Gulla was sent to the Sheriff's Office, Miller said.

Burney Huff is now an executive at the state Department of Health. At the time, he was an administrator for the Muckleshoot tribal government. Huff said there was debate on the council over whether or not the letter should be specify Gulla's alleged molestation of underage girls.

Huff gave to the P-I the text of the letter he was ordered by the tribal council to send to Sheriff Dave Reichert. The letter said, "Some elements of the relationship between Mr. Ghulla (sic) and residents of the reservation have not been pleasant. On behalf of the Muckleshoot Tribal Council, I request that Mr. Ghulla not be assigned to perform any duties on the Muckleshoot Indian Reservation."

The letter was signed by tribal Chairman John Daniels Jr. Daniels, through tribal spokesman Rollin Fatland, recently refused to comment, saying that his memory of the matter is vague and that the tribe enjoys a good relationship with the King County Sheriff's Office.

A few weeks later, the FBI received an anonymous call that it transmitted by letter and a follow-up phone call to the King County Sheriff's Office. The FBI letter to the Sheriff's Office reported that the anonymous caller said Denny Gulla was being investigated by the Muckleshoot Tribe for the rape of a girl who was the victim of a traffic accident.

Wassena George said that a King County sheriff's detective visited her in juvenile detention, told her he was investigating Gulla and questioned her. She does not recall his name.

"I didn't tell him everything," George said. "I did tell him (Gulla) made passes toward me."

The P-I, in the course of reporting this story, invoked the state's public records laws in requesting that the Sheriff's Office turn over all its personnel and Internal Investigations Unit files on Gulla to the newspaper. The office's position is that it is not required to turn over files on unsustained allegations.

No files were turned over to the P-I that reflected charges of sexual misconduct by Gulla. Many of the files that were received have extensive redactions.

Gulla no longer patrols the Muckleshoot Reservation.

After the traffic accident, the girl spent weeks in a coma at Harborview Medical Center, her mother said. When she emerged from the coma, she went to a nursing home.

"They expected her to never walk, talk and have a memory," the mother said. "It took a really long time,

it took forever for her to talk. She has a plate in one side of her head, and I guess she can't see out of one eye. She has a limp and has a hard time going down the steps. If you ask her straight-up questions, she can't answer.

"She was so young, so pretty."

Wassena George says Gulla's actions changed her forever.

The experience "made me not want to walk no more. I didn't feel safe."

"I was abused as a child growing up, and I always kept it to myself. So when (Gulla) did it and he thought that I was too drunk to remember or just that he could do it, I didn't want to say nothing to nobody because I don't like to get anybody in trouble. So I kept it to myself.

"And yes, it did mess up my head."

Gang initiation videotaped

When Gulla encouraged members of a White Center gang to beat a prospective member as part of an initiation rite so that his partner could videotape it as a training tool for other officers, the Police Guild's power saved him from being disciplined.

The 1992 videotape shows Gulla, then a detective of the gang unit and working directly for then Lieutenant Rahr, spending several minutes assuring seven skeptical gang members that if they beat up a youth as an initiation rite, they would not get in trouble.

The incident created a furor of negative publicity for the Sheriff's Office from news media around the country. Then-Sheriff James Montgomery, who noted that Gulla and his partner used "bad judgment," said he would impose discipline, which could range from a reprimand to firing, after the detectives had a chance to defend themselves in hearings.

But Gulla and the Guild ultimately prevailed in the disciplinary process. Guild attorney Vick represented Gulla in the matter. He said recently that the reason Gulla and his partner were not disciplined is that "they didn't violate any policy. Their job wasn't to enforce the law, it was to collect intelligence. You can argue all day long about the wisdom of it, but that was the assigned job. At the end of the day, the sheriff ... would have to get on the stand and say we want to punish him for what we wanted him to do."

Montgomery, now chief of the Bellevue Police Department, said Monday: "We had several rounds with (Gulla) over the years. That one pushed me right over the top. It was a terrible decision. We did go to the mat over that one."

While Sheriff Rahr has not responded to P-I requests for comment on this story, she answered some questions about the videotaping incident a few weeks ago.

"They should have stopped it rather than videotaping it," Rahr said. Asked if she had failed to adequately supervise the detectives, she said: "No. It was a judgment issue on the part of Detective Gulla. When I attempted to discipline Denny Gulla and transfer him out of the unit ... the transfer was overturned by an arbitrator. And I was forced to take him back in the unit even though I knew he did not possess the necessary judgment to do the job."

Asked if she still believes Gulla lacks the judgment to do the job she said: "Yes."

When asked why he has not been fired she said: "I've done everything I could do within the confines of the labor contract. I disciplined him, and the discipline was overturned."

"You probably see that pattern a lot, in the King County Sheriff's Office," Rahr said. "We have a Guild that is very, very, very successful in overturning discipline cases."

Conduct unbecoming

Gulla was angry when he pulled open the back door of a patrol car, grabbed a hit-and-run suspect by the shirt and starting shaking. As Gulla screamed profanities at the suspect, he struck the man in the chest with a partially open hand.

The Sheriff's Office found that Gulla had committed conduct unbecoming an officer in the October 1988 incident at Skopabsh Village. And in discussions about the appropriate punishment for his misconduct, some high officers in the department sounded warnings about Gulla's lack of good judgment.

"It is my firm belief, based upon past performance, that if Officer Gulla continues to work off duty at Skopabsh village, additional complaints and performance problems will be generated," said a letter from sheriff's Chief Greg Boyle to a police union legal adviser representing Gulla in disciplinary proceedings.

Boyle said Gulla's performance "deteriorates" without close supervision. And "Skopabsh Village, by Officer Gulla's own description, is certainly an unstructured microcosm of society. It is a frequently hostile, confrontational, and confusing environment which calls for excellent judgment and a solid decision-making process. Officer Gulla has demonstrated by the recent incident at Skopabsh Village and by past errors that good judgment is lacking in these situations."

That letter came seven years before Gulla is alleged to have molested two 14-year-old girls at the Skopabsh Village tribal housing project.

The 1988 incident at Skopabsh village began as a drunken argument among a small group of people. Then the driver of a car involved in the argument lurched forward a few feet -- forcing a man onto the hood -- then stopped. As a friend helped the man off the hood, the car moved forward again and the friend was bumped. The car then accelerated away from the scene.

Gulla, who was patrolling the village as an off-duty job, spotted the altercation and sought to stop the car by standing in the dark road and shining a light on himself and the oncoming vehicle. But he was forced to quickly move out of the way to keep from being hit, according to his police report.

Two on-duty sheriff's officers, Corey Darlington and Alan Garrison, quickly took the man into custody and put him in the back of their patrol car. Then Gulla pulled up to the scene in his personal car, walked up to the back door of the patrol car and opened it.

"He reached in with both hands, grabbed him by the shirt collar and started shaking him, not violently, just shaking him," Darlington, a recruit officer, told to an internal affairs investigator. He said 'Don't you recognize me, you almost ran me over.' He was definitely angry, and he said it in a ... yelling tone of voice."

"I could tell he was angry because as soon as he opened the door, he immediately grabbed (the suspect)

by the shirt collar. He didn't hesitate, he just reached in there and started shaking him immediately."

The rookie cop was worried that the situation could escalate. "I wanted to watch to make sure that it didn't get completely out of hand," as Gulla screamed at the prisoner, calling him an "asshole" and "a little s--t," Darlington said. Gulla, who was not in uniform, asked the prisoner why he hadn't stopped when Gulla tried to flag him down. When Gulla didn't get the answers he wanted, he got "a little more angry" and gave the prisoner "a short, quick rap on the chest with his left hand," Darlington said.

Gulla told a different story to King County investigators. He said he opened the patrol car door to identify the prisoner as the driver involved in the incident and discovered he was not handcuffed. He said he took hold of the prisoner as an "officer safety measure." In the course of questioning him, "he made a quick movement -- I didn't and still don't know what his intentions was/were -- I reached out with my open right hand" and "pushed him back."

The King County Prosecutor's Office, in deciding there was insufficient evidence to charge Gulla criminally, called Darlington's version of the incident "most plausible, given the fact that he candidly says that Officer Gulla was verbally abusing" the prisoner. The prisoner later brought a civil suit against Gulla, but Gulla prevailed.

King County Sheriff's Lt. Larry Mayes thought Gulla lied about the level of violence perpetrated against the suspect, according to investigation files. He also opined that "Gulla does not fully understand the inappropriateness of his actions, and the unprofessionalism displayed in this incident."

Mayes recommended a 30-day suspension without pay, 20 days of which would be held in abeyance unless Gulla was further disciplined within the next year. In a memo to Sheriff James Montgomery, he wrote that while the punishment "may seem rather severe, this officer has accumulated 3 written reprimands and 5 suspensions. That is a total of 8 separate sustained complaints and 11 manual violations in the past 4 years."

Montgomery reduced the suspension to five days without pay.

But the union, a predecessor union to the Guild, stood firmly behind Gulla. Months of disciplinary hearings and appeals took place. And Gulla got support from the executive director of the Muckleshoot Housing Authority, Connie Moreno, who wrote in a letter that Skopabsh Village was "comprised of a group of extremely low-income people with severe alcohol and drug abuse problems. I spoke to various King County officers who informed me that there was only one person on the entire force that would even attempt to get this housing project under control. That person was Denny Gulla."

The letter goes on to say that the prisoner Gulla struck "has terrorized this community. Perhaps Officer Gulla could have been a bit more polite, but under the circumstances his behavior if not totally commendable was certainly understandable."

More than a year elapsed before Gulla was finally suspended for one day without pay.

Darlington paid a dear price for his candor. The Gulla incident directly resulted in his departure from the department, according to Darlington. A note in internal-affairs unit files talking about his reluctance to testify against Gulla in disciplinary hearings quotes Darlington as saying: "Gulla's friends wrote ... saying I was a poor officer. I'm hesitant to assist in reopening this can of worms. I'm real hesitant to help. I wasn't treated very well by the department."

Now a lieutenant for the Tacoma Police Department, Darlington was reached recently at the FBI Academy at Quantico, Va., where he is taking training.

"Some of the senior officers did not like a less senior officer telling the truth," Darlington said. "I wasn't about to lie to the investigators."

As a rookie, he said, "I was on probation at the time. I was a model officer all through the training. I received a very good probation report and work performance reviews. And then all of a sudden, magically, my probation reports became unfavorable" after the Gulla incident.

"It was peer pressure, and I received unfavorable reports" as a result of truthfully testifying against Gulla, Darlington said, adding that he was ultimately forced to leave after suddenly getting poor evaluations from his field-training officer.

"I don't have anything personal against the guy," Darlington said of Gulla. "It just didn't seem right to me at the time, even as a new officer. It didn't look right to me."

'Too scared to say no'

It's been 21 years since Kay Quall ran into Denny Gulla.

Quall was out on a double date with her friend Jeremy and another couple when the car stalled and rolled to a stop. The other couple went for gas while Jeremy and Quall stayed with the car and waited.

"We both fell asleep. We woke up to a police guy banging on our window."

It was Gulla, who offered to give Quall and her boyfriend a ride home.

They got into the patrol car with Gulla and a civilian intern who had been accompanying Gulla on patrol named Greg Haglund.

He dropped Jeremy home first.

It was getting late, about 1:30 a.m., but Gulla offered to take Quall to Bob's Big Boy restaurant in Issaquah before bringing her home to her affluent Tiger Mountain neighborhood, according to Quall and police records.

"I think I said something like my mom's going to worry," Quall said recently. "And they reassured me that it's OK -- they are the police."

Gulla called Quall's mother, Jo Bellows, to say "Not to worry. My daughter had run out of gas and was with a friend," according to a recent interview with Bellows and police records. "The gist of it was that they would go back and check on them and give them a ride home" if the other couple had not returned with gas.

Gulla didn't reveal in that call that the girl was actually at the restaurant with him.

"They got me a burger and fries and we sat there and ate it," Quall said.

When they left the restaurant, "Gulla's partner was driving and Gulla got in the back with me. From

downtown Issaquah, it's probably a 20-minute ride home. That's when he started making moves on me. He started kissing me and going under my shirt."

Asked to specify, Quall said Gulla put his tongue in her mouth and felt her breasts. "I just went along with it," Quall said. "He was a big, older man. He was the police. He had a gun on him. I was too scared to say no. And he also had the partner."

Haglund, now a Des Moines police officer, said Monday that he does not remember the incident.

When they got to her neighborhood, Quall recalled, they "pulled over so he could have a little bit more time with me. When I got home, I didn't tell my mom because I felt I had done something wrong."

Quall said Gulla called a couple of times shortly after the incident. "He wanted to take me out. He wanted to see me."

That might have been the end of the story if Bellows hadn't had lunch with a friend several weeks later.

"I never knew anything about it until I had lunch with my daughter Holly and my friend Jeanette (Depriest). And Jeanette started telling me this story about what happened to her daughter" who was picked up for suspected DUI. "When (the officer) started something with her, she jumped out of the car."

Holly, in whom her little sister had confided, chimed in saying that it was the same officer, Denny Gulla, in both cases. Both mothers quickly filed complaints about Gulla.

Depriest's daughter, Jennifer, was 18 when her path crossed Gulla's within weeks of the incident with Kay Quall.

Jennifer Depriest Berens recalled recently that she was out driving with a friend when Gulla pulled her over on suspicion of driving under the influence of alcohol.

She remembers being frightened when Gulla said something like: "If I can see you again, I can make the Breathalyzer go away."

Records reflect that Gulla made an unusual error in conducting the breath test and pointed out his own error in officer's notes, with the result that its use as evidence was invalidated.

Berens said she agreed to do a "ride-along" in Gulla's patrol car because she was scared and because she had to do a ride-along anyway for an advanced placement class at Issaquah High School. The next evening, Berens met Gulla at Bob's Big Boy and joined him in his patrol car, according to internal-affairs records.

"I rode along with him for the evening and then he went to drop me off at my car and he said: 'I guess this is where I make my move on you.' And I said 'I don't think so' and I just got out of the car and skedaddled."

"I was really scared," she said. "It was very intimidating."

Internal-affairs records about the incidents given to the P-I by the Sheriff's Office are heavily redacted and do not reflect Quall's allegations that Gulla molested her or Berens' allegation that she fled from

Gulla's advances.

Quall said in a recent interview that she never told investigators about Gulla molesting her. "I didn't tell. I was too frightened he would come after me."

Quall's mother, who did not know of the alleged molestation, said she raised the possibility with an investigator. "I just knew -- and I told this to the detective -- that there was more to it," Bellows said. "I really thought he might have raped her and she didn't tell me. That scared me, to know he was running around the neighborhood."

"I remember that detective telling me how girls that age, they make up stories."

Gulla was found to have lied twice to investigators (as well as to Quall's mother) and to have committed conduct unbecoming an officer by having "an unauthorized rider with him on duty and he conducted himself improperly. ..." The end of the sentence was blacked out by the Sheriff's Office.

Even Guild attorney Christopher Vick calls lying a firing offense. "There are certain things you can do that means you just can't be a police officer anymore," Vick said. "And lying is one of them."

But Gulla was not fired. And it is unclear the extent to which the internal-affairs investigators explored the possibility of sexual misconduct, if at all, because of the redactions.

A memo from then-Capt. Greg Boyle to Sheriff Vern Thomas makes it clear the civilian rider, Haglund, was of little help to investigators. "Mr. Haglund's recollection is very poor," Boyle wrote.

In an interview with investigators, Gulla said he was simply trying to help Quall become more presentable to her mother before taking her home. "She didn't look real good because she'd been laying around ... with this guy ... and her hair was all messed up and her clothes and everything. We'll just go to Bob's Big Boy and straighten yourself up, maybe get a cup of coffee, and I'll call your mom and ... just kind of explain to her what's going on ... break the ice for you before you get home. Just ... trying to give her a little break."

Boyle wrote that "it is clear that (Quall) was taken to the restaurant by Officer Gulla. The fact pattern of the totality of the incident certainly casts doubt on Officer Gulla's credibility concerning this matter."

In the case of Berens, "Officer Gulla intentionally failed to follow proper DWI processing procedures in order to create an issue on which the charges could later be reduced," Boyle wrote.

In recommending punishment for Gulla, Chief Jerry Burk wrote the sheriff saying Gulla should be transferred from the Special Operations unit because "those officers must be trustworthy while working rather independently. That is not true of Officer Gulla."

Gulla was suspended without pay for two days.

Said Berens: "Looking back, you would think the guy would have been fired. The guy used his authority inappropriately."

Said Quall: "I think the whole department is involved. They knew what he's been doing, and they haven't stopped him."

FOLLOW-UP

FBI starts inquiry in deputy's case

P-I reporters Lewis Kamb and Eric Nalder contributed to this report. P-I reporter Paul Shukovsky can be reached at 206-448-8072 or paulshukovsky@seattlepi.com.

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April 30, 1984

PERSONNEL ORDER 84-188

POLICE OFFICER DENNY J. GULLA, assigned to Precinct 3, Field Operations Division, has been found to be in violation of Department Manual Section 1.4.0, Duty Hours, and 2.3.15, Punctuality, in that he was late in reporting to duty on February 7, March 30, and April 8, 1984.

Therefore, under the authority of RCW 41.14.110 and RCW 41.14.120, Officer Gulla is suspended for one (1) working day without pay. This day of suspension will be scheduled in advance by the Precinct 3 Commander and will be completed prior to May 25, 1984.

Upon completion of this disciplinary action, Officer Gulla will submit a report certifying compliance through the chain of command to the Personnel Section.

JAMES J. NICKLE, ACTING SHERIFF-DIRECTOR

Distribution:

Sheriff Thomas
Chief J. L. Burk
Major T. M. Nault
Officer Denny J. Gulla
Personnel Records
Payroll
I.I.U.
Civil Service
Legal Unit
Union Local 519
Personnel Manager

RECEIVED
MAY 03 1984
INTERNAL INVESTIGATIONS UNIT

KING COUNTY POLICE

MEMORANDUM

To: PERSONNEL SECTION **Date:** APRIL 23, 1984

From: CHIEF JAMES J. NICKLE:cc **Via:**

Subject: DISCIPLINARY ACTION/OFFICER DENNIS J. GULLA

A precinct level investigation was recently conducted regarding Officer Dennis J. Gulla's failure to report for duty at the prescribed starting time. The investigation revealed that Officer Gulla reported late for duty on the following dates: 02/07/84, 03/30/84, and 04/08/84.

Officer Gulla has been found to be in violation of Department Manual Sections 1.4.0, Duty Hours, and 2.3.15, Punctuality.

Officer Gulla is, therefore, suspended for one day. Said day will be scheduled by the Precinct Commander and taken prior to May 25, 1984. At the completion of this suspension Officer Gulla will notify the Personnel Section via the chain of command of compliance with this order.

Order being typed

RECEIVED APR 23 1984 Mgr's Personnel & Trng

cc: I.I.U.
Major Nault

RECEIVED APR 25 1984 INTERNAL INVESTIGATIONS UNIT

KING COUNTY POLICE

MEMORANDUM

APR 19 1984
K.C.D.P.S.

To: SHERIFF-DIRECTOR VERN THOMAS
Lieutenant David W. Sowers

From: LIEUTENANT DAVID W. SOWERS:lc

Date: 4/17/84

Via: Chain

Subject: RECOMMENDATION FOR DISCIPLINARY ACTION
POLICE OFFICER DENNIS J. GULLA #04392

This memorandum is written to recommend disciplinary action for Police Officer Dennis J. Gulla, Serial #04392 for violation of 1) K.C.D.P.S. Manual Section 1.4.0, Duty Hours: Department personnel shall work those hours or shifts designated by the Division Commander. Supervisors may modify the assigned hours, when necessary, with the Division Commander's approval; 2) K.C.D.P.S. Manual Section 2.3.15, Punctuality: Members and employees of the Department shall be punctual in reporting for duty at the time and place designated by their superior officers. Habitual failure to report promptly at the time directed shall be deemed in neglect of duty.

DISCIPLINARY HISTORY:

02/15/84 - Written reprimand: For failure to respond to subpoena, Federal Way District Court on 1/31/84. Officer Gulla also reported late to Defensive Tactics School that day, which resulted in his dismiss from that class by Sgt. Donna Nolan.

SUMMARY:

02/07/84: Officer Gulla arrived 10 minutes late, resulting in his missing roll call, and being late going in to service. Sgt. Jilbert, Kent Police Department, reported to Sgt. Atchley that Officer Gulla was stopped by Kent P.D. for speeding while in uniform, en-route to work that morning.

02/08/84: Sgt. Atchley discussed continuing tardiness and speeding incident with Officer Gulla.

03/30/84: Officer Gulla failed to report for roll call at 2150 hrs. After roll call, Sgt. Atchley directed M.P.O. Gary Danichek to call Officer Gulla at home. Officer Gulla answered M.P.O. Danichecks call saying he had overslept and he would be right in. Sgt. Atchley noted his arrival time at the precinct as 2336 hrs. At that time Officer Gulla was not in uniform. Sgt. Atchley noted Officer Gulla was not ready for duty until 2355 hrs. Sgt. Atchley advised Officer Gulla at that time that he would be paid only for 6 hours that day, since that was all he worked. Officer Gulla's response was in that in the future he would call in sick when he was tired or he had overslept.

03/31/84: Officer Gulla called in sick. Sgt. Atchley was advised by Sgt. R. Nelson that he had seen Officer Gulla at the Federal Way Substation earlier that day.

04/08/84: Officer Gulla reported for roll call 5 minutes late, which resulted in his not being ready to go in to the field at the end of roll call.

cc: Major Nault
Officer Gulla
Lt. Sowers' file
Headquarter's Memo file
Sgt. Atchley

RECOMMENDATION:

I recommend Officer Dennis J. Gulla be found in violation of King County Department of Public Safety Manual Sections 1.4.0 Duty Hours, and 2.3.15 Punctuality. Since Officer Gulla already has a written reprimand for violation of Department policy, I recommend Officer Gulla receive a one day suspension for violation of Manual Sections 1.4.0, Duty Hours, and 2.3.15, Punctuality.

KING COUNTY DEPARTMENT OF PUBLIC SAFETY

ADDITIONAL INFORMATION SHEET/OFFICER'S REPORT

Case No.

TO	VIA	DATE	TIME
MAJOR NAULT	CHAIN OF COMMAND	04-08-84	1100

FROM	SUBJECT: CONTINUATION OF ☐ OFFICER'S REPORT REGARDING ☒
SGT. FRANK L. ATCHLEY #07685	OFFICER D. GULLA/RECOMMENDATION FOR DISCIPLINE

ITEM:

I would like to preface this report with the fact that OFF. GULLA is one of the most productive officers on my shift. However, OFF. GULLA's failure to adhere to KCDPS MANUAL SECTIONS 1.4.0 and 2.3.15 or to submit his paper work at the end of his shift, makes him less than dependable.

KCDPS MANUAL SECTION 1.4.0 reads as follows; DUTY HOURS: Department personnel shall work those hours or shifts designated by the Division Commander. Supervisors may modify the assigned hours, when necessary, with the Division Commander's approval.

Compensation for hours worked shall be in accordance with the collective bargaining agreement in force.

KCDPS MANUAL SECTION 2.3.15 reads as follows; PUNCTUALITY: Members and employees of the Department shall be punctual in reporting for duty at the time and place designated by their superior officers. Habitual failure to report promptly at the time directed shall be deemed in neglect of duty.

On 01-31-84, OFF. GULLA failed to respond to subpoena's from FEDERAL WAY DISTRICT COURT, which he was given a written reprimand for. On this same day he also reported late to the "BATON SCHOOL" at the academy, which resulted in his dismissal from that class by SGT. DONNA NOLAN.

On 02-07-84, OFF. GULLA arrived to work ten minutes late. His tardiness resulted in his missing roll call and being unable to go into service at the designated time.

I was later advised by SGT. JILBERT of KENT POLICE DEPARTMENT, that OFF. GULLA had been stopped by one of his officers for speeding through the city of KENT. He further advised that OFF. GULLA was driving his Corvett at the time, in unifrom and enroute to work.

On 02-08-84, at the beginning of shift, I discussed the tardiness and the speeding incident with OFF. GULLA. He was advised at that time that I would not continue to tolerate his tardiness.

On 02-15-84, OFF. GULLA was given the above mentioned written reprimand in reference to his failure to respond to the subpoena's from FEDERAL WAY DISTRICT COURT. During our conversation on this matter, he commented that he could have avoided this by calling

INVESTIGATING OFFICER	SERIAL	UNIT	APPROVED BY
SGT. FRANK L. ATCHLEY	07685	1F	Lt [illegible]

KCDPS C-102 40M 4/74

KING COUNTY DEPARTMENT OF PUBLIC SAFETY

ADDITIONAL INFORMATION SHEET/OFFICER'S REPORT

Case No.

TO	VIA	DATE	TIME
MAJOR NAULT	CHAIN OF COMMAND	04-08-84	1100

FROM	SUBJECT: CONTINUATION OF [X] OFFICER'S REPORT REGARDING [ ]
SGT. FRANK L. ATCHLEY #07685	OFFICER D. GULLA

ITEM:

in sick on the day he missed the court date and the class at the academy.

On 02-27-84, I met with OFF. GULLA in the Sergeant's office. I at this time discussed with him the need to submit his paper work and activity logs at the end of his shift and before going home. This discussion was the result of his failure to submit his logs for 02-12-84 and 02-24-84.

After this discussion and being warned against the future failure to submit his logs, he failed to turn in logs for 03-13-84, 03-14-84, 03-17-84, 03-24-84 and 03-29-84.

On 03-30-84, OFF. GULLA failed to report to roll call. After roll call, I instructed MPO DANICHEK to telephone OFF. GULLA at his home. While I was present, MPO DANICHEK made the call. OFF. GULLA answered the telephone and he responded with the fact that he had over slept. He stated that he would come right to work.

When OFF. GULLA arrived at the precinct, I met him at the door. I noted the time to be exactly 2336 hrs.. OFF. GULLA was not in uniform and he had to change his clothes. I noted that he was not ready for duty until 2355 hrs..

I at this time told OFF. GULLA that it would be shown on the attendance log, that he worked only six hours and I would recommend that he be paid for only six hours of work for this shift. He responded to my comment by saying that in the future he would call in sick when he was tired or he had over slept.

On 03-31-84, OFF. GULLA called in sick. I was later advised by SGT. NELSON, that earlier in the day, he had seen OFF. GULLA at the FED. WAY SUB-STATION.

On 04-08-84, OFF. GULLA arrived five minutes late to roll call. He did not have his unit ready and was unable to immediately go into service at the conclusion of roll call.

In conclusion, I would like to state that where I feel that OFF. GULLA, has the potential for being a very good officer and a asset to this department, it is also my opinion that the above mentioned conduct can no longer be condoned in any way. Therefore, I recommend that based on the repeated violation of KCDPS MANUAL SECTIONS 1.4.0 and 2.3.15, that OFF. GULLA be found in neglect of duty. I also recommend a one day suspension or the forfeiture of one vacation day.

INVESTIGATING OFFICER	SERIAL	UNIT	APPROVED BY:
SGT. FRANK L. ATCHLEY	07685	1F	

C-102 40M 4/74

KING COUNTY POLICE

MEMORANDUM

TO: Sheriff Vern Thomas DATE: 11/25/86

FROM: Capt Greg Boyle
Captain Greg Boyle, Inspections & Planning:wn VIA: Chief Burk

SUBJECT: IIU Case 86-43; Bellows vs. Gulla

The Internal Investigations Unit has recently concluded the investigation of a complaint which alleges that Police Officer Denny Gulla, assigned to the Traffic Unit, Special Operations Section, acted inappropriately in his contact with a fifteen year old female, Kay Bellows, on April 13, 1986. Kay Bellows alleges that Officer Gulla made a "pass" at her and otherwise conducted himself improperly subsequent to contact with her on a citizen assist detail. It is further alleged that Officer Gulla lied to Mrs. Jo Bellows, Kay's mother, during a phone conversation he had with her to explain Kay's whereabouts. Kay Bellows also alleges that Officer Gulla made phone contact with her for personal reasons at her residence on four or five occasions subsequent to the initial contact the officer had with her.

Kay Bellows relates that the following events occured the morning of April 13, 1986. Kay Bellows and three of her friends ran out of gas on the Cemetary Road during the early morning hours. Two of her friends left on foot to locate some gas and Ms. Bellows and her male friend, Jeremy Mayer, stayed with the car. At 0104 hours on April 13, 1986, Officer Gulla arrived at their location accompanied by a volunteer rider, Greg Haglund. Officer Gulla had Ms. Bellows and Mr. Mayer get in his police car and then drove Mayer home. Ms. Bellows alleges Officer Gulla asked her how old she was and she replied "Fifteen". Officer Gulla replied, "Well, I'll just put down 18 'cause that's how old you look." Ms. Bellows alleges that while they were enroute to Bob's Big Boy Restaurant in Issaquah, they observed a woman walking on the road crying. Officer Gulla stopped and volunteer Haglund left the police car to find out what was wrong. At this point, she alleges that Officer Gulla told her she was pretty and asked her if she would mind if a cop "made a move at her?" Ms. Bellows states she told him she would mind and did not want him to. While enroute to the Bellows residence a short time later, Officer Gulla, volunteer Haglund and Ms. Bellows stopped at Bob's Big Boy Restaurant. Ms. Bellows states they were at the restaurant for approximately thirty to forty-five minutes. During that time Officer Gulla telephoned her mother, Mrs. Jo Bellows, and Kay (Ms. Bellows) ate a cheeseburger, coke and fries, which Officer Gulla paid for. Kay did not indicate to I.I.U. that she had been drinking that evening. When the three left the restaurant, Officer Gulla drove Ms. Bellows home, walked her to the front door, meeting Mrs. Jo Bellows. Kay Bellows alleges that Officer Gulla later called her at home between 1400

hours to 1600 hours on April 13, 1986 (that same day) asking her to go out that night. Her seventeen year old sister, Holly Bellows, witnessed receipt of this phone call from Officer Gulla. Ms. Bellows says she told him "no". Ms. Bellows alleges that Officer Gulla again called her the next day, sometime in the afternoon, asking her to go out. Ms. Bellows alleges that over all, Officer Gulla called her at home several times during that following one week period. There have been no additional contacts since then.

Mrs. Jo Bellows phoned the King County Police Communications Center on August 8, 1986 to file a complaint against Officer Denny Gulla. She stated she did not find out about Officer Gulla's alleged misconduct with her daughter until sometime recently. Mrs. Bellows was having lunch with a friend, Mrs. Jeanett DePriest, in Issaquah and the subject of her daughter, Jennifer DePriest's arrest for DWI was mentioned. During Mrs. DePriest's and Mrs. Bellow's conversation, it was determined that Officer Denny Gulla had had contact with both of their respective daughters, Jennifer DePriest and Kay Bellows. (Refer to companion I.I.U. Case 86-44).

During Mrs. Bellows interview with Detective Colwell, she related the following facts. On April 13, 1986 at approximately 0130 hours, she received a phone call at home from Officer Gulla. Officer Gulla told her he had found her daughter, Kay Bellows, and her friend in a car that had run out of gas and that they were waiting for help. Officer Gulla gave her his name and told her to call 911 if her daughter wasn't home in an hour or so. Officer Gulla later brought Kay Bellows home around 0315 hours, April 13, 1986. Mrs. Bellows alleges that when Officer Gulla telephoned her he did not tell her that her daughter, Kay, was with him, nor did he tell her that Kay had been drinking. Officer Gulla's phone conversation focused on the fact that Kay and her friend were waiting in a car that had run out of gas and that the kids were safe and that he would check on them later.

Holly Bellows stated she was aware Officer Gulla telephoned her sister, Kay, the same day he had brought Kay home. Kay told Holly in the afternoon of April 13, 1986, that the officer had taken her to Bob's Big Boy Restaurant after dropping her friend off. Holly asked her sister if she had "told mom any of this?" Kay replied "No, I thought mom would be mad at me for not making him bring me straight home and going to the hamburger place with them." Holly stated she witnessed Officer Gulla call Kay once, and was told by Kay that the officer had called her three to four times.

Gregory Haglund states on April 13, 1986 he was a civilian rider with Officer Denny Gulla. He remembers a car in the ditch with a male and female inside. "We took the male home, and we were going to take the female home but we stopped and had something to eat on the way." Haglund thinks they ate at Bob's Big Boy

Restaurant in Issaquah, but is not positive. He recalls that he thought Kay had been drinking that evening. He does not recall stopping to contact a woman in the road. Overall, Mr. Haglund is a very poor witness and it is undetermined whether his very poor recollection of events is due to poor memory or his friendship with Officer Gulla.

The Internal Investigations Unit requested a CAD printout of Officer Gulla's police activity for his shift of April 12/13, 1986. On April 13, 1986 he was dispatched and arrived at a "car in the ditch" call at 0104 hours. He cleared that detail at 0159 hours. At 0159 hours Officer Gulla was "Out of Service-Eating", Code 979. He cleared at 0256 hours.

On September 18, 1986, Officer Gulla was requested by Detective Colwell to bring his Officer's Notebook for the April 12/13, 1986 shift, with him for his IIU interview on September 22, 1986. Officer Gulla stated "There is no notebook." (Refer to Gulla statement, Page 2). On October 1, 1986 Officer Gulla's Officer's Notebook was received in IIU. A thorough inspection of his Officer's Notebook revealed no entries for April 12/13, 1986, nor any entries indicating any contact with Kay Bellows. It is noted that a page count of his Officer's Notebook indicates numerous pages are missing.

Officer Gulla was interviewed by Captain Greg Boyle on September 22, 1986 at 1344 hours. Initially he was questioned about his Officer's Notebook. Officer Gulla stated he "probably has a notebook from that period of time, but it doesn't have dates or anything...I just use it." Officer Gulla stated that, "the incident (Bellows) in question wasn't of significant nature to be put in." Officer Gulla stated he was on duty on April 12/13, 1986 and had a civilian rider, Greg Haglund, with him. He remembers the incident of the car in the ditch, and the young male and female in the front seat of the car. He stated after he woke the couple up he could tell both of them had been drinking. Officer Gulla was told by the couple that they were returning from a friend's party and had run out of gas. Officer Gulla and Haglund took the male home, and drove Kay Bellows to Bob's Big Boy Restaurant. Officer Gulla stated while at Bob's Big Boy he called radio, told them he was having coffee, then called Mrs. Bellows. Officer Gulla alleges he told Mrs. Bellows that her daughter had been with friends, ran out of gas, that there wasn't anything criminal involved and that he would have her daughter there in about fifteen or twenty minutes. Officer Gulla alleges he told Mrs. Bellows that her daughter had been drinking, and was at the restaurant with him. Officer Gulla stated he was at the restaurant for ten to fifteen minutes. Officer Gulla denies making any suggestive comments to Kay Bellows indicating an

interest in starting a personal relationship. He states that Kay Bellows told him about "young guys" selling cocaine at school, but she could not name individuals or be specific. Officer Gulla states he made one follow-up phone call to Kay Bellows, at her home, asking about specifics on the drug activity. He alleges he has had no contact with her since. Officer Gulla states that they did not stop to contact a woman in the road on the way to the restaurant, the time when the alleged flirtation occured.

Kay Bellows' companion, Jeremy Mayer, was contacted by Detective Colwell on September 3, 1986. He indicated that he and Kay had not been drinking on that evening and that Kay later told him that the police had taken her to a restaurant. He could offer no other pertinent information.

As an aside, during the processing of this complaint investigation, an event has occured during which Kay Bellows was found to have been drinking. On September 27, 1986 at 0830, Kay Bellows was driving her mother's car, with her friend Greg Schuler as a passenger. Schuler had Ms. Bellows park about a block away from Clark's Texaco in Issaquah. Schuler entered the Texaco station, shoplifted three half cases of beer and ran to Ms. Bellows' vehicle. Ms. Bellows drove the vehicle to a friend's house. At 1145 hours, Kay Bellows was driving her mother's car, a 1980 Cadillac, lost control and smashed into a telephone pole, totaling the Cadillac. See King County Traffic Collision Report 86-205633 and Issaquah Police Department Case Number 86-00981. (Attached).

In summary, several issues were addressed during this investigation. Unfortunately, corroboration sufficient to prove or disprove critical facts is lacking.

The complainant and her male friend indicate Ms. Bellows had not been drinking on the evening of April 12/13, 1986, but Officer Gulla and Mr. Haglund indicate she had been. Mrs. Bellows states that Kay immediately went upstairs to bed when she was brought home and, therefore, she didn't observe whether Kay had been drinking. Kay's sister, Holly, states that Kay later confided in her that she had been drinking on the evening of April 12/13, 1986. The subsequent incident in which Kay was drinking during the morning of September 27, 1986 tends to support the conclusion that she was most probably drinking on April 12/13, 1986.

Kay Bellows alleges that Officer Gulla made several suggestive comments and a "pass" at her while they were alone in the patrol car. Officer Gulla denies this. Officer Gulla and volunteer Haglund dispute that Officer Gulla was alone in the car with Kay Bellows and deny that the incident of stopping to contact a woman in the roadway, when the alleged flirtation occured, actually

happened.

Officer Gulla states that they stopped at the restaurant to allow Kay to have coffee and "straighten" herself up before he took her home. He states they were at the restaurant only 10-15 minutes and that they did not eat. He also states that, the entire episode, from initial contact at the scene until they arrived at her residence, was 45-60 minutes. Mr. Haglund's recollection is very poor, but he thinks they may have had something to eat at the restaurant. Kay Bellows indicates that they specifically stopped at the restaurant to eat and that Officer Gulla bought her food. CAD records reflect the initial contact at the scene occured at 0104 hours, that he cleared the detail and went 979 at 0159 hours, and went back in service at 0256 hours. It is unknown exactly at what time they arrived at the Bellows' residence, but Mrs. Bellows recalls it being approximately 0315 to 0330 hours. However, she also recalls her telephone call from Officer Gulla being about 0130 hours, when it actually was probably later. Anyway, they were apparently at the restaurant for 45 to 60 minutes.

Mrs. Bellows clearly recalls the conversation with Officer Gulla and his alleged comments that her daughter had been left at the location of the disabled vehicle. Officer Gulla refutes that allegation and states he informed Mrs. Bellows that Kay was with him. There were no witnesses to that conversation.

Kay Bellows states that Officer Gulla telephoned her at her residence on the same afternoon he took her home, April 13, and several times subsequently the following week asking her to go out with him. Holly Bellows states she was present when Kay received at least one of Officer Gulla's calls. Officer Gulla states that he called her only once in order to obtain information concerning drug traffic at her school, a topic he alleges was discussed during their original contact. Mr. Haglund does not recall any conversation about drugs.

Officer Gulla was directed to submit his notebook for the shift in question to IIU in hopes that it would contain evidence to clarify several issues, such as activity times, notes and information on Kay Bellows including the disputed notation concerning her age. However, Officer Gulla initially indicated he did not have a notebook. This issue was addressed, somewhat unsatisfactorily, during his IIU interview when he alluded to a misunderstanding about the matter. When he subsequently did submit his notebook, it contained no information about the Bellows incident. However, the incident did occur in April, 1986, before notebook format and documentation requirements were initiated. Traffic Unit personnel do not maintain narrative log sheets, only statistical recaps. Thus, no documentation

generated by Officer Gulla was available.

In conclusion, the success of this investigation was impeded by the four (4) month delay in receiving the complaint due to lapses of memory, loss of evidence (such as Communications Center tapes) and inability to identify potential witnesses. The primary witness, Kay Bellows, was intoxicated to an undetermined degree on the evening of the incident and her testimony is only marginally credible. Mrs. Bellows has informed IIU that Kay is currently in psychological counselling due to alcohol and behavior problems. Confidentially Mrs. Bellows has also informed IIU that she has located and read an entry in Kay's diary which states that on April 13 Kay had been drinking at a party and later had "made out with a cop and it was fun." It is clear that Kay was taken to the restaurant by Officer Gulla, but she was not an arrestee. The discrepancies in statements concerning the content of the telephone call to Mrs. Bellows from the restaurant and the subsequent call(s) to Kay cannot be resolved with independent corroboration. The fact pattern of the totality of the incident certainly casts doubt on Officer Gulla's credibility concerning this matter and his lack of any documentation whatsover, particularly considering the length of time he was involved in this incident and his apparent reluctance to surrender his notebook to investigators, is at least discomforting. Anyway, it is concluded that insufficient evidence exists to either fully support or refute the allegations of misconduct against Officer Gulla and it is, therefore, recommended that this complaint be classified as "Non-Sustained."

KING COUNTY DEPARTMENT OF PUBLIC SAFETY

Notification of Complaint

I.I.U. CASE # 86-43

DATE: 9/18/86

FROM: INTERNAL INVESTIGATIONS UNIT

TO:	ACCUSED	WITNESS
Police Officer Denny Gulla	[X]	[ ]
	[ ]	[ ]
	[ ]	[ ]
	[ ]	[ ]

The Internal Investigations Unit is currently conducting an investigation into a complaint of misconduct lodged against the above accused individual(s). In order to proceed with the investigation, it is necessary that this Unit receive a detailed statement from you concerning your actions and observations during the incident in question.

Therefore, you are directed to contact the assigned I.I.U. Investigator as indicated below for more specific information regarding the allegations(s). You will be advised during this contact to either submit a written statement immediately or you will be scheduled for a personal interview with the investigator.

Contact I.I.U. Investigator Detective Ben Colwell at 344-5200 on

or before Tuesday, 9/23/86 between the hours of 0830 - 1600.

Name of Complainant/Alleged Victim K.C.D.P.S.

Date/Time/Location/Type of Incident April 13 through April 18, 1986; during and subsequent to your contact with a female juvenile, you conducted yourself improperly and made false statements to the child's parent, thereby violating Manual Sections 2.2.0 B.(8)(Conduct Unbecoming An Officer), and 2.2.0 A(1)(Making False Statements).

Nature of Allegation(s)

Improper Procedures	[ ]	Discourtesy	[ ]
Improper Conduct	[X]	Criminal Violation	[ ]
Unnecessary/Excessive Force	[ ]	Miscellaneous	[ ]

cc: Sheriff Thomas
Chief Burk
Captain Pompey

APPROVED: Capt Jim Boyle
(Commander, I.I.U.)

KCDPS A-150 (5/84)

KING COUNTY POLICE

MEMORANDUM

TO: Sheriff Vern Thomas DATE: 11/26/86

FROM: Capt Greg Boyle
Captain Greg Boyle, Inspections & Planning:wn VIA: Chief Burk

SUBJECT: IIU Case 86-44; DePriest vs. Gulla

The Internal Investigations Unit has recently concluded the investigation of information which suggests that Police Officer Denny Gulla, assigned to the Traffic Unit, Special Operations Section, conducted himself improperly with regard to his involvement with an 18 year old female DWI arrestee. Ms. Jennifer DePriest alleges that on the early morning of February 15, 1986, she was stopped by Officer Gullas as a DWI suspect and that the following events occured: Officer Gulla took her to the Renton Police Department for a Breathalyzer Test which he somehow intentionally manipulated to reflect an inflated reading of .15, the exact same reading of the person tested immediately before her; Officer Gulla intentionally failed to follow proper DWI processing procedures (observe subject constantly for 15 minutes prior to testing) in order to create an issue on which the charge could be later reduced; Officer Gulla took her to a remote location to converse and do paperwork; Officer stated that if she would go riding with him later that same night that he would have her DWI charge reduced to Negligent Driving; that she did meet Officer Gulla and rode with him that evening and that he had her sign a Hold Harmless form which he returned to her at the end of the ride, and, that at the end of the ride Officer Gulla pressured her to meet him again and made a "pass" at her. Ms. DePriest refused to see Officer Gulla again and has not. The DWI charge was subsquently dismissed on prosecution motion.

Ms. DePriest relates the following events occured, beginning with the evening of February 14, 1986: She and her girlfriend, Carrie Ruby, were enroute to go dancing at the "Encore" in Renton. At approximately 2000 hours, they stopped at a friend's house in Issaquah where they each had two drinks (Vodka Collins). Around 2100 hours, they left and headed for Baskin and Robbins where they talked to a friend. From there they headed for the Encore, arriving around 2300 to 2330 hours. They stayed at the Encore for approximately 45 minutes, left and took a male friend to Denny's Restaurant in Renton, where they had something to eat. They then drove back to the Encore. A short time later the three of them left, with Jennifer and Carrie driving the male home. He lives a considerable distance outside of Renton. After they let the friend off, they were trying to find their way home when Jennifer "did a California stop through a Stop sign and got pulled over by a policeman." This was at 0125 hours on February 15, 1986.

Officer Gulla asked her out of her car and gave her sobriety tests on the sidewalk. Gulla's report reflects that the tests consisted of standing eyes closed (room wave 2-3"), standing one foot (unstable but OK), walking (unstable) and nystigma (15 degrees to 20 degrees). Shortly after the tests, Officer Gulla asked Ms. DePriest if she would release her car to her passenger, Carrie Ruby. DePriest agreed and Officer Gulla approached Ms. Ruby and told her they were going to the Renton police station so Ms. DePriest could take a Breathalyzer Test.

At the Renton Police Department, Ms. Ruby remained in Ms. DePriest's car in the parking lot while Officer Gulla and Ms. DePriest entered the police station.

Ms. DePriest was given a Breathalyzer Test at 0155 hours and blew a .15. Prior to her test, she states she observed, "A man who had taken it right before me and he was really drunk and he scored a .15 and then I took the test immediately after him and we didn't wait fifteen minutes like you're supposed to and I scored a .15." Ms. DePriest states Officer Gulla told her he was going to arrest her for Driving While Intoxicated and that he would tell Ms. Ruby to drive her (DePriest's) car to her (Ruby's) house. Officer Gulla then would drop Ms.DePriest off about three hours later at the Ruby residence, after they finished the paperwork.

Ms. DePriest states Officer Gulla and she then left Renton Police Department and drove to a secluded turnaround area close to the Maple Valley Golf Course where he completed some paperwork and made small talk. She states that during this time, Officer Gulla said if she would ride with him in his police car just to observe, that he would do everything he could to get her DWI reduced to a Negligent Driving charge. it was agreed that she would ride that same night. She says they spent about one and a half hours doing paperwork. She states that after the paperwork was completed, he drove her to her friend, Carrie Ruby's house, arriving at approximately 0300 hours, where her car was located.

On February 15, at 2000 hours, she met Officer Gulla as prearranged at Bob's Big Boy Restaurant in Issaquah, and rode with him until 2200 hours. At this point, Officer Gulla asked to look at her citation and he allegedly asked, "Do you want to discuss this over lunch tomorrow?" to which she replied, "No, not really." Officer Gulla told her he wanted her to go riding with him again and gave her his business card with his phone number on it. As she was getting out of his patrol car Officer Gulla said, "Well, I guess this is where I make my pass at you." As Ms. Depriest was getting into her car in the restaurant parking lot, Officer Gulla walked over and said, "You forgot this" and handed her the Hold Harmless Agreement she had signed. She has since had no further contact with him.

On June 4, 1986, King County Deputy Prosecutor Kyle Aiken dismissed Ms. DePriest's DWI charge in Renton District Court. In her statement to IIU, she indicates the reason for dismissal was Officer Gulla's failure to watch Ms. DePriest's mouth for the required fifteen minutes prior to the Breathalyzer and the mixed physical/field sobriety tests. Ms. Aiken notified Officer Gulla of the dismissal of the DWI and advised him that he could refile infraction charges against Ms. DePriest. However, as of August 15, 1986, no other charges have been filed.

Ms. Carrie Ruby, Jennifer DePriest's passenger on February 14, 1986, states that she and Jennifer had two drinks each between 2000 hours and 2100 hours, and nothing after that. After Ms. DePriest was arrested for DWI, she was given permission by Officer Gulla to drive Ms. DePriest's car to the Renton Police Department. She waited in the parking lot for at least a half an hour. Officer Gulla came to her and told her that he had a couple of hours of paperwork and talking to do with Jennifer, and he was going to try and work out a deal with her. Officer Gulla said that Jennifer had signed a release so that Ms. Ruby could drive DePriest's car to Ms. Ruby's house. He stated he would bring Jennifer to Ms. Ruby's house when they were finished talking so she could pick up her car.

Ms. Ruby stated she left the Renton police station and arrived at her residence at approximately 0225 to 0230 hours. She waited up for Ms. DePriest until 0300 hours when she saw the police car in her driveway. After three or four minutes, Ms. DePriest came inside and told her that Officer Gulla was going to try and help her with her ticket. Ms. DePriest told her she was to meet Officer Gulla the next night in Issaquah to go riding in his police car. Jennifer related at the time that she felt Officer Gulla was really nice, and that he felt bad about the ticket and was going to try and help her deal with it.

On August 13, 1986 the Internal Investigations Unit initiated an investigation of this possible misconduct by Officer Gulla. Mrs. Jeanett DePriest, the mother of Jennifer DePriest, was contacted by phone. She stated after her daughter was charged with DWI, she and her husband retained an attorney, Mr. David Williams, to represent Jennifer. On June 4, 1986, all charges were dismissed. She also verified that her daughter had gone riding with the officer on the evening of February 15, 1986 and that the hold harmless form had been given to their attorney.

On August 13, 1986, Detective Ben Colwell contacted Deputy Prosecutor, Ms. Kyle Aiken. She was requested to write a report detailing Officer Gulla's DWI charge and the subsequent dismissal. She states in her report that Officer Gulla, as noted in his report, failed to watch the defendant's mouth the required fifteen minutes. "Given the inadmissibility of the Breathalyzer and the mixed physicals and driving (43 in a 30 MPH zone, California roll through a Stop sign)," her supervisor, Senior Deputy Prosecutor Stephen Moore, and she decided to dismiss the

DWI and notify Officer Gulla that he could refile civil infractions. On June 4, 1986, in the Renton District Court, Ms. Aiken notified Offcier Gulla of the dismissal of the DWI charge. She states, "I asked him (Officer Gulla) if he wanted the citation so he could write the infractions, he said "No", that he remembered the case." On August 15, 1986, Ms. Aiken checked with Renton District Court and no other charges have been filed against Jennifer DePriest by Officer Gulla.

The Internal Investigations Unit has obtained the Renton Court docket for Ms. DePriest, which establishes that the Breathalyzer Test was suppressed and the state's case on amending DWI to Negligent Driving was denied. Officer Gulla's DWI report was obtained, including his officers report admitting his error on the Breathalyzer Test.

On October 9, 1986 WSP Trooper Tony McElroy was contacted by Detective Ben Colwell. Trooper McElroy is an expert on DWI's and the custodian of B/A logs. Detective Colwell requested that Trooper McElroy review Officer Gulla's written physical tests of Jennifer DePriest. Following is the summary of Trooper McElroy's observations:

If she blew a .15 at 0155 hours she would have had 3.3 drinks in her system. If she stopped drinking at 2130 hours and blew .15 at 0155 hours she would have had to have consumed seven drinks prior to 2130 hours.

Trooper McElroy also stated that the 15 to 20 degree nystigma meant she should have blown between .30 and .35, but cocaine can cause this. The rest of the physicals were consistent with a B/A of .15. He further commented that it is possible for an officer to manipulate a Breathalyzer reading. However, since the ampoules are not retained, no corroborating evidence would exist. These comments support the same conclusions solicited from Sgt. Couture, King County Police. Although the Breathalyzer Log does confirm that the subject tested immediately preceding Ms. DePriest also had a reading of .15, this would not facilitate, or be relevant, to a subsequent test manipulation.

On September 22, 1986, Officer Gulla was interviewed by Captain Boyle and Detective Colwell in the IIU office. Officer Gulla recalled the incident, and remembered that he had an intern rider, Greg Haglund, with him during the shift in question. Officer Gulla stated he observed Ms. DePriest driving, paced her for about five blocks at 43 in a 30 MPH speed zone. He observed her roll through a Stop sign, and stopped her on the Benson Road, just north of Royal Hills Drive. He had her perform a series of sobriety tests. Officer Gulla states that as a result of the sobriety tests he thought her ability to drive was impaired.

Officer Gulla gave Ms. DePriest's passenger (Carrie Ruby) "some" sobriety tests. "She might have driven DePriest's vehicle to the Renton police station, but I can't recall for sure." At the Renton police station, Officer Gulla administered the Breathalyzer, and indicates that he did not watch DePriest's mouth the full fifteen minutes prior to her Breathalyzer Test. He further indicated that intern Haglund observed the B/A test. Officer Gulla maintains that the sobriety tests he administered were consistent with a B/A of .15.

Officer Gulla contends that he discovered the procedural error on the B/A test at a later time when he was completing the paperwork. He filed the DWI anyway, thinking the case would still be sufficient. During this phase of the interview, Officer Gulla cited State vs. Hamrick, which states if there is only fourteen minutes and fifty-nine seconds of watching the defendant's mouth, the court won't allow the Breathalyzer admitted. The correct case to cite is State vs. Baker (1960). Officer Gulla states he took Ms. Depriest directly home from the Renton Police Department.

Both Officer Gulla and Ms. DePriest agree that the original traffic stop was valid. Ms. DePriest alleges she had only two drinks from 2000 hours to 2100 hours. Prior to her taking the B/A test, there was a man ahead of her who blew a .15 "and he was really drunk." She states she took the B/A test immediately after him and she blew a .15 also. Officer Gulla states he administered the B/A test properly, in that he followed the thirteen steps prior to giving Ms. DePriest her B/A test. Officer Gulla admitted in his Officer's Report that he failed to observe Ms. DePriest's mouth for the required fifteen minutes.

On June 4, 1986 Officer Gulla acknowledges he was told by Prosecutor Kyle Aiken the DWI charge on Jennifer DePriest had been dismissed. She allegedly informed Officer Gulla that he could refile civil infractions, but this was never done. Officer Gulla alleges that he does not recall her suggestion and did not feel he could file infractions after the DWI dismissal.

Officer Gulla denies taking Ms. DePriest to the Maple Valley Golf Course after the B/A test to complete paperwork. He denies any conversation with her about reducing a DWI charge to Negligent Driving. He denies that she went riding with him that same night after her arrest. He alleges that it was at least a week later, or longer, when Ms. DePriest called Special Operations and left a message with the secretary, Venetia Metzdorf, to have Officer Gulla call her regarding a civilian ridealong. Officer Gulla says he called her at home and made arrangements with her to ride. He then called Sgt. Couture at home and was told to "get a Hold Harmless Agreement" and put that in his box. Officer Gulla admits he did not tell Sgt. Couture she was someone he had arrested recently.

Officer Gulla states he met Ms. DePriest at Bob's Big Boy Restaurant, had her sign the Hold Harmless and then did police work for four or five hours. He indicates that he later placed the Hold Harmless form in his sergeant's box. Officer Gulla denies making the statement "I guess this is where I make a pass at you" or having any interest in initiating a personal relationship with Ms. DePriest.

Sgt. William Couture (Gulla's supervisor) was request~~ing~~ed to write an Officer's Report concerning any request he has had from Officer Gulla to allow civilian riders. Sgt. Couture remembers that sometime in the first half of this year, Officer Gulla called him at home and asked him about a civilian rider. Sgt. Couture does not remember the specifics of the conversation. Sgt. Couture recently completed Officer Gulla's personnel evaluation for that period and found two (2) Hold Harmless Agreements in the packet, one agreement was from Greg Haglund, an ex-King County Police intern, and Cindy Dahl, a civilian who on 05/01/86 was gathering information for a class paper; nothing for Jennifer DePriest. We don't know whether Gulla's call concerned DePriest or Dahl. Furthermore, Special Operations secretary Venetia Metzdorf indicates she does not recall Ms. DePriest leaving a message for Officer Gulla as he alleges. A search of Special Operations Unit files has not located a Hold Harmless Agreement from Ms. DePriest.

Subsequent to the IIU interview with Officer Gulla, he telephoned Detective Colwell on September 23, 1986 and stated that he was no longer sure that intern Haglund had been riding with him on the shift of Ms. DePriest's arrest. This call was received after IIU had already confirmed with Mr. Haglund that he was <u>not</u> a rider during the February 14/15 shift. Unfortunately, Officer Gulla's improved recollection somewhat negated the accuracy of his IIU statement since he had relied on Mr. Haglund's presence to refute some of Ms. DePriest's allegations.

Officer Gulla also submitted his notebook to IIU as requested for inspection. It contained no information concerning the contact with Ms. DePriest.

The CAD printout for the shift was obtained; shows Officer Gulla's DWI stop occured on 02/15/86 at 0131 hours. He cleared at 0227 hours, a citizen assist at 0228 hours (DePriest) which he cleared at 0254 hours.

Upon receipt of a copy of the Hold Harmless form on 09/25/86 from Ms. DePriest's mother, Jeanett, Officer Gulla was contacted and requested by Detective Colwell to submit a written response to the allegation that Ms. DePriest had, in fact, ridden with him on February 15, 1986 and that he had returned the Hold Harmless form to her as alleged. Officer Gulla submitted an Officer's Report dated 10/27/86 in which he again denies Ms. DePriest rode with

with him on February 15 and he questions the authenticity of the Hold Harmless form copy in the possession of IIU.

Detective Colwell subsequently obtained the original Hold Harmless form from Mr. Williams, DePriest's attorney. From visual inspection of the form, it appears that Officer Gulla may have written the date "2/15/86". It is an out-of-date form (Rev. 2/81) with no writing on the back, as opposed to the new form (Rev. 12/84). The original form was submitted to the Latent Print Lab and Officer Gulla's left thumb print was found on the form by examiner Marilyn Hattori.

Findings and Conclusions

It is clear that the traffic stop of Ms. DePriest by Officer Gulla was proper and justified. Her degree of intoxication and the validity of the breathalyzer reading, although disputed by Ms. DePriest and Ms. Ruby and tainted by Officer Gulla's procedural error and subsequent actions, cannot be established at this time and, thus, the officer's findings have not been refuted.

Several inconsistencies have arisen relative to whether Officer Gulla instructed Ms. Ruby to drive to Renton Police Department and wait while he processed Ms. DePriest; whether he later informed Ms. Ruby to drive home and await Ms. DePriest's arrival(due to the volume of paperwork needing to be completed); and whether Officer Gulla took Ms. DePriest home or to Ms. Ruby's residence. Officer Gulla, although his memory has somewhat faded, does not recall asking or directing Ms. Ruby to go to Renton Police Department; he denies later contacting Ms. Ruby in the Renton Police Department parking lot and telling her to go home and await Ms. DePriest because he had "a couple hours of paperwork and talking to do"; and, he denies later taking Ms. DePriest to Ms. Ruby's residence rather than home. Ms. DePriest and Ms. Ruby both indicate otherwise. An analysis of the available evidence is inconclusive. Officer Gulla indicates that he originally instructed Ms. Ruby to drive home from the scene, that she just stopped by Renton Police Department on the way home and that he advised her to leave because of the amount of time required to process a DWI. A fact is that Ms. Ruby did drive to Renton Police Department, and it seems unlikely that she would do so lacking such a request or suggestion by the officer. Ms. Ruby states she waited in the parking lot of Renton Police Department for about 1/2 hour before she was sent home by Officer Gulla. This seems fairly accurate since the arrest occured about 0130 and the Breathalyzer was administered about 0155. Ms. Ruby states she arrived home at about 0225 to 0230, and that Officer Gulla brought Ms. DePriest to the house at about 0300. The exact time that Officer Gulla and Ms. DePriest left Renton Police Department is uncertain. CAD indicates the arrest was cleared at 0227 and that a citizen assist (Ms. DePriest's transportation)

began at 0228 and concluded at 0254. Ms. DePriest alleges that Officer Gulla took her to an area near the Maple Valley Golf Course (actually the Maplewood Golf Course just outside of Renton) and that they remained there for one and one half hours talking and doing paperwork. This is impossible considering the established time parameters. However, it is possible that a stop of 20 minutes or less could have been made by the golf course. It is evident from the available information that Officer Gulla did ultimately transport Ms. DePriest to Ms. Ruby's residence rather than to her own residence. They live nearby each other in the north Issaquah area (Pine Lake - Beaver Lake). After some conversation with Ms. Ruby about having the charge reduced and the arrangement to ride with Officer Gulla that evening, Ms. DePriest drove home and arrived about 0330 (confirmed by Mrs. J. DePriest). The alleged comments made by Officer Gulla to both Ms. DePriest and Ms. Ruby regarding his interest and willingness to have the DWI charge reduced cannot be proved, but would not be inconsistent with the entire scenario of the aforementioned and subsequent events. The allegation that Officer Gulla made a "pass" at Ms. DePriest at the conclusion of her ride on the evening of 2/15/86 likewise cannot be proved or disproved. The significance of Officer Gulla's failure to file any civil infractions against Ms. DePriest after the dismissal of the DWI charge is undetermined.

Recommendations

It is recommended that Officer Gulla's self admitted failure to properly process a DWI suspect with regard to administering the Breathalyzer Test (technically a violation of Manual Section 2.2.0 B3 Incompetence or Inefficiency) be addressed by his Special Operations Section supervisors as a performance indication and deficiency.

With regard to actual misconduct supported by the results of this investigation, it is recommended that Officer Gulla be found in violation of Manual Section 2.2.0 B8 (Conduct Unbecoming) in that on February 15, 1986, Officer Gulla had an unauthorized civilian rider with him while on duty. Officer Gulla had arrested and cited this civilian for DWI on his previous shift (that same date, less than 24 hours earlier), failed to obtain the prior, informed approval of his supervisor to have the civilian rider and failed to submit a Hold Harmless form for the civilian rider at the conclusion of his tour of duty. Additionally, it is recommended that Officer Gulla be found in violation of Manual Section 2.2.0 A1 (False Statements) in that Officer Gulla made false statements concerning the aforementioned issues during the IIU investigation.

January 22, 1987

PERSONNEL ORDER 87-30

POLICE OFFICER DENNY J. GULLA, assigned to the Special Operations Section, Field Operations Division, has been found to be in violation of Department Manual Sections 2.2.0 A 1, False Statements, on two occasions, and 2.2.0 B 8, Conduct Unbecoming.... Specifically, Officer Gulla made false statements to Internal Investigations Unit personnel during the investigation of IIU cases 86-43 and 86-44. Additionally on or about February 15, 1986, he had an unauthorized rider with him on duty and he conducted himself improperly toward this rider.

Therefore, under the authority of RCW 41.14.110 and RCW 41.14.120, Officer Denny J. Gulla:

1) is transferred from the Special Operations Section to Precinct 3, Patrol effective February 10, 1987 and

2) is suspended for five (5) working days without pay. Three days of this suspension will be held in abeyance and then dropped on the condition that Officer Gulla have no violations of a similar nature for one year from the date of receipt of this personnel order and that he receive, at Department expense, an evaluation by a Department psychologist and participate, at his own expense, in any counselling program which may be prescribed by that psychologist.

This order will not be effective until February 10, 1987 in order to allow Officer Gulla the opportunity to exercise any appeal rights he may have under the union contract and Civil Service rules. This discipline shall be completed by March 10, 1987 and will be scheduled in advance with the approval of his Precinct Commander. Upon completion of this disciplinary action, Officer Gulla will submit a report certifying compliance to the Personnel Section through the chain of command.

Should Officer Gulla fail to comply with the conditions for holding the three days of suspension in abeyance, that discipline shall be given immediate effect consistent with existing personnel practices and contractual obligations.

VERN THOMAS, SHERIFF-DIRECTOR

Distribution:

Chief J. L. Burk; Chief J. J. Nickle; Captain D. H. Richmond; Major F. H. Adamson; Personnel Concerned; Personnel Records; Payroll; IIU: Legal Unit; Personnel Manager; Civil Service; Union Local 519

KING COUNTY POLICE

MEMORANDUM

TO: Sheriff James E. Montgomery DATE: 11/23/88

FROM: Lt. Larry Mayes, Internal Investigations Unit:wn VIA:

SUBJECT: Summary of IIU Case 88-44, KCDPS vs. Officer Denny Gulla

On October 17, 1988 at approximately 2230 hours Mr. and Mrs. contacted KCP Officers Garrison and Darlington at Southeast 272nd and 132nd Southeast. The wanted to report an assault that had occurred at Skopapsh Village earlier. A short time later both officers were notified by radio that the may have been involved in a hit and run involving two pedestrians.

After the officers contacted the was placed in the back seat of the patrol vehicle, unhandcuffed. A few minutes later Officer Denny Gulla arrived; he had been working undercover/AND OFF DUTY at Skopapsh Village. Officer Gulla, driving his private vehicle, had been involved in a chase with the as they left the Village.

Robert alleges that Officer Gulla opened the left rear door of the police vehicle, "He 'ceeded to get into the back seat and started punchin' and hittin' me. About approximately 15 times or 10 times, I can't really count to how many times he struck me".

Q: Where did he strike you?

A: In the stomach and in the face, slapping me and hittin' me..."

Sherry was interviewed by Detective Adkins on October 20, 1988.

Q: Okay. How many times was your husband struck?

A: Three times.

Q: And, how was he struck, with what?

A: A fist.

Q: Closed fist?

A: Yes.

Q: And where was your husband struck at?

A: In the chest, I'd seen it in the chest, I believe he got hit in the mouth too cuz when I looked back at my husband his head went back.

Officer Garrison was interviewed by Lt. Mayes in IIU. He stated that when Officer Gulla arrived he (Gulla) opened the rear driver door of the patrol vehicle and kneeled inside.

APP. 23D

Q: What was Officer Gulla's emotional state at that time?

A: Hmm I'd say he was angry.

Q: How angry?

A: I don't know how to qualify that.

Q: I mean was he just upset or was he emotional, somehwere between just being upset and veins popping out on his forehead?

A: He didn't seem out of control, he just seemed angry.

Officer Garrison admits that he intercepted as she was headed toward Officer Gulla. He heard say "He hit him" and, "He shouldn't do that". Officer Garrison did not witness Officer Gulla strike

Officer Darlington was interviewed by Lt. Mayes. During the time that Officer Gulla was in the back seat of the officers' patrol vehicle he witnessed Officer Gulla strike <u>one</u> <u>time</u> on his chest with a halfway open fist.

Q: When Gulla grabbed , shaking him and yelling at him, was he using profanity?

A: Yes he was.

Q: Was he calling profane names?

A: Gulla called an "asshole" and a "little shit", that's all I heard as far as profanity.

Officer Darlington states, as does Officer Gulla, that Officer Gulla was wearing a green jacket that said "POLICE" across the back, and had an embroidered star on the left front of the jacket. Officer Darlington further states that when he saw Officer Gulla strike on the chest, was not resisting or making any type of furtive moves.

Officer Gulla states: "When I opened the back door I found unhandcuffed, and I assumed unsearched. I took hold of shirt sleeve - as an officer safety measure...he made a quick movement - I didn't and still don't know what his intentions was/were - I reached out with my open right hand, palm towards and pushed him back. This was a defensive reaction on my part, not a conscious effort". Officer Gulla denies slapping or punching

Conclusions

Officer Gulla is found to be in violation of Manual Sections 2.2.0 B(8) Conduct Unbecoming and 2.1.7 Courtesy (Members...shall at all times conduct themselves in an orderly, courteous and civil manner...). Officer Gulla entered the rear seat area of a patrol vehicle where was sitting, struck him on the chest one time and referred to as an "asshole" and a "little shit". This was witnessed by Recruit Officer Corey Darlington.

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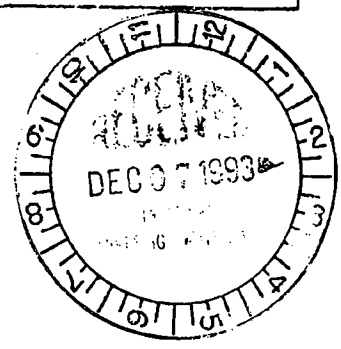
CIVIL DIVISION



IN THE MATTER OF THE ABITRATION

BETWEEN

THE KING COUNTY POLICE OFFICERS GUILD,	)	
and	)	ARBITRATION AWARD
KING COUNTY	)	

Grievant: Denny Gulla

Richard J. Ennis, Arbitrator

APPEARANCES

For the Guild:

Deborah Bellam, Attorney
425 Pontius Avenue N., Suite 200
Seattle, WA 98109

For the Employer:

Maureen Madion
Deputy Prosecutor
E550 King County Courthouse
Seattle, WA 98104-2312

HEARING

The hearing was held on September 21-24, 1993 in a conference room in the Prefontaine Building in Seattle, WA.

RULE AND CONTRACT PROVISIONS

The King County Police Manual contains the following provision concerning "Conduct Unbecoming":

> RULE 2.2.0.B(8) Behavior whichs brings the officer/employee or the Department into disrepute, tends to discredit or destroy public respect for the officer/employee or confidence in the operation of the Department, adversely affects or impairs the efficiency of the officer/employee, or is detrimental to the morale, discipline or efficency of the Department.

The Collective Bargaining Agreement between the Police Guild and King County contains the following provisions:

> ARTICLE 2 MANAGEMENT RIGHTS
>
> It is recognized that the Employer retains the right to manage the affairs of the County and direct the work force. Such functions of the Employer include, but are not limited to:....discipline, suspend, demote or dismiss employees for just cause;....
>
> Article 12, Section 5 JUST CAUSE STANDARD
>
> No employee may be discharged, suspended without pay or disciplined in any way except for just cause. In addition, the County will employ the concept of progressive discipline.

BACKGROUND

Sometime during the year 1991 the King County Police Department realized that a juvenile gang problem was emerging in the Seattle area. There had been a "denial" syndrome in the community and, to some extant, in the Police Department itself. People wanted to think that such gangs existed only in the large Eastern cities or in Los Angeles and had not yet reached Seattle.

There was, however, evidence to contrary and as a result

the Department realized that it was ill equipped to deal with the phenomenon. Consequently, it was decided that a "Gang" unit should be formed within the Department in order to gather intelligence concerning such gangs for use in educating the public and the personel of the Department itself. The gang unit was formed and thereafter the events that brought about this arbitration occurred.

FACTS

This case arises out of events occurring on March 19, 1992. At that time the Grievant, Police Officer Denny Gulla, was a member of the newly formed "Gang Unit". This unit was formed in recognition of the fact that criminal youth gangs were beginning to spring up in the Seattle area and were no longer confined to Los Angeles. The gangs were similar to and perhaps affiliated with the Southern California Bloods and Crips.

Prior to the time in question Officer Gulla had been told to get close to a gang in the White Center community. This gang called itself the Loco Asian Boys, or LABS. Officer Gulla's task was to learn all he could about this gang, it's lifestyle, hand signals, code words, members names and and the gang's mode of operation. He was told not to hassle them but to attempt to gain their trust. In other words, he was to act in the intelligence gathering mode rather than the law enforcement mode.

The officers in the gang unit did not wear regular police officer's uniforms but were dressed more informally. They were not undercover. Their garb contained a fabric

inscription proclaiming "Gang Unit" and they wore their usual sidearms. The gang members were fully aware that these men were police officers.

Officer Gulla had had some success in becoming acquainted with the LABS. On March 19, 1992 he advised his superior, Lt. Sue Rahr, that he proposed to take his video camera with him and perhaps get some of the gang on tape. Lt. Rahr was pleased with this suggestion and felt it a good idea.

Gulla and his partner, Officer Scott Badics, encountered some of the gang members at an outdoor basketball court in the White Center area. The six gang members present allowed Gulla to set up his camera on a tripod and tape them as they shot baskets and idly clowned about.

Then the matter of a "jump-in" arose. The jump-in was an initiation of two new members. These members would be beaten up to learn if they were tough enough to be gang members. Gulla asked if he could tape the jump-in. The gang members objected to this on the ground that the tape would be used as evidence against them. They were, after all, going to beat up a couple of young boys. Gulla told them that if the initiates consented to the beating, then there was no crime. The tape, he said, would go no further than his own department. The gang members believed him and shortly thereafter the initiation commenced.

The recipient of the beating was Aaron Livermore. The gang members circled him. Although Livermore appeared as if he might make some effort to defend himself he was quickly knocked to the ground. As he lay the gang struck him

repeatedly with their fists. They also kicked him in the back, stomach, chest and head. Two of the boys were particularly vicious. The beating lasted for nearly one minute.

Livermore was bloodied with cuts, bruises and abrasions. As he walked to a car with his friend he claimed he was alright, and was glad he was "in." He may even have said it was "fun". The other initiate who had viewed the beating declined the honor. "Nope", he said, "not today. Some other time." One of the gang members told him he couldn't change his mind, however, he was allowed to leave.

Officer Gulla took his tape back to headquarters where it was viewed by his superiors. It came to the attention of a King County Councilman who was outraged that the Officers on the scene allowed such a beating to take place in their presence and failed to intervene. In some way the episode came to the attention of the press and a number of articles descriptive of the event appeared in the papers.

The Department promised an investigation of the matter. The Department's Internal Investigation Unit explored the episode and filed a report. Officers Gulla and Bedics were charged with "conduct unbecoming a police officer." Disciplinary recommendations were made to the executive in charge of the King County Police, Sheriff James Montgomery. The Sheriff was briefed, he talked to Gulla, then, as had been his custom, he followed the recommendations

submitted to him.

Both Officers recieved letters of reprimand and Officer Gulla was given a disciplinary transfer out of the Gang Unit.

ISSUE

Did the Department violate the "just cause" provisions of the Collective Bargaining Agreement when it issued a letter of reprimand as well as a disciplinary transfer to Grievant, Gulla?

THE GUILD'S POSITION: The Police Guild contends that the "Conduct Unbecoming" rule is so vague and undefined that it violates the traditional due process provisions of the law and may not be upheld.

It is further argued that the discipline administered did not meet the tests for just cause as required by the Collective Bargaining Agreement. The first of such tests involves notice; that is, did the employer forewarn the Officers of the possible or probable consequences of their conduct? The Officers are considered to have knowledge that their conduct is subject to discipline only if the conduct is "hard-core", that is, conduct that any reasonable person must know would be cause for discipline. Hard-core includes acts prohibited by law or rule such as theft, drunkeness, breaking into a store, etc..

Here the Officers did not know that a consensual beating was illegal. Many other Officers shared this belief. Since the Officers believed that if consented to, a gang

initiation which involved a beating was not a crime they had no reason to think discipline might follow for failure to make an arrest.

Nor, did the Officers have forewarning that negative publicity might ensue which might reflect on the public's perception of the Department and that they might be held responsible for such perception.

The Guild further urges that even if the conduct unbecoming rule is found constitutional on its face the County did not meet it's burden of proof by a "clear and convincing" or "beyond a reasonable doubt" standard.

It is also argued that the just cause test involving a fair and objective investigation was not followed. The Employer's investigation, it is urged, should include an inquiry into possible justifications for the employee's conduct. The Internal Investigation Unit did not interview Lt. Rahr, the Grievant's supervisor who did not see the episode as a disciplinary problem. Nor did the unit question Sgt. Couture, who was familiar with Rahr's instructions, nor did they consult a gang expert.

The Guild further claims that the County has failed to apply it's discipline even handedly to all employees. In this connection the Guild refers to cases in which Officers observe or participate in drug transactions and make no arrests when their mission is intelligence gathering. The Guild cites other instances in which Officers do distasteful things in their effort to fight crime. Yet, no discipline follows.

The Guild also contends that the County failed to prove it's case beyond a reasonable doubt or even by clear and convincing evidence as required in cases of this kind wherein the long term stigma of the punishment may be as serious concerning Grievant's career as a discharge.

Finally, the Guild argues that Officer Gulla has been made the scapegoat for the unfavorable publicity which followed this episode. The Department should have admitted that it's rules and training were inadequate to cover the situation at issue. Department officials did, in effect, admit the same to the media.

THE COUNTY'S POSITION: The County asserts that although the "conduct unbecoming" rule is admittedly broad the Department is not bound to anticipate and list every instance in which the rule would be applicable. Officers are all aware of the rule, and are professionals who are expected to act independantly and use good judgement.

On the matter of just cause the County cites the Washington Supreme Court case, Baldwin v Sisters of Providence, 112 Wn.2d 127, which contains the following:

> a fair and honest cause or reason, regulated by good faith on the part of the party exercisisng the power. We further hold that a discharge for "just cause" is one which is not for any arbitrary, capricious, or illegal reason and which is based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.

It is urged that the Arbitrator adopt this rule rather than the "seven test" Daugherty rule frequently applied by arbitrators in discipline and discharge cases.

In the event, however, that the Daugherty rule is followed

the County claims that it has complied with each element of the seven part test.

1. Notice. The conduct unbecoming rule had been set forth in the manual issued all officers upon hire for several years. Officer Gulla was well aware of the rule having been disciplined under it on prior occasions.

2. Reasonableness of rule. The rule is reasonabley related to both (1) the orderly, efficient and safe operation of the King County police force and (b) the performance that the Department might properly expect of police officers.

Officers are expected to act in a manner consistent with their public trust and responsibility.

3. Investigation. Upon learning of the incident Chief Adamson immediately request that the Department's Internal Investigation Unit conduct an investigation and this was done.

4. Fair investigation. Dective Bowen conducted the investigation. He talked to both officers involved on two separate occasions and to Aaron Livermore and his parents. Officer Gulla's legal representative was present in both interviews. Bowen also talked to school officials and reviewed the video tape several times. Bowen issued findings and conclusions but made no recommendation to Sheriff Montgomery.

5. Proof. During the investigation sustantial evidence was developed that Officer Gulla was guilty of conduct unbecoming an officer.

6. Equal treatment. Other files are reviewed to determine

past discipline for similar infractions. Roecommendations are made in the context of the officer's disciplinary history. There is no evidence that any other officers were penalized differently for the same offense.

7. Penalty. The degree of discipline was reasonably related to (a) the seriousness of the proven offense and (b) the record of Officer Gulla in his service with the Department.

In addition to the claim that allowing the initiation to take place was improper the County considered as wrongful the granting of immunity to the gang members and the failure to request medical atttention for the victim.

The County also contends that it need only prove it's case by the customary preponderance of the evidence.

DISCUSSION AND AWARD

This has been a highly adversarial case. It involved a number of pre-trial telephone conferences and preliminary motions. The case was hard fought at the hearing which extended into the fourth day. Both sides presented a number of high quality witnesses.

The County took the lead and based it's case primarily upon the testimony of Frank Adamson, Chief of the Criminal Investigation Division, and Lt. Pat Ferguson, Commander of the Investigative Unit. Chief Adamson testified that he was "shocked" when he saw the tape and that it should have been obvious to the Officers on the scene that a crime was being committed. He stated that Gulla "forgot he was a Police Officer" and should have discouaged the initiation rather

than promising immunity. Once the assault started it should have been stopped and, failing that, medical help should have been summoned afterward.

Lt. Ferguson testified that he believed the Grievant Officer's actions diminished respect for the Department. He said that various people had expressed disapproval. He considered Detective Pat Bowen's investigation to be complete and thorough. He also said that the discipline of the Officers should send a message to other police.

Also testifying for the County were Lt. Sue Rahr, Detective Pat Bowen, and Sheriff James Montgomery. Detective Bowen offered his investigative file and his conclusion that a Conduct Unbecoming charge was justified.

Sheriff Montgomery told that he was briefed, interviewed Gulla, and then followed the recommendations as to discipline as was his usual custom.

Lt. Sue Rahr's testimony will be discussed later.

Before discussing the merits I intend to deal with some of the collateral issues of fact and law raised by both sides.

Central to the Guild's case is the contention that Officer Gulla believed that a consensual beating was not a crime. In this connection considerable evidence was presented indicating that this belief was shared by an appreciable number of other police officers. In fact, this issue was so puzzling that the matter was referred to the King County Prosecuting Attorney's office for an answer. The Prosecuting Attorney was unable to come up with an immediate answer and stated that it was a "case of first impression" in the State

of Washington. After legal research, the Prosecutor's office concluded that the majority rule in other jurisditions where the question had been raised was that such a consensual beating was a breach of the peace and constituted criminal conduct. In view of the initial uncertainty as to whether a consensual beating did constitute a crime the Prosecutor declined to charge Officer Gulla with criminal wrongdoing.

Given this set of facts I am unable to find any merit in the County's claim that Officer Gulla improperly "granted immunity" to the gang. As things stood at the time of the incident Gulla could hardly be expected to know that some Courts somewhere in the United States had held contrary to his belief.

I also reject Officer Gulla's failure to summon medical help as misconduct. After the beating, initiate Livermore walked and talked normally. He had no broken bones and though he was bloodied it was from surface bleeding frequently described as "cuts and abrasions". He claimed to be alright and was somewhat exuberant over being "in".

I find no merit in the Guild's contention that the "Conduct unbecoming" rule is unconstitutionally broad. The County's response to this is simply that the circumstances that could invoke the operation of the rule are so varied and unforeseeable that it would be impossible to list them specifically. The point is well taken and I concur.

The County has urged that I follow the just cause rule promulgated by Washington Supreme Court and cited above. The Daugherty Seven Test rule is somewhat less broad, offers

precise guidelines to the Arbitrator, and is less susceptable to the Arbitrators substituting his judgement for that of management. Since the Daugherty rule is customarily used by Arbitrators in labor grievance cases I choose to follow it.

We now reach the matter of just cause. At the hearing the County had the burden of proof and called, as it's first witness, Lt. Sue Rahr the Commander of the Gang Unit. Lt. Rahr testified that the Unit's function was primarily that of intelligence gathering. She sought Officers who were self-starters, aggressive, highly initiative, had a good record of arrests, and were experienced on the street. Since Officer Gulla was one of her choices we may assume that he met the criteria set out.

Lt. Rahr was aware of Gulla's prior discipline for conduct unbecoming but she felt he had outgrown that. She discussed that with him and warned him that another lapse would not be tolerated. She also advised him that the unit had no experience in the field--no standard operating procedure--but must rely on it's member's judgment. The unit, she told him, was to gather intellignece about gangs, the gang members and their activities. Officers were to attempt to learn the meaning of the gang's hand signals and graffiti peculiar to gangs. There was a need for information about Seattle gangs in order to educate parents, the community, and to train other Officers. The gang unit was to act primarily in the intelligence gathering mode rather than the law enforcement mode.

So instructed, Officer Gulla was sent to the South Central area of Seattle. Here he made contact with the LABS. Lt. Rahr regarded the Loco Asian Boys as a powerful gang and was pleased with the rapport that Gulla had established with them. She was enthusiastic when Gulla suggested video taping the gang. She did not anticipate that a "jump in" would be taped.

When Lt. Rahr learned that Officer Gulla had taped the jump in without interfering and that this had provoked outrage in some quarters she testified that she felt a certain responsibility herself for Gulla's conduct because her instructions to him had been very broad. She further testified that the unit was in an intelligence gathering mode as opposed to a law enforcement mode. She stated that Officer's have discretion in making a misdemeaner arrest. The degree of injury being inflicted would be a factor to be considered.

Lt. Rahr stated that for these reasons she did not feel that punishment was indicated but rather that Gullas did not possess the judgmental skill necessary for the job.

The testimony on both sides of the case was of very high quality. It's general tenor supported Lt. Rahr's statement's that the gang unit was engaged in gathering information and had not yet formulated any rules of conduct. Training Officer, Gus Hall, stated that "they were making this stuff up as they went along."

In became apparent during the hearing that a large number of active Police Officers, perhaps the majority, believed

and may have been trained to believe, that a consensual beating was not a crime. The King County Prosecutor's report contains the following: "The detectives will not be prosecuted because they had a good faith belief that the initiation assault was not a crime, which is consistent with the prevailing view in both the common law and the law enforcemnt community. Since this is a case of first impression it would not be fair to prosecute the detectives for failing to recognize that the assault might be a crime against the public order and a breach of the peace."

There was also testimony by a number of Officers that they do not always make an arrest when a crime is committed in their presence when their mission is otherwise and in such cases no discipline follows.

I found particularly significant the testimony of Detective David Redamann and Officer Roger Allen. Redamann had worked with gangs long before the present gang unit was formed and was one of the founding members of the Department's gang unit. As a gang expert he conducts gang related statewide training for police officers as well as that ~~that~~ for the Seattle department. He has been loaned out to other police departments including the Washington State Patrol for gang activity investigations. He was familiar with "jump ins" and stated that this one was not unusually violent. He stated that the video tape would be an invaluable tool for police departments as well as the public at large in coping with the denial of gang activity in the Seattle area. He stated that intelligence gathering, in

instances such as this, was more important than enforcement work. He went on to compare the tape with "Scared Straight" a film shown to youngsters illustrating the horrors of prison life.

Officer Roger Allen is a Patrol Officer working the White Center Area and is familiar with the LABS gang. He concurred with Detective Redamann opinions as to the value of the tape in convincing youth to avoid gangs.

Allen noted that the initiation stopped before any serious injury could occur and observed that the initiation would have taken place whether police officers were present or not. Both he and Redamann agreed that the presence of the Officers on the scene prevented the declining initiate from being jumped in.

Allen discussed gang philosophy in connection with what kids should be told about gangs. He said these gangs are not about comradeship as are other organizations which kids might join. He compared the callousness of those who were the chief particpants in the beating with the compassion shown by another gang member when the beating was over. He observed that the individual who showed concern was no longer a gang member. He also testified that there was no loyalty among gang members and if one were arrested for an offense that individual would promptly deny his participation in the crime and identify another member as being the real culprit.

The Grievant, Detective Denny Gulla, had been on the force for over 11 years. He had become interested in gangs as a

Patrolman in the Kent area. He testified that he researched and attended classes on gangs. He has also taught other Officers and has spoken, in public and in schools, on the subject. He had observed denial of gang existance among the public as well as within the Police Department.

He stated that the newly formed gang unit was "trail blazing" and was not sure just where it was going. They worked on a day to day basis. His mission was not to hassle the gangs but to gather intelligence. A video tape of gang activity would be a valuable training tool.

On the day of the incident he was not aware that a jump in was going to occur. He had been taught and understood that a consensual beating was not a crime and with this in mind he advised the gang that the tape could not be used against them.

During the initiation assault he was concentrating on keeping the action in the tiny view finder in his camcorder which tended to divide his attention. When the thought came to him that he should intervene and put a stop to things he could see that the attack was winding down and coming to an end on it's own. When the second initiate, Landon, backed out Gulla told him, "that's smart."

Later, when Chief Adamson viewed the tape, Gulla stated that Adamson said, "80% of our Officers with under 10 years service would have done the same thing."

The newspaper articles which discussed the event were factually straight forward. They did mention that Councilman Simms had expressed outrage over the matter.

A Press Release issued by the Department contained the statement that policies and guidelines regarding police and gang interaction had been re-written and additional training would be initiated for all officers as well as a distribution of new policy regulations.

After considering all of the evidence produced at the hearing and studying counsel's briefs and arguments I am convinced that there was no evidence indicating a loss of public respect for the Police Department nor was there any evidence supporting a loss of efficiency or morale.

It would appear in retrospect that Officer Gulla was mistaken in permitting and taping the initiation assault. Mistakes, however, are made daily by employees at all levels in all lines of endeavor as part of a learning process. Usually discipline is called for when the mistake is made knowingly and with intent toward wrongdoing.

I am convinced that if police officials were disturbed it was caused more by the publicity accorded this event rather than the event itself and that the fault lies with whoever leaked the information to the media.

In reaching this conclusion I have considered the internal investigation report submitted by Detective Pat Bowen. I note that the Officer in charge of the Gang Unit, Lt. Sue Rahr, was never interviewed. She was the person who gave Dectective Gulla his instructions. At the hearing she did not think that the episode warranted discipline. Nor did the investigating officer interview any of the experienced gang officers in order to gain insight into gang and police

interaction.

Bowen closed his report with the statement: "For the above reasons the allegation of 'Conduct Unbecoming' should be sustained." This would make it appear that the decision to discipline Grievant Gulla had already been reached prior to the instigating the investigation. This is a direct violation of the Daugherty seven test rule regarding investigation by management. In order to be considered a thorough and unbiased investigation the enquiry should attempt to discover the reasons why Grievant acted as he did at the time in question. I seems to me that the investigation went only far enough to support a conclusion that had already been reached and that the investigating Officer was telling his superiors what he thought they wanted to hear.

Rather than admit that it's rules and policys were inadeqate to cover the sitiuation the Department used Gulla and Bedics as scapegoats for what it percieved as bad publicity.

For the all of the above reasons I am finding in favor of Grievant Gulla and sustaining the grievance. The letter of reprimand should be withdrawn from Grievant's file and Grievant restored to his former position. If Lt. Rahr is dissatisfied with Grievant's performance a non-disciplinary transfer would be in order.

December 2, 1993

Richard J. Ennis, Arbitrator

INCIDENT			
STATUS ☐ OPEN ☒ CLOSED ☐ INACTIVE	SHERIFF KING COUNTY — INTERNAL INVESTIGATIONS FOLLOW-UP REPORT	IIU NUMBER 2004-002	
PRESENT DATE 03/02/04		FCR CODE	DISTRICT
TYPE OF COMPLAINT(S) SEE BELOW			
DISPOSITION(S):	ALLEGATION I SUSTAINED		

R. P.					
NAME (LAST, FIRST, MIDDLE) SEE BELOW		RESIDENCE PHONE		BUSINESS PHONE	
RESIDENCE ADDRESS		OCCUPATION	RACE	SEX	DOB

1. ALLEGATION(S): LIST EACH ALLEGATION WITH A ROMAN NUMERAL
2. EVIDENCE: LIST EVIDENCE PERTINENT TO INVESTIGATION
3. PERSONS INTERVIEWED: NAMES / ADDRESSES / TELEPHONE NUMBERS
4. ADDITIONAL ENTRIES: COMMENCE EACH NEW INVESTIGATIVE ENTRY WITH DATE / TIME

ACCUSED EMPLOYEE(S)/ALLEGATIONS:

Sgt. Denny Gulla – Serial 04392

Allegation I – Abuse of Authority – GOM 3.00.020(3);

It is alleged Sgt. Denny Gulla made a pre-text stop on complainants Kelly and Johnston on January 10, 2004 at 2240 hrs. in Pierce County (outside Buckley). Complainants allege Sgt. Gulla used profanity and made threats to kill them during the stop. Sgt. Gulla also disseminated flyers with photos of the complainants to local law enforcement agencies in King and Pierce County.

EVIDENCE:

Complainant Michael Kelly Statement
Complainant Ferrell Johnston Statement
Buckley PD Officer Ryan Boyle Statement
Complainant Buckley PD Chief James Arsanto Statement
Wilkeson PD Sergeant Robert Carsey
Sergeant Denny Gulla Statement
Captain Ken Wardstrom Statement
Sergeant Tony Provenzo Statement
Pierce County Sheriff's Office Incident Report # 04-026-070-8
Electric Court Document Copy – Cause No. 04-3-11969-7KNT
911 Tape Transcriptions
Divorce Documents – Declarations, Letters and Exhibits
Flyers (2) dated 01/11/04

PERSON(S) INTERVIEWED:

Michael Kelly	27919 – 112th St., E. Maple Valley, WA 98321	Cell:	253/332-9657 H: 360/829-1541
Ferrell Johnston	3716 Hampton Way Kent, WA 98032		H: 253/859-2842
Officer Ryan Boyle	Buckley Police Department		B: 360/862-9059
Chief James Arsanto	Same		
Zina – Dispatch Supervisor	Same		
Sgt. Robert Carsey	Wilkeson Police Department		B: 360/862-9059
Roger Juvet	King County Police Officer's Guild		B: 206/957-0937

ASSIGNED INVESTIGATOR	SERIAL NUMBER	UNIT NUMBER	APPROVED BY
SGT. M. FRANCES CARLSON	06281	63	

Sgt. Denny Gulla	Precinct Four	B: 206/296-3333
Sgt. Tony Provenzo	Precinct Four	B: 206/296-3333
Captain Ken Wardstrom	Precinct Four	B: 206/296-3333
Sue Gordon	Communication Center	B: 206/205-7965
Sgt. DJ Nesel	Court Security – RJC	B: 206/205-2357
Sgt. Bruce Peterson	Same (temporary)	B: 206/296-3865
Deputy Jerrard	Pierce County Sheriff's Office	B: 253/798-7530
Chief Jeter	Bonney Lake PD	B: 253/863-4545
Chief Weigle	Enumclaw PD	B: 360/825-3505
Genieve Diyenski	Nextel	B: 425/278-2062

ADDITIONAL ENTRIES:

1. **01/13/04 – 1257 hrs.** IIU received telephone call from complainant Mike Kelly. He left voicemail for me on my direct line.

2. **01/14/04** IIU received A-128 and attachments from Precinct 4 Captain Webster, who initiated complaint.

3. **01/15/04 – 1105 hrs.** Telephone call to Mike Kelly. Kelly was upset and excited about the traffic stop by Sgt. Gulla. I told him I had the complaint initiated by Captain Webster and the Buckley chief. Kelly told me right off the bat that he was willing to take a lie detector test. I schedule appointment for an interview for 01/20/04 AT 1100 hrs. for him and 1200 hrs. for his friend, Ferrell Johnston also in the vehicle with him at the time of the stop. Kelly told me his estranged wife Tara heard the incident at the time.

4. **01/15/04 – 1117 hrs.** Ran Kelly through Access.

5. **01/15/04 – 1200 hrs.** Initiated IIU tracking number.

6. **01/15/04 – 1305 hrs.** Received telephone call from Kelly who was concerned about being under surveillance by Sgt. Gulla (based on what Sgt. Gulla told him at the traffic stop). I told him no.

7. **01/15/04 – 1255 hrs.** Telephone call to Buckley PD for when Officer Boyle works and how to contact Sgt. Carsey. I left voicemails for both. At 1315 hrs. I received telephone call from Sgt. Carsey. I scheduled interview with him for 01/21/04 at 1100 hrs. at precinct 3.

8. **01/16/04 – 1734 hrs.** Received telephone call from Officer Ryan Boyle and scheduled appointment for interview on 01/20/04 at 1400 hrs. at Buckley PD. He told me that had already received a telephone call from Sgt. Gulla wanting a copy of his report. Officer Boyle said this whole situation made he very uncomfortable.

9. **01/17/04 – 1330 – 1600 hrs.** Drove to Buckley area to check out site before Kelly/Johnston interview.

10. **01/19/04 – 0928-0935 hrs.** Received telephone call from Officer Boyle. We scheduled interview for 01/21/04 at 1200 hrs. incident (KCSO CAD#).

11. **01/20/04 – 1040 hrs.** Arrived at Kelly's residence. 1122 – 1150 hrs. Tape-recorded Kelly's statement. 1210 hrs. Johnston arrived, Kelly left to give me privacy for the interview. Prior to his leaving, Kelly gave me copy of statement written by his sister about the conversation she had with Tara Kelly who was "bragging" about the traffic stop.

12. 01/20/04 – 1225 – 1253 hrs. Interviewed Johnston. Kelly returned during the last portion of the interview then left for a court appearance in Enumclaw. (See statements for details).

13. 01/20/04 – 1300 hrs. Cleared Kelly's residence. I drove around the area again in Buckley to see if I could match what Kelly told me to the area.

14. 01/20/04 – 1346 hrs. Telephone call to Officer Boyle, left voicemail to let him know I was at Buckley PD for our interview. Buckley PD told me Officer Boyle was in still in Reno due to a flight delay.

15. 01/20/04 – 1425 hrs. I cleared Buckley area.

16. 01/21/07 – 1100 hrs. Met with Sgt. Carsey. 1119-1139 hrs. Tape-recorded his statement. (See statement for details).

17. 01/21/04 – 0733 hrs. Received message from Ferrell Johnston with case number of incident.

18. 01/20/04 – 1750 hrs. Called Officer Boyle for his home address for our interview.

19. 01/20/04 – 1610 hrs. Telephone call to Buckley PD dispatch regarding procedures for request of radio/telephone tapes of Sgt. Gulla's traffic stop.

20. 01/21/03 – 0753 hrs. Received voicemail from Buckley PD Dispatch Supervisor – Zina regarding request. I prepared fax request using department form and faxed to Buckley PD later in the day. Also submitted 911-tape request for radio transmission by Sgt. Gulla to Sue Gordon. And a request to see if our communication center received telephone call from Ferrell Johnston.

21. 01/21/04 – 1309 hrs. Received voicemail from Cynthia at Buckley PD that tapes were ready. I called her back to arrange picking up the tapes the next day.

22. 01/21/04 – 1329 – 1350 hrs. Searched IRIS for incident involving Sgt. Gulla. Ran up Kelly vehicle plate in ACCESS.

22. 01/22/04 – 1125 hrs. Received voicemail from Mike Kelly stating that two deputy sergeants escorted Sgt. Gulla out of the court. At 1145 hrs. I received fax from Zina, Dispatch Supervisor for Buckley PD acknowledging my request for the radio transmissions and telephone call from Sgt. Gulla.

23. 01/22/04 – 1200 hrs. Arrived at Officer Boyle's residence. 1214 – 1244 hrs., tape-recorded his statement. (See statement for details). Cleared residence at 1300 hours. Please note the incorrect date on Officer Boyle's statement, the true date was January 21, 2004. Before the interview I went by Buckley PD and picked up the tapes (disk).

24. 01/22/04 – 1400 hrs. Went to Civil Unit, April Chavez looked into their system for any/all orders involving Michael and Tara Kelly.

25. 01/22/04 – 1400 hrs. Typed up A-150 for Sgt. Gulla and sent via department mail. (Incorrect date on A-150, true date should be January 21, 2004).

26. 01/22/04 – 1500 hrs. Received telephone call from Mike Kelly wanting to know about Sgt. Gulla's ability to attend his divorce hearing for 01/23/04. I told him as long as Sgt. Gulla was not in uniform or on-duty he could attend it. He also told me he never lived at 27919 – 112thSt., SE (an address cited in the original complaint by Captain Webster). Kelly said he has lived at his residence

for the past 2-4 years. I also discussed the procedures of IIU and steps taken after the investigation is closed and how he will be notified.

28. 01/22/04 – 1510 hrs. Telephone call to Captain Webster and KCPOG that A-150 was in the mail for service.

29. 01/22/04 – 1519 hrs. Ran up Tara Kelly in ACCESS.

30. 01/22/04 – 1130 hrs. Mike Kelly called IIU and left voicemail and message about Sgt. Gulla showing up at divorce hearing.

31. 01/26/04 – 0730 hrs. Mike Kelly called and left message for me. He also left two messages on my Nextel telephone on 01/23/04 at 1013 and 1014 hrs.

32. 01/23/04 –1013/1014 hrs. Received two voicemails from Mike Kelley stating his 10-year-old daughter told him some disturbing news about Sgt. Gulla.

33. 01/26/04 – 1023 hrs. Mike Kelly called, he his said his daughter knows about what happened because Sgt. Gulla's daughter was present for the incident. His accusation was that Sgt. Gulla had his daughter in his patrol vehicle during the traffic stop. Kelly also talked about the divorce hearing and how Sgt. Gulla showed up at the last minute and tried to submit a written statement to the court through the DV-Prosecutor. Sgt. Gulla did not testify at the hearing. Kelly said that a bailiff came up to Sgt. Gulla, then the two deputies escorted him out. Kelly said his attorney will be filing a lawsuit against KCSO because of this incident. He also said that Sgt. Gulla is mad at the Buckley PD Officer because the Buckley lied.

34. 01/26/04 – 1035 hrs. After the telephone call, I checked Personnel to see if Sgt. Gulla had an officer's report requesting permission to transport family members in his patrol vehicle. There was none in his file.

35. 01/26/04 – 1042-1045 hrs. Received faxes from Kelly – the statement he told me in his interview that he gave to his attorney after the incident and the statement his attorney acquired, written by Sgt. Gulla. I also checked precinct four to see if they had his personnel file with an officer's report requesting permission to transport family members in Sgt. Gulla's patrol vehicle. They did not have his file yet from CID.

36. 01/26/04 – 1105 hrs. Received voicemail at 1045 hrs., from Sue Gordon. At 1115 hrs., I called Sgt. DJ Nesel at RJC –Court Security to inquire about what Kelly mentioned above.

37. 01/26/04 – 1435 hrs. Returned telephone call to Roger Juvet. Left message on his pager.

38. 01/26/04 – 1440 hrs. Telephone call to Chief Arsanto, Buckley PD regarding flyer. He told me he pulled flyer off their bulletin board because there was no KCSO heading, so he was not sure it was sanctioned by the King County Sheriff's Office. He also gave me the name of the other Chief's for Bonney Lake and Enumclaw PD's and their telephone numbers so I could contact them about the flyers. Chief Arsanto said he still had the flyer and I arranged for Captain Louie to pick it up the next day. He said that he has known Sgt. Gulla all his law enforcement career (Gulla) and does not think Sgt. Gulla was thinking that night. Chief Arsanto said their dispatcher was contacted by Kelly and he made the comment, "He's going to get what's coming to him" (meaning Sgt. Gulla).

39. 01/26/04 – 1453 hrs. Telephone call to Roger Juvet, KCPOG – left voicemail.

40. 01/26/04 – 1504 hrs. Telephone call to Chief Arsanto at Buckley P. D., a I left message. I also called Chief Weigle at Enumclaw PD and asked if he could check for the flyer at 1508 hrs.

41. 01/26/04 – 1515 hrs. Received telephone message from Deputy Jerrard, Pierce County Sheriff's Office, regarding criminal complaint she took from Kelly and Johnston involving Sgt. Gulla. I received their incident report # 04-026-0708. I returned her call. She received same letter for statements (witness statement typed up recounting their story to their attorney). Deputy Jerrard said case would be forwarded to Prosecutor's Office and explained how I could get copy of the report.

42. 01/26/04 – 1545 hrs. Received return telephone call from Bonney Lake PD Chief regarding flyer disseminated by Sgt. Gulla. Checking to see if he could locate.

43. 01/26/04 – 1600-1700 hrs. Received and reviewed the divorce documents between Tara and Mike Kelly.

44. 01/26/04 – 1710 hrs. Received voicemail from Sgt. Nesel regarding supervisor in charge of court security – Sgt. Bruce Peterson (taking place of Sgt. Sally Mendel while on leave).

45. 01/27/04 – 0858 hrs. Received voicemail from Chief Wiegel, Enumclaw PD – he was unable to locate any flyers distributed by Sgt. Gulla.

46. 01/27/07 – 0912 hrs. Received voicemail from Sgt. Peterson returning my telephone call.

47. 01/27/04 – 1005 hrs. Received telephone call from Roger Juvet. Juvet called back at 1040 hrs.

48. 01/27/04 – 1134 hrs. Telephone call to Sgt. Peterson, left message. 1152 hrs., sent email to Genevieve Diyenski at Nextel requesting Sgt. Gulla's cell phone records from 12/20/03 –01/20/04.

49. 01/28/04 – 1045 hrs. Received telephone call from Chief Wiegel at Enumclaw PD, he could not locate the flyer distributed by Sgt. Gulla.

50. 01/28/04 – 1050 hrs. Sgts. Nesel and Peterson visited me at IIU. I talked with Sgt. Peterson, he briefly talked with Sgt. Gulla to make sure he was not armed at the RJC. There was not any escort out of a courtroom. The reason Sgt. Gulla was talked to was because he bypassed the security instead of going through and the security screeners were concerned.

51. 01/28/04 – 1340 hrs. Telephone call to Genevieve Diyenski at Nextel, I did not get answer so I sent her an email with my request.

52. 01/28/04 – 1545 hrs. Received telephone call from Officer Boyle regarding a Washington State Trooper expressing concern about the flyer. Apparently, the flyer was seen at Enumclaw PD by another trooper who passed on the information to the trooper who lives in Buckley. I received the name and called WSP dispatch to leave a message for the trooper to call me. The issue I talked to Officer Boyle was about the vandalisms cited by Sgt. Gulla in his statement for the Tara Kelly divorce hearing. Officer Boyle said that the vandalisms were not related to Mike Kelly.

53. 01/29/04 – 1113 hrs. Received return email from Genevieve Diyenski that she was currently processing my request for Sgt. Gulla's cell phone records.

54. 01/29/04 – 1325 hrs. Telephone call to Chief Arsanto, Buckley PD. Left voicemail for him regarding interview.

55. 01/29/04 – 1750 hrs. Received telephone call from Trooper Beth Durgan, WSP regarding the flyer Sgt. Gulla disseminated. Trooper Durgan said she would send me the flyer via Buckley PD. She found out about the flyer because Trooper Mark Soper told her about it, the flyer was at Enumclaw PD.

56. 01/30/04 – 1325 hrs. Notified by Captain Webster via email Sgt. Gulla was served with the A-150.

57. 01/30/04 – 1547 hrs. Chief Rahr emailed Sgt. Gulla regarding the flyer, requesting he cease and desist from further dissemination. I received carbon copy of email.

58. 01/30/04 – 1550 hrs. Telephone call to Pierce County Sheriff's Office – Records Unit for copy of report taken by Deputy Gerard. Judy said she would fax the report to me and she did at 1600 hrs.

59. 01/30/04 – 1602 hrs. Received from Communication Center radio transmission tape from request I made on 01/21/04.

60. 02/02/04 – 0932 hrs. Received email from Chief Rahr, her acknowledgement from Sgt. Gulla, receipt of her earlier email about the flyers.

61. 02/02/04 – 1030 hrs. Arrived at Buckley PD. Met with Chief Arsanto. Tape-recorded his statement from 1104 – 1120 hrs. (See his statement for details). I was told by Chief Arsanto his concern that Sgt. Gulla was bad mouthing his department to the owner of an espresso stand because she asked him what was going on. He suggested I talk with her. Before leaving, Chief Arsanto gave me an envelope he received from Trooper Durgan containing the flyer disseminated by Sgt. Gulla. It matched the flyer Chief Arsanto took off his bulletin board and later gave to Captain Louie.

I cleared Buckley PD at 1132 hrs. At 1138 hrs. I spoke to Patty Emery at Plateau Espresso. She told me Sgt. Gulla told her there was a problem with his girlfriend's husband involving Buckley PD, but he did not badmouth the officer or the Chief. She did not know why the Chief thought Denny made derogatory comments. I cleared the espresso stand at 1141 hrs.

62. 02/02/04 –1310 hrs. Typed up amended A-150 for Sgt. Gulla as requested by Roger Juvet, KCPOG. He said Hillary, Guild attorney would be present for interview due to possible criminal charges pending in Pierce County. It should be noted the time of the A-150 is incorrect, 1100 hrs. It should reflect 1310 hrs.

63. 02/06/04 – 1250 hrs. Telephone call to Pierce County SO Records for Judy Hamilton. I requested an updated copy of the incident report in entry #58. I was trying to find out if the case was forwarded to the Pierce County Prosecutor's Office for charges. Hamilton said she could not answer that question and referred me to the PCSO's IIU office – Lt. Andrews. At. 1425 hrs., I received voicemail from Lt. Andrews. I returned his call and left voicemail. Lt. Andrews called on 02/09/04 at 0845 hrs., leaving voicemail that Gulla case was forwarded to their prosecutor's office. There was no active investigation. At 1208 hrs., I called and left voicemail for Lt. Andrews for an updated copy of incident report and left fax number.

64. 02/09/04 – 02/23/04 Worked on IIU caseload. I worked on this IIU follow-up entries.

65. 02/11/04 Received package from Nextel, Inc. of Sgt. Gulla's cell phone records for December 2003 – January 2004.

66. 02/23/04 – 1420 hrs. At Captain Louie's request, IIU received copy of same incident report cited above 04-0260708.1 from Pierce County Sheriff's Office.

67. 02/24/04 – 1200 hrs. Received telephone call from Roger Juvet regarding status of criminal investigation in Pierce County. I told him case was referred to prosecutor's office, and that I had not heard anything in return regarding charges.

68. 02/27/04 – 1505 hrs. Received voicemail from Sgt. Personious from Buckley PD answering question I had in previous telephone call (unknown date and time) to him of a Tacoma PD officer who saw Kelly in area of Sgt. Gulla's residence. Sgt. Personious did not have the name of that officer.

69. 03/01/04 – 1400 hrs. Mike Kelly called. I asked him if he was west of Mundy Loss Road the night Sgt. Gulla made contact with him that night. Kelly told me he was not anywhere near Buckley earlier in the day.

70. 03/02/04 – 1905 hrs. Received email from Sgt. Provenzo with his officer's report I requested earlier in the A-150. (See statement for details).

71. 03/03 – 03/30/04 Worked on IIU caseload.

72. 03/31/04 – 1500 hrs. Telephone call to Craig Adams, Pierce County S. O. Legal Advisor. Left voicemail inquiring whom to contact in Prosecutor's Office for disposition of criminal charges regarding Sgt. Gulla's case. Adams returned my telephone call at 1515 hrs. He said he would call DPA's office for status and call me back or send me email with information.

73. 03/31/04 – 1557 hrs. Received email from Craig Adams. He forwarded email he received at 1521 hrs. from DPA Kevin Benton regarding status of the criminal case. DPA Benton said he returned the case back to the deputy for additional follow-up.

74. 04/01 – 04/07/04 Worked on IIU caseload.

75. 04/08 – 04/13/04 Worked on follow-up and Summary.

SUMMARY

Michael and Tara Kelly separated in November 2003 and are in the process of a divorce. Ferrell Johnston is Michael Kelly's best friend. Tara Kelly began dating Sgt. Denny Gulla shortly after she separated from Michael Kelly.

Michael Kelly states that on January 10, 2004 he and Johnston left his residence around 2200 hrs. Kelly felt he was being following by a marked King County Sheriff's patrol car because Kelly saw a patrol car just south of his residence in Enumclaw, then later after he crossed into Pierce County on Hwy 410. That is when the patrol car came up close as though to get his license plate before backing off. When Kelly got into Buckley, he turned right so he could to lose the patrol car. At that time, Kelly said he did not know who was in the patrol car. Kelly did acknowledge his wife was dating a King County Sheriff's deputy, but had not met him. (At the time of the IIU interview Kelly knew Sgt. Gulla's name and will be referred to by name).

Kelly said he continued driving the backroads in Buckley paralleling Hwy. 410, because he had wanted to go by a dealership outside Buckley to check to see if his wife had sold his mustang. Kelly described several times when he saw the KCSO patrol car again, before being pulled over westbound on Hwy 410. A second patrol car joined the first and he was contacted by the Buckley PD officer (Officer Boyle) who asked for his driver's license, etc. Officer Boyle said he was speeding when Kelly asked why he was stopped. After Officer Boyle took Kelly's information, walked away and later returned, Sgt. Gulla walked back to Kelly's car with him. Kelly noted a 3rd officer had arrived (Sgt. Carsey, Wilkeson

Officer Gulla states he met Ms. DePriest at Bob's Big Boy Restaurant, had her sign the Hold Harmless and then did police work for four or five hours. He indicates that he later placed the Hold Harmless form in his sergeant's box. Officer Gulla denies making the statement "I guess this is where I make a pass at you" or having any interest in initiating a personal relationship with Ms. DePriest.

Sgt. William Couture (Gulla's supervisor) was request~~ing~~ed to write an Officer's Report concerning any request he has had from Officer Gulla to allow civilian riders. Sgt. Couture remembers that sometime in the first half of this year, Officer Gulla called him at home and asked him about a civilian rider. Sgt. Couture does not remember the specifics of the conversation. Sgt. Couture recently completed Officer Gulla's personnel evaluation for that period and found two (2) Hold Harmless Agreements in the packet, one agreement was from Greg Haglund, an ex-King County Police intern, and Cindy Dahl, a civilian who on 05/01/86 was gathering information for a class paper; nothing for Jennifer DePriest. We don't know whether Gulla's call concerned DePriest or Dahl. Furthermore, Special Operations secretary Venetia Metzdorf indicates she does not recall Ms. DePriest leaving a message for Officer Gulla as he alleges. A search of Special Operations Unit files has not located a Hold Harmless Agreement from Ms. DePriest.

Subsequent to the IIU interview with Officer Gulla, he telephoned Detective Colwell on September 23, 1986 and stated that he was no longer sure that intern Haglund had been riding with him on the shift of Ms. DePriest's arrest. This call was received after IIU had already confirmed with Mr. Haglund that he was <u>not</u> a rider during the February 14/15 shift. Unfortunately, Officer Gulla's improved recollection somewhat negated the accuracy of his IIU statement since he had relied on Mr. Haglund's presence to refute some of Ms. DePriest's allegations.

Officer Gulla also submitted his notebook to IIU as requested for inspection. It contained no information concerning the contact with Ms. DePriest.

The CAD printout for the shift was obtained; shows Officer Gulla's DWI stop occured on 02/15/86 at 0131 hours. He cleared at 0227 hours, a citizen assist at 0228 hours (DePriest) which he cleared at 0254 hours.

Upon receipt of a copy of the Hold Harmless form on 09/25/86 from Ms. DePriest's mother, Jeanett, Officer Gulla was contacted and requested by Detective Colwell to submit a written response to the allegation that Ms. DePriest had, in fact, ridden with him on February 15, 1986 and that he had returned the Hold Harmless form to her as alleged. Officer Gulla submitted an Officer's Report dated 10/27/86 in which he again denies Ms. DePriest rode with

with him on February 15 and he questions the authenticity of the Hold Harmless form copy in the possession of IIU.

Detective Colwell subsequently obtained the original Hold Harmless form from Mr. Williams, DePriest's attorney. From visual inspection of the form, it appears that Officer Gulla may have written the date "2/15/86". It is an out-of-date form (Rev. 2/81) with no writing on the back, as opposed to the new form (Rev. 12/84). The original form was submitted to the Latent Print Lab and Officer Gulla's left thumb print was found on the form by examiner Marilyn Hattori.

Findings and Conclusions

It is clear that the traffic stop of Ms. DePriest by Officer Gulla was proper and justified. Her degree of intoxication and the validity of the breathalyzer reading, although disputed by Ms. DePriest and Ms. Ruby and tainted by Officer Gulla's procedural error and subsequent actions, cannot be established at this time and, thus, the officer's findings have not been refuted.

Several inconsistencies have arisen relative to whether Officer Gulla instructed Ms. Ruby to drive to Renton Police Department and wait while he processed Ms. DePriest; whether he later informed Ms. Ruby to drive home and await Ms. DePriest's arrival(due to the volume of paperwork needing to be completed); and whether Officer Gulla took Ms. DePriest home or to Ms. Ruby's residence. Officer Gulla, although his memory has somewhat faded, does not recall asking or directing Ms. Ruby to go to Renton Police Department; he denies later contacting Ms. Ruby in the Renton Police Department parking lot and telling her to go home and await Ms. DePriest because he had "a couple hours of paperwork and talking to do"; and, he denies later taking Ms. DePriest to Ms. Ruby's residence rather than home. Ms. DePriest and Ms. Ruby both indicate otherwise. An analysis of the available evidence is inconclusive. Officer Gulla indicates that he originally instructed Ms. Ruby to drive home from the scene, that she just stopped by Renton Police Department on the way home and that he advised her to leave because of the amount of time required to process a DWI. A fact is that Ms. Ruby did drive to Renton Police Department, and it seems unlikely that she would do so lacking such a request or suggestion by the officer. Ms. Ruby states she waited in the parking lot of Renton Police Department for about 1/2 hour before she was sent home by Officer Gulla. This seems fairly accurate since the arrest occured about 0130 and the Breathalyzer was administered about 0155. Ms. Ruby states she arrived home at about 0225 to 0230, and that Officer Gulla brought Ms. DePriest to the house at about 0300. The exact time that Officer Gulla and Ms. DePriest left Renton Police Department is uncertain. CAD indicates the arrest was cleared at 0227 and that a citizen assist (Ms. DePriest's transportation)

began at 0228 and concluded at 0254. Ms. DePriest alleges that Officer Gulla took her to an area near the Maple Valley Golf Course (actually the Maplewood Golf Course just outside of Renton) and that they remained there for one and one half hours talking and doing paperwork. This is impossible considering the established time parameters. However, it is possible that a stop of 20 minutes or less could have been made by the golf course. It is evident from the available information that Officer Gulla did ultimately transport Ms. DePriest to Ms. Ruby's residence rather than to her own residence. They live nearby each other in the north Issaquah area (Pine Lake - Beaver Lake). After some conversation with Ms. Ruby about having the charge reduced and the arrangement to ride with Officer Gulla that evening, Ms. DePriest drove home and arrived about 0330 (confirmed by Mrs. J. DePriest). The alleged comments made by Officer Gulla to both Ms. DePriest and Ms. Ruby regarding his interest and willingness to have the DWI charge reduced cannot be proved, but would not be inconsistent with the entire scenario of the aforementioned and subsequent events. The allegation that Officer Gulla made a "pass" at Ms. DePriest at the conclusion of her ride on the evening of 2/15/86 likewise cannot be proved or disproved. The significance of Officer Gulla's failure to file any civil infractions against Ms. DePriest after the dismissal of the DWI charge is undetermined.

Recommendations

It is recommended that Officer Gulla's self admitted failure to properly process a DWI suspect with regard to administering the Breathalyzer Test (technically a violation of Manual Section 2.2.0 B3 Incompetence or Inefficiency) be addressed by his Special Operations Section supervisors as a performance indication and deficiency.

With regard to actual misconduct supported by the results of this investigation, it is recommended that Officer Gulla be found in violation of Manual Section 2.2.0 B8 (Conduct Unbecoming) in that on February 15, 1986, Officer Gulla had an unauthorized civilian rider with him while on duty. Officer Gulla had arrested and cited this civilian for DWI on his previous shift (that same date, less than 24 hours earlier), failed to obtain the prior, informed approval of his supervisor to have the civilian rider and failed to submit a Hold Harmless form for the civilian rider at the conclusion of his tour of duty. Additionally, it is recommended that Officer Gulla be found in violation of Manual Section 2.2.0 A1 (False Statements) in that Officer Gulla made false statements concerning the aforementioned issues during the IIU investigation.

January 22, 1987

PERSONNEL ORDER 87-30

POLICE OFFICER DENNY J. GULLA, assigned to the Special Operations Section, Field Operations Division, has been found to be in violation of Department Manual Sections 2.2.0 A 1, False Statements, on two occasions, and 2.2.0 B 8, Conduct Unbecoming.... Specifically, Officer Gulla made false statements to Internal Investigations Unit personnel during the investigation of IIU cases 86-43 and 86-44. Additionally on or about February 15, 1986, he had an unauthorized rider with him on duty and he conducted himself improperly toward this rider.

Therefore, under the authority of RCW 41.14.110 and RCW 41.14.120, Officer Denny J. Gulla:

1) is transferred from the Special Operations Section to Precinct 3, Patrol effective February 10, 1987 and

2) is suspended for five (5) working days without pay. Three days of this suspension will be held in abeyance and then dropped on the condition that Officer Gulla have no violations of a similar nature for one year from the date of receipt of this personnel order and that he receive, at Department expense, an evaluation by a Department psychologist and participate, at his own expense, in any counselling program which may be prescribed by that psychologist.

This order will not be effective until February 10, 1987 in order to allow Officer Gulla the opportunity to exercise any appeal rights he may have under the union contract and Civil Service rules. This discipline shall be completed by March 10, 1987 and will be scheduled in advance with the approval of his Precinct Commander. Upon completion of this disciplinary action, Officer Gulla will submit a report certifying compliance to the Personnel Section through the chain of command.

Should Officer Gulla fail to comply with the conditions for holding the three days of suspension in abeyance, that discipline shall be given immediate effect consistent with existing personnel practices and contractual obligations.

VERN THOMAS, SHERIFF-DIRECTOR

Distribution:

Chief J. L. Burk; Chief J. J. Nickle; Captain D. H. Richmond; Major F. H. Adamson; Personnel Concerned; Personnel Records; Payroll; IIU: Legal Unit; Personnel Manager; Civil Service; Union Local 519

KING COUNTY POLICE

MEMORANDUM

TO: Sheriff James E. Montgomery DATE: 11/23/88

FROM: Lt. Larry Mayes, Internal Investigations Unit:wn VIA:

SUBJECT: Summary of IIU Case 88-44, KCDPS vs. Officer Denny Gulla

On October 17, 1988 at approximately 2230 hours Mr. and Mrs. contacted KCP Officers Garrison and Darlington at Southeast 272nd and 132nd Southeast. The wanted to report an assault that had occurred at Skopapsh Village earlier. A short time later both officers were notified by radio that the may have been involved in a hit and run involving two pedestrians.

After the officers contacted the was placed in the back seat of the patrol vehicle, unhandcuffed. A few minutes later Officer Denny Gulla arrived; he had been working undercover/and off duty at Skopapsh Village. Officer Gulla, driving his private vehicle, had been involved in a chase with the as they left the Village.

Robert alleges that Officer Gulla opened the left rear door of the police vehicle, "He 'ceeded to get into the back seat and started punchin' and hittin' me. About approximately 15 times or 10 times, I can't really count to how many times he struck me".

Q: Where did he strike you?

A: In the stomach and in the face, slapping me and hittin' me..."

Sherry was interviewed by Detective Adkins on October 20, 1988.

Q: Okay. How many times was your husband struck?

A: Three times.

Q: And, how was he struck, with what?

A: A fist.

Q: Closed fist?

A: Yes.

Q: And where was your husband struck at?

A: In the chest, I'd seen it in the chest, I believe he got hit in the mouth too cuz when I looked back at my husband his head went back.

Officer Garrison was interviewed by Lt. Mayes in IIU. He stated that when Officer Gulla arrived he (Gulla) opened the rear driver door of the patrol vehicle and kneeled inside.

Q: What was Officer Gulla's emotional state at that time?

A: Hmm I'd say he was angry.

Q: How angry?

A: I don't know how to qualify that.

Q: I mean was he just upset or was he emotional, somehwere between just being upset and veins popping out on his forehead?

A: He didn't seem out of control, he just seemed angry.

Officer Garrison admits that he intercepted as she was headed toward Officer Gulla. He heard say "He hit him" and, "He shouldn't do that". Officer Garrison did not witness Officer Gulla strike

Officer Darlington was interviewed by Lt. Mayes. During the time that Officer Gulla was in the back seat of the officers' patrol vehicle he witnessed Officer Gulla strike <u>one</u> <u>time</u> on his chest with a halfway open fist.

Q: When Gulla grabbed , shaking him and yelling at him, was he using profanity?

A: Yes he was.

Q: Was he calling profane names?

A: Gulla called an "asshole" and a "little shit", that's all I heard as far as profanity.

Officer Darlington states, as does Officer Gulla, that Officer Gulla was wearing a green jacket that said "POLICE" across the back, and had an embroidered star on the left front of the jacket. Officer Darlington further states that when he saw Officer Gulla strike on the chest, was not resisting or making any type of furtive moves.

Officer Gulla states: "When I opened the back door I found unhandcuffed, and I assumed unsearched. I took hold of shirt sleeve - as an officer safety measure...he made a quick movement - I didn't and still don't know what his intentions was/were - I reached out with my open right hand, palm towards and pushed him back. This was a defensive reaction on my part, not a conscious effort". Officer Gulla denies slapping or punching

Conclusions

Officer Gulla is found to be in violation of Manual Sections 2.2.0 B(8) Conduct Unbecoming and 2.1.7 Courtesy (Members...shall at all times conduct themselves in an orderly, courteous and civil manner...). Officer Gulla entered the rear seat area of a patrol vehicle where was sitting, struck him on the chest one time and referred to as an "asshole" and a "little shit". This was witnessed by Recruit Officer Corey Darlington.

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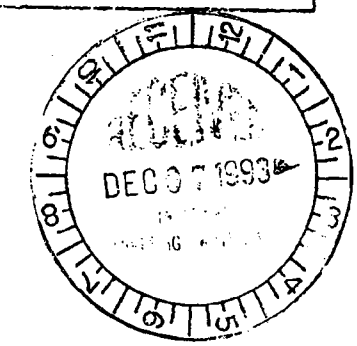

IN THE MATTER OF THE ABITRATION

BETWEEN

THE KING COUNTY POLICE OFFICERS GUILD,	)	
and	)	ARBITRATION AWARD
KING COUNTY	)	

Grievant: Denny Gulla

Richard J. Ennis, Arbitrator

APPEARANCES

For the Guild:

Deborah Bellam, Attorney
425 Pontius Avenue N., Suite 200
Seattle, WA 98109

For the Employer:

Maureen Madion
Deputy Prosecutor
E550 King County Courthouse
Seattle, WA 98104-2312

HEARING

The hearing was held on September 21-24, 1993 in a conference room in the Prefontaine Building in Seattle, WA.

RULE AND CONTRACT PROVISIONS

The King County Police Manual contains the following provision concerning "Conduct Unbecoming":

> RULE 2.2.0.B(8) Behavior whichs brings the officer/employee or the Department into disrepute, tends to discredit or destroy public respect for the officer/employee or confidence in the operation of the Department, adversely affects or impairs the efficiency of the officer/employee, or is detrimental to the morale, discipline or efficency of the Department.

The Collective Bargaining Agreement between the Police Guild and King County contains the following provisions:

> ARTICLE 2 MANAGEMENT RIGHTS
>
> It is recognized that the Employer retains the right to manage the affairs of the County and direct the work force. Such functions of the Employer include, but are not limited to:....discipline, suspend, demote or dismiss employees for just cause;....
>
> Article 12, Section 5 JUST CAUSE STANDARD
>
> No employee may be discharged, suspended without pay or disciplined in any way except for just cause. In addition, the County will employ the concept of progressive discipline.

BACKGROUND

Sometime during the year 1991 the King County Police Department realized that a juvenile gang problem was emerging in the Seattle area. There had been a "denial" syndrome in the community and, to some extant, in the Police Department itself. People wanted to think that such gangs existed only in the large Eastern cities or in Los Angeles and had not yet reached Seattle.

There was, however, evidence to contrary and as a result

the Department realized that it was ill equipped to deal with the phenomenon. Consequently, it was decided that a "Gang" unit should be formed within the Department in order to gather intelligence concerning such gangs for use in educating the public and the personel of the Department itself. The gang unit was formed and thereafter the events that brought about this arbitration occurred.

FACTS

This case arises out of events occurring on March 19, 1992. At that time the Grievant, Police Officer Denny Gulla, was a member of the newly formed "Gang Unit". This unit was formed in recognition of the fact that criminal youth gangs were beginning to spring up in the Seattle area and were no longer confined to Los Angeles. The gangs were similar to and perhaps affiliated with the Southern California Bloods and Crips.

Prior to the time in question Officer Gulla had been told to get close to a gang in the White Center community. This gang called itself the Loco Asian Boys, or LABS. Officer Gulla's task was to learn all he could about this gang, it's lifestyle, hand signals, code words, members names and and the gang's mode of operation. He was told not to hassle them but to attempt to gain their trust. In other words, he was to act in the intelligence gathering mode rather than the law enforcement mode.

The officers in the gang unit did not wear regular police officer's uniforms but were dressed more informally. They were not undercover. Their garb contained a fabric

inscription proclaiming "Gang Unit" and they wore their usual sidearms. The gang members were fully aware that these men were police officers.

Officer Gulla had had some success in becoming acquainted with the LABS. On March 19, 1992 he advised his superior, Lt. Sue Rahr, that he proposed to take his video camera with him and perhaps get some of the gang on tape. Lt. Rahr was pleased with this suggestion and felt it a good idea.

Gulla and his partner, Officer Scott Badics, encountered some of the gang members at an outdoor basketball court in the White Center area. The six gang members present allowed Gulla to set up his camera on a tripod and tape them as they shot baskets and idly clowned about.

Then the matter of a "jump-in" arose. The jump-in was an initiation of two new members. These members would be beaten up to learn if they were tough enough to be gang members. Gulla asked if he could tape the jump-in. The gang members objected to this on the ground that the tape would be used as evidence against them. They were, after all, going to beat up a couple of young boys. Gulla told them that if the initiates consented to the beating, then there was no crime. The tape, he said, would go no further than his own department. The gang members believed him and shortly thereafter the initiation commenced.

The recipient of the beating was Aaron Livermore. The gang members circled him. Although Livermore appeared as if he might make some effort to defend himself he was quickly knocked to the ground. As he lay the gang struck him

repeatedly with their fists. They also kicked him in the back, stomach, chest and head. Two of the boys were particularly vicious. The beating lasted for nearly one minute.

Livermore was bloodied with cuts, bruises and abrasions. As he walked to a car with his friend he claimed he was alright, and was glad he was "in." He may even have said it was "fun". The other initiate who had viewed the beating declined the honor. "Nope", he said, "not today. Some other time." One of the gang members told him he couldn't change his mind, however, he was allowed to leave.

Officer Gulla took his tape back to headquarters where it was viewed by his superiors. It came to the attention of a King County Councilman who was outraged that the Officers on the scene allowed such a beating to take place in their presence and failed to intervene. In some way the episode came to the attention of the press and a number of articles descriptive of the event appeared in the papers.

The Department promised an investigation of the matter. The Department's Internal Investigation Unit explored the episode and filed a report. Officers Gulla and Bedics were charged with "conduct unbecoming a police officer." Disciplinary recommendations were made to the executive in charge of the King County Police, Sheriff James Montgomery. The Sheriff was briefed, he talked to Gulla, then, as had been his custom, he followed the recommendations

submitted to him.

Both Officers recieved letters of reprimand and Officer Gulla was given a disciplinary transfer out of the Gang Unit.

ISSUE

Did the Department violate the "just cause" provisions of the Collective Bargaining Agreement when it issued a letter of reprimand as well as a disciplinary transfer to Grievant, Gulla?

THE GUILD'S POSITION: The Police Guild contends that the "Conduct Unbecoming" rule is so vague and undefined that it violates the traditional due process provisions of the law and may not be upheld.

It is further argued that the discipline administered did not meet the tests for just cause as required by the Collective Bargaining Agreement. The first of such tests involves notice; that is, did the employer forewarn the Officers of the possible or probable consequences of their conduct? The Officers are considered to have knowledge that their conduct is subject to discipline only if the conduct is "hard-core", that is, conduct that any reasonable person must know would be cause for discipline. Hard-core includes acts prohibited by law or rule such as theft, drunkeness, breaking into a store, etc..

Here the Officers did not know that a consensual beating was illegal. Many other Officers shared this belief. Since the Officers believed that if consented to, a gang

initiation which involved a beating was not a crime they had no reason to think discipline might follow for failure to make an arrest.

Nor, did the Officers have forewarning that negative publicity might ensue which might reflect on the public's perception of the Department and that they might be held responsible for such perception.

The Guild further urges that even if the conduct unbecoming rule is found constitutional on its face the County did not meet it's burden of proof by a "clear and convincing" or "beyond a reasonable doubt" standard.

It is also argued that the just cause test involving a fair and objective investigation was not followed. The Employer's investigation, it is urged, should include an inquiry into possible justifications for the employee's conduct. The Internal Investigation Unit did not interview Lt. Rahr, the Grievant's supervisor who did not see the episode as a disciplinary problem. Nor did the unit question Sgt. Couture, who was familiar with Rahr's instructions, nor did they consult a gang expert.

The Guild further claims that the County has failed to apply it's discipline even handedly to all employees. In this connection the Guild refers to cases in which Officers observe or participate in drug transactions and make no arrests when their mission is intelligence gathering. The Guild cites other instances in which Officers do distasteful things in their effort to fight crime. Yet, no discipline follows.

The Guild also contends that the County failed to prove it's case beyond a reasonable doubt or even by clear and convincing evidence as required in cases of this kind wherein the long term stigma of the punishment may be as serious concerning Grievant's career as a discharge.

Finally, the Guild argues that Officer Gulla has been made the scapegoat for the unfavorable publicity which followed this episode. The Department should have admitted that it's rules and training were inadequate to cover the situation at issue. Department officials did, in effect, admit the same to the media.

THE COUNTY'S POSITION: The County asserts that although the "conduct unbecoming" rule is admittedly broad the Department is not bound to anticipate and list every instance in which the rule would be applicable. Officers are all aware of the rule, and are professionals who are expected to act independantly and use good judgement.

On the matter of just cause the County cites the Washington Supreme Court case, Baldwin v Sisters of Providence, 112 Wn.2d 127, which contains the following:

> a fair and honest cause or reason, regulated by good faith on the part of the party exercisisng the power. We further hold that a discharge for "just cause" is one which is not for any arbitrary, capricious, or illegal reason and which is based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.

It is urged that the Arbitrator adopt this rule rather than the "seven test" Daugherty rule frequently applied by arbitrators in discipline and discharge cases.

In the event, however, that the Daugherty rule is followed

the County claims that it has complied with each element of the seven part test.

1. Notice. The conduct unbecoming rule had been set forth in the manual issued all officers upon hire for several years. Officer Gulla was well aware of the rule having been disciplined under it on prior occasions.

2. Reasonableness of rule. The rule is reasonabley related to both (1) the orderly, efficient and safe operation of the King County police force and (b) the performance that the Department might properly expect of police officers.

Officers are expected to act in a manner consistent with their public trust and responsibility.

3. Investigation. Upon learning of the incident Chief Adamson immediately request that the Department's Internal Investigation Unit conduct an investigation and this was done.

4. Fair investigation. Dective Bowen conducted the investigation. He talked to both officers involved on two separate occasions and to Aaron Livermore and his parents. Officer Gulla's legal representative was present in both interviews. Bowen also talked to school officials and reviewed the video tape several times. Bowen issued findings and conclusions but made no recommendation to Sheriff Montgomery.

5. Proof. During the investigation sustantial evidence was developed that Officer Gulla was guilty of conduct unbecoming an officer.

6. Equal treatment. Other files are reviewed to determine

past discipline for similar infractions. Roecommendations are made in the context of the officer's disciplinary history. There is no evidence that any other officers were penalized differently for the same offense.

7. Penalty. The degree of discipline was reasonably related to (a) the seriousness of the proven offense and (b) the record of Officer Gulla in his service with the Department.

In addition to the claim that allowing the initiation to take place was improper the County considered as wrongful the granting of immunity to the gang members and the failure to request medical atttention for the victim.

The County also contends that it need only prove it's case by the customary preponderance of the evidence.

DISCUSSION AND AWARD

This has been a highly adversarial case. It involved a number of pre-trial telephone conferences and preliminary motions. The case was hard fought at the hearing which extended into the fourth day. Both sides presented a number of high quality witnesses.

The County took the lead and based it's case primarily upon the testimony of Frank Adamson, Chief of the Criminal Investigation Division, and Lt. Pat Ferguson, Commander of the Investigative Unit. Chief Adamson testified that he was "shocked" when he saw the tape and that it should have been obvious to the Officers on the scene that a crime was being committed. He stated that Gulla "forgot he was a Police Officer" and should have discouaged the initiation rather

than promising immunity. Once the assault started it should have been stopped and, failing that, medical help should have been summoned afterward.

Lt. Ferguson testified that he believed the Grievant Officer's actions diminished respect for the Department. He said that various people had expressed disapproval. He considered Detective Pat Bowen's investigation to be complete and thorough. He also said that the discipline of the Officers should send a message to other police.

Also testifying for the County were Lt. Sue Rahr, Detective Pat Bowen, and Sheriff James Montgomery. Detective Bowen offered his investigative file and his conclusion that a Conduct Unbecoming charge was justified.

Sheriff Montgomery told that he was briefed, interviewed Gulla, and then followed the recommendations as to discipline as was his usual custom.

Lt. Sue Rahr's testimony will be discussed later.

Before discussing the merits I intend to deal with some of the collateral issues of fact and law raised by both sides.

Central to the Guild's case is the contention that Officer Gulla believed that a consensual beating was not a crime. In this connection considerable evidence was presented indicating that this belief was shared by an appreciable number of other police officers. In fact, this issue was so puzzling that the matter was referred to the King County Prosecuting Attorney's office for an answer. The Prosecuting Attorney was unable to come up with an immediate answer and stated that it was a "case of first impression" in the State

of Washington. After legal research, the Prosecutor's office concluded that the majority rule in other jurisditions where the question had been raised was that such a consensual beating was a breach of the peace and constituted criminal conduct. In view of the initial uncertainty as to whether a consensual beating did constitute a crime the Prosecutor declined to charge Officer Gulla with criminal wrongdoing.

Given this set of facts I am unable to find any merit in the County's claim that Officer Gulla improperly "granted immunity" to the gang. As things stood at the time of the incident Gulla could hardly be expected to know that some Courts somewhere in the United States had held contrary to his belief.

I also reject Officer Gulla's failure to summon medical help as misconduct. After the beating, initiate Livermore walked and talked normally. He had no broken bones and though he was bloodied it was from surface bleeding frequently described as "cuts and abrasions". He claimed to be alright and was somewhat exuberant over being "in".

I find no merit in the Guild's contention that the "Conduct unbecoming" rule is unconstitutionally broad. The County's response to this is simply that the circumstances that could invoke the operation of the rule are so varied and unforeseeable that it would be impossible to list them specifically. The point is well taken and I concur.

The County has urged that I follow the just cause rule promulgated by Washington Supreme Court and cited above. The Daugherty Seven Test rule is somewhat less broad, offers

precise guidelines to the Arbitrator, and is less susceptable to the Arbitrators substituting his judgement for that of management. Since the Daugherty rule is customarily used by Arbitrators in labor grievance cases I choose to follow it.

We now reach the matter of just cause. At the hearing the County had the burden of proof and called, as it's first witness, Lt. Sue Rahr the Commander of the Gang Unit. Lt. Rahr testified that the Unit's function was primarily that of intelligence gathering. She sought Officers who were self-starters, aggressive, highly initiative, had a good record of arrests, and were experienced on the street. Since Officer Gulla was one of her choices we may assume that he met the criteria set out.

Lt. Rahr was aware of Gulla's prior discipline for conduct unbecoming but she felt he had outgrown that. She discussed that with him and warned him that another lapse would not be tolerated. She also advised him that the unit had no experience in the field--no standard operating procedure--but must rely on it's member's judgment. The unit, she told him, was to gather intellignece about gangs, the gang members and their activities. Officers were to attempt to learn the meaning of the gang's hand signals and graffiti peculiar to gangs. There was a need for information about Seattle gangs in order to educate parents, the community, and to train other Officers. The gang unit was to act primarily in the intelligence gathering mode rather than the law enforcement mode.

So instructed, Officer Gulla was sent to the South Central area of Seattle. Here he made contact with the LABS. Lt. Rahr regarded the Loco Asian Boys as a powerful gang and was pleased with the rapport that Gulla had established with them. She was enthusiastic when Gulla suggested video taping the gang. She did not anticipate that a "jump in" would be taped.

When Lt. Rahr learned that Officer Gulla had taped the jump in without interfering and that this had provoked outrage in some quarters she testified that she felt a certain responsibility herself for Gulla's conduct because her instructions to him had been very broad. She further testified that the unit was in an intelligence gathering mode as opposed to a law enforcement mode. She stated that Officer's have discretion in making a misdemeaner arrest. The degree of injury being inflicted would be a factor to be considered.

Lt. Rahr stated that for these reasons she did not feel that punishment was indicated but rather that Gullas did not possess the judgmental skill necessary for the job.

The testimony on both sides of the case was of very high quality. It's general tenor supported Lt. Rahr's statement's that the gang unit was engaged in gathering information and had not yet formulated any rules of conduct. Training Officer, Gus Hall, stated that "they were making this stuff up as they went along."

In became apparent during the hearing that a large number of active Police Officers, perhaps the majority, believed

and may have been trained to believe, that a consensual beating was not a crime. The King County Prosecutor's report contains the following: "The detectives will not be prosecuted because they had a good faith belief that the initiation assault was not a crime, which is consistent with the prevailing view in both the common law and the law enforcemnt community. Since this is a case of first impression it would not be fair to prosecute the detectives for failing to recognize that the assault might be a crime against the public order and a breach of the peace."

There was also testimony by a number of Officers that they do not always make an arrest when a crime is committed in their presence when their mission is otherwise and in such cases no discipline follows.

I found particularly significant the testimony of Detective David Redamann and Officer Roger Allen. Redamann had worked with gangs long before the present gang unit was formed and was one of the founding members of the Department's gang unit. As a gang expert he conducts gang related statewide training for police officers as well as that ~~that~~ for the Seattle department. He has been loaned out to other police departments including the Washington State Patrol for gang activity investigations. He was familiar with "jump ins" and stated that this one was not unusually violent. He stated that the video tape would be an invaluable tool for police departments as well as the public at large in coping with the denial of gang activity in the Seattle area. He stated that intelligence gathering, in

instances such as this, was more important than enforcement work. He went on to compare the tape with "Scared Straight" a film shown to youngsters illustrating the horrors of prison life.

Officer Roger Allen is a Patrol Officer working the White Center Area and is familiar with the LABS gang. He concurred with Detective Redamann opinions as to the value of the tape in convincing youth to avoid gangs.

Allen noted that the initiation stopped before any serious injury could occur and observed that the initiation would have taken place whether police officers were present or not. Both he and Redamann agreed that the presence of the Officers on the scene prevented the declining initiate from being jumped in.

Allen discussed gang philosophy in connection with what kids should be told about gangs. He said these gangs are not about comradeship as are other organizations which kids might join. He compared the callousness of those who were the chief particpants in the beating with the compassion shown by another gang member when the beating was over. He observed that the individual who showed concern was no longer a gang member. He also testified that there was no loyalty among gang members and if one were arrested for an offense that individual would promptly deny his participation in the crime and identify another member as being the real culprit.

The Grievant, Detective Denny Gulla, had been on the force for over 11 years. He had become interested in gangs as a

Patrolman in the Kent area. He testified that he researched and attended classes on gangs. He has also taught other Officers and has spoken, in public and in schools, on the subject. He had observed denial of gang existance among the public as well as within the Police Department.

He stated that the newly formed gang unit was "trail blazing" and was not sure just where it was going. They worked on a day to day basis. His mission was not to hassle the gangs but to gather intelligence. A video tape of gang activity would be a valuable training tool.

On the day of the incident he was not aware that a jump in was going to occur. He had been taught and understood that a consensual beating was not a crime and with this in mind he advised the gang that the tape could not be used against them.

During the initiation assault he was concentrating on keeping the action in the tiny view finder in his camcorder which tended to divide his attention. When the thought came to him that he should intervene and put a stop to things he could see that the attack was winding down and coming to an end on it's own. When the second initiate, Landon, backed out Gulla told him, "that's smart."

Later, when Chief Adamson viewed the tape, Gulla stated that Adamson said, "80% of our Officers with under 10 years service would have done the same thing."

The newspaper articles which discussed the event were factually straight forward. They did mention that Councilman Simms had expressed outrage over the matter.

A Press Release issued by the Department contained the statement that policies and guidelines regarding police and gang interaction had been re-written and additional training would be initiated for all officers as well as a distribution of new policy regulations.

After considering all of the evidence produced at the hearing and studying counsel's briefs and arguments I am convinced that there was no evidence indicating a loss of public respect for the Police Department nor was there any evidence supporting a loss of efficiency or morale.

It would appear in retrospect that Officer Gulla was mistaken in permitting and taping the initiation assault. Mistakes, however, are made daily by employees at all levels in all lines of endeavor as part of a learning process. Usually discipline is called for when the mistake is made knowingly and with intent toward wrongdoing.

I am convinced that if police officials were disturbed it was caused more by the publicity accorded this event rather than the event itself and that the fault lies with whoever leaked the information to the media.

In reaching this conclusion I have considered the internal investigation report submitted by Detective Pat Bowen. I note that the Officer in charge of the Gang Unit, Lt. Sue Rahr, was never interviewed. She was the person who gave Dectective Gulla his instructions. At the hearing she did not think that the episode warranted discipline. Nor did the investigating officer interview any of the experienced gang officers in order to gain insight into gang and police

interaction.

Bowen closed his report with the statement: "For the above reasons the allegation of 'Conduct Unbecoming' should be sustained." This would make it appear that the decision to discipline Grievant Gulla had already been reached prior to the instigating the investigation. This is a direct violation of the Daugherty seven test rule regarding investigation by management. In order to be considered a thorough and unbiased investigation the enquiry should attempt to discover the reasons why Grievant acted as he did at the time in question. I seems to me that the investigation went only far enough to support a conclusion that had already been reached and that the investigating Officer was telling his superiors what he thought they wanted to hear.

Rather than admit that it's rules and policys were inadeqate to cover the sitiuation the Department used Gulla and Bedics as scapegoats for what it percieved as bad publicity.

For the all of the above reasons I am finding in favor of Grievant Gulla and sustaining the grievance. The letter of reprimand should be withdrawn from Grievant's file and Grievant restored to his former position. If Lt. Rahr is dissatisfied with Grievant's performance a non-disciplinary transfer would be in order.

December 2, 1993

Richard J. Ennis, Arbitrator

INCIDENT			
STATUS ☐OPEN ☒CLOSED ☐INACTIVE	SHERIFF KING COUNTY	INTERNAL INVESTIGATIONS FOLLOW-UP REPORT	IIU NUMBER 2004-002
PRESENT DATE 03/02/04			FCR CODE / DISTRICT
TYPE OF COMPLAINT(S) SEE BELOW			
DISPOSITION(S):	ALLEGATION I SUSTAINED		

R. P.					
NAME (LAST, FIRST, MIDDLE) SEE BELOW	RESIDENCE PHONE		BUSINESS PHONE		
RESIDENCE ADDRESS	OCCUPATION	RACE	SEX	DOB	

1. ALLEGATION(S): LIST EACH ALLEGATION WITH A ROMAN NUMERAL
2. EVIDENCE: LIST EVIDENCE PERTINENT TO INVESTIGATION
3. PERSONS INTERVIEWED: NAMES / ADDRESSES / TELEPHONE NUMBERS
4. ADDITIONAL ENTRIES: COMMENCE EACH NEW INVESTIGATIVE ENTRY WITH DATE / TIME

ACCUSED EMPLOYEE(S)/ALLEGATIONS:

Sgt. Denny Gulla – Serial 04392

Allegation I – Abuse of Authority – GOM 3.00.020(3);

It is alleged Sgt. Denny Gulla made a pre-text stop on complainants Kelly and Johnston on January 10, 2004 at 2240 hrs. in Pierce County (outside Buckley). Complainants allege Sgt. Gulla used profanity and made threats to kill them during the stop. Sgt. Gulla also disseminated flyers with photos of the complainants to local law enforcement agencies in King and Pierce County.

EVIDENCE:

Complainant Michael Kelly Statement
Complainant Ferrell Johnston Statement
Buckley PD Officer Ryan Boyle Statement
Complainant Buckley PD Chief James Arsanto Statement
Wilkeson PD Sergeant Robert Carsey
Sergeant Denny Gulla Statement
Captain Ken Wardstrom Statement
Sergeant Tony Provenzo Statement
Pierce County Sheriff's Office Incident Report # 04-026-070-8
Electric Court Document Copy – Cause No. 04-3-11969-7KNT
911 Tape Transcriptions
Divorce Documents – Declarations, Letters and Exhibits
Flyers (2) dated 01/11/04

PERSON(S) INTERVIEWED:

Michael Kelly	27919 – 112th St., E. Maple Valley, WA 98321	Cell:	253/332-9657 H: 360/829-1541
Ferrell Johnston	3716 Hampton Way Kent, WA 98032		H: 253/859-2842
Officer Ryan Boyle	Buckley Police Department		B: 360/862-9059
Chief James Arsanto	Same		
Zina – Dispatch Supervisor	Same		
Sgt. Robert Carsey	Wilkeson Police Department		B: 360/862-9059
Roger Juvet	King County Police Officer's Guild		B: 206/957-0937

ASSIGNED INVESTIGATOR	SERIAL NUMBER	UNIT NUMBER	APPROVED BY
SGT. M. FRANCES CARLSON	06281	63	

Sgt. Denny Gulla	Precinct Four	B: 206/296-3333
Sgt. Tony Provenzo	Precinct Four	B: 206/296-3333
Captain Ken Wardstrom	Precinct Four	B: 206/296-3333
Sue Gordon	Communication Center	B: 206/205-7965
Sgt. DJ Nesel	Court Security – RJC	B: 206/205-2357
Sgt. Bruce Peterson	Same (temporary)	B: 206/296-3865
Deputy Jerrard	Pierce County Sheriff's Office	B: 253/798-7530
Chief Jeter	Bonney Lake PD	B: 253/863-4545
Chief Weigle	Enumclaw PD	B: 360/825-3505
Genieve Diyenski	Nextel	B: 425/278-2062

ADDITIONAL ENTRIES:

1. **01/13/04 – 1257 hrs.** IIU received telephone call from complainant Mike Kelly. He left voicemail for me on my direct line.

2. **01/14/04** IIU received A-128 and attachments from Precinct 4 Captain Webster, who initiated complaint.

3. **01/15/04 – 1105 hrs.** Telephone call to Mike Kelly. Kelly was upset and excited about the traffic stop by Sgt. Gulla. I told him I had the complaint initiated by Captain Webster and the Buckley chief. Kelly told me right off the bat that he was willing to take a lie detector test. I schedule appointment for an interview for 01/20/04 AT 1100 hrs. for him and 1200 hrs. for his friend, Ferrell Johnston also in the vehicle with him at the time of the stop. Kelly told me his estranged wife Tara heard the incident at the time.

4. **01/15/04 – 1117 hrs.** Ran Kelly through Access.

5. **01/15/04 – 1200 hrs.** Initiated IIU tracking number.

6. **01/15/04 – 1305 hrs.** Received telephone call from Kelly who was concerned about being under surveillance by Sgt. Gulla (based on what Sgt. Gulla told him at the traffic stop). I told him no.

7. **01/15/04 – 1255 hrs.** Telephone call to Buckley PD for when Officer Boyle works and how to contact Sgt. Carsey. I left voicemails for both. At 1315 hrs. I received telephone call from Sgt. Carsey. I scheduled interview with him for 01/21/04 at 1100 hrs. at precinct 3.

8. **01/16/04 – 1734 hrs.** Received telephone call from Officer Ryan Boyle and scheduled appointment for interview on 01/20/04 at 1400 hrs. at Buckley PD. He told me that had already received a telephone call from Sgt. Gulla wanting a copy of his report. Officer Boyle said this whole situation made he very uncomfortable.

9. **01/17/04 – 1330 – 1600 hrs.** Drove to Buckley area to check out site before Kelly/Johnston interview.

10. **01/19/04 – 0928-0935 hrs.** Received telephone call from Officer Boyle. We scheduled interview for 01/21/04 at 1200 hrs. incident (KCSO CAD#).

11. **01/20/04 – 1040 hrs.** Arrived at Kelly's residence. 1122 – 1150 hrs. Tape-recorded Kelly's statement. 1210 hrs. Johnston arrived, Kelly left to give me privacy for the interview. Prior to his leaving, Kelly gave me copy of statement written by his sister about the conversation she had with Tara Kelly who was "bragging" about the traffic stop.

12. 01/20/04 – 1225 – 1253 hrs. Interviewed Johnston. Kelly returned during the last portion of the interview then left for a court appearance in Enumclaw. (See statements for details).

13. 01/20/04 – 1300 hrs. Cleared Kelly's residence. I drove around the area again in Buckley to see if I could match what Kelly told me to the area.

14. 01/20/04 – 1346 hrs. Telephone call to Officer Boyle, left voicemail to let him know I was at Buckley PD for our interview. Buckley PD told me Officer Boyle was in still in Reno due to a flight delay.

15. 01/20/04 – 1425 hrs. I cleared Buckley area.

16. 01/21/07 – 1100 hrs. Met with Sgt. Carsey. 1119-1139 hrs. Tape-recorded his statement. (See statement for details).

17. 01/21/04 – 0733 hrs. Received message from Ferrell Johnston with case number of incident.

18. 01/20/04 – 1750 hrs. Called Officer Boyle for his home address for our interview.

19. 01/20/04 – 1610 hrs. Telephone call to Buckley PD dispatch regarding procedures for request of radio/telephone tapes of Sgt. Gulla's traffic stop.

20. 01/21/03 – 0753 hrs. Received voicemail from Buckley PD Dispatch Supervisor – Zina regarding request. I prepared fax request using department form and faxed to Buckley PD later in the day. Also submitted 911-tape request for radio transmission by Sgt. Gulla to Sue Gordon. And a request to see if our communication center received telephone call from Ferrell Johnston.

21. 01/21/04 – 1309 hrs. Received voicemail from Cynthia at Buckley PD that tapes were ready. I called her back to arrange picking up the tapes the next day.

22. 01/21/04 – 1329 – 1350 hrs. Searched IRIS for incident involving Sgt. Gulla. Ran up Kelly vehicle plate in ACCESS.

22. 01/22/04 – 1125 hrs. Received voicemail from Mike Kelly stating that two deputy sergeants escorted Sgt. Gulla out of the court. At 1145 hrs. I received fax from Zina, Dispatch Supervisor for Buckley PD acknowledging my request for the radio transmissions and telephone call from Sgt. Gulla.

23. 01/22/04 – 1200 hrs. Arrived at Officer Boyle's residence. 1214 – 1244 hrs., tape-recorded his statement. (See statement for details). Cleared residence at 1300 hours. Please note the incorrect date on Officer Boyle's statement, the true date was January 21, 2004. Before the interview I went by Buckley PD and picked up the tapes (disk).

24. 01/22/04 – 1400 hrs. Went to Civil Unit, April Chavez looked into their system for any/all orders involving Michael and Tara Kelly.

25. 01/22/04 – 1400 hrs. Typed up A-150 for Sgt. Gulla and sent via department mail. (Incorrect date on A-150, true date should be January 21, 2004).

26. 01/22/04 – 1500 hrs. Received telephone call from Mike Kelly wanting to know about Sgt. Gulla's ability to attend his divorce hearing for 01/23/04. I told him as long as Sgt. Gulla was not in uniform or on-duty he could attend it. He also told me he never lived at 27919 – 112thSt., SE (an address cited in the original complaint by Captain Webster). Kelly said he has lived at his residence

for the past 2-4 years. I also discussed the procedures of IIU and steps taken after the investigation is closed and how he will be notified.

28. 01/22/04 – 1510 hrs. Telephone call to Captain Webster and KCPOG that A-150 was in the mail for service.

29. 01/22/04 – 1519 hrs. Ran up Tara Kelly in ACCESS.

30. 01/22/04 – 1130 hrs. Mike Kelly called IIU and left voicemail and message about Sgt. Gulla showing up at divorce hearing.

31. 01/26/04 – 0730 hrs. Mike Kelly called and left message for me. He also left two messages on my Nextel telephone on 01/23/04 at 1013 and 1014 hrs.

32. 01/23/04 –1013/1014 hrs. Received two voicemails from Mike Kelley stating his 10-year-old daughter told him some disturbing news about Sgt. Gulla.

33. 01/26/04 – 1023 hrs. Mike Kelly called, he his said his daughter knows about what happened because Sgt. Gulla's daughter was present for the incident. His accusation was that Sgt. Gulla had his daughter in his patrol vehicle during the traffic stop. Kelly also talked about the divorce hearing and how Sgt. Gulla showed up at the last minute and tried to submit a written statement to the court through the DV-Prosecutor. Sgt. Gulla did not testify at the hearing. Kelly said that a bailiff came up to Sgt. Gulla, then the two deputies escorted him out. Kelly said his attorney will be filing a lawsuit against KCSO because of this incident. He also said that Sgt. Gulla is mad at the Buckley PD Officer because the Buckley lied.

34. 01/26/04 – 1035 hrs. After the telephone call, I checked Personnel to see if Sgt. Gulla had an officer's report requesting permission to transport family members in his patrol vehicle. There was none in his file.

35. 01/26/04 – 1042-1045 hrs. Received faxes from Kelly – the statement he told me in his interview that he gave to his attorney after the incident and the statement his attorney acquired, written by Sgt. Gulla. I also checked precinct four to see if they had his personnel file with an officer's report requesting permission to transport family members in Sgt. Gulla's patrol vehicle. They did not have his file yet from CID.

36. 01/26/04 – 1105 hrs. Received voicemail at 1045 hrs., from Sue Gordon. At 1115 hrs., I called Sgt. DJ Nesel at RJC –Court Security to inquire about what Kelly mentioned above.

37. 01/26/04 – 1435 hrs. Returned telephone call to Roger Juvet. Left message on his pager.

38. 01/26/04 – 1440 hrs. Telephone call to Chief Arsanto, Buckley PD regarding flyer. He told me he pulled flyer off their bulletin board because there was no KCSO heading, so he was not sure it was sanctioned by the King County Sheriff's Office. He also gave me the name of the other Chief's for Bonney Lake and Enumclaw PD's and their telephone numbers so I could contact them about the flyers. Chief Arsanto said he still had the flyer and I arranged for Captain Louie to pick it up the next day. He said that he has known Sgt. Gulla all his law enforcement career (Gulla) and does not think Sgt. Gulla was thinking that night. Chief Arsanto said their dispatcher was contacted by Kelly and he made the comment, "He's going to get what's coming to him" (meaning Sgt. Gulla).

39. 01/26/04 – 1453 hrs. Telephone call to Roger Juvet, KCPOG – left voicemail.

40. 01/26/04 – 1504 hrs. Telephone call to Chief Arsanto at Buckley P. D., a I left message. I also called Chief Weigle at Enumclaw PD and asked if he could check for the flyer at 1508 hrs.

41. 01/26/04 – 1515 hrs. Received telephone message from Deputy Jerrard, Pierce County Sheriff's Office, regarding criminal complaint she took from Kelly and Johnston involving Sgt. Gulla. I received their incident report # 04-026-0708. I returned her call. She received same letter for statements (witness statement typed up recounting their story to their attorney). Deputy Jerrard said case would be forwarded to Prosecutor's Office and explained how I could get copy of the report.

42. 01/26/04 – 1545 hrs. Received return telephone call from Bonney Lake PD Chief regarding flyer disseminated by Sgt. Gulla. Checking to see if he could locate.

43. 01/26/04 – 1600-1700 hrs. Received and reviewed the divorce documents between Tara and Mike Kelly.

44. 01/26/04 – 1710 hrs. Received voicemail from Sgt. Nesel regarding supervisor in charge of court security – Sgt. Bruce Peterson (taking place of Sgt. Sally Mendel while on leave).

45. 01/27/04 – 0858 hrs. Received voicemail from Chief Wiegel, Enumclaw PD – he was unable to locate any flyers distributed by Sgt. Gulla.

46. 01/27/07 – 0912 hrs. Received voicemail from Sgt. Peterson returning my telephone call.

47. 01/27/04 – 1005 hrs. Received telephone call from Roger Juvet. Juvet called back at 1040 hrs.

48. 01/27/04 – 1134 hrs. Telephone call to Sgt. Peterson, left message. 1152 hrs., sent email to Genevieve Diyenski at Nextel requesting Sgt. Gulla's cell phone records from 12/20/03 –01/20/04.

49. 01/28/04 – 1045 hrs. Received telephone call from Chief Wiegel at Enumclaw PD, he could not locate the flyer distributed by Sgt. Gulla.

50. 01/28/04 – 1050 hrs. Sgts. Nesel and Peterson visited me at IIU. I talked with Sgt. Peterson, he briefly talked with Sgt. Gulla to make sure he was not armed at the RJC. There was not any escort out of a courtroom. The reason Sgt. Gulla was talked to was because he bypassed the security instead of going through and the security screeners were concerned.

51. 01/28/04 – 1340 hrs. Telephone call to Genevieve Diyenski at Nextel, I did not get answer so I sent her an email with my request.

52. 01/28/04 – 1545 hrs. Received telephone call from Officer Boyle regarding a Washington State Trooper expressing concern about the flyer. Apparently, the flyer was seen at Enumclaw PD by another trooper who passed on the information to the trooper who lives in Buckley. I received the name and called WSP dispatch to leave a message for the trooper to call me. The issue I talked to Officer Boyle was about the vandalisms cited by Sgt. Gulla in his statement for the Tara Kelly divorce hearing. Officer Boyle said that the vandalisms were not related to Mike Kelly.

53. 01/29/04 – 1113 hrs. Received return email from Genevieve Diyenski that she was currently processing my request for Sgt. Gulla's cell phone records.

54. 01/29/04 – 1325 hrs. Telephone call to Chief Arsanto, Buckley PD. Left voicemail for him regarding interview.

55. 01/29/04 – 1750 hrs. Received telephone call from Trooper Beth Durgan, WSP regarding the flyer Sgt. Gulla disseminated. Trooper Durgan said she would send me the flyer via Buckley PD. She found out about the flyer because Trooper Mark Soper told her about it, the flyer was at Enumclaw PD.

56. 01/30/04 – 1325 hrs. Notified by Captain Webster via email Sgt. Gulla was served with the A-150.

57. 01/30/04 – 1547 hrs. Chief Rahr emailed Sgt. Gulla regarding the flyer, requesting he cease and desist from further dissemination. I received carbon copy of email.

58. 01/30/04 – 1550 hrs. Telephone call to Pierce County Sheriff's Office – Records Unit for copy of report taken by Deputy Gerard. Judy said she would fax the report to me and she did at 1600 hrs.

59. 01/30/04 – 1602 hrs. Received from Communication Center radio transmission tape from request I made on 01/21/04.

60. 02/02/04 – 0932 hrs. Received email from Chief Rahr, her acknowledgement from Sgt. Gulla, receipt of her earlier email about the flyers.

61. 02/02/04 – 1030 hrs. Arrived at Buckley PD. Met with Chief Arsanto. Tape-recorded his statement from 1104 – 1120 hrs. (See his statement for details). I was told by Chief Arsanto his concern that Sgt. Gulla was bad mouthing his department to the owner of an espresso stand because she asked him what was going on. He suggested I talk with her. Before leaving, Chief Arsanto gave me an envelope he received from Trooper Durgan containing the flyer disseminated by Sgt. Gulla. It matched the flyer Chief Arsanto took off his bulletin board and later gave to Captain Louie.

I cleared Buckley PD at 1132 hrs. At 1138 hrs. I spoke to Patty Emery at Plateau Espresso. She told me Sgt. Gulla told her there was a problem with his girlfriend's husband involving Buckley PD, but he did not badmouth the officer or the Chief. She did not know why the Chief thought Denny made derogatory comments. I cleared the espresso stand at 1141 hrs.

62. 02/02/04 –1310 hrs. Typed up amended A-150 for Sgt. Gulla as requested by Roger Juvet, KCPOG. He said Hillary, Guild attorney would be present for interview due to possible criminal charges pending in Pierce County. It should be noted the time of the A-150 is incorrect, 1100 hrs. It should reflect 1310 hrs.

63. 02/06/04 – 1250 hrs. Telephone call to Pierce County SO Records for Judy Hamilton. I requested an updated copy of the incident report in entry #58. I was trying to find out if the case was forwarded to the Pierce County Prosecutor's Office for charges. Hamilton said she could not answer that question and referred me to the PCSO's IIU office – Lt. Andrews. At. 1425 hrs., I received voicemail from Lt. Andrews. I returned his call and left voicemail. Lt. Andrews called on 02/09/04 at 0845 hrs., leaving voicemail that Gulla case was forwarded to their prosecutor's office. There was no active investigation. At 1208 hrs., I called and left voicemail for Lt. Andrews for an updated copy of incident report and left fax number.

64. 02/09/04 – 02/23/04 Worked on IIU caseload. I worked on this IIU follow-up entries.

65. 02/11/04 Received package from Nextel, Inc. of Sgt. Gulla's cell phone records for December 2003 – January 2004.

66. 02/23/04 – 1420 hrs. At Captain Louie's request, IIU received copy of same incident report cited above 04-0260708.1 from Pierce County Sheriff's Office.

67. 02/24/04 – 1200 hrs. Received telephone call from Roger Juvet regarding status of criminal investigation in Pierce County. I told him case was referred to prosecutor's office, and that I had not heard anything in return regarding charges.

68. 02/27/04 – 1505 hrs. Received voicemail from Sgt. Personious from Buckley PD answering question I had in previous telephone call (unknown date and time) to him of a Tacoma PD officer who saw Kelly in area of Sgt. Gulla's residence. Sgt. Personious did not have the name of that officer.

69. 03/01/04 – 1400 hrs. Mike Kelly called. I asked him if he was west of Mundy Loss Road the night Sgt. Gulla made contact with him that night. Kelly told me he was not anywhere near Buckley earlier in the day.

70. 03/02/04 – 1905 hrs. Received email from Sgt. Provenzo with his officer's report I requested earlier in the A-150. (See statement for details).

71. 03/03 – 03/30/04 Worked on IIU caseload.

72. 03/31/04 – 1500 hrs. Telephone call to Craig Adams, Pierce County S. O. Legal Advisor. Left voicemail inquiring whom to contact in Prosecutor's Office for disposition of criminal charges regarding Sgt. Gulla's case. Adams returned my telephone call at 1515 hrs. He said he would call DPA's office for status and call me back or send me email with information.

73. 03/31/04 – 1557 hrs. Received email from Craig Adams. He forwarded email he received at 1521 hrs. from DPA Kevin Benton regarding status of the criminal case. DPA Benton said he returned the case back to the deputy for additional follow-up.

74. 04/01 – 04/07/04 Worked on IIU caseload.

75. 04/08 – 04/13/04 Worked on follow-up and Summary.

SUMMARY

Michael and Tara Kelly separated in November 2003 and are in the process of a divorce. Ferrell Johnston is Michael Kelly's best friend. Tara Kelly began dating Sgt. Denny Gulla shortly after she separated from Michael Kelly.

Michael Kelly states that on January 10, 2004 he and Johnston left his residence around 2200 hrs. Kelly felt he was being following by a marked King County Sheriff's patrol car because Kelly saw a patrol car just south of his residence in Enumclaw, then later after he crossed into Pierce County on Hwy 410. That is when the patrol car came up close as though to get his license plate before backing off. When Kelly got into Buckley, he turned right so he could to lose the patrol car. At that time, Kelly said he did not know who was in the patrol car. Kelly did acknowledge his wife was dating a King County Sheriff's deputy, but had not met him. (At the time of the IIU interview Kelly knew Sgt. Gulla's name and will be referred to by name).

Kelly said he continued driving the backroads in Buckley paralleling Hwy. 410, because he had wanted to go by a dealership outside Buckley to check to see if his wife had sold his mustang. Kelly described several times when he saw the KCSO patrol car again, before being pulled over westbound on Hwy 410. A second patrol car joined the first and he was contacted by the Buckley PD officer (Officer Boyle) who asked for his driver's license, etc. Officer Boyle said he was speeding when Kelly asked why he was stopped. After Officer Boyle took Kelly's information, walked away and later returned, Sgt. Gulla walked back to Kelly's car with him. Kelly noted a 3rd officer had arrived (Sgt. Carsey, Wilkeson

PD). When Officer Boyle returned to Kelly's car, Officer Boyle started to say something before Sgt. Gulla leaned in the window, grabbed his name tag and said "this is who's going to get you, I'm going to shoot you in your mother fucking face, if you're within 100 yards of my house, you mother fucker." Kelly said Sgt. Gulla used the term "mother fucker" numerous times. Kelly said Sgt. Gulla never asked him if he was looking for Sgt. Gulla's house. Kelly felt Sgt. Gulla continued to get enraged while he continued to call Kelly a 'mother fucker.' Kelly said his friend Johnston was in the car and witnessed this.

Sgt. Gulla went to Johnston's side of the car (passenger side) and asked "who the fuck are you?" to Johnston. Kelly said Sgt. Gulla told Johnston , "I'll shoot you in your mother fucking face too if I ever see you within" or "If you're in Buckley." This continued for several minutes before Kelly said he was taken out of his car by Sgt. Gulla and told to interlock his hands behind his back before being searched. Sgt. Gulla asked him about guns or drugs in Kelly's car and he said had none. Johnston was taken back to the patrol cars by one of the other officers. Sgt. Gulla retrieved his camera then came back and took photographs of him, Johnston and Kelly's car. Sgt. Gulla told Kelly he was taking pictures because he was "going to post these fucking pictures of you on every single god damn car in Pierce County and Washington State Patrol" (WSP). Sgt. Gulla bragged about having the King County cops in his hip pocket along with WSP. Sgt. Gulla named the Judge Kelly saw in Enumclaw for the No Contact Order, in his hip pocket and said Kelly was 'fucked, your life is done, I'm going to get ridof you. I know people that will make you disappear." Kelly said Sgt. Gulla told him the two officers there at the scene would sign anything that he will do. Kelly said Sgt. Gulla brought up vandalisms in the Buckley area where Kelly might be a suspect, but Kelly denied it to Officer Boyle when later asked about it. Kelly felt his life was in danger because of Sgt. Gulla's comments and threats that night. Later Kelly and Johnston file a police report with Pierce County Sheriff's Office. In a telephone conversation with Sgt. Carlson, Kelly said he was not in the area earlier that night, driving around. Kelly also commented that Sgt. Gulla would plant a gun on him after shooting him.

Johnston reiterated what Kelly said to Sgt. Carlson in the IIU interview. There was only one King County Sheriff's patrol car on the road before them being stopped. The stop occurred just outside Buckley in unincorporated Pierce County, around 10:00 PM on Hwy 410. Johnston and Kelly went on the side streets after they realized the patrol car was following them and ran into what they thought was the same patrol car at several different intersections before being pulled over on Hwy 410. Officer Boyle contacted them, requested Kelly's information (DOL, registration and insurance), then walked back to Sgt. Gulla's car where Officer Boyle handed Sgt. Gulla the information. Sgt. Gulla returned to their car and said for them to look at his nametag "mother fuckers. Now you found who you were looking for." "You mother fuckers know who I am. If I ever see you fuckers, I'll shoot you in your mother fucking face." Sgt. Gulla continued, "I've got people I can make you fucking disappear, if I have to shoot you fuckers tonight, these deputies will take my back and they will write down whatever I want them to." Johnston heard Sgt. Gulla tell Kelly, "I heard you're really a fucking violent person." "I'd like to see you get out and do something to me 'cause I'll shoot you in the fucking face." Johnston said Sgt. Gulla kept on for awhile like that. Johnston said Sgt. Gulla was in a rage, and held his hand like a gun when he was pointed it at Kelly just inside the car door. Sgt. Gulla asked Johnston, "who the fuck are you?" before Johnston could answer, Sgt. Gulla said, "I'll shootyou in the mother fucking face too and I can make you fucking disappear, I got people that will help me do that." Johnston said Sgt. Gulla was screaming these threats to them.

Johnston said Sgt. Gulla came up to Kelly's car about three times and continued to repeat his threat about shooting them, making them disappear and having cops and a Judge in his hip pocket, as stated above. While Sgt. Gulla directed his comments to the both of them, he primarily talked to Kelly and continued screaming at them. Johnston saw Kelly taken out of the car by Sgt. Gulla and patted down and later saw Sgt. Gulla take photos of Kelly, Johnston and Kelly's car. Sgt. Gulla said he would be posting flyers in every State Patrol and King County car so they would know who Kelly and Johnston are. Then that is when they were asked to get out of the car to get searched.

Officer Ryan Boyle works for the Buckley P. D. and was on duty the night of January 10, 2004. Officer Boyle recalls Sgt. Gulla coming to the station that night to talk to him about a vehicle he felt was following him and gave a description of the vehicle including a partial plate of PPH and the driver of this vehicle has done so in the past. Sgt. Gulla wanted him to stop the vehicle to check and see what was going on. Sgt. Gulla told him, he was dating the driver's wife. Sgt. Gulla was concerned the ex-husband was looking for his residence. Later, Officer Boyle was in the office when Sgt. Gulla called Buckley PD dispatch to say he was behind the same vehicle, travelling 50 MPH and on the border of Buckley at 112th. Officer Boyle had the dispatcher ask Sgt. Gulla if he had probable cause (PC) for the stop and that he would be on his way. While enroute, Buckley dispatch updated Sgt. Gulla's location at Mundy Loss Rd. turning westbound. Officer Boyle told dispatch if Sgt. Gulla had PC to make the stop and he would be there shortly. Officer Boyle made the initial contact with the driver, Mr. Kelly after briefly talking with Sgt. Gulla. Officer Boyle said it was clear Sgt. Gulla was upset. Officer Boyle contacted Kelly and asked for the appropriate information and told him what the stop was for when asked by Kelly. Sgt. Carsey from Wilkinson PD was there also and went to the driver's side of Kelly's vehicle along with Sgt. Gulla.

When Sgt. Gulla made contact with Kelly, Officer Boyle said he quit talking because Sgt. Gulla took over the stop. Sgt. Gulla leaned on the driver's door window seal and asked the driver (Kelly) if he was looking for his house. Officer Boyle said Sgt. Gulla used profanity and asked Kelly "are you looking for my house mother fucker?" Officer Boyle said he was getting nervous, trying to decide what to do because he was not sure what Sgt. Gulla was intending to do. Sgt. Gulla talked to Kelly for about a minute, telling Kelly if he was looking for him, Sgt. Gulla was going to kill him. Sgt. Gulla made this comment at least three times and made the same threat to the passenger, Johnston. When Sgt. Gulla asked both occupants in the car if they understood, Kelly and Johnston said yes. Officer Boyle said Sgt. Gulla pointed at Kelly and Johnston, but did not use the same hand gestures they told Sgt. Carlson (like a gun turned sideways) and only pointed at them to make his point. Officer Boyle did not take the hand gesture as a threat. There was no physical touching at this time between Sgt. Gulla and Kelly.

Officer Boyle and Sgt. Gulla were back at their cars when Officer Boyle saw Sgt. Gulla return to Kelly's vehicle. Officer Boyle asked Sgt. Carsey to return to Kelly's car to re-contact the occupants and make sure nothing was going on. While on his cell phone, Officer Boyle saw Kelly taken out of his car and had his hands behind his back in a detaining position by Sgt. Gulla, and Officer Boyle thought Sgt. Gulla was arresting Kelly. Officer Boyle said he did not know exactly what was going on. Officer Boyle hung up and requested his dispatcher contact a supervisor. Then Officer Boyle asked Sgt. Carsey what was going on and found out that Sgt. Gulla was checking Kelly for weapons. Johnston was out of the car at that point and Officer Boyle asked him to walk back to Sgt. Gulla's patrol car to talk and tell him what was going on. Johnston's story changed several times, from lookingfor Kelly's car (mustang) to saying thanks to Kelly's wife's new boyfriend (Sgt. Gulla). Johnston did not say anything about visiting a friend. Officer Boyle thought Johnston was scared during their conversation, but felt Johnston was just saying something to get them out of his hair.

Officer Boyle said some of the information on his report was incorrect (pertaining to Kelly including his address), which he thought he got from the department of licensing. Officer Boyle does not recall ever receiving what the PC for the stop from Sgt. Gulla and at the time of the IIU interview still did not know what it was. Officer Boyle saw Sgt. Gulla get his camera out and take pictures of Kelly, Johnston and Kelly's vehicle. Officer Boyle did remember talking with Kelly trying to get additional information then later while Sgt. Gulla was in the background taking pictures. He did not pay much attention to what Sgt. Gulla was saying other than Sgt. Gulla was still upset. This was after Sgt. Gulla put his camera away and came back to Kelly's vehicle. Officer Boyle did not want to describe Sgt. Gulla's demeanor to be anything other than upset and not out of control. However, Officer Boyle felt he had to step in because Sgt. Gulla started to yell at Johnston and saw spit coming out of his mouth. Officer Boyle

thought Sgt. Gulla was so upset talking, Officer Boyle said he told the passenger to go back to his car because he felt it was time to end the contact.

Officer Boyle thought Sgt. Gulla did not yell any more to the passenger than what he did to the driver. Sgt. Gulla yelled because he was angry. After Officer Boyle told Johnston to return to the car, Sgt. Gulla stopped talking immediately. Officer Boyle talked with Sgt. Gulla briefly before Sgt. Gulla ju$ left.

Afterward, Officer Boyle talked again with Kelly and asked him if he knew anything about vandalisms in the area. After the stop, Officer Boyle talked with Officer Mills and Sgt. Personious from his department. Officer Boyle wrote up the incident because he was so uncomfortable about the stop. Officer Boyle later saw a flyer at his police station of the pictures taken of Kelly and Johnston on the night of the stop.

Chief Arsanto, Chief of Buckley P. D. heard about the stop the night of the incident and talked with Officer Boyle the next night. Chief Arsanto knew how upset Officer Boyle was by the stop and told him to document it. Chief Arsanto also saw the flyer disseminated by Sgt. Gulla and took it down, to later give it to KCSO – IIU. The officer safety bulletin was not an official document from KCSO and was removed. The bulletin was produced off of Sgt. Gulla's personal computer. Chief Arsanto heard about Sgt. Gulla having a relationship with the person of interest in the flyer. Another officer told Chief Arsanto there was no violation within Buckley, his officers wre made very uncomfortable while witnessing Sgt. Gulla use profanity and threats toward the complainants. The incidents listed in the officer safety bulletin/flyer did not pertain to the complainants. The suspects had already been identified several months ago. Chief Arsanto stated Sgt. Gulla could have misunderstood the information and thought it was associated with the complainants. Chief Arsanto believed Sgt. Gulla's behavior was inappropriate and it put a new officer in a difficult situation on the traffic stop.

Sgt. Carsey works for Wilkeson P. D. and worked the night Sgt. Gulla made contact with Kelly and Johnston outside Buckley City limits. Sgt. Carsey heard Sgt. Gulla yell at the driver (Kelly) about being in the area and if Kelly came around the area again, Sgt. Gulla would take it as a threat and would shoot him (Kelly). Sgt. Carsey said he was flabbergasted, because he knew Officer Boyle was trying to find out what Sgt. Gulla's PC was for the stop. Sgt. Carsey said he did not remember if Sgt. Gulla used any profanity during the stop, but remembered the look of shock and fear on Kelly and Johnston's faces. Sgt. Carsey felt the initial contact between the occupants of the car and Sgt. Gulla lasted about 3-4 minutes. Sgt. Carsey heard Sgt. Gulla say something about a restraining order and knowing Judge Bathum. Sgt. Carsey did not have direct contact with Sgt. Gulla, but stood back watching. Officer Boyle had him at some point go back to Kelly's car after Sgt. Gulla returned to it. Sgt. Carsey heard Sgt. Gulla yell at the occupants, not to get him involved with what is going on between Kelly and his ex-wife, that it was a personal problem. Sgt. Gulla asked Kelly if he had weapons and took him out of the car to check. Sgt. Carsey said Johnston asked him if he wanted to check him also, so he did. Sgt. Carsey took Johnston out of the car to check for weapons. Officer Boyle took Johnston back to Sgt. Gulla's patrol car to talk to him. Sgt. Gulla retrieved his camera and took pictures of Kelly's car and of Kelly and Johnston when he returned to the car.

Sgt. Carsey said Sgt. Gulla was very upset, possibly enraged. Sgt. Gulla was so angry he was out of control. Officer Boyle told him Kelly and Johnston kept changing their stories about why they were in the area. Sgt. Carsey thought he saw the same car in the area earlier in the night because he remembered the last three digits PPH. Sgt. Carsey does not recall Sgt. Gulla tell Kelly and Johnston that he had cops in his back pocket. Sgt. Carsey remembers how stunned he was Sgt. Gulla made the comment he was going to shoot Kelly and Johnston and how he felt Sgt. Gulla was out of control and took pictures.

Sgt. Gulla said he was on his way home the night of January 10, 2004 when he saw Kelly's car on Hwy 410 just south of the county line and recognized it. Sgt. Gulla called Tara Kelly to confirm the

license plate on the car. Sgt. Gulla said he went to Buckley PD to alert them that he felt Kelly was following him. Sgt. Gulla left Buckley PD to return home when he saw Kelly in his neighborhood. It appeared to Sgt. Gulla, Kelly was trying to find where he lived, so Sgt. Gulla parked in a neighbor's driveway (also a police officer). When Kelly saw his patrol car, Kelly left the area with Sgt. Gulla following him. Sgt. Gulla called Buckley PD dispatch to let them know he was following Kelly (in unincorporated Pierce County) on 112th heading back toward Buckley. Officer Boyle asked him what his PC was and Sgt. Gulla said it was speeding because he had begun pacing Kelly. When Kelly turned westbound on Hwy 410 from Mundy Loss, Sgt. Gulla said was told to go ahead and stop Kelly's car because Buckley would be there shortly. Once Officer Boyle arrived, Sgt. Gulla said he got out of his patrol car to cover Officer Boyle because he did not know if there would be back up and later explained he thought the officer appeared a little inexperienced. Sgt. Gulla admits to making contact with Kelly and Johnston and asked them if they were following him. Sgt. Gulla knew information about Michael Kelly, received from Tara Kelly, about Kelly's drug history and of a previous incident involving Kelly and firearms. Sgt. Gulla said there was a potential for Kelly to be armed. Sgt. Gulla felt Kelly had violated the Restraining Order Tara Kelly petitioned for because Kelly admitted to driving by her house on a previous date. Sgt. Gulla admits to using the term "fuck" several times when he was trying to make his point to both Kelly and Johnston. That if they were going to continue to try to find his house, he would "fucking shoot them," but emphatically states he did not use the term "mother fucker." Sgt. Gulla felt Kelly and Johnston were also responsible for vandalisms in Buckley due to the information he received from Officer Boyle in their earlier visit. (Later Sgt. Carlson would learn the vandalisms were isolated incidents with differing times and neither Kelly nor Johnston is considered a suspect).

Sgt. Gulla admitted to taking Kelly out of the car because he felt Kelly had weapons and he was concerned for officer safety reasons. Sgt. Gulla knew of Kelly's drug history as a Methamphetamine user from Tara Kelly's divorce papers. Sgt. Gulla felt Kelly's previous history with firearms, drugs and possible violation of the Restraining Order, Sgt. Gulla admitted he took photographs of Kelly, Johnston and the car, to disseminate their information around to local law enforcement agencies.

Sgt. Gulla said he talked with Sgt. Provenzo the next day and later Captain Wardstrom before sending out the flyers about Kelly and Johnston. Sgt. Gulla told both of them what happened and received comments from Sgt. Provenzo about what to put in the flyer before he sent it out to the law enforcement agencies.

Captain Wardstrom said Sgt. Gulla told him a "Reader's Digest" version about this specific incident regarding the contact between him and the complainant (who's ex-wife Sgt. Gulla was dating). Captain Wardstrom said he had not seen the flyer Sgt. Gulla disseminated nor did he approve of such a flyer for distribution to any law enforcement agencies in King or Pierce Counties. Captain Wardstrom did not give any input for such a flyer. Captain Wardstrom also knew of a fax that came to Sgt. Gulla within the same time and he made sure Sgt. Gulla received it. The fax that came into the precinct, Captain Wardstrom was alerted to it by Susan Wall and a telephone call she received from Buckley PD about the 'ex-husband' (Kelly). Captain Wardstrom said Sgt. Gulla told him he 'politely' warned Kelly that it was not a good idea to be looking for a police officer's residence. Sgt. Gulla said he wanted to let other officers who live in the area about Kelly's actions.

Sgt. Provenzo works with Sgt. Gulla on second shift. Sgt. Provenzo was not certain of the exact date of the incident, but thought his conversation with Sgt. Gulla occurred within the following week. During their conversation, Sgt. Gulla told him what happened and expressed concern Kelly was trying to find his house and was concerned for his daughters. Sgt. Gulla expressed his concern about a previous incident involving Kelly and an AR firearm, and knew about a restraining order obtained by Sgt. Gulla's girlfriend. Sgt. Gulla told him of some vandalisms in the area of police officer's home, and thought one of his neighbor's was a victim. Sgt. Gulla told him he did call Buckley PD about the suspicious car and later contacted the driver of the car with Buckley PD (and confirmed it was his girlfriend's estranged husband).

Sgt. Provenzo was told by Sgt. Gulla of his intention to type up an informational officer safety notice for the local police but he told Sgt. Gulla to be careful not to get involved in the investigation which he and his girlfriend were involved. Sgt. Gulla said the local police were aware and it was Sgt. Provenzo's impression Sgt. Gulla's main focus of the 'bulletin' was simply as an officer safety issue for the local police. When Sgt. Gulla finished the bulletin with two digital photographs he showed Sgt. Provenzo. Sgt. Provenzo did give him some advice, not to mention his relationship with Kelly's wife, as a KCSO employee. Once that information was eliminated, Sgt. Provenzo said he told Sgt. Gulla to be careful with the dissemination of the information and to make sure the local agency(s) handle any issues, not him. Sgt. Provenzo felt Sgt. Gulla was familiar with the department's philosophies about policing in your own neighborhood.

The radio transmissions affirms Officer Boyle's statement that he asked the dispatcher to find out if there was PC for the stop, he ran the names of Kelly and Johnston and he requested dispatch to contact a supervisor. Sgt. Gulla's telephone call to Buckley PD was taped as well when he explained he stopped in earlier to talk with Officer Boyle about the complainant's vehicle.

CONCLUSION

It is alleged Sgt. Denny Gulla made a pre-text stop on complainants Kelly and Johnston on January 10, 2004 at 2240 hrs. in Pierce County (outside Buckley). Complainants allege Sgt. Gulla used profanity and made threats to kill them during the stop. Sgt. Gulla also disseminated flyers with photos of the complainants to local law enforcement agencies in King and Pierce County.

Abuse of Authority – GOM 3.00.020(3)
Sgt. Gulla used his authority as a King County Sheriff's Office employee to involve the Buckley Police Department in stopping and contacting the complainants – Michael Kelly and Ferrell Johnston outside their city limits in unincorporated Pierce County. Sgt. Gulla had stopped at Buckley PD in full uniform before the stop, to inform them (Officer Boyle) he thought he was being followed by the complainants (while driving a marked patrol car) on his way home. Sgt. Gulla had confirmed the license plate of Kelly's car with Kelly's estranged wife (Sgt. Gulla's girlfriend), so he knew who was driving the car because he recognized it. Kelly denies following Sgt. Gulla and said he thought the KCSO patrol car was following him once they crossed over into Pierce County.

During the stop, Sgt. Gulla became aggressive and used profanity and made a threat of shooting the complainant(s) if they continued to try to find his house. Officer Boyle heard the profanity. Officer Boyle and Sgt. Carsey from Wilkeson PD, heard the threat of shooting the complainants, made by Sgt. Gulla. Officer Boyle asked his dispatcher to contact a supervisor and later documented this incident and spoke to his Chief the next day about it. Both complainants and Sgt. Carsey felt Sgt. Gulla was in a rage and out of control. While Officer Boyle would not commit to that description, he did say that Sgt. Gulla was angry and upset. Chief Arsanto of Buckley PD was concerned that Sgt. Gulla involved his officer to make the stop outside their city limits.

Sgt. Gulla used his authority as a police officer to disseminate information about the complainants in flyers to local law enforcement agencies – Enumclaw PD, Bonney Lake PD and Buckley PD. All parties at the scene saw Sgt. Gulla take photographs of Kelly, Johnston and the car they were in and heard Sgt. Gulla say he was going to send the information out so police officers in the area would know who they are. Sgt. Gulla told Sgt. Carlson in the IIU interview both Sgt. Provenzo and Captain Wardstrom knew of the flyer and gave the perception he had permission to disseminate the flyers. Captain Wardstrom knew little about the incident, was not told or saw the flyer, nor did he give his permission to disseminate the flyer. Sgt. Provenzo remembers his conversation with Sgt. Gulla about

the incident and told Sgt. Gulla not to use any reference to KCSO, not to become involved in the investigation and to be careful in the dissemination of the information to local law enforcement. It is unknown how soon after the incident Sgt. Gulla disseminated the flyer. The officer safety flyer lists information from Kelly's divorce proceedings and lists Sgt. Gulla as the contact. The vandalism incidents did not involve Kelly or his passenger Johnston. There was no criminal incident reports associated to these subject that could be verified.

Based on the facts of the investigation, I recommend the following: **Allegation I –Abuse of Authority – GOM 3.00.020(3) – SUSTAINED.**

Sgt. Gulla admits to using the words – "fuck" or "fucking", but denied using the term "mother fucker" in his comments to the complainants. Sgt. Gulla admitted he told the complainants he would shoot them if they came looking for his residence, because he wanted to make a point. Offcer Boyle heard the word "mother fucker" said by Sgt. Gulla, but Sgt. Carsey did not remember hearing any profanity. Both complainants and Sgt. Carsey said Sgt. Gulla was out of control and in a rage. Officer Boyle did not, but all agreed Sgt. Gulla was angry and upset. Sgt. Gulla was unprofessional during this contact.

Sgt. Gulla involved Buckley PD and Wilkeson PD personnel to make a traffic stop of a possible suspicious vehicle by his residence in unincorporated Pierce County. Sgt. Gulla lost control of his anger during the stop, used profanity and made threats to shoot the complainants if they continued to try and locate his residence. Kelly and Johnston filed a police report with Pierce County Sheriff's Office against Sgt. Gulla. Currently the police case has been sent back to the deputy for additional work and follow-up. Officer Boyle documented the incident because he was concerned about Sgt. Gulla's behavior and Chief Arsanto requested he document the incident too and sent a copy of the report to Captain Webster, Sgt. Gulla's supervisor at SeaTac PD.

The officer safety flyers were not approved or sanctioned by KCSO command staff. It did not involve a current criminal case but did involve a personal relationship between Sgt. Gulla and the estranged wife of complainant Kelly. The information listed was not verified and would have led other agencies to make unconstitutional stops on Mr. Kelly based on erroneous information. Sgt. Gulla should have stepped aside while the Buckley and Wilkinson police officers conducted the traffic stop. Sgt. Gulla did not do this and got personally involved, losing his composure. This is no indication Kelly was cited for the infraction that night by either Sgt. Gulla or Officer Boyle.

SHERIFF
KING COUNTY

Memorandum

Date: June 29, 2004

To: Personnel Unit **Via:** Direct

From: Captain Cameron Webster, IIU

Re: **REQUEST FOR PERSONNEL ORDERS**

Denny Gulla, assigned to Field Ops Pct Four has been found in violation of the following General Orders Manual Section:

1) **GOM 3.00.020 (3) Appropriate Use of Authority,** in that he inappropriately used his authority as a King County Sheriff's Sergeant during a traffic stop on 01/10/04.

Therefore, under authority of R.C.W. 41.14.110 and 41.14.120, Denny Gulla is suspended without pay for one working day. Forfeiture of vacation days is not authorized in lieu of time off without pay.

This discipline will not be imposed until after July 31, 2004 to give Denny Gulla the opportunity to exercise any appeal rights he may have under the collective bargaining agreement between King County and KCPOG, or under King County Civil Service Rules. This discipline must be scheduled in writing, in advance with his supervisor. A copy of the resulting memo or O.R. shall be forwarded to the Personnel Unit. This must be completed by August 15, 2004 unless the matter becomes the subject of an official grievance or Civil Service appeal. If a grievance or an appeal is filed, at the conclusion of that process any resulting suspension will be served within such time period as determined by I.I.U.

Additionally, Denny Gulla will return to the rank of Deputy effective July 1, 2004 and will be reassigned to Field Ops, Pct Three, Unincorporated Patrol.

Please draft personnel orders to cover these issues.

cc: IIU File #2004-002
Major David Germani, Pct Three
Major Scott Somers, Pct Four
KCPOG

SHERIFF
KING COUNTY

KING COUNTY SHERIFF'S OFFICE
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Susan L. Rahr
Sheriff

August 7, 2009

David B. Zuckerman
Attorney
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104

RE: Public Disclosure Request LU 09-05001
YOUR CLIENT: Sione Lui
KCSO Event 01-041133

Dear Mr. Zuckerman:

This letter is the second follow up to your April 28, 2009 public disclosure request that was received by the King County Sheriff's Office (KCSO) Records Unit on April 29, 2009. The Legal Unit received your request on May 1, 2009.

1. Information Regarding Detective Denny Gulla

The table below summarizes our response to your request regarding Deputy Gulla's IIU files, including non-sustained files:

Gulla IIU Investigations – Redactions Taken		
IIU Investigation	**Withheld/Redacted**	**Law Cited**
1984-011	Nothing withheld/no redactions	
1984-020	Nothing withheld/no redactions	
1985-027	Redacted - personal identifiers, non-conviction data regarding a third party.	RCW 10.97.050 - If desired, please contact the Legal Unit to set up a time for viewing this information.
1986-034	Nothing withheld/no redactions.	
1986-037	Redacted – 1 paragraph non-responsive information about another deputy	
1986-037	Redacted - personal identifiers, non-conviction data regarding a third party.	RCW 10.97.050 - If desired, pl contact the Legal Unit to se' for viewing this informa'

Gulla IIU Investigations – Redactions Taken		
IIU Investigation	**Withheld/Redacted**	**Law Cited**
1986-043	Nothing withheld/no redactions	8/7/09 - Released unredacted because it was publicized in Seattle PI article.
1986-044	Nothing withheld/no redactions	8/7/09 - Released unredacted because it was publicized in Seattle PI article.
1988-044	Redacted - personal identifiers, non-conviction data regarding a third party.	RCW 10.97.050 - If desired, please contact the Legal Unit to set up a time for viewing this information.
1988-044	Withheld – booking photo	RCW 70.48.100 - Booking photos should only be released to the subject of record, law enforcement or pursuant to a court order.
1988-044	Redacted - non-responsive document regarding grievance scheduling for another deputy.	
1988-044	Withheld – 1 page Triple I	28 USC § 20.33(a) which states that criminal history record information contained in the III System may only be made available to criminal justice agencies. WAC 446-20-170 which limits the dissemination of state criminal history record information by criminal justice agencies.
1989-012	Nothing withheld/no redactions.	
1990-098	43 pages – non-sustained	RCW 42.56.240(1)
1991-091	13 pages – non-sustained	RCW 42.56.240(1)
1992-018	55 pages – non-sustained	RCW 42.56.240(1)
1992-049	370 pages – non-sustained; 8/7/09 - unredacted arbitrator's decision (20 pages) released.	RCW 42.56.240(1)
1992-155	25 pages – non-sustained	RCW 42.56.240(1)
1994-029	40 pages – non-sustained	RCW 42.56.240(1)
1996-065	11 pages – non-sustained	RCW 42.56.240(1)
1996-086	12 pages – non-sustained	RCW 42.56.240(1)
1996-156	339 pages – non-sustained	RCW 42.56.240(1)
2001-045	26 pages – non-sustained	RCW 42.56.240(1)
2004-002	Redacted – employee email addresses, phone numbers	Not public information but if it was, redacted per RCW 42.56.230(4) and RCW 42.56.240(1)
2004-002	Redacted – employee home address, map depicting address, juvenile identifiers	Not public information but if it was, redacted per RCW 42.56.250(3) and RCW 42.56.230(5)

Gulla IIU Investigations – Redactions Taken		
IIU Investigation	**Withheld/Redacted**	**Law Cited**
2004-002	Redacted – account numbers	RCW 42.56.230(4)
2004-002	Withheld - 8 pages Triple I	28 USC § 20.33(a) which states that criminal history record information contained in the III System may only be made available to criminal justice agencies. WAC 446-20-170 which limits the dissemination of state criminal history record information by criminal justice agencies.
2004-044	17 pages withheld – non-sustained	RCW 42.56.240(1)
2005-077	37 pages withheld – non-sustained	RCW 42.56.240(1)
2006-065	263 pages withheld – non-sustained	RCW 42.56.240(1)

As the table above outlines, there are twelve investigations of allegations that were non-sustained totaling 1251 pages that are withheld per RCW 42.56.240(1), as specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy. The investigations typically contain documents such as the complaint, witness interviews, investigator's follow up reports, findings and other documents relevant to the particular complaint.

At this time, I am enclosing a CD that contains the unredacted IIU investigations labeled 1986-043 and 1986-044 as well as the arbitrator's decision regarding 1992-049. These files are regarding cases that were covered in the 2005 Seattle PI articles. Due to time constraints, I was unable to complete revision of redactions as listed in the table for 2004-002. I will provide a CD containing this revised document as well as a file of Deputy Gulla's redacted personnel file and a file of complaints regarding Deputy Gulla by August 17, 2009.

To date, you have received the following documents described in the list on page 2 of your April 28, 2009 public disclosure request:

- Redacted version of sustained IIU investigation 2004-002 regarding Mike Kelly and Ferrell Johnson.
- Redacted version of sustained IIU investigation 1986-044 regarding Jennifer DePriest Berens. On the enclosed CD, you have received a non-redacted version of this investigation.
- Redacted version of sustained IIU investigation 1988-044 regarding the hit and run suspect in 1988.

There are no IIU complaints responsive to your requests regarding Wassena George and Lolita Fulgencio.

We have provided a redacted version of the only IIU investigation regarding the Kay Quall (nee Bellows), sustained IIU investigation 1986-043. On the enclosed CD, you have received a non-redacted version of this investigation.

We have been unable to locate a copy of the videotape of a gang initiation in 1992. We will continue to search for it. On the enclosed CD, you have received a copy of the arbitrator's decision regarding the IIU investigation of this case. We will do further investigation to determine if additional portions of this investigation can be released.

2. Records Regarding Case No. 01-041133

- Copies of tapes and transcripts made of Jessica and James Negron's tape statements obtained by Detective Doyon.
  - On the enclosed CD please find a copy of a transcript of Detective Doyon's interview with James and Jessica Negron. We do not have a tape of this interview.

- Notes, reports and tapes concerning an interview of suspect Sione Lui by Detective Doyon and Gulla on February 9, 2001.
  - We are unable to locate any documents responsive to this request.

- Set of prints from the original negatives of all photographs taken by the Medical Examiner's office during the examination of the murder victim.
  - Medical examiner records are exempt from disclosure per RCW 68.50.105 and *Reid v. Pierce County* 136 Wn 2d. 195 (1998).

If you have any additional questions, please feel free to contact the Legal Unit at (206) 296-5292.

Sincerely,

SUSAN L. RAHR
King County Sheriff

Leslie J. Groce
Paralegal, Legal Unit

Enclosure

SHERIFF
KING COUNTY

KING COUNTY SHERIFF'S OFFICE
516 Third Avenue, W-116
Seattle, WA 98104-2312
Tel: 206-296-4155 • Fax: 206-296-0168

Susan L. Rahr
Sheriff

August 14, 2009

David B. Zuckerman
Attorney
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104

RE: Public Disclosure Request LU 09-05001
YOUR CLIENT: Sione Lui
KCSO Event 01-041133

Dear Mr. Zuckerman:

This letter is the third follow up to your April 28, 2009 public disclosure request that was received by the King County Sheriff's Office (KCSO) Records Unit on April 29, 2009. The Legal Unit received your request on May 1, 2009.

As I indicated in my August 7, 2009 letter to you, enclosed please find a CD that contains newly redacted IIU file 2004-002, Deputy Gulla's redacted personnel file and travelling file and a file containing complaints regarding Deputy Gulla.

- **IIU 2004-002**
  On the enclosed CD please find a redacted copy of IIU 2004-002. The following information has been redacted or withheld from this file:

INFORMATION REDACTED/WITHHELD	LAW CITED
Employee email addresses, phone numbers redacted	Not public information but if it was, redacted per RCW 42.56.230(4) and RCW 42.56.240(1)
Employee home address, map depicting address, juvenile identifiers redacted	Not public information but if it was, redacted per RCW 42.56.250(3) and RCW 42.56.230(5)
Account numbers - redacted	RCW 42.56.230(4)

INFORMATION REDACTED/WITHHELD	LAW CITED
7 pages Triple I withheld	28 USC § 20.33(a) which states that criminal history record information contained in the III System may only be made available to criminal justice agencies. WAC 446-20-170 which limits the dissemination of state criminal history record information by criminal justice agencies.

- **A copy of Deputy Gulla's personnel file.**
  On the enclosed CD please find a redacted copy of Deputy Gulla's personnel file (PERS GULLA_RE). The following information has been redacted or withheld from this file:

INFORMATION REDACTED/WITHHELD	LAW CITED
Social security numbers redacted	42 USC § 405(c)(2)(C)(viii)(I)
Identity of dependents of employee, including names, address, phone numbers redacted	Not public information but if it was, redacted per RCW 42.56.250(3)
Information regarding other KCSO employees redacted	Not responsive to your request.
Performance evaluations - 5 pages redacted, 124 pages withheld	RCW 42.56.250(3) and RCW 42.56.230(2); *Dawson v Daly* 125 Wn 2d 243 1994.
Employee healthcare selections/ retirement beneficiary information – redacted, 1 page withheld	Not public information but if it was, per RCW 42.56.230(2)
Prior job history portion of job application – 2 pages withheld	RCW 42.56.250(2)

- **A copy of Deputy Gulla's travelling file.**
  On the enclosed CD please find a redacted copy of Deputy Gulla's travelling file (TRV GULLA_RE). The following information has been redacted or withheld from this file:

INFORMATION REDACTED/WITHHELD	LAW CITED
Social security numbers redacted	42 USC § 405(c)(2)(C)(viii)(I)
Identity of dependents of employee, including names, address, phone numbers, performance evaluations redacted	Not public information but if it was, redacted per RCW 42.56.250(3)

INFORMATION REDACTED/WITHHELD	LAW CITED
License plate of employee's work vehicle redacted	Not public information but if it was, redacted per RCW 42.56.230(4) and RCW 42.56.240(1)
Performance evaluations – 7 pages redacted, 109 pages withheld	RCW 42.56.250(3) and RCW 42.56.230(2); *Dawson v Daly* 125 Wn 2d 243 1994.
Employee healthcare selections/ retirement beneficiary information redacted	Not public information but if it was, redacted per RCW 42.56.230(2)

- **Complaints regarding Deputy Gulla.**
  On the enclosed CD please find COMPLAINTS, a file containing copies of complaints regarding Deputy Gulla.

We are unable to locate a copy of the videotape of a gang initiation in 1992.

If you have any additional questions, please feel free to contact the Legal Unit at (206) 296-5292.

Sincerely,

SUSAN L. RAHR
King County Sheriff

Leslie J. Groce

Leslie J. Groce
Paralegal, Legal Unit

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April 24, 2009

Ms. Kristin Richardson
Mr. John Castleton
Senior Deputy Prosecuting Attorneys
King County Prosecutor's Office
W554 King County Courthouse
516 Third Ave.
Seattle, WA 98104-2390

Re: State v. Sione Lui, King County Superior Court No. 07-1-04039-7SEA

Dear Ms. Richardson and Mr. Castleton:

I recently asked whether the State would agree to two orders: 1) releasing juror contact information to the defense; and 2) releasing physical evidence for DNA testing by an outside laboratory. Ms. Richardson informed me by e-mail that the State would not agree to such orders. I then contacted Judge Trickey's bailiff to set a date for a hearing. He suggested that I file a written motion first. I plan to file that shortly.

I am also now requesting some discovery. If you do not agree with these requests, I will ask to have them heard at the same hearing. In the interest of expediting the case, I may include the discovery matters in the motion even if you have not yet responded to the requests. To the extent we come to agreement, I will notify the Court that those portions of the motion are moot.

DISCOVERY REQUESTS

1. Any Information Tending to Impeach the Credibility of Detective Denny Gulla.

It is clear from the trial transcript that both sides were aware of the November 15, 2005 article in the Seattle Post-Intelligencer concerning Det. Gulla's history of misconduct. The State moved to exclude any mention of the matters discussed in the article and the defense conceded the point. Mr. Lui may argue in a personal restraint petition that trial counsel was ineffective in doing so.

I therefore request disclosure of any information relating to Det. Gulla's credibility. According to a June 24, 2007 article from the Seattle Times, your office had by then included Gulla in a "Brady list." Presumably, the King County Prosecutor has gathered various information about him that it considers to be disclosable under Brady v. Maryland, 373 U.S. 83, 87 (1963).

however, does not include these statements. I do not know whether he ever received them. Could you please provide me with copies of the tapes and any transcripts that were made of them. I apologize for the inconvenience if you have already provided these materials to Mr. Savage and he somehow misplaced them.

I also noticed that Evamarie Gordon says she "understand[s]" that James Negron has an alibi. LUI 2418-19. It would appear that the police gave her that information. I did not find anything else in the discovery, however, concerning an alibi. If that is contained in anything other than the taped statements described above, could you please provide that information as well?

3. Detective Doyon's Notes/Tape of Interview with Lui on 2/9/01.

At trial Det. Gulla testified that Det. Doyon took detailed notes of their interview with Mr. Lui on February 9, 2001. RP 955. Gulla said that he himself did not take notes. I could not find Det. Doyon's notes in the discovery. Nor could I find a tape of the interview. Please provide the notes and tape or confirm that they do not exist. Again, I apologize if this is something you already provided to prior counsel.

4. Prints of Autopsy Photos

The defense is consulting with Dr. Theodore Becker (Ph.D. in Human Performance) for an assessment of whether Mr. Lui was physically capable of the acts alleged. Dr. Becker would like to view the autopsy photos. Mr. Savage's file contains only black and white photocopies of the photos. I am requesting a set of prints from the original negatives. In the alternative, if the photos were taken digitally, it would likely be easier to provide copies of the digital files. I would agree to an appropriate protective order, of course.

Thank you again for your assistance.

Sincerely,

David B. Zuckerman
Attorney for Sione Lui

DBZ:ek

Impeachment evidence clearly falls within the disclosure mandate of Brady. United States v. Bagley, 473 U.S. 667 (1984); United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1993). Further, the government has a duty to search not just its own prosecutorial offices but also its investigative and other agencies for such impeachment material. Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("prosecution has a duty to learn of any favorable evidence known to the others working on the government's behalf in the case, including the police"; writ granted where state failed to disclose statements by witnesses even though only police, and not prosecutor, knew about the statements).

Finally, this duty to disclose exculpatory and impeaching information continues even after trial, well into post-conviction proceedings. Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976); Thompson v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992); Monroe v. Butler, 690 F. Supp. 521, 522-23, 525-26 (E.D. La. 1988), aff'd, 883 F.2d 331 (5th Cir.), cert. denied, 487 U.S. 1247 (1988) It follows with greater force that the Brady obligation applies where, as here, the case is still on direct appeal. See Smith v. Roberts, 115 F.3d 818, 819-20 (10th Cir. 1997).

This disclosure should include, at a minimum, full details concerning the matters discussed in the 2005 newspaper article, including the following:

- Allegations of sexual misconduct involving Kay Quall, Wassena George, Lolita Fulgencio and others.
- Misconduct relating to Mike Kelly and Ferrell Johnson, including statements of witnesses such as Buckley police officer Ryan Brown.
- Gulla's videotaping of a gang initiation in 1992.
- Gulla's use of force against a hit and run suspect in 1988, including statements and reports of King County Sheriff's Lieutenant Larry Mayes, Sheriff's deputies Corey Darlington and Alan Garrison, and then-Chief Greg Boyle.
- Gulla's DUI arrest of Jennifer DePriest Berens, including statements made by Captain Boyle and Chief Jerry Burk.
- Any other incidents in which Det. Gulla has been accused of any form of misconduct, including lying, abusing his position as a police officer, using excessive force, or failing to following department rules and regulations.

The disclosure should include all sources including witness statements, police reports, personnel files, and internal investigation files. Among other things, the newspaper article indicates that top management within the Sheriff's Office have at various times expressed a desire to fire Gulla but have been thwarted by the officer's guild. Any evidence tending to show that Gulla's status within the Sheriff's Office was tenuous at any time between 2001 and 2007 would be circumstantial evidence of his motivation to obtain a conviction in the Boussiacos case by improper means. See generally, Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (defense had Sixth Amendment right to confront witness with his vulnerable status as a probationer).

2. Statements of Jessica and James Negron

According to a report of Detective Doyon, he obtained taped statements from Jessica and James Negron. See Lui 2233. The discovery I obtained from prior attorney Anthony Savage,

FILED
08 MAY 18 AM 10: 32
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

The Honorable Michael J. Trickey

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. SIONE P. LUI, Defendant.	NO. 07-1-04039-7SEA DEFENDANT'S MOTION, MEMORANDUM, AND DECLARATION RE: DISCOVERY AND DNA TESTING

I.
MOTION

Defendant Sione P. Lui, through his attorney David B. Zuckerman, moves for discovery and DNA testing, as set out in the following memorandum.

II.
MEMORANDUM

A. INTRODUCTION

Mr. Lui was convicted in this Court of murder in the second degree. His direct appeal is currently pending in Division One of the Court of Appeals. Undersigned counsel is handling the appeal and also investigating potential postconviction claims based on facts outside of the existing record. The parties have reached agreement on some matters, but those raised in this motion require resolution by the Court.

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Because this Court presided over the trial, Lui will not reiterate the testimony in detail, except where it is relevant to some request in this motion.

B. LUI IS ENTITLED TO IMPEACHMENT INFORMATION REGARDING DETECTIVE DENNY GULLA

In its trial memorandum filed on December 24, 2007 (Dkt. 47), the State moved to exclude any allegations of misconduct by Detective Denny Gulla.

> In 2005, the Seattle Post-Intelligencer ran an article that included information about Det. Gulla, who is now a patrol officer. The story involved allegations of misconduct through inappropriate contact with underage girls (including an incident 23 years ago!), threatening behaviors with the husband of a girlfriend, allowing gang members to assault another member who consented as part of an initiation, and rough handling of a suspect (20 years ago). There is reference in the article to Gulla being found to have "lied twice to investigators" in the incident from 23 years ago. None of these alleged incidents have ever resulted in criminal charges. The State has received nothing related to the "lying" allegations or anything else in the article.
>
> While arguably titillating, information derived from the newspaper exposé is not admissible in our trial as impeachment or for any other reason.

State's Trial Memorandum at 10.

The newspaper article is attached as Ex. A. It revealed that Gulla's "23-year career has been marked by numerous instances of misconduct." This included assaulting a prisoner in custody, encouraging gang members to beat a new recruit so that Gulla could videotape the initiation, and pulling over his lover's husband on a "bogus traffic stop" and threatening to kill him. The paper also reported allegations that Gulla "sexually molested four teenage girls." In one case, Gulla told an 18-year-old DUI arrestee that he would "make the Breathalyzer" go away if she agreed to go out with him. Gulla then "made an unusual error in conducting the breath test and pointed out his own error in officer's notes, with the result that its use as evidence was invalidated." In many of these incidents, Gulla's superiors concluded that he lied to them when questioned about his misconduct. According to the King County Sheriff Sue Rahr, the department should have fired Gulla "a long time ago" but had been thwarted by a powerful

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union. As early as 1988, Gulla had "accumulated 3 written reprimands and 5 suspensions. That is a total of 8 separate sustained complaints and 11 manual violations in the past 4 years." Id.

The Sheriff's Office resisted much of the newspaper's public disclosure request and never produced full records. Id. Presumably, there is additional misconduct that has yet to be disclosed.

In its trial memorandum in this case, the State devoted four pages to why the information about Det. Gulla should be inadmissible. For the most part, the argument seemed to assume that the *only* impeachment information concerning Gulla would be the article itself. For example, under the heading of "Hearsay", the State argued that "[e]verything contained in the article would be double hearsay in a court of law." Id. at 10. The State characterized the misconduct as too old to be relevant, but in fact the article laid out a history of misconduct beginning more than 20 years ago and continuing until the date of the article. For example, one of the most serious allegations involved an incident in 2004 in which Gulla pulled over for no reason the husband of a woman Gulla was dating, threatened to kill the man and, by some accounts, admitted that he would freely lie about his conduct. Ex. A. Gulla was found to have abused his power, was demoted to the rank of deputy, and was suspended for one day without pay. Id.

At a hearing on March 24, 2008, defense counsel conceded that Gulla's misconduct was not admissible at trial. RP 59. On April 9, 2008, however, defense counsel expressed his belief that the prosecutor would likely not call Gulla as a witness "because of matters referred to in pretrial arguments." RP 644. In fact, Det. Gulla did testify to several incriminating matters, beginning at RP (4/14/08) 940. Among other things, he pointed out that Lui's house, and particularly his garbage can, seemed suspiciously clean. He also described an interview with Lui, suggesting several times that Lui seemed to be faking concern for Elaina Boussiacos, and concluding that the detectives obtained "nothing useful" from Lui. RP 955-56. He also testified that there were many leaves and pine needles in Lui's driveway but no debris on the victim's

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shoes, suggesting that she did not walk out the house but rather was carried out after being killed. RP 988. Perhaps most importantly, Gulla was the one who obtained scent samples for the dog trailing that took place on February 14, 2001. He claimed that he carefully followed the instructions of the dog handler in gathering items that would contain Lui's scent, and that he avoided spreading the scent himself along the path ultimately followed by the dog. RP 959-61. But there was no corroboration of that testimony.

Lui may argue on appeal or in a postconviction petition that defense counsel was ineffective in failing to challenge Gulla's credibility and/or that the State withheld material impeachment evidence concerning Gulla. The problem with the State's position, apparently accepted by defense counsel, was the assumption that the *only* available information relating to Det. Gulla was that found within a particular newspaper article. The article itself explains that the Post-Intelligencer received only very limited responses to its public disclosure requests. Clearly, further investigation was needed.

The State suggested in its briefing that most or all of Gulla's misconduct was too old to be relevant. But there is no indication that the prosecutors made any effort to look into Gulla's conduct between 2005 (when the article was published) and 2008 (when Lui's trial took place).

Despite its limitations, the article strongly suggests that considerable admissible impeachment evidence could have been presented. For example, King County Sheriff Sue Rahr is quoted in 2005 as saying that Gulla not only showed poor judgment in the past, but *currently* "lacks the judgment to do the job." When asked why he had not been fired, she responded: "I've done everything I could do within the confines of the labor contract. I disciplined him, and the discipline was overturned." She blamed that on the Guild, which "is very, very, very successful in overturning discipline cases."

These statements indicate that Gulla's position in the Sheriff's Office had been tenuous for some time as of 2005. It seems doubtful that his position improved much by the time of trial

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in this case. When he took the stand, Gulla identified himself as a deputy rather than a detective, indicating that his demotion had now lasted for three or four years. RP 941. Thus, it seems reasonable that KCSO records would show that Gulla had concerns about discipline and possibly termination in 2001, when he initially investigated this case, as well as in 2008, when he testified before the jury.

Gulla's tenuous status with KCSO goes directly to his motivation to trump up a case against Lui. Working under a Sheriff who wants to see him fired places him in essentially a probationary status. He would likely have been motivated in 2001 to solve the Boussiacos murder at any cost. Similarly, he would have motivation in the 2008 trial to deny any misconduct.

Gulla's motivations fall within the constitutional right to present evidence of bias. "Bias" is a general term incorporating various factors that can cause a witness to fabricate or slant her testimony, such as prejudice, self-interest, or ulterior motives. See Davis v. Alaska, 415 U.S. 309, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice, §§ 607.7 through 607.11 at 320-33 (4th Ed. 1999). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." United States v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). The right of a criminal defendant to cross-examine witnesses against him as to their bias in favor of the State is guaranteed by the Sixth Amendment to the United States Constitution. Davis, 415 U.S. at 315-316. "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id. at 316-17. See also, State v. Spencer, 111 Wn. App. 401, 45 P.3d 209 (2002); State v. Roberts, 25 Wn. App. 830, 611 P.2d 1297 (1980); State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971) ("It is fundamental that a defendant charged with the commission of a crime should be given great

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latitude in the cross-examination of prosecuting witnesses to show motive or credibility."); 5A Tegland § 607.7 at 320 ("the defendant enjoys nearly an absolute right to demonstrate bias on the part of the prosecution witnesses"). Among other things, the defense is entitled to explore a witness' "vulnerable status as a probationer." Davis v. Alaska, 415 U.S. at 318. Gulla's entire history of misconduct and discipline was relevant to show his exposure to termination and perhaps even to criminal charges.

Evidence which is inadmissible on other grounds may still be admissible for the purpose of showing bias. Abel, 469 U.S. at 55 (although specific instances of conduct inadmissible under ER 608(b) for purpose of showing "character for untruthfulness", admissible to show bias); United States v. James, 609 F.2d 36, 46-47 (2d Cir. 1979), cert. denied, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980); 5A Tegland § 607.10 at 331 ("When acts of misconduct or criminal convictions are offered to show bias (as opposed to a general tendency towards untruthfulness), the restrictions in Rules 608 and 609 are inapplicable.")

Some of Gulla's misconduct may also have been admissible under ER 404(b) to show motive and common scheme or plan. For example, that Gulla would sabotage a breath test to get a date tends to show his motivation to distort evidence for his own gain. In Lui's case, the gain would not have been sexual favors, but rather enhanced status with the Sheriff's Office.

The defense could also likely have presented witnesses to Gulla's reputation for lying under ER 608(a). The State's brief on that point noted that "[t]he defendant in our case has not endorsed any reputation witnesses." State's Trial Memorandum at 12. In view of Gulla's documented history of lying during investigations, it seems likely that members of the Sheriff's Office – perhaps the Sheriff herself – could have testified at trial to Gulla's poor character for truthfulness based on his current reputation.

The defense could also have cross-examined Gulla about specific instances of conduct reflecting on his credibility. ER 608(b). "Conduct involving fraud or deception is likely to be

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indicative of the witness's general disposition with regard to truthfulness." 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 608.6, at 361-62 For example, Gulla told Mike Kelly in 2004 that he was prepared to shoot him with a gun taken from a "crack head" and then give a false story about what happened. According to the 2005 article, there were at least two other incidents in which Sheriff's investigators concluded that Gulla lied to them. It is true that these two incidents were somewhat old. The Court could well find them sufficiently probative, however, if they are part of continuing pattern of engaging in misconduct and then lying about it.

As noted above, the State's trial memorandum discusses only allegations in the single newspaper article, which was on its face incomplete. There is no suggestion that the trial prosecutors made any inquiries within their own office for additional information concerning Gulla's credibility, much less seeking out information from the Sheriff's Office. This suggests that Lui's right to due process may have been violated.

The Supreme Court has long held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); see also United States v. Bagley, 473 U.S. 667, 674-76, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481 (1985); Kyles v. Whitley, 514 U.S. 419, 432-33, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The Court has established the following three-part test to determine whether a Brady violation has occurred: (1) the evidence must have been suppressed by the state, either willfully or inadvertently; (2) the suppressed evidence must be favorable to the accused, either because it is exculpatory or impeaching in nature; and (3) the evidence must be material to the defense, meaning that there is a "reasonable probability" that it would have changed the result. Strickler v. Greene, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The Brady rule encompasses evidence not

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actually known by the individual prosecutor. "In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" Strickler v. Greene, 527 U.S. at 281 (quoting Kyles v. Whitley, 514 U.S. at 437). Carriger v. Stewart, 132 F.3d 463, 479-82 (9th Cir. 1997) (prosecution had a duty to obtain and review a Department of Corrections file of its principle witness); United States v. Wood, 57 F.3d 733 (9th Cir. 1995) (in prosecution for conspiracy to defraud Food and Drug Administration, prosecutor was required to disclose information known to FDA).

It does not appear that the State met its Brady obligations regarding Denny Gulla. Mr. Savage's file does not reflect any discovery from the prosecutor concerning Gulla's credibility. As discussed above, the prosecutor's trial memorandum suggests that the individual prosecutors made no effort to learn of impeachment evidence concerning Gulla, beyond what everyone knew from the newspaper article.

The Court should order the State to fulfill its Brady obligations now. The duty continues after the trial has concluded. See Smith v. Roberts, 115 F.3d 818, 819-20 (10th Cir. 1997) (direct appeal pending); Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992) (state has duty to disclose exculpatory evidence under Brady during a habeas corpus proceeding); Monroe v. Butler, 690 F. Supp. 521, 522-23, 525-26 (E.D. La. 1988) (holding that state's failure to disclose exculpatory evidence discovered after conviction violated habeas petitioner's Brady rights), aff'd, 883 F.2d 331 (5th Cir.), cert. denied, 487 U.S. 1247 (1988). Similarly, CrR 4.7(h)(2) provides for a "continuing duty to disclose" discovery.

A second basis for Lui's request is the Public Records Act, RCW 42.56. Records maintained by an agency are available for inspection and copying. RCW 42.56.080. The definitions in RCW 42.17 apply. See RCW 42.56.010. A "public record" includes any "writing" that is "used" or "retained" by a government agency, RCW 42.17.020(41), and the fact that it is

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so "used" or "retained" by an agency for purposes of prosecution makes it relate to the conduct of government. Generally, once a case has been prosecuted, any investigative exemption no longer applies. Cowles Publishing Co. v. Spokane Police Department, 139 Wn.2d 472, 987 P.2d 620 (1999). Prosecutor's files are not generally exempt from the PDA. Limstrom v. Ladenburg, 136 Wn.2d 595, 963 P.2d 869 (1998).

Third, the Rules of Appellate procedure contemplate that additional evidence may under some circumstances be taken and submitted for purposes of a direct appeal. RAP 9.11. If Lui can promptly gather new evidence he may be able to resolve all his claims through the pending appeal, which would be more efficient for all concerned. Failing that, however, Lui will present his new evidence though a postjudgment motion in this Court or a personal restraint petition in the Court of Appeals.

The trial court has authority to entertain postjudgment motions while an appeal is pending. RAP 7.2(e). The permission of the appellate court is necessary only if the ruling will "change a decision then being reviewed by the appellate court." Id. Even then, the trial court is free to consider the motion and make a ruling, but it may not formally enter the decision until the parties obtain permission from the appellate court. Because none of the requests in this motion will change the decision under review by the court of appeals, the court can rule on the motion without approval from the appellate court.

C. TAPE AND NOTES OF DEFENDANT'S INTERVIEW WITH DETECTIVE DOYON ON FEBRUARY 9, 2001

At trial Det. Gulla testified that Det. Doyon took detailed notes of their interview with Mr. Lui on February 9, 2001. RP 955. Gulla said that he himself did not take notes. The discovery received from prior counsel does not appear to contain Det. Doyon's notes or a tape of the interview. I am requesting that the State either provide the notes and tape or confirm that they do not exist.

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D. JUROR INFORMATION

This Court previously signed an agreed order directing the Clerk to release the sealed juror questionnaires to the parties, with restrictions on further disclosures. See Ex. B. The defense sought that information so that its investigator could contact the jurors. Unfortunately, the questionnaires contained little or no information to assist with contact. At this point, the defense investigator has located only three of the jurors. Lui now seeks an order directing Jury Services to release the actual addresses and telephone numbers of the jurors. This information is needed for two reasons.

First, based on an interview with juror Clare Comins, the defense has learned that the jurors considered extrinsic information based on one of the jurors' purported personal knowledge of the crime scene. See Declaration of Denise Scaffidi; Ex. C.

> 3. [Clare Comins] informed me that he was one of the jurors for the trial and that during deliberations in the above captioned matter there was discussion concerning the credibility of one of Mr. Lui's defense witnesses, a man named Sam.
> 4. I took this to be Sam Taumoefolau as this is the only witness with the first name of Sam who testified for Mr. Lui and I am aware that his testimony concerned the issue below.
> 5. When asked what the concerns were with Mr. Taumoefolau's credibility, Mr. Comins stated that there were a few issues raised. He stated that one issue concerned Mr. Taumoefolau's testimony that both he and Mr. Lui had distributed missing person's leaflets at a particular mall that was described on the witness stand. The location of this mall was outside the area of the aerial photographs that had been introduced as exhibits in the case, however, Mr. Taumoefolau was able to describe where this mall was that he and Mr. Lui went to while distributing the leaflets.
> 6. Mr. Comins stated that during the deliberations by the jury, one of the female jurors explained she had lived in Woodinville at the time of the murder and she knew that the mall described by Mr. Taumoefolau could not possibly have been leafleted in the days following Ms. Boussiacos's disappearance because the mall had not yet been built. Mr. Comins stated further that he believed that the jurors discussed this information during deliberations and that it reflected poorly on Mr. Taumoefolau's overall testimony.

Ex. C. The defense should have an opportunity to contact the remaining jurors to corroborate the statements of Mr. Comins.

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Second, undersigned counsel's recent visit to the exhibit room revealed another potential issue for which juror testimony may be needed. On April 22, 2008, the State played for the jury redacted tapes of a police interview with Mr. Lui. The tapes were admitted as exhibits 158-61, and a transcript was marked for identification as Ex. 157. The record reflects that the jurors followed along with a transcript, but it is not clear from the record whether that was Ex. 157 or a different version. When I brought this to the attention of prosecutor Kristin Richardson, she responded that the jurors were given a redacted version and provided me with a copy of it. Nevertheless, it is possible that a mistake was made during the trial. The defense should be permitted to ask the jurors about this.

A criminal defendant has state and federal constitutional rights to trial by an impartial jury. See Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968); U.S. Const. amend. 6; Washington Const. art. 1, § 22. The Sixth Amendment also guarantees the rights to confrontation of witnesses and to the assistance of counsel. The Fourteenth Amendment due process clause guarantees the right to a fair trial. All of these rights are violated when the jury receives material information outside of the courtroom. See Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); Gibson v. Clanon, 633 F.2d 851, 854 (9th Cir. 1980). "When a juror communicates objective extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause." Jeffries v. Wood, 114 F.3d 1484, 1490 (9th Cir. 1996). Such facts will not have been subject to objection, cross examination, explanation, or rebuttal by either party. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014, 807 P.2d 883 (1991) (quoting Lockwood v. A C & S, Inc., 44 Wn. App. 330, 357-58, 722 P.2d 826 (1986), aff'd, 109 Wn.2d 235, 744 P.2d 605 (1987)). When misconduct has occurred, "'a new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'" United States v.

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Bagley, 641 F.2d 1235, 1242 (9th Cir. 1981), cert. denied, 454 U.S. 942 (1981) (quoting Gibson v. Clanon, 633 F.2d at 855 (9th Cir. 1980)); State v. Briggs, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989) (citing numerous cases). There is no need for a petitioner to show that all the jurors were exposed to improper extrinsic information. See Lawson v. Borg, 60 F.3d 608, 613 (9th Cir. 1995).

Jurors may testify to the fact that misconduct occurred, but may not testify to the subjective effect that the misconduct had on their internal deliberations. State v. Jackman, 113 Wn.2d 772, 782, 783 P.2d 580 (1989).

E. THE DEFENSE SHOULD BE PERMITTED TO PERFORM DNA TESTING THAT WAS NOT DONE AT TRIAL

1. Summary of Relevant Forensic Testimony at Trial

Elaina Boussiacos's body was found in the trunk of her car. VII RP 951. She was wearing sweatpants and a long-sleeved t-shirt. VII RP 865-66. She had some injuries including bruising in the area of her neck. VII RP 865. Her bra was stuffed up inside of her shirt. VII RP 866-67. It appeared that she had been dressed by someone else. IV RP 344; XVI RP 1726-28; XVI RP 1832.

Nine identifiable fingerprints were found on the car. None of them belonged to Lui. XII RP 1578, 1581.

The detectives found a small blood stain by the stick shift. VII RP 883. It was collected into evidence. VIII RP 1031. The Washington State Patrol Crime Laboratory obtained a DNA profile from the blood. IX RP 1194-95. It did not match Lui or Boussiacos. IX RP 1224-25.

The steering wheel contained Boussiacos's DNA with a trace of unidentified male DNA. IX RP 1218.

Discovery indicates that a swab of the victim's neck was tested and the only profile obtained matched the victim's DNA.

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The victim's shoelaces contained DNA belonging to either Lui or his son, DNA belonging to either James Negron (the victim's ex-husband) or his son, and DNA belonging to an unidentified male. The DNA testimony also raised the possibility of a weak, unknown male profile in the vaginal wash. The record does not reflect any attempt to determine whether the unidentified profiles found on the stick shift, the shoelaces, the steering wheel, and the vaginal wash were consistent with each other.

The crime scene team from the Washington State Patrol Laboratory was not called out to examine Boussiacos's car for trace evidence. IX RP 1260. Nobody tested her clothing to see whether the perpetrator left skin cells on it when putting her in the trunk. IX RP 1274.

2. Further Testing Requested

Undersigned counsel has spoken with Dr. Julie Heinig, Chief Forensic Scientist at DNA Diagnostics Center (DDC) in Fairfield, Ohio. Before beginning any analysis, Dr. Heinig would prefer to review the relevant discovery, including the notes of DNA testing already done.[1] She has provided some preliminary ideas, however, for tests that would likely be useful in this case.

First, the unknown male DNA found in the blood on the stick shift skirt could be compared with the unknown male DNA found on the victim's shoelaces. No comparison was made at the time of trial because the blood was tested using a standard STR method, whereas the shoelaces were tested using a Y-STR method that is restricted to the male Y chromosome. DDC could re-test the blood using Y-STR and then compare the profiles. If the same man left blood on the stick shift and also handled the victim's shoelaces, that would strongly suggest that he was the perpetrator. It is hard to conceive of any innocent reason that a man not closely affiliated with Ms. Boussiacos would leave his DNA in both places.

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[1] The defense does not wish to go through the expense of this step before the Court has ruled that DNA testing may take place.

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Second, the swab from the steering wheel could be re-tested using Y-STR. At the time of trial, the test performed by the Washington State Patrol Crime Laboratory (WSPCL) using standard STR found only a trace of male DNA. As the testimony in this case revealed, however, the more sensitive Y-STR test will often provide a useful profile, particularly when a significant amount of female DNA otherwise obscures any male portion (as would likely be the case with the female victim's steering wheel). If a male profile on the steering wheel matched the unknown male profile on the shoelaces and/or the stick shift blood, that would again strongly suggest that the DNA belonged to the perpetrator. It would also be highly significant if the profile on the steering wheel matched Mr. Negron. It is perhaps understandable that his paternal lineage would be found on Ms. Boussiacos's shoelaces, because his son may have handled them.[2] The young son would not likely have been driving the car, however, and testimony indicated that Ms. Boussiacos avoided any unnecessary contact with her ex-husband and therefore would not have permitted him to drive her car.

Third, various items of Ms. Boussiacos's clothing could be tested using the relatively new "touch DNA" methods.[3] It was the State's theory at trial that the victim was dressed by the perpetrator. Her bra, for example, was found stuffed down her shirt.[4] Further, the medical examiner testified that her underpants were apparently used as a handle to carry her. Dr. Heinig

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[2] Testing on the Y chromosome will generally yield the same result for an entire paternal lineage because the Y chromosome is typically inherited without change among male descendents.

[3] Such methods were recently used to exonerate family members in the JonBenet Ramsey case.

[4] Although this was not pointed out at trial, that fact tends to exculpate Mr. Lui. If he killed Ms. Boussiacos in their home, as the State maintained, what purpose would be served by stuffing the bra under her shirt without putting it on her properly? It would not help create an appearance that she dressed herself, and there was no need to remove her bra from the home since her bras would normally be found there. On the other hand, if Ms. Boussiacos was killed by someone else after she left the home, the killer would not have wished her bra to be found in his possession or at the scene, so he would have had reason to place it on her body.

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would expect to find some of the perpetrator's sweat or skin cells on the clothing under those circumstances. She would likely use a "scraping" method to obtain those cells.

Fourth, several hairs were found on the victim's clothing, and a single hair was found on her hand. Discovery indicates that WSPCL extracted DNA from the root of one hair but could not obtain a profile. The more sensitive tests offered by DDC might reveal a profile.

Fifth, discovery indicates that WSPCL tested a swab of the victim's neck but could obtain only her own profile. Again, Y-STR testing might reveal a male profile. Such a result would be highly significant because the manner of death was strangulation.

Sixth, the defense will ask Dr. Heinig to review the testing data regarding the vaginal wash to determine whether it truly reflects a second male contributor and whether additional testing could lead to a full profile for that contributor.

If the Court grants the defense request for testing, the parties can likely work out an agreed procedure for forwarding the necessary evidence to DDC.

Defendant is not seeking public funds for the testing.

3. RCW 10.73.170 has been Amended to Provide for Broader Access to DNA Testing

In March 2005, the Legislature amended RCW 10.73.170[5], broadening access to post-conviction DNA testing. It expanded the circumstances under which the right to testing is granted, removed the sunset clause, placed courts – rather than prosecutors – in charge of the decision to grant or deny requests, and authorized the appointment of counsel. Of specific import to this case, the Legislature added a third avenue under which a petitioner could access post-conviction DNA testing to the two provisions contained in prior statutes. The third provision expands access to testing to situations in which: (iii) "[t]he DNA testing now requested would be

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significantly more accurate than prior DNA testing or would provide significant new information." RCW 10.73.170(2)(a)(iii).

RCW 10.73.170 currently states in relevant part:

(2) The motion [requesting DNA testing] shall:

(a) State that:

(i) The court ruled that DNA testing did not meet acceptable scientific standards; or

(ii) The DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or

(iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;

(b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and possibility of parole.

(c) Comply with all other procedural requirements established by court rule.

(3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis . . .

The State may rely on Riofta v. State, 134 Wn. App. 669, 142 P.3d 193 (2006), a Division Two case which added a non-statutory requirement to subsection (3): that the requested testing was "unavailable at trial." In doing so, it contravened basic principles of statutory construction and limited access to post-conviction DNA testing, even while acknowledging that the 2005 amendments to RCW 10.73.170 "broaden[ed] access to post-conviction DNA testing." Id. at 678-79.

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[5] The prior version of RCW 10.73.170 allowed testing under only two circumstances: (i) "if DNA testing was not admitted because the court ruled DNA testing did not meet acceptable standards" or (ii) "DNA testing technology was not sufficiently developed to test the DNA evidence in the case." See App. (6)(c) (2004 statute).

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The three provisions of the 2005 statute must be read in conjunction with each other to determine the legislative intent in adding a new ground for testing to the statute. See Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (the plain meaning of a statute "is discerned from all that the Legislature has said in the statute and related statutes"). Subsection (i) addresses situations where DNA testing was done and a court ruled the testing did not meet acceptable scientific standards. Subsection (ii) addresses scenarios where DNA testing was not done because DNA technology was not sufficiently developed. Subsection (iii) addresses the potential of future DNA testing to shed new light on information currently available, either by providing more accurate information than past testing, or providing significant new information.

Thus, the Legislature contemplated three situations that would warrant new testing: situations in which DNA testing was done poorly, situations in which DNA testing technology was inadequate, and situations in which – regardless of what happened in the past – future DNA testing would lead to better information, either by rendering more accurate information, or by providing significant new information. When the subsections are read in conjunction with each other, Division Two's insertion of text into subsection (iii) renders the provision superfluous. This is so because future DNA testing can only provide "significant new information unavailable at trial" when: (i) past DNA tests were ruled inadmissible by the court or (ii) DNA tests were not done because the sample size was too small or too degraded to test with then-existing technology. The Court of Appeals' interpretation violates the basic canon of statutory construction which holds that a statute should not be interpreted so as to render one part inoperative. Davis v. State ex rel. Dep't of Licensing, 137 Wn.2d 957, 969, 977 P.2d 554 (1999).

The Legislative intent can also be inferred from the material changes to the 2005 statute. Notably, the Legislature made deliberate decisions: (1) to add a new ground for post-conviction DNA testing; (2) to exclude the legal language "unavailable at trial" in the provisions of RCW 10.73.170; (3) to remove the sunset clause provision; (4) to place decision-making power with

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the courts, rather than with the prosecutor; and (5) to authorize courts to appoint counsel to prepare and present the motion. The first two of these amendments, like the others, must have been intended to effect some material purpose. See Vita Food Products, Inc. v. State, 91 Wn.2d 132, 134, 587 P.2d 535 (1978).

4. Mr. Lui Meets the Standard of RCW 10.73.170

In this case, Mr. Lui can easily satisfy the plain language of the statute. As discussed above in section E(2), "[t]he DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information." To reiterate just one example, "touch DNA" testing of the victim's underpants and bra will provide information of great significance, since the perpetrator must have handled that clothing while dressing the victim and lifting her into the trunk of her car. The results will be particularly significant if they match the unknown male DNA found on the victim's shoelaces and stick shift skirt. Obviously, such information will also be "material to the identity of the perpetrator" under RCW 10.73.170(2)(b).

Finally, there is a "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." See RCW 10.73.100.170(3). That the evidence against Lui was not strong is demonstrated by the passage of six years before the State charged him with the crime. Any new evidence obtained during that time was equivocal at best. For example, the more recent DNA tests performed by the State supported only two points: that some DNA consistent with Lui's paternal lineage was on Ms. Boussiacos's shoelaces, and that a tiny amount of Lui's DNA was found in the vaginal wash. The shoelace results were hardly incriminating, since Lui or his son could have touched the shoelaces at any time. Further, DNA consistent with the Negron lineage was also found on the shoelaces, yet the State has not suggested that this proves James Negron or his son was the perpetrator. That Lui's DNA was found in the vaginal wash is hardly surprising since he was living with, and engaged to, Boussiacos. The State made

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much of the fact that Lui denied recent intercourse with Boussiacos. But the microscopic amount of his DNA found in the wash was consistent with intercourse that took place some time ago, as well as with brief genital contact that Lui may not have equated with "sex."

Further, Lui's postconviction investigation has revealed that the picture presented at trial appeared more incriminating than it should have. Although Lui is not yet prepared to file a collateral attack, he can give two significant examples at this time. First, the State relied on testimony from Katherine Wozow that the victim's car sat in the parking lot of the Woodinville Athletic Club (WAC) from Saturday, February 3, 2001 (the day she disappeared), until February 9, 2001 (the day her body was found in the trunk). This contradicted the testimony of a defense witness that the car was not there when he and the defendant put up missing person flyers in the area. The defense had an investigator's report of an interview with Amber Mathwig, another WAC employee, in which she stated with certainty that the car was *not* in the lot any earlier than Tuesday, February 6. Although defense counsel called Ms. Mathwig to the stand and asked her some questions about the dog tracking, he inexplicably failed to ask her the critical questions about the car. As the Court may recall, Mathwig's testimony came just shortly after defense counsel suffered an injury which – in the Court's view – rendered him temporarily incapable of handling the trial.

As a second example, the State made much of evidence that a bloodhound trailed Lui's scent from the area of victim's car to the Lui/Boussiacos home. The defense presented a single witness to confirm that Lui had been putting up missing person flyers in that area, but his testimony came off poorly due to lack of preparation. The discovery indicates that the defense could have called at least two additional witnesses to confirm that Lui had been postering in the relevant area.

Thus, further DNA testing is likely to demonstrate Lui's probable innocence.

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DATED this 15th day of May, 2009.

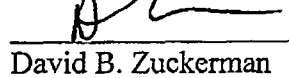
Respectfully submitted:

David B. Zuckerman, WSBA #18221
Attorney for Sione P. Lui

III.
DECLARATION OF DAVID ZUCKERMAN

I swear under penalty of perjury under the laws of the State of Washington that the factual assertions in the above memorandum are true and correct to the best of my knowledge.

5/15/09 Seattle, WA
Date and Place



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CERTIFICATE OF SERVICE

I certify that on the date listed below, I served by ABC Legal Messenger copies of this pleading on the following individuals:

Ms. Kristin Richardson
King County Prosecutor's Office
516 Third Avenue, Room W554
Seattle, WA 98104

The Honorable Michael Trickey
King County Superior Court Judge
516 Third Avenue, Room C203
Seattle, WA 98104

I further certify that on the date listed below, I served by United States Postal Service a copy of this pleading on the following individual:

Mr. Sione P. Lui #319129
Washington Corrections Center
PO Box 900
Shelton, WA 98584

5/15/2009
Date

Steven Plastrik
Steven Plastrik

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Seattle Post-Intelligencer

http://www.seattlepi.com/local/248384_gulla15.html

EXHIBIT A

BEST AVAILABLE IMAGE POSSIBLE

Deputy accused of molestations, abuse

Denny Gulla still carries gun and badge

Tuesday, November 15, 2005

By PAUL SHUKOVSKY
SEATTLE POST-INTELLIGENCER REPORTER

Editor's note: This story has been changed since it was originally published. The King County Sheriff Office's Precinct 3 has headquarters in Maple Valley and does not include Covington as the story originally stated.

Kay Quall was 14 when she learned never to trust a cop.

She was on a date when the car ran out of gas. King County sheriff's Deputy Denny Gulla offered Quall and her boyfriend a ride home. Gulla dropped the young man off first. Then, Quall says, he got in the back seat of his patrol car with her, slid his hand under her shirt and thrust his tongue into her mouth.

Quall is 35 now. She is one of three women who say they still carry memories from their encounters with Gulla when each was 14. One of the others is brain-damaged now from an apparent suicide attempt and the third is in jail, struggling with her own demons. But one fact binds them all:

zoom Dan DeLong / P-I

Kay Quall, now 35, says she was sexually abused by King County sheriff's Deputy Denny Gulla when she was 14.

Denny Gulla is still on patrol with a badge and a gun.

The file on his 23-year career is fat with other complaints of abuse -- assaulting a prisoner, making a pass at a high school senior, videotaping a gang beating he could have prevented and, most recently, pulling over his lover's husband and threatening to shoot him in the "mother-f---ing face."

King County Sheriff Sue Rahr admits that the department should have fired Gulla a long time ago. She says every disciplinary step has been diluted or thwarted entirely by the powerful union that represents deputies and sergeants. The union's attorney calls that claim "silly."

Gulla

For whatever reason, no sheriff has even tried to fire Denny Gulla.

Gulla is the third King County sheriff's officer spotlighted by the Seattle Post-Intelligencer whose record reflects a lack of accountability. The others are former Detective Dan Ring, who was charged with several crimes but managed to escape trial, ending up with a cash payment and an enhanced retirement; and Deputy Ferenc Zana, whose live-in lover is charged with stealing Zana's gun and killing a convenience-store clerk with it.

'I will kill you'

Mike Kelly and his friend Ferrell Johnston were on a slow drive through Buckley in January 2004 when off-duty King County sheriff's Sgt. Denny Gulla, who was having an affair with Kelly's wife, turned on the flashing lights and pulled them over. Kelly watched through his rearview mirror as cars from the Buckley and Wilkeson police departments also arrived.

zoom Scott Eklund / P-I

Mike Kelly says Gulla threatened to kill him.

Buckley Officer Ryan Boyle wrote in his report that he asked Gulla the reason for the stop. He got no answer, and noticed that Gulla was upset, so he went to speak with Kelly.

As they talked, Gulla came over, leaned into Kelly's window and began to yell at Kelly and Johnston. According to Boyle's report, Gulla screamed, "You looking for my house mother-f---er? You better not be. If you're looking for my house I will kill you."

Boyle would later tell his chief that Gulla repeatedly said, "I will blow your f---ing brains out, do you understand me? I will take my pistol and I will shoot you in the f---ing head."

Spit was flying from Gulla's mouth onto Kelly's face.

Kelly -- 6 feet 4 inches and 235 pounds -- was so terrified that the 5-foot 9-inch Gulla would shoot him that he wet his pants.

Gulla said he had a gun in his trunk seized from a crack head, "a nobody, and that's what he'd use to shoot me in my mother f---ing face. And these two cops here will collaborate (sic) whatever story he says and I'll be gone," according to Kelly.

Then, as Boyle watched, Gulla took Kelly out of the vehicle with his hands behind his back as though he was arresting him.

"I'm standing there with my fingers interlocked behind my back ... and he's just trying to get me to do something," Kelly told investigators. "He's making comments on my wife, just all kinds of garbage. He said something about, yeah, I'm the one f---ing your wife. ... He's just on and on about my kids, you're never gonna see your kids again. He was trying to get me to make a move or something. He wanted an excuse and he wanted it bad. I really felt like he was trying to get me to talk back. I thought he was gonna shoot me right there. I honest to God thought that this is it, I'm done."

Two weeks later, Kelly told King County detectives: "Every night I come home, I go through the house with my gun."

A criminal investigation of Gulla by the Pierce County Sheriff's Department on suspicion of harassment lasted several weeks before the case was forwarded to Kevin Benton, a Pierce County deputy prosecuting attorney, who declined to charge Gulla.

Asked to explain why the case against Gulla was dropped, Benton said he could not comment because he has been prosecuting a murder trial and has not had time to review the file.

King County settled a claim for damages with a $30,000 award to Kelly and $10,000 to his friend

Johnston.

During an internal investigation by the King County Sheriff's Office, Gulla admitted to threatening to kill Kelly. He defended his actions by asserting that Kelly was looking for his Buckley home and had told other people he wanted to kill him. Gulla's attorney submitted a letter to Benton saying that Gulla's threats to shoot Kelly were simply statements "that he would exercise his right of self-defense if necessary."

Gulla also contended that Kelly was behind a series of vandalism incidents against the property of police officers that live in his Buckley neighborhood. But the Buckley police chief rejected that, saying the vandals had been identified.

On May 19, 2004, Rahr, then chief of operations, recommended to Sheriff Dave Reichert, now a member of Congress, that Gulla be suspended for five days without pay and that he be returned to the rank of deputy.

Rahr refused to comment for this story. But several weeks ago, she made clear to a P-I reporter that she doesn't believe Gulla should have a badge. Asked why she hasn't fired him, she said: "I have tried to deal with Denny Gulla, and he is consistently supported by the union. I've done everything I could do within the confines of the labor contract."

"Silly," said Christopher Vick, a lawyer with the King County Police Officers Guild. "The sheriff has complete control over who they discipline and how."

Reichert ruled that Gulla had abused his power by making the traffic stop without cause. He ordered Gulla returned to the rank of deputy and suspended him for one day without pay.

Two weeks later, guild President Steve Eggert filed a grievance over the one-day suspension and demotion. "We do not believe there was just cause for the finding or discipline. We believe the proper remedy in this matter would be to nonsustain the allegations against Deputy Gulla and rescind any discipline associated with this investigation including his loss of rank."

Eggert repeatedly failed to return calls for comment. Reichert also chose not to comment for this story.

Gulla, in two brief telephone conversations and a short e-mail, refused to comment for this story. He mentioned during one call that he has yet to serve his one-day suspension. He is assigned to patrol, working out of Precinct 3 in Maple Valley. [**Editor's Note:** The original version of this article incorrectly stated the location of Precinct 3.]

Not long after the incident, Kelly left King County. "I moved out ... for one reason: He and many of his cop friends were on my ass like I've never seen. I couldn't go anywhere without being followed. I would get pulled over.

"I didn't want one dime of money, I just wanted his badge. I am appalled that he is still a cop."

A troubled 14-year-old

Ten years ago, Wassena George was a troubled 14-year-old girl living on the Muckleshoot Indian Reservation. Gulla was working off duty, providing security at a tribal housing complex called Skopabsh Village.

Gulla "would pick me up and make sexual remarks," George said in an interview. "He would pick me up as a runaway, but he wouldn't bring me home."

Twice he picked her up when she was intoxicated and "there was a lot of improper touching," said George, who was interviewed recently at the Yakima County Jail. She is serving a sentence on an old charge of being a minor in possession of alcohol and breaking a window.

His "hands were going up my shirt," touching her breasts, she said.

George's mother, Norma Eyle, said recently that Wassena told her about the attacks right after they occurred.

"I think it kind of messed her up," said Eyle. "She got kind of goofy after that. ... She never used to do drugs, but she's into drugs now. We tried to get her into counseling, rehab."

George and several other Muckleshoot reservation residents and former tribal officials assert that Gulla molested another young girl on the reservation.

Gulla "was having a relationship with one of my friends," George said. "He would drop me off sometimes and pretty soon he would come back and pick her up. He made her give him" oral sex.

The P-I is not naming the girl because she later suffered brain damage after being struck by a car in an apparent suicide attempt. Though she is now an adult, her capacity to give informed consent to being identified as a victim of alleged sexual abuse is questionable.

That 14-year-old girl, like George, was struggling with alcohol and drug abuse and problems in her family. Gulla groomed her for sex, plying her with presents such as an expensive leather jacket, said friends and neighbors.

Mike Starr Sr. is a fisherman and Muckleshoot tribal youth worker. Like many people on the reservation, he acknowledges having hard feelings toward Gulla not only because of the deputy's alleged penchant for young girls, but because he has arrested members of the Starr family.

"He'd come riding along and he'd have young girls in his car," Starr said.

"Wassena George was one. But (the unnamed girl) was the main one he messed with quite a bit. When he was messing around with her, she'd come up to the house and talk to the kids."

Starr was staying in Skopabsh Village one night when his daughter "watched Gulla go in the window. He ... took (the girl) away in handcuffs. She was home the next morning. She was 13 or 14 at the time."

One close friend of the girl asked that her name not be used because she feared it could threaten her job. The girl told her that she was sexually intimate with Gulla.

The P-I did not interview the girl because her guardian denied access. But the girl's friend said that even now, she talks about Gulla.

"After the accident, she said: 'I know you didn't like me messing around with Gulla,' " the friend said.

"If you weren't giving in, he would tell you 'I'm going to make you miserable, put you in jail,' " said the

friend. "If you wouldn't go with him he would be an asshole."

"I wasn't one of those girls that would give in," the friend said. The girl "was giving in until her accident."

The friend said the girl was vulnerable because "she was on her own. The mom lived there, but she was drunk."

The girl's mother, when asked if she knew if her child had been sexually abused by a police officer, said: "Is it Gulla? I'm not really sure if he was trying to mess with her. She said something to that effect."

She said Gulla was often "around all the young girls." But she said she could remember little else about that time period.

Gary Starr used to hang out with the girl.

"I knew he was messing around with (the girl). She told me," he said. "She was saying Gulla was ... trying to be a weirdo, a perv, and he was threatening to take her to jail if she didn't do what he wanted."

Lolita "Lolly" Fulgencio was also one of the girl's friends.

"He used to go around and harass people without any reason -- just drive up on us," Fulgencio said. "There was one incident where me and (the girl) were going to go out and we were leaving from her house and he pulled right up and said, 'Hey, how you girls doing tonight?'

"He was coming on to us. And I was, 'Ooh. Gross.' But (the unnamed girl) responded to him and said 'Good, Denny. How you doing?' She pulled out a cigarette and he lit her cigarette for her. ...

"Then we went to a party. I went home and went to sleep. I got up at 4 or 5 in the morning, opened up the window and saw (the girl) running up the road. There was a car parked up there, and it was Denny's car. He was parked up there at the first speed bump waiting for her. She ran up to his car, jumped in and they drove off. That was the first time we got an indication she was messing around with him."

Michele McCloud was part of that group of friends, too. She recently called the girl "one of my best friends."

Gulla "bought her a nice leather parka," McCloud said. "She didn't want to admit it. She just told us that he bought her a coat. She would sneak around with him."

"Denny was Denny around here," McCloud said. "Nobody could do anything about it. He was a cop, and we were a bunch of native kids that nobody was going to listen to."

But one tribal council member did listen -- William "Sonny" Miller.

"When I was on the council, (Gulla) was messing around with young girls, taking them, threatening them and having his way with them," Miller said. "There were probably three or four girls ... he did that with."

"He more or less drove around here like no one could touch him. He was threatening people: 'I won't haul you in if you do this and this and this.' "

Miller became the catalyst on the tribal council to do something about Gulla.

It was about that time that the girl almost lost her life in a traffic accident.

On Nov. 13, 1996, at about 11:45 p.m., Muckleshoot tribal member Joseph Allen was driving along Auburn-Enumclaw Road when "she just jumped out in front of me," Allen said in a recent interview. "When I was driving by -- she was trying to commit suicide."

"There were people who were with her when she got hit, and they said she was out there jumping in front of cars," the friend who requested anonymity said.

Finally, more than a year after the accident, the tribal council took action. A complaint about Gulla was sent to the Sheriff's Office, Miller said.

Burney Huff is now an executive at the state Department of Health. At the time, he was an administrator for the Muckleshoot tribal government. Huff said there was debate on the council over whether or not the letter should be specify Gulla's alleged molestation of underage girls.

Huff gave to the P-I the text of the letter he was ordered by the tribal council to send to Sheriff Dave Reichert. The letter said, "Some elements of the relationship between Mr. Ghulla (sic) and residents of the reservation have not been pleasant. On behalf of the Muckleshoot Tribal Council, I request that Mr. Ghulla not be assigned to perform any duties on the Muckleshoot Indian Reservation."

The letter was signed by tribal Chairman John Daniels Jr. Daniels, through tribal spokesman Rollin Fatland, recently refused to comment, saying that his memory of the matter is vague and that the tribe enjoys a good relationship with the King County Sheriff's Office.

A few weeks later, the FBI received an anonymous call that it transmitted by letter and a follow-up phone call to the King County Sheriff's Office. The FBI letter to the Sheriff's Office reported that the anonymous caller said Denny Gulla was being investigated by the Muckleshoot Tribe for the rape of a girl who was the victim of a traffic accident.

Wassena George said that a King County sheriff's detective visited her in juvenile detention, told her he was investigating Gulla and questioned her. She does not recall his name.

"I didn't tell him everything," George said. "I did tell him (Gulla) made passes toward me."

The P-I, in the course of reporting this story, invoked the state's public records laws in requesting that the Sheriff's Office turn over all its personnel and Internal Investigations Unit files on Gulla to the newspaper. The office's position is that it is not required to turn over files on unsustained allegations.

No files were turned over to the P-I that reflected charges of sexual misconduct by Gulla. Many of the files that were received have extensive redactions.

Gulla no longer patrols the Muckleshoot Reservation.

After the traffic accident, the girl spent weeks in a coma at Harborview Medical Center, her mother said. When she emerged from the coma, she went to a nursing home.

"They expected her to never walk, talk and have a memory," the mother said. "It took a really long time,

it took forever for her to talk. She has a plate in one side of her head, and I guess she can't see out of one eye. She has a limp and has a hard time going down the steps. If you ask her straight-up questions, she can't answer.

"She was so young, so pretty."

Wassena George says Gulla's actions changed her forever.

The experience "made me not want to walk no more. I didn't feel safe."

"I was abused as a child growing up, and I always kept it to myself. So when (Gulla) did it and he thought that I was too drunk to remember or just that he could do it, I didn't want to say nothing to nobody because I don't like to get anybody in trouble. So I kept it to myself.

"And yes, it did mess up my head."

Gang initiation videotaped

When Gulla encouraged members of a White Center gang to beat a prospective member as part of an initiation rite so that his partner could videotape it as a training tool for other officers, the Police Guild's power saved him from being disciplined.

The 1992 videotape shows Gulla, then a detective of the gang unit and working directly for then Lieutenant Rahr, spending several minutes assuring seven skeptical gang members that if they beat up a youth as an initiation rite, they would not get in trouble.

The incident created a furor of negative publicity for the Sheriff's Office from news media around the country. Then-Sheriff James Montgomery, who noted that Gulla and his partner used "bad judgment," said he would impose discipline, which could range from a reprimand to firing, after the detectives had a chance to defend themselves in hearings.

But Gulla and the Guild ultimately prevailed in the disciplinary process. Guild attorney Vick represented Gulla in the matter. He said recently that the reason Gulla and his partner were not disciplined is that "they didn't violate any policy. Their job wasn't to enforce the law, it was to collect intelligence. You can argue all day long about the wisdom of it, but that was the assigned job. At the end of the day, the sheriff ... would have to get on the stand and say we want to punish him for what we wanted him to do."

Montgomery, now chief of the Bellevue Police Department, said Monday: "We had several rounds with (Gulla) over the years. That one pushed me right over the top. It was a terrible decision. We did go to the mat over that one."

While Sheriff Rahr has not responded to P-I requests for comment on this story, she answered some questions about the videotaping incident a few weeks ago.

"They should have stopped it rather than videotaping it," Rahr said. Asked if she had failed to adequately supervise the detectives, she said: "No. It was a judgment issue on the part of Detective Gulla. When I attempted to discipline Denny Gulla and transfer him out of the unit ... the transfer was overturned by an arbitrator. And I was forced to take him back in the unit even though I knew he did not possess the necessary judgment to do the job."

Asked if she still believes Gulla lacks the judgment to do the job she said: "Yes."

When asked why he has not been fired she said: "I've done everything I could do within the confines of the labor contract. I disciplined him, and the discipline was overturned."

"You probably see that pattern a lot, in the King County Sheriff's Office," Rahr said. "We have a Guild that is very, very, very successful in overturning discipline cases."

Conduct unbecoming

Gulla was angry when he pulled open the back door of a patrol car, grabbed a hit-and-run suspect by the shirt and starting shaking. As Gulla screamed profanities at the suspect, he struck the man in the chest with a partially open hand.

The Sheriff's Office found that Gulla had committed conduct unbecoming an officer in the October 1988 incident at Skopabsh Village. And in discussions about the appropriate punishment for his misconduct, some high officers in the department sounded warnings about Gulla's lack of good judgment.

"It is my firm belief, based upon past performance, that if Officer Gulla continues to work off duty at Skopabsh village, additional complaints and performance problems will be generated," said a letter from sheriff's Chief Greg Boyle to a police union legal adviser representing Gulla in disciplinary proceedings.

Boyle said Gulla's performance "deteriorates" without close supervision. And "Skopabsh Village, by Officer Gulla's own description, is certainly an unstructured microcosm of society. It is a frequently hostile, confrontational, and confusing environment which calls for excellent judgment and a solid decision-making process. Officer Gulla has demonstrated by the recent incident at Skopabsh Village and by past errors that good judgment is lacking in these situations."

That letter came seven years before Gulla is alleged to have molested two 14-year-old girls at the Skopabsh Village tribal housing project.

The 1988 incident at Skopabsh village began as a drunken argument among a small group of people. Then the driver of a car involved in the argument lurched forward a few feet -- forcing a man onto the hood -- then stopped. As a friend helped the man off the hood, the car moved forward again and the friend was bumped. The car then accelerated away from the scene.

Gulla, who was patrolling the village as an off-duty job, spotted the altercation and sought to stop the car by standing in the dark road and shining a light on himself and the oncoming vehicle. But he was forced to quickly move out of the way to keep from being hit, according to his police report.

Two on-duty sheriff's officers, Corey Darlington and Alan Garrison, quickly took the man into custody and put him in the back of their patrol car. Then Gulla pulled up to the scene in his personal car, walked up to the back door of the patrol car and opened it.

"He reached in with both hands, grabbed him by the shirt collar and started shaking him, not violently, just shaking him," Darlington, a recruit officer, told to an internal affairs investigator. He said 'Don't you recognize me, you almost ran me over.' He was definitely angry, and he said it in a ... yelling tone of voice."

"I could tell he was angry because as soon as he opened the door, he immediately grabbed (the suspect)

by the shirt collar. He didn't hesitate, he just reached in there and started shaking him immediately."

The rookie cop was worried that the situation could escalate. "I wanted to watch to make sure that it didn't get completely out of hand," as Gulla screamed at the prisoner, calling him an "asshole" and "a little s--t," Darlington said. Gulla, who was not in uniform, asked the prisoner why he hadn't stopped when Gulla tried to flag him down. When Gulla didn't get the answers he wanted, he got "a little more angry" and gave the prisoner "a short, quick rap on the chest with his left hand," Darlington said.

Gulla told a different story to King County investigators. He said he opened the patrol car door to identify the prisoner as the driver involved in the incident and discovered he was not handcuffed. He said he took hold of the prisoner as an "officer safety measure." In the course of questioning him, "he made a quick movement -- I didn't and still don't know what his intentions was/were -- I reached out with my open right hand" and "pushed him back."

The King County Prosecutor's Office, in deciding there was insufficient evidence to charge Gulla criminally, called Darlington's version of the incident "most plausible, given the fact that he candidly says that Officer Gulla was verbally abusing" the prisoner. The prisoner later brought a civil suit against Gulla, but Gulla prevailed.

King County Sheriff's Lt. Larry Mayes thought Gulla lied about the level of violence perpetrated against the suspect, according to investigation files. He also opined that "Gulla does not fully understand the inappropriateness of his actions, and the unprofessionalism displayed in this incident."

Mayes recommended a 30-day suspension without pay, 20 days of which would be held in abeyance unless Gulla was further disciplined within the next year. In a memo to Sheriff James Montgomery, he wrote that while the punishment "may seem rather severe, this officer has accumulated 3 written reprimands and 5 suspensions. That is a total of 8 separate sustained complaints and 11 manual violations in the past 4 years."

Montgomery reduced the suspension to five days without pay.

But the union, a predecessor union to the Guild, stood firmly behind Gulla. Months of disciplinary hearings and appeals took place. And Gulla got support from the executive director of the Muckleshoot Housing Authority, Connie Moreno, who wrote in a letter that Skopabsh Village was "comprised of a group of extremely low-income people with severe alcohol and drug abuse problems. I spoke to various King County officers who informed me that there was only one person on the entire force that would even attempt to get this housing project under control. That person was Denny Gulla."

The letter goes on to say that the prisoner Gulla struck "has terrorized this community. Perhaps Officer Gulla could have been a bit more polite, but under the circumstances his behavior if not totally commendable was certainly understandable."

More than a year elapsed before Gulla was finally suspended for one day without pay.

Darlington paid a dear price for his candor. The Gulla incident directly resulted in his departure from the department, according to Darlington. A note in internal-affairs unit files talking about his reluctance to testify against Gulla in disciplinary hearings quotes Darlington as saying: "Gulla's friends wrote ... saying I was a poor officer. I'm hesitant to assist in reopening this can of worms. I'm real hesitant to help. I wasn't treated very well by the department."

Now a lieutenant for the Tacoma Police Department, Darlington was reached recently at the FBI Academy at Quantico, Va., where he is taking training.

"Some of the senior officers did not like a less senior officer telling the truth," Darlington said. "I wasn't about to lie to the investigators."

As a rookie, he said, "I was on probation at the time. I was a model officer all through the training. I received a very good probation report and work performance reviews. And then all of a sudden, magically, my probation reports became unfavorable" after the Gulla incident.

"It was peer pressure, and I received unfavorable reports" as a result of truthfully testifying against Gulla, Darlington said, adding that he was ultimately forced to leave after suddenly getting poor evaluations from his field-training officer.

"I don't have anything personal against the guy," Darlington said of Gulla. "It just didn't seem right to me at the time, even as a new officer. It didn't look right to me."

'Too scared to say no'

It's been 21 years since Kay Quall ran into Denny Gulla.

Quall was out on a double date with her friend Jeremy and another couple when the car stalled and rolled to a stop. The other couple went for gas while Jeremy and Quall stayed with the car and waited.

"We both fell asleep. We woke up to a police guy banging on our window."

It was Gulla, who offered to give Quall and her boyfriend a ride home.

They got into the patrol car with Gulla and a civilian intern who had been accompanying Gulla on patrol named Greg Haglund.

He dropped Jeremy home first.

It was getting late, about 1:30 a.m., but Gulla offered to take Quall to Bob's Big Boy restaurant in Issaquah before bringing her home to her affluent Tiger Mountain neighborhood, according to Quall and police records.

"I think I said something like my mom's going to worry," Quall said recently. "And they reassured me that it's OK -- they are the police."

Gulla called Quall's mother, Jo Bellows, to say "Not to worry. My daughter had run out of gas and was with a friend," according to a recent interview with Bellows and police records. "The gist of it was that they would go back and check on them and give them a ride home" if the other couple had not returned with gas.

Gulla didn't reveal in that call that the girl was actually at the restaurant with him.

"They got me a burger and fries and we sat there and ate it," Quall said.

When they left the restaurant, "Gulla's partner was driving and Gulla got in the back with me. From

downtown Issaquah, it's probably a 20-minute ride home. That's when he started making moves on me. He started kissing me and going under my shirt."

Asked to specify, Quall said Gulla put his tongue in her mouth and felt her breasts. "I just went along with it," Quall said. "He was a big, older man. He was the police. He had a gun on him. I was too scared to say no. And he also had the partner."

Haglund, now a Des Moines police officer, said Monday that he does not remember the incident.

When they got to her neighborhood, Quall recalled, they "pulled over so he could have a little bit more time with me. When I got home, I didn't tell my mom because I felt I had done something wrong."

Quall said Gulla called a couple of times shortly after the incident. "He wanted to take me out. He wanted to see me."

That might have been the end of the story if Bellows hadn't had lunch with a friend several weeks later.

"I never knew anything about it until I had lunch with my daughter Holly and my friend Jeanette (Depriest). And Jeanette started telling me this story about what happened to her daughter" who was picked up for suspected DUI. "When (the officer) started something with her, she jumped out of the car."

Holly, in whom her little sister had confided, chimed in saying that it was the same officer, Denny Gulla, in both cases. Both mothers quickly filed complaints about Gulla.

Depriest's daughter, Jennifer, was 18 when her path crossed Gulla's within weeks of the incident with Kay Quall.

Jennifer Depriest Berens recalled recently that she was out driving with a friend when Gulla pulled her over on suspicion of driving under the influence of alcohol.

She remembers being frightened when Gulla said something like: "If I can see you again, I can make the Breathalyzer go away."

Records reflect that Gulla made an unusual error in conducting the breath test and pointed out his own error in officer's notes, with the result that its use as evidence was invalidated.

Berens said she agreed to do a "ride-along" in Gulla's patrol car because she was scared and because she had to do a ride-along anyway for an advanced placement class at Issaquah High School. The next evening, Berens met Gulla at Bob's Big Boy and joined him in his patrol car, according to internal-affairs records.

"I rode along with him for the evening and then he went to drop me off at my car and he said: 'I guess this is where I make my move on you.' And I said 'I don't think so' and I just got out of the car and skedaddled."

"I was really scared," she said. "It was very intimidating."

Internal-affairs records about the incidents given to the P-I by the Sheriff's Office are heavily redacted and do not reflect Quall's allegations that Gulla molested her or Berens' allegation that she fled from

Gulla's advances.

Quall said in a recent interview that she never told investigators about Gulla molesting her. "I didn't tell. I was too frightened he would come after me."

Quall's mother, who did not know of the alleged molestation, said she raised the possibility with an investigator. "I just knew -- and I told this to the detective -- that there was more to it," Bellows said. "I really thought he might have raped her and she didn't tell me. That scared me, to know he was running around the neighborhood."

"I remember that detective telling me how girls that age, they make up stories."

Gulla was found to have lied twice to investigators (as well as to Quall's mother) and to have committed conduct unbecoming an officer by having "an unauthorized rider with him on duty and he conducted himself improperly. ..." The end of the sentence was blacked out by the Sheriff's Office.

Even Guild attorney Christopher Vick calls lying a firing offense. "There are certain things you can do that means you just can't be a police officer anymore," Vick said. "And lying is one of them."

But Gulla was not fired. And it is unclear the extent to which the internal-affairs investigators explored the possibility of sexual misconduct, if at all, because of the redactions.

A memo from then-Capt. Greg Boyle to Sheriff Vern Thomas makes it clear the civilian rider, Haglund, was of little help to investigators. "Mr. Haglund's recollection is very poor," Boyle wrote.

In an interview with investigators, Gulla said he was simply trying to help Quall become more presentable to her mother before taking her home. "She didn't look real good because she'd been laying around ... with this guy ... and her hair was all messed up and her clothes and everything. We'll just go to Bob's Big Boy and straighten yourself up, maybe get a cup of coffee, and I'll call your mom and ... just kind of explain to her what's going on ... break the ice for you before you get home. Just ... trying to give her a little break."

Boyle wrote that "it is clear that (Quall) was taken to the restaurant by Officer Gulla. The fact pattern of the totality of the incident certainly casts doubt on Officer Gulla's credibility concerning this matter."

In the case of Berens, "Officer Gulla intentionally failed to follow proper DWI processing procedures in order to create an issue on which the charges could later be reduced," Boyle wrote.

In recommending punishment for Gulla, Chief Jerry Burk wrote the sheriff saying Gulla should be transferred from the Special Operations unit because "those officers must be trustworthy while working rather independently. That is not true of Officer Gulla."

Gulla was suspended without pay for two days.

Said Berens: "Looking back, you would think the guy would have been fired. The guy used his authority inappropriately."

Said Quall: "I think the whole department is involved. They knew what he's been doing, and they haven't stopped him."

FOLLOW-UP

FBI starts inquiry in deputy's case

P-I reporters Lewis Kamb and Eric Nalder contributed to this report. P-I reporter Paul Shukovsky can be reached at 206-448-8072 or paulshukovsky@seattlepi.com.

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EXHIBIT B

PHOTOCOPY

FILED

09 APR -3 AM 9:53

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. SIONE P. LUI, Defendant.	No. 07-1-04039-7SEA AGREED MOTION AND ORDER FOR ACCESS TO JUROR INFORMATION

MOTION

Defendant Sione P. Lui, through his attorney, David B. Zuckerman, moves for disclosure of the sealed juror questionnaires under the terms of the protective order set out below. See GR 31(j). The King County Prosecutor does not oppose this motion.

ORDER

The Court Clerk shall permit attorney David Zuckerman, or any member of his staff, to review and copy the juror questionnaire forms attached to this Court's order of April 7, 2008. No identifying information regarding the jurors, including their addresses and full names, shall be revealed, published or disseminated to anyone other than David Zuckerman, his staff, and investigator Denise Scaffidi for use as is reasonably necessary to investigate and prepare a personal restraint petition. The defendant shall not receive the information.

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

The defense shall ensure that the terms of this order are communicated to all individuals working on the defense team. If the defense determines the publication of information is necessary in order to prepare and litigate a petition, it shall first seek an order from this Court or an appellate court permitting such disclosure.

DONE IN OPEN COURT this 15th day of ~~March~~ April, 2009.

HONORABLE MICHAEL J. TRICKEY

Presented by:

David B. Zuckerman, WSBA 18221
Attorney for Sione Lui

Approved for entry/copy received:

for
Kristin V. Richardson, WSBA 19042
Senior Deputy Prosecuting Attorney
(per telephonic authorization)

LAW OFFICE OF
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Seattle, Washington 98104
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EXHIBIT C

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee,	)	KING COUNTY CO. 07-1-04039-7SEA
vs.	)	COURT OF APPEALS NO. 61804-1-1
SIONE P. LUI, Defendant/Appellant	)	DECLARATION OF DENISE SCAFFIDI

Denise Scaffidi declares as follows:

1. I am a private investigator and was retained by the family of Sione Lui to contact jurors from his criminal trial for the purpose of questioning them regarding certain issues that may have arisen during deliberations.
2. On or about June 16, 2008 I was contacted by one of the jurors, Clare Comins. He contacted me by telephone in response to a message that I had left on his phone.
3. The juror informed me that he was one of the jurors for the trial and that during deliberations in the above captioned matter there was discussion concerning the credibility of one of Mr. Lui's defense witnesses, a man named Sam.
4. I took this to be Sam Taumoefolau as this is the only witness with the first name of Sam who testified for Mr. Lui and I am aware that his testimony concerned the issue below.
5. When asked what the concerns were with Mr. Taumoefolau's credibility, Mr. Comins stated that there were a few issues raised. He stated that one issue concerned Mr. Taumoefolau's testimony that both he and Mr. Lui had distributed missing person's leaflets at a particular mall that was described on the witness stand. The location of this mall was outside the area of the aerial photographs that had been introduced as exhibits in the case, however, Mr. Taumoefolau was able to describe where this mall was that he and Mr. Lui went to while distributing the leaflets.
6. Mr. Comins stated that during the deliberations by the jury, one of the female jurors explained she had lived in Woodinville at the time of the murder and she knew that the mall described by Mr. Taumoefolau could not possibly have been leafletted in the days following Ms. Boussiqcos disappearance because the mall had not yet been built. Mr. Comins stated further that he believed that the jurors discussed this information during deliberations and that it reflected poorly on Mr. Taumoefolau's overall testimony.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

5/15/2009 Vashon, WA.

Date and Place

Denise Scaffidi
PO Box 1039
Vashon, WA 98070
(206) 222-9205

FILED
KING COUNTY, WASHINGTON

JUN 0 5 2009

SUPERIOR COURT CLERK
BRANDI SYME
DEPUTY

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

State of Washington vs. Sione hui Defendant	No. 07-1-04039-7 SEA ORDER ON CRIMINAL MOTION (ORCM)

This Court, having heard a motion by the defense for discovery and release of evidence for DNA testing

IT IS HEREBY ORDERED that 1.) The defense motion for the State to obtain further information from the Sheriff's office concerning Det. Gulla is denied; 2) the prosecutors must inquire whether KCSO possesses any tape or notes concerning a 2/9/01 interview of the defendant and if so, turn it over to the defense; 3) the request for juror contact info is denied; 4) The request for DNA testing is denied in view of State v. Hoffa.

Dated: 6/5/09

JUDGE MICHAEL J. TRICKEY

K Richardson
Deputy Prosecuting Attorney, WSBA No. 19042

Dan Weber
Attorney for the Defendant, WSBA No. 18221

Order on Criminal Motion (ORCM)

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Page 2

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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE
DEPUTY

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District Western District of Washington
Name (under which you were convicted): STEVEN PAUL KOZOL	Docket or Case No.:
Place of Confinement: McNeil Island Corrections Center	Prisoner No.: 974691
Petitioner (include the name under which you were convicted) STEVEN PAUL KOZOL	Respondent (authorized person having custody of petitioner) v. ALICE PAYNE
The Attorney General of the State of Washington	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: King County Superior Court - The Honorable Ronald Kessler, Regional Justice Center, 401 - 4th Ave. N., Room 2D, Kent, WA. 98032

   (b) Criminal docket or case number (if you know): 00-1-09050-8 KNT

2. (a) Date of the judgment of conviction (if you know): April 19, 2001

   (b) Date of sentencing: August 3, 2001

3. Length of sentence: Concurrent: 479 months, 221 months, 120 months

4. In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐

5. Identify all crimes of which you were convicted and sentenced in this case:
   one count - 1st degree attempted murder
   one count - 1st degree burglary
   two counts - deadly weapon enhancement

6. (a) What was your plea? (Check one)

   (1) Not guilty ☒ (3) Nolo contendere (no contest) ☐

   (2) Guilty ☐ (4) Insanity plea ☐

   (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

SEP 29 27

06-CV-01074-PET

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☒ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: Washington State Court of Appeals, Division One

(b) Docket or case number (if you know): 49154-7-1

(c) Result: conviction affirmed

(d) Date of result (if you know): June 30, 2003

(e) Citation to the case (if you know): State v. Kozol, unp. decision noted at 117 Wn. App 1037 (2003)

(f) Grounds raised: lack of particularity in warrant; police turned search into a general search; ineffective assistance for failure to present suppression motion, failure to object to evidence; faulty jury instructions; police fabrication of evidence; defense counsel was ineffective in failing to investigate case.

(g) Did you seek further review by a higher state court? Yes ☒ No ☐

If yes, answer the following:

(1) Name of court: Washington State Supreme Court

(2) Docket or case number (if you know): 74329-1

(3) Result: review denied

(4) Date of result (if you know): February 4, 2004

(5) Citation to the case (if you know): State v. Kozol, unp. decision 150 Wn. 2d 1037 (2004)

(6) Grounds raised: same as in 9(f), above.

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Washington State Court of Appeals, Division One

(2) Docket or case number (if you know): 55747-5-1

(3) Date of filing (if you know): February 16, 2005

(4) Nature of the proceeding: Personal Restraint Petition

(5) Grounds raised: Police falsified evidence; State used false testimony and evidence; biased jurors on jury; prosecutorial misconduct for calling defense witness "a liar"; counsel ineffective for failing to identify or challenge false evidence; failing to seek to excuse biased jurors; sentence improperly calculated.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: petition dismissed

(8) Date of result (if you know): December 30, 2005

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: Washington State Supreme Court

(2) Docket or case number (if you know): 78226-1

(3) Date of filing (if you know): January 24, 2006

(4) Nature of the proceeding: Motion for Discretionary Review

(5) Grounds raised: Police falsified evidence; State used false evidence and testimony; biased jurors on the jury; counsel ineffective for failing to identify or challenge false evidence, failing to seek to excuse biased jurors; cumulative error.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: Motion for review denied

(8) Date of result (if you know): April 5, 2006

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: Washington State Supreme Court

(2) Docket or case number (if you know): 78226-1

(3) Date of filing (if you know): April 25, 2006

(4) Nature of the proceeding: Motion to Modify Commissioner's Ruling

(5) Grounds raised: State used false testimony and evidence; biased jurors on the jury; counsel ineffective for failing to identify or challenge false testimony and evidence; ineffective for failing to seek to excuse biased jurors; cumulative error.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: Motion for review denied

(8) Date of result (if you know): June 2, 2006

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☒ No ☐

(3) Third petition: Yes ☒ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Fabrication of physical evidence by police violated Kozol's right to a fair trial and due process.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): During the execution of a search warrant at Kozol's residence, the police gathered numerous items from all throughout Kozol's garage, assembled them into a collection of items in the middle of the garage, then reconfigured them further into evidence that they said was used to make a silencer for a gun; the police then seized the items under the plain-view doctrine.

(b) If you did not exhaust your state remedies on Ground One, explain why: _____

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Personal Restraint Petition

Name and location of the court where the motion or petition was filed: Washington State Court of Appeals, Division One, 600 University St., Seattle, WA. 98101-4170.

Docket or case number (if you know): 55747-5-I

Date of the court's decision: December 30, 2005

Result (attach a copy of the court's opinion or order, if available): Petition dismissed as frivolous under RAP 16.11 (b).

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Washington State Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA. 98504-0929

Docket or case number (if you know): 78226-1

Date of the court's decision: April 5, 2006

Result (attach a copy of the court's opinion or order, if available): Motion for review denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies**: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: Filed a Motion to Modify Commissioner's Ruling in the Wash. St. Supreme Court, no. 78226-1, filed April 25, 2006, motion denied on June 2, 2006

GROUND TWO: Kozol was denied his right to due process when the State knowingly used false testimony and evidence against him.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The police gave false pretrial testimony to get otherwise inadmissible evidence admitted. The State knowingly used the false testimony to get the plain-view "silencer" evidence admitted, and proceeded to use false evidence all throughout the trial. The police's testimony was false because police records show items were not where police claimed, and further police testimony and statements from

prosecutors impeached pretrial police testimony.

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Personal Restraint Petition

Name and location of the court where the motion or petition was filed: Washington State Court of Appeals, Division One, 600 University St., Seattle, WA. 98101-4170

Docket or case number (if you know): 55747-5-1

Date of the court's decision: December 30, 2005

Result (attach a copy of the court's opinion or order, if available): Petition dismissed as frivolous under RAP 16.11(b).

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Washington State Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA. 98504-0929

Docket or case number (if you know): 78226-1

Date of the court's decision: April 5, 2006

Result (attach a copy of the court's opinion or order, if available): Motion for review denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: Filed a Motion to Modify Commissioner's Ruling in the Wash. St. Supreme Court, no. 78226-1, filed on April 25, 2006, motion denied on June 2, 2006.

GROUND THREE: Kazol was denied effective assistance of counsel when counsel failed to identify or challenge the State's false testimony and evidence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Despite multiple police records showing the plain-view "silencer" evidence was not where the police testified it was when they seized it, and despite the prosecutions own admission at trial and further police testimony that evidence was somewhere other than where police testified it was when they seized it, defense counsel made no attempt to identify or challenge the false testimony or evidence.

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Personal Restraint Petition

Name and location of the court where the motion or petition was filed: Washington State Court of Appeals, Division One, 600 University St., Seattle WA. 98101-4170

Docket or case number (if you know): 55747-5-1

Date of the court's decision: December 30, 2005

Result (attach a copy of the court's opinion or order, if available): Petition dismissed as frivolous under RAP 16.11(b).

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Washington State Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA. 98504-0929

Docket or case number (if you know): 78226-1

Date of the court's decision: April 5, 2006

Result (attach a copy of the court's opinion or order, if available): Motion for review denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: Filed a Motion to Modify Commissioner's Ruling in the Wash. Supreme Court, no. 78226-1, filed on April 25, 2006, motion denied on June 2, 2006.

GROUND FOUR: Kozol's rights to due process were violated by the State's failure to disclose exculpatory information.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The State withheld numerous documents, including police reports, from the trial discovery that were exculpatory and impeaching in nature, and illustrated police misconduct.

(b) If you did not exhaust your state remedies on Ground Four, explain why: These documents were withheld from trial discovery. When appellate counsel requested them, over four years later, they were not identified by the prosecutor's office nor delivered to petitioner in time for him to identify and raise the issue in his available state remedy. No other state remedy remains, so no state court has jurisdiction.

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did <u>not</u> raise this issue in your direct appeal, explain why: Did not know documents were suppressed by the State until direct appeal proceedings were finalized

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☒

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: Ground Four. Due to good cause, petitioner was unable to identify and present this ground to any state court. The State suppressed the evidence for over four years, and petitioner did not receive it in time to be included in the state remedy.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:
(a) At preliminary hearing: court-appointed daily stand-in lawyer
(b) At arraignment and plea: court-appointed daily stand-in lawyer
(c) At trial: Anthony Savage 615 - 2nd Ave., Suite 340 Seattle, WA. 98104
(d) At sentencing: Michael Danko 600 - 1st Ave., Suite 205, Seattle, WA. 98104
(e) On appeal: Michael Danko 600 - 1st Ave, Suite 205, Seattle, WA. 98104
David B. Koch 1908 - E. Madison St. Seattle, WA. 98122
(f) In any post-conviction proceeding: petitioner, pro se
(g) On appeal from any ruling against you in a post-conviction proceeding: petitioner pro se

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.* _____

_____

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(continued...)

Therefore, petitioner asks that the Court grant the following relief: Overturn his convictions for the reasons listed in this petition and supporting brief that was filed.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 7/25/06 (month, date, year).

Executed (signed) on 7/25/06 (date).

Signature of Petitioner

*(...continued)

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

_____

_____

GROUND FIVE : Kozol argues that even if any one of the above violations of his rights don't warrant relief, the cumulative effect of them all is so prejudicial as to require reversal.

(a) Supporting Facts : The police physically fabricated material evidence, the police gave false testimony to get the evidence admitted against Kozol, the State knowingly used the false testimony and evidence, defense counsel failed to identify or challenge the false testimony or evidence, and the State suppressed exculpatory and impeachment evidence.

(b)

(c)

(1) No.

(2) Evidence was outside of the trial record

(D)

(1) No.

GROUND SIX: Kozol was denied his right to a fair trial by an impartial jury.

(a) Supporting Facts: Three jurors on Kozol's jury, Juror Gramm, Juror Dimico, and Juror Anderson, were all either victims of, or had close family members who had committed, crimes similar to those Kozol was on trial for; creating implied bias.

(b)

(c)

(1) No.

(2) Evidence outside of trial record; attorneys did not raise issue.

(D)

(1) Yes.

(2) Personal Restraint Petition

court: Wash. St. Court of Appeals, Div. One, 600 University St., Seattle, WA. 98101.

case# 55747-5-1

decision date: December 30, 2005.

result: Petition dismissed as frivolous under RAP 16.11 (b).

(3) No.

(4) Yes.

(5) Yes.

(6) Wash. St. Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA. 98504

case#: 78226-1

decision date: April 5, 2006.

result: Motion for review denied.

(E) Filed a Motion to Modify Commissioner's Ruling in the Wash. St. Supreme Court, no. 78226-1, filed April 25, 2006, motion denied on June 2, 2006.

GROUND SEVEN: Defense counsel was ineffective in failing to seek to excuse biased jurors for cause.

(a) Supporting Facts: Defense counsel Anthony Savage failed to seek to excuse impliedly-biased jurors Gramm, Dimico, and Anderson for cause, constituting ineffective assistance.

(b)

(c)

(1) No.

(2) Evidence outside of trial record; attorneys did not raise issues.

(d)

(1) Yes.

(2) Personal Restraint Petition

court: Wash St. Court of Appeals, Div. One, 600 University St., Seattle, WA. 98101.

case#: 55747-5-1

decision date: December 30, 2005

result: Petition dismissed as frivolous under RAP 16.11 (b).

(3) No.

(4) Yes.

(5) Yes.

(6) Wash. St. Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA. 98504-0929.

case# 78226-1

decision date: April 5, 2006.

result: Motion for review denied.

(e) Filed a Motion To Modify Commissioner's Ruling in the Wash. Supreme Court, no. 78226-1, filed on April 25, 2006, motion denied on June 2, 2006.

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

In re the Personal Restraint Petition of STEVEN KOZOL, Petitioner.	NO. 55747-5-I SUPPLEMENTAL DECLARATION OF DAVID ZUCKERMAN RE: EXHIBITS

David Zuckerman declares as follows:

1) I am an attorney licensed to practice law in the state of Washington. My practice focuses on postconviction claims, including personal restraint petitions and federal habeas petitions.

2) Mr. Kozol filed a motion under CrR 7.8 for a new trial, based in part on his allegations that Detective Gulla presented false testimony at a pretrial suppression hearing. The motion was forwarded to this Court for treatment as a personal restraint petition. The State has responded. I have reviewed the Rule 7.8 motion and the State's Response to the extent that they discuss the issue concerning the pretrial suppression hearing.

3) In its Response, the State maintains that Mr. Kozol has not proved that Det. Gulla's pretrial testimony was false. I have first-hand knowledge that Det. Gulla's testimony was erroneous concerning the place where pretrial exhibits 3 and 8 were found.

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
206.623.1595

4) Mr. Kozol's family hired me to assist him in exploring claims for a potential collateral attack on his conviction. I reviewed the trial transcript and various other materials, including certain evidence logs and police reports.

5) On November 16, 2004, I viewed some of the exhibits in this case at the Regional Justice Center in Kent and dictated extensive notes on them. I took color photographs of several trial exhibits.

6) I also made photocopies of some pretrial exhibits. These exhibits are themselves photographs of various items taken into evidence. The photocopies I made do not capture the color and detail in the photographs, but do indicate the basic nature of the items photographed.

7) After reviewing these materials, I determined that Detective Gulla's testimony at the pretrial suppression hearing was inaccurate. He testified he observed the items shown in pretrial exhibits 2, 3,4, 5, 6, and 8 in plain view and in close proximity to each other when he searched the garage. In fact, according to the police reports and evidence logs, the items shown in pretrial exhibits 3 and 8 were found during a later search of an Audi automobile. I advised Mr. Kozol of this erroneous testimony. Due to lack of funds, Mr. Kozol prepared his Rule 7.8 motion on his own.

8) I will discuss below in detail why it is clear that the items contained in pretrial exhibits 3 and 8 were found in the Audi.

9) PRETRIAL EXHIBIT 3

a) At the pretrial hearing, Det. Gulla described exhibit 3 as containing washers or "wipes" that could be used to make a silencer. RP (4/5/01) at 86.

b) In the evidence room, I observed that pretrial exhibit 3 is a photograph of an evidence item labeled "SAT-31." Mr. Kozol has included an accurate photocopy of exhibit 3 in appendix B of his Rule 7.8 motion.

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104

c) When I examined trial exhibit 29 in the evidence room, I saw that it was a box with "SAT-31" written on it. It also has the following writing, "Box w/ tools & documents from trunk of Audi" and "Tompkins 11/22/00." The contents are consistent with the photo admitted as pretrial exhibit 3. The box contains many washers, along with other items such as documents and tools. I took a color photograph of trial exhibit 29, which Mr. Kozol has included in Appendix B.

d) According to the evidence log, SAT-31 is a box with documents and tools that was found in the trunk of the Audi. See App. B. to Rule 7.8 motion and Ex. F to State's Response. A police report also indicates that SAT-31 was taken from the trunk of the Audi on November 22, 2000, by detective Scott A. Tompkins. See App. B. to Rule 7.8 motion. (The letters "SAT" in the evidence logs are Det. Tompkins' initials.)

10) PRETRIAL EXHIBIT 8

a) At the pretrial hearing, Det. Gulla described exhibit 8 as a metal tap for threading a cylinder. He said it could be used in making a screw-on silencer. RP (4/5/01) at 88.

b) In the evidence room, I observed that pretrial exhibit 8 is a photograph of several tools lying next to an evidence label that says "SAT-30." Mr. Kozol has included an accurate photocopy of exhibit 8 in appendix C of his Rule 7.8 motion.

c) When I examined trial exhibit 31, I saw that it was a bag containing documents and tools. It included the label "SAT-30." Ex. 31(d) – contained within this exhibit – was one of the tools shown in pretrial ex. 8. It appears to be the tool that Det. Gulla referred to as a tap. I took a color photograph of ex. 31(d), which Mr. Kozol has included in App. C.

d) According to the evidence logs, SAT-30 is a bag with documents and tools found in the trunk of the Audi. See App. C. to Rule 7.8 motion and App. F. to State's Response. A police report also indicates that SAT-30 was taken from the trunk of the Audi on November 22, 2000, by Detective Scott A. Tompkins. See App. C. to Rule 7.8 motion.

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DAVID B. ZUCKERMAN
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705 Second Avenue
Seattle, Washington 98104

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

6/16/05 SEATTLE, WA
Date and Place

David B. Zuckerman,
Attorney at Law

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104

ANTHONY SAVAGE, P. S.
LAWYER
615 SECOND AVENUE, SUITE 340
SEATTLE, WASHINGTON 98104-2200
(206) 682-1882
FAX (206) 683-1885

October 13, 2004

David B. Zuckerman, Attorney at Law
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104

Re: Steven Kozol

Dear David:

This will very belatedly acknowledge receipt of your letter of September 15th regarding Steven Kozol. I was not deliberately delaying answering you. Your letter got buried under another pile and has just come to my attention. Please accept my apologizes.

I don't have much for you because, to the best of my memory, my files in almost there entirety went over to Mike Danko at the time he substituted for me. You might check with him on this.

I do enclose the following:

1. Notes sent to me by Mr. Kozol during the course of my representation;

2. Mr. Kozol's trial notes;

3. A copy of a search warrant involved in his matter;

4. An article on brain fingerprinting; and

5. Copies of correspondence sent and received up until the time of Mr. Danko's substitution.

If I can be of any other further assistance, please advise.

Very truly yours,

Anthony Savage

ANTHONY SAVAGE

AS: kc
Encl.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,)
Plaintiff,) No. 00-1-09050-8 KNT
vs.) Court of Appeals No.
STEVEN KOZOL,) JURY VOIR DIRE
Defendant.)

VERBATIM REPORT OF PROCEEDINGS

Heard Before: The Honorable Ronald Kessler
April 9th, 2001
9:00 a.m.

KING COUNTY REGIONAL JUSTICE CENTER
KENT, WASHINGTON

APPEARANCES:
Rod Scarr and Del Kolde, on behalf of the Plaintiff;
Anthony Savage, on behalf of the Defendant.

Whereupon,
the following proceedings were had and done, to wit:

P R O C E E D I N G S

(The following occurred in the presence of the jury:)

THE COURT: Please be seated. Good morning. Welcome to Department 44 of King County Superior Court, I'm Judge Kessler. An important part of a trial is the selection of the jury for which the law requires that all prospective jurors be sworn before questions are asked, so at this time, and for the last time, I will ask you all to rise and raise your right hand to be sworn.

(Jury sworn.)

THE COURT: Thank you. Please be seated. In order that the case be tried before an impartial jury, the lawyers and I will ask you questions, not to embarrass you or to pry into your personal lives, but to determine if you are unbiased and without any preconceived ideas with respect to this case or with respect to this type of case. You should not withhold any information in order to be seated on this particular jury, or more likely in order to avoid being sent back to the purgatory room on the second floor, which we recognize that there is nothing for you to do. Please turn off any

cellular phones that you have, please turn off the sound of any pagers or beepers that you have. While you may use a phone during court recesses, if you are selected to serve, you may not use cell phones during deliberations while you are in the jury room. The lawyers have the right and the duty to challenge any number of jurors for cause. They may also challenge up to seven jurors each without giving a reason. These are called peremptory challenges. You should not take offense if you are challenged. It is not intended as a personal reflection on you, nor should you spend a lot of time trying to figure out why you were challenged, since these reasons are rather elusive.

This is a criminal action instituted by the State of Washington as plaintiff. At this time, I would ask the deputy prosecuting attorneys to please rise and introduce yourselves.

MR. SCARR: Good morning, my name Rod Scarr.

MR. KOLDE: My name is Del Kolde.

THE COURT: Thank you. Defense counsel, please rise and introduce yourself and your client..

MR. SAVAGE: Good morning, my name Tony is

Savage, good morning. This is Steven Kozol.

THE COURT: Thank you. Mr. Kozol is charged by information with the crimes of attempted murder in the first degree; as an alternative count, attempted murder in the second degree, and burglary in the first degree. To those charges, Mr. Kozol has entered pleas of not guilty. Those pleas put in issue every element of the crimes charged. The information is an accusation. It is a document that the prosecutor prepared and served upon Mr. Kozol that informed him of the charge so that he could prepare a defense, and the prosecutor filed with the Court, that got the judicial and beurocratic processes rolling. You are not to consider the filing of the information or its contents as proof of the matters charged. It is your duty to determine the facts in the case from the evidence produced in court. It is also your duty to accept the law from the Court regardless of what you personally believe the law is or ought to be.

Mr. Kozol is presumed innocent. This presumption continues throughout the entire trial unless and until, in your deliberations,

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN PAUL KOZOL,	)	
	)	
Petitioner,	)	CASE NO. C06-1074-MJP-MJB
	)	
v.	)	
	)	
ALICE PAYNE,	)	REPORT & RECOMMENDATION
	)	
Respondent	)	
	)	

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Steven Kozol is a state prisoner who is currently incarcerated at the McNeil Island Corrections Center in Steilacoom, Washington. He seeks relief under 28 U.S.C. § 2254 from his King County Superior Court convictions on charges of attempted murder in the first degree and burglary in the first degree. Respondent has filed an answer to the petition together with relevant portions of the state court record. Petitioner has filed a reply to respondent's answer. The briefing is now complete and this matter is ripe for review.[1] Following careful consideration of the record,

[1] Petitioner's briefing in this matter, when judged by any standard, must be deemed excessive. Petitioner's memorandum in support of his petition is 95 pages in length. Petitioner's response to

this Court concludes that petitioner's § 2254 petition should be denied and that petitioner's petition, and this action, should be dismissed with prejudice.

FACTUAL AND PROCEDURAL HISTORY

The Washington Court of Appeals, on direct appeal of petitioner's conviction, summarized the facts of petitioner's crime as follows:

> Steven Kozol and Thomas Wolter were housemates in Wolter's home from November 1999 to May 2000. Wolter was financially stable, whereas Kozol seldom worked. Kozol owed three months' rent when he moved out of Wolter's home.
>
> Six months later, on November 15, 2000, Wolter was violently attacked in his home by a man wearing a black ski mask over his head and face, leather gloves, and a thick gray sweat suit. Wolter fought his assailant in the upstairs office of his home where the initial attack occurred, then in the stairwell and at the bottom of the stairs, then back upstairs at the doorway to Wolter's bedroom after Wolter ran upstairs and tried to barricade himself in the bedroom and the assailant returned up the stairs and attempted to kick in the door, then back down the stairwell and into the lower part of the house where Wolter was finally able to break away and run to a neighbor's home. In the course of the attack and the ensuing struggle, Wolter was shot with a taser gun, shot three times with a handgun, and threatened with a knife.
>
> Wolter's neighbor called 911. Police arrived quickly but were unable to locate the assailant. Wolter was taken to Harborview Hospital where he was treated for the gunshot wounds and for numerous lacerations requiring stitches. Wolter was not able to identify his assailant, but he was able to describe the clothing worn by the man, and gave police a general description of the man's height, weight, and build. He also told police that when he was shot with the gun he heard a "popping" or "puff" noise, and that the gun seemed to have something long attached to it. This led police to believe that the gun had been equipped with a silencer.
>
> The officers obtained a search warrant to search Wolter's home for evidence. They found no sign of forced entry. They found bloodstains on the carpet and walls, bullets and bullet holes, a wire from a taser gun, a taser barb on the jacket Wolter had

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respondent's answer is a staggering 196 pages. The issues presented to this Court for review simply do not warrant the extraordinary number of pages petitioner has devoted to them. However, rather than delay this matter further by striking petitioner's responsive brief and requiring that he resubmit a more concise response, the Court has elected to proceed to disposition on the record as it currently stands.

been wearing, and "AFIDS" on the floor of the office. The acronym AFIDS stands for "anti-felon identification tags." They are automatically deployed when a taser gun is fired, and they have a serial number on them that can be traced back to a specific taser gun. In this case, the AFIDS were traced to a taser gun that had been purchased by Wolter's former housemate Steve Kozol, eight days before the attack, from a business called Spy Connection. The physical description Wolter gave police of his attacker was similar to that of Kozol.

The bullets retrieved from the crime scene were found to have been shot from a 9 mm. semi-automatic or fully automatic pistol manufactured by SWD Company. This company imprints the logo "Cobray" on the firearms that it manufactures. Police subsequently found evidence that Kozol had purchased a 9 mm. Cobray handgun and a rapid-fire attachment for the gun.

Because the AFIDS had been traced to a taser gun purchased by Kozol, police promptly began watching him. They saw him transfer a briefcase from his Audi vehicle into the trunk of a Mustang owned by his girlfriend. They obtained multiple search warrants to search Kozol's residence, a storage facility that he rented, his Audi, and his girlfriend's Mustang. In the Mustang, police found a briefcase containing Wolter's identification, several bank statements and blank checks belonging to Wolter, a newspaper article about the attack on Wolter, and a business card from the business called Spy Connection. Wolter subsequently identified the briefcase as one belonging to him.

Police found a book entitled Quick and Dirty Home Made Silencers in Kozol's Audi. They also found "smear transfer" bloodstains on the driver's seat of the car. Swabs were taken, tested, and found to exactly match a blood sample taken from Wolter.

In Kozol's garage, police found parts that could be used to make home made silencers for guns using some of the methods described in the book on how to make silencers that was found in Kozol's Audi. Detective Gulla, who helped execute the search warrant for Kozol's garage, subsequently testified that based on his training and experience with firearms and silencers, including actual experience in making a home made silencer, he immediately recognized the parts that he saw in the garage as those from which silencers can be made. He also testified that these parts were located in close proximity to one another.

Kozol was charged with attempted murder in the first degree, and in the alternative, with attempted murder in the second degree. He was also charged with burglary in the first degree. Each of the charges included an allegation that Kozol was armed with a deadly weapon at the time of the crimes.

Kozol brought a motion to suppress evidence obtained from only one of the several search warrants that were issued, the warrant which authorized the search of Kozol's house, garage, and car. The court denied the motion to suppress.

At trial, Kozol testified that although he had indeed purchased a taser gun, a 9 mm. Cobray handgun, and a rapid-fire attachment for the gun, these items had been stolen from his rented storage locker before the night of the crime against Wolter. He testified that he had intended to give the taser gun to his girlfriend for Christmas, and that he had intended to use the handgun for target practice. He testified that the blood on his car seat could have come from a rag that he had used to treat a foot injury Wolter received when he stepped on a nail, which rag he had tossed into his car. He testified that Wolter gave him the briefcase, and that because the two had shared the office on the second floor of Wolter's home while they were housemates, Wolter's identification, blank checks, and banks statements, which predated the crime by several months, could have been accidentally swept into the briefcase when Kozol moved out. He denied any involvement in the attack on Wolter. Both he and his girlfriend testified that on the night of the attack, Kozol had been with the girlfriend at her home the whole time. Kozol explained that the parts in his garage were for his hobby of building homemade rockets and for a business project of developing a new kind of air filter for diesel trucks. He also claimed to be writing a novel that included spies and taser guns.

Wolter testified during rebuttal that he had no recollection of injuring his foot by stepping on a nail, or of giving Kozol his briefcase, but that the happening of either event was in the realm of possibility.

The jury found Kozol guilty of attempted first degree murder and first degree burglary, and also found that he had been armed with a deadly weapon at the time of each offense. Kozol was sentenced within the standard range.

(Dkt. No. 11, Ex. 5 at 2-5.)

Petitioner appealed his conviction and sentence to the Washington Court of Appeals. (*See id.*, Exs. 2-4.) On June 30, 2003, the Court of Appeals issued an opinion in which it affirmed petitioner's convictions. (*Id.*, Ex. 5.)

Petitioner next filed a petition for review in the Washington Supreme Court. Petitioner, through counsel, presented the following six issues to the Supreme Court for review:

1. WPIC 100.01, which defines "attempt" for purposes of attempted crimes, actually defines a far more inchoate crime. Rather than defining these crimes

as an attempt to commit a completed crime, it defines these crimes as an attempt to attempt a crime. Did use of this instruction at petitioner's trial ease the prosecution's burden of proof and violate due process?

2. The Court of Appeals concluded that any error in the definition of attempt was cured by subsequent instructions. The Court's decision in this regard conflicts with prior precedent from this Court. Is review therefore appropriate under RAP 13.4(b)(1)?

3. Did the affidavit in support of a search warrant covering petitioner's house, garage, and car lack sufficient facts to establish a nexus between criminal activity, the items to be seized, and the places to be searched in violation of the Fourth Amendment to the United States Constitution and this Court's decision in State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999)?

4. Did the warrant contain an insufficiently particularized description of the property to be seized, thereby also violating petitioner's constitutional rights under the Fourth Amendment to the United States Constitution?

5. Did the trial court err and violate petitioner's rights under the Fourth Amendment when it concluded that evidence not covered by the search warrant fell within the plain view exception to the warrant requirement?

6. Is review of these Fourth Amendment issues appropriate under RAP 13.4(b)(3) because this case presents significant questions of federal constitutional law?

(Dkt. No. 11, Ex. 6 at 1-2.)

On February 4, 2004, the Washington Supreme Court denied petitioner's petition for review without comment. (*Id.*, Ex. 7.)

In February 2005, petitioner filed a motion for relief from judgment in the King County Superior Court. (*See id.*, Ex. 8.) That motion was apparently transferred to the Washington Court of Appeals for consideration as a personal restraint petition. The Court of Appeals issued an order dismissing petitioner's personal restraint petition on December 30, 2005. (*Id.*, Ex. 9.)

In January 2006, petitioner filed a motion for discretionary review in the Washington Supreme Court challenging the Court of Appeals' dismissal of his personal restraint petition. (Dkt.

No. 11, Ex. 10.) Petitioner presented the following issues to the Supreme Court for review:

1) Whether the Acting Chief Judge improperly dismissed the PRP as frivolous?

2) Whether the Acting Chief Judge committed obvious and probable error under RAP 13.5(b)(1) and (2) as to each claim raised in this PRP?

a) Whether Mr. Kozol was denied his right to due process under U.S. Const., amend. 14, where the State knowingly presented false evidence and testimony in the CrR 3.6 hearing?

b) Whether Mr. Kozol was denied effective assistance of counsel under U.S. Const. amend. 6, where defense counsel, in the CrR 3.6 hearing, failed to cross-examine the State's witness, to present evidence or testimony for the defense, or to identify the false evidence and testimony presented by the State?

c) Whether Mr. Kozol's right to an impartial jury under U.S. Const., amend 6 was violated, where three impliedly biased jurors sat upon his jury?

d) Whether Mr. Kozol was denied effective assistance of counsel under U.S. Const., amend. 6, where his lawyer failed to challenge biased jurors for cause?

e) Whether Mr. Kozol was denied due process because of cumulative error?

(Dkt. No. 11, Ex. 10 at 1-2.)

On April 5, 2006, the Supreme Court Commissioner issued a ruling denying review. (*Id.*, Ex. 11.) Petitioner moved to modify the commissioner's ruling, but that motion was also denied. (*Id.*, Exs. 12 and 13.) Petitioner now seeks federal habeas review of his convictions.

GROUNDS FOR RELIEF

Petitioner identifies seven grounds for relief in his federal habeas petition:

GROUND ONE: Fabrication of physical evidence by police violated Kozol's right to a fair trial and due process.

GROUND TWO: Kozol was denied his right to due process when the state knowingly used false testimony and evidence against him.

GROUND THREE: Kozol was denied effective assistance of counsel when counsel failed to identify or challenge the State's false testimony and evidence.

GROUND FOUR: Kozol's rights to due process were violated by the State's failure to disclose exculpatory evidence.

GROUND FIVE: Kozol argues that even if any one of the above violations of his rights don't warrant relief, the cumulative effect of them all is so prejudicial as to require reversal.

GROUND SIX: Kozol was denied his right to a fair trial by an impartial jury.

GROUND SEVEN: Defense counsel was ineffective in failing to seek to excuse biased jurors.

(Dkt. No. 1 at 6, 7, 9, 11, 17, 18, and 19.)

DISCUSSION

Respondent asserts in her answer to petitioner's federal habeas petition that petitioner failed to properly exhaust his first, fourth and fifth grounds for relief, and that these claims are now procedurally barred. Respondent argues that petitioner's remaining claims fail on the merits. Petitioner argues, with respect to his first ground for relief, that he properly exhausted the claim by presenting it to the state courts on direct appeal and in his personal restraint proceedings. Petitioner concedes that he failed to properly exhaust his fourth and fifth grounds for relief in the state courts, but argues that his failure to exhaust should be excused. Petitioner vigorously argues the merits of each of his individual claims.

Exhaustion and Procedural Default

The United States Supreme Court has made clear that state remedies must first be exhausted on all issues raised in a federal habeas corpus petition. *Rose v. Lundy*, 455 U.S. 509 (1982); 28

U.S.C. §2254(b), (c). Exhaustion must be shown either by providing the highest state court with the opportunity to rule on the merits of the claim or by showing that no state remedy remains available. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996)(citations omitted).

The exhaustion requirement is a matter of comity, intended to afford the state courts "the first opportunity to remedy a constitutional violation." *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981). A federal habeas petitioner must provide the state courts with a fair opportunity to apply controlling legal principles to the facts bearing on his constitutional claim. *Picard v. Connor*, 404 U.S. 270 (1971); *Anderson v. Harless*, 459 U.S. 4 (1982). It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. *Harless*, 459 U.S. at 6. The habeas petitioner must have fairly presented to the state courts the substance of his federal habeas corpus claims. *Id.*

1. Ground One

Petitioner asserts in his first ground for federal habeas relief that during the execution of a search warrant at his residence, the police gathered items from throughout his garage and reconfigured them so that they could be seized under the plain view doctrine. The items at issue were items which the prosecution argued could be used to make a silencer for a gun. Petitioner contends that the fabrication of physical evidence by police violated his right to a fair trial and to due process.

Respondent argues that this claim has not been properly exhausted because it was not properly presented to the Washington Supreme Court for review. Petitioner asserts in his petition that he presented this claim to the state courts on direct appeal and on collateral review. (*See* Dkt. No. 1 at 6-7.) The record does not support petitioner's assertion.

The record reflects that on direct appeal petitioner presented to the Court of Appeals in his pro se supplemental brief a claim similar to his first ground for federal habeas relief. However, petitioner did not specifically argue on appeal that the fabrication of evidence violated his due process rights. Instead, he argued that his Fourth Amendment rights were violated when the police exceeded the scope of the warrant. (Dkt. No. 11, Ex. 3 at 5-27.) Included in petitioner's argument in support of his Fourth Amendment claim was an assertion that the police manipulated the evidence and then improperly seized evidence which did not fall within the scope of the warrant or the plain view exception to the warrant requirement. (*Id.*)

Petitioner also alleged in his pro se supplemental brief that the trial court erred by allowing seized evidence to be admitted under the plain view doctrine. (*Id.*, Ex. 3 at 28-45.) In support of that claim, petitioner once again argued that the police had improperly manipulated evidence. (*Id.*) However, nowhere in his briefing did petitioner ever present to the Court of Appeals the precise claim presented here; *i.e.*, that the fabrication of physical evidence by the police violated his due process rights. Petitioner also failed to present any such claim to the Washington Supreme Court on direct appeal. Thus, this Court concludes that petitioner's first ground for federal habeas relief was not properly exhausted on direct appeal.

The record also reflects that petitioner failed to properly exhaust his first ground for relief on collateral review. A review of petitioner's personal restraint petition, and his motion for discretionary review, reveals that petitioner made allegations therein about Detective Gulla moving evidence to satisfy the plain view requirement. (*Id.*, Ex. 8 at 15-16; Ex. 10 at 27-29.) However, these allegations were made in petitioner's arguments in support of his claim that his counsel rendered ineffective assistance when he failed to challenge the false testimony of Detective Gulla at

the pretrial suppression hearing. (*See* Dkt. No. 11, Ex. 8 at 15-16; Ex. 10 at 27-29.) Petitioner did not present to the state courts on collateral review any independent due process claim regarding manipulation of evidence, or any argument specific to the due process claim presented in his first ground for federal habeas relief. Accordingly, this Court concludes that petitioner failed to properly exhaust his first ground for relief on collateral review as well.

2. Grounds Four and Five

Petitioner asserts in his fourth ground for federal habeas relief that his due process rights were violated by the state's failure to disclose exculpatory information. (Dkt. No. 1 at 11.) He asserts in his fifth ground for relief that the cumulative effect of the alleged constitutional violations was so prejudicial as to warrant reversal. (*See id.* at 17.) Petitioner concedes in his petition that he did not properly exhaust these claims. (*See id.* at 11-12, and 17.) He argues, however, that his failure to exhaust should be excused. (*See id.*, Supporting Brief at 56-63; *see also* Dkt. No. 15 at 117-129 and 157-160.) As petitioner concedes that these claims have not been properly exhausted, the Court need not address respondent's arguments to that effect. The Court will address below petitioner's claim that his failure to exhaust should be excused.

3. Cause and Prejudice

When a petitioner fails to exhaust his state court remedies and the court to which petitioner would be required to present his claims in order to satisfy the exhaustion requirement would now find the claims to be procedurally barred, there is a procedural default for purposes of federal habeas review. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991).

Respondent argues that petitioner, having failed to properly exhaust his first, fourth, and fifth grounds for relief, would now be barred from presenting those claims to the state courts under RCW

10.73.090 (time bar), and RCW 10.73.140 (successive petition bar). RCW 10.73.090(1) provides that a petition for collateral attack on a judgment and sentence in a criminal case must be filed within one year after the judgment becomes final. Petitioner's direct appeal was finally resolved in February 2004 when the Washington Supreme Court denied petitioner's petition for review. (*See* Dkt. No. 11, Ex. 7.) It therefore appears that petitioner would be time barred from presenting his unexhausted claims to the state courts. In addition, because petitioner has previously presented a personal restraint petition to the state courts, the state courts are unlikely to entertain another personal restraint petition from petitioner. *See* RCW 10.73.140.

Accordingly, this Court concludes that petitioner has procedurally defaulted on his first, fourth, and fifth grounds for federal habeas relief. When a state prisoner defaults on his federal claims in state court, pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. at 750. Petitioner argues that he can demonstrate cause and prejudice for his failure to exhaust his fourth and fifth grounds for relief.[2]

To satisfy the "cause" prong of the cause and prejudice standard, petitioner must show that some objective factor external to the defense prevented him from complying with the state's procedural rule. *Id.* at 753 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To show "prejudice," the petitioner "must shoulder the burden of showing, not merely that the errors at his

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[2] Petitioner believes he has properly exhausted his first ground for relief and vigorously argues that position in his briefs. He presents no alternative argument that his failure to exhaust should be excused.

trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). Only in an "extraordinary case" may the habeas court grant the writ without a showing of cause or prejudice to correct a "fundamental miscarriage of justice" where a constitutional violation has resulted in the conviction of a defendant who is actually innocent. *Murray v. Carrier*, 477 U.S. at 495-96.

Petitioner argues that his failure to exhaust his fourth and fifth grounds for relief should be excused because the discovery records upon which these claims are based were withheld from trial counsel and were not provided to petitioner until February 4, 2005, despite efforts by an attorney working on his behalf to obtain those records. Petitioner asserts that the deadline for filing his collateral attack in the state courts was February 24, 2005, and that his inability to obtain the files prior to February 4, 2005, left him insufficient time to review the materials and develop his claim that the state failed to disclose exculpatory evidence and present it to the state courts. (Dkt. No. 1, Supporting Brief at 58-62.)

The record before this Court appears to support petitioner's claim that he did not receive portions of the state court record relevant to his claim that the state failed to disclose exculpatory evidence; *i.e.*, police reports, until a short time before his personal restraint petition was due. However, the record suggests that petitioner certainly had possession of the documents necessary to identify the claims asserted in his fourth and fifth grounds for federal habeas relief for a substantial period of time before the Court of Appeals dismissed his personal restraint petition on December 30, 2005. Petitioner fails to explain why he made no attempt to amend his petition to present these claims in his personal restraint proceedings. In fact, the attorney who assisted petitioner in obtaining

the records suggested to petitioner that he should attempt to do just that; *i.e.*, amend his petition, if the records forwarded to petitioner revealed any new claims to him. (*See* Dkt. No. 1, Supporting Brief, Ex. 15-L.) This Court is simply not satisfied that petitioner could not have, through the exercise of reasonable diligence, presented his fourth and fifth grounds for federal habeas relief to the state courts on collateral review. Accordingly, this Court concludes that petitioner has not established cause for his failure to exhaust his state court remedies with respect to these two grounds for relief.

Because petitioner has not met his burden of demonstrating cause for his procedural default, this Court need not determine whether petitioner carried his burden of showing actual prejudice. *Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1448 (9th Cir. 1989) (citing *Smith v. Murray*, 477 U.S. 527, 533 (1986)). In addition, petitioner makes no colorable showing of actual innocence. Petitioner therefore fails to demonstrate that his fourth and fifth grounds for federal habeas relief are eligible for federal habeas review. As noted above, petitioner makes no effort to demonstrate cause and prejudice for his failure to exhaust his first ground for relief and, thus, that claim is also ineligible for federal habeas review. Petitioner's federal habeas petition should therefore be dismissed as to his first, fourth, and fifth grounds for relief.

Standard of Review for Exhausted Claims

Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's decision was *contrary to*, or involved an *unreasonable application* of, clearly established federal law, as determined by the Supreme Court, or if the decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (emphasis added). Under the

"contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The Supreme Court has made clear that a state court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 69 (2003).

Presentation of False Evidence

Petitioner asserts in his second ground for federal habeas relief that his due process rights were violated when the state knowingly used false evidence and testimony against him. Petitioner contends that the police gave false testimony at a pretrial suppression hearing in order to get otherwise inadmissible evidence admitted. At issue here are items of evidence which, according to the testimony of Detective Denny Gulla at the pretrial hearing, could be used to make a homemade silencer. Petitioner argues that the state failed to correct the false testimony, that the state proceeded to rely on the false evidence during the trial, and that the state presented testimony during the course of the actual trial which impeached the pretrial testimony upon which the false evidence was admitted, and yet made to no attempt to bring this to the attention of the trial court.

It is well established that a conviction obtained by the knowing use of false evidence is fundamentally unfair, and that such a conviction may not stand under the Fourteenth Amendment if

there is any reasonable likelihood that the false testimony affected the judgment of the jury. *Napue v. Illinois*, 360 U.S. 264, 269 (1950). *See also, United States v. Agurs*, 427 U.S. 97, 103 (1976).

The Court of Appeals rejected petitioner's claim regarding presentation of false evidence in petitioner's personal restraint proceedings. The Court of Appeals explained its ruling as follows:

> Kozol first contends that his due process rights were violated when the State presented false testimony at the suppression hearing. He maintains Detective Gulla falsely testified that various items that could be used to construct a silencer were found in Kozol's garage "in close proximity." Kozol has also submitted evidence suggesting that two of these items – pretrial exhibits #3 and #8 – were not found in his garage, but rather in the trunk of his car during a different search.
>
> The victim in this case had provided information to investigating officers suggesting that the assailant's firearm had been fitted with a silencer. At the suppression hearing, Det. Gulla testified he immediately recognized various items found in Kozol's garage during the execution of a search warrant, including wire screens, aluminum tubing, a wooden board with round marks matching the tubing, washers or "wipes" (Exhibit #3), and a metal tap (exhibit #8), as components of a homemade silencer. The trial court concluded that the items did not fall within the scope of the search warrant, but were admissible under the "plain view" doctrine.
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> The crux of Kozol's argument appears to be that Det. Gulla's testimony placing exhibits #3 and #8 in the garage was critical to the trial court's pretrial decision to admit the alleged silencer components found in the garage. Kozol concedes that Det. Gulla's trial testimony was accurate.
>
> A conviction obtained through the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is a reasonable likelihood that the allegedly false testimony affected the jury's judgment. In re Pers. Restraint of Benn, 135 Wn.2d 868, 936-37, 952 P.2d 116 (1998) (citing United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). A court need not resolve the issue of whether the State knowingly used perjured testimony unless there is a reasonable likelihood that the testimony affected the jury's verdict. In re Benn, 134 Wn.2d at 937.
>
> Kozol does not allege that exhibits #3 and #8 were not admissible merely because they were found in the trunk of his car rather than in his garage. Moreover, the other items found in Kozol's trunk included various parts that were similar to those found in the garage and that could be used to construct a silencer. The court also admitted a book found in the trunk entitled "Quick and Dirty Homemade Silencers." Consequently, the location of exhibits #3 and #8 did not materially affect

the nature of the evidence before the jury on the issue of the silencer components.

Kozol claims that the trial court would not have admitted any of the silencer components from the garage had it known exhibits #3 and #8 were found in the trunk of Kozol's car. But there is no dispute that Det. Gulla found a wire screen, metal tubing, and a wooden board with round marks corresponding to the tubing in Kozol's garage and that these parts could be used to construct a silencer. Kozol makes no showing that these items would not have been admitted under the "plain view" doctrine.

In any event, even exclusion of all of the silencer components found in the garage would not have affected the outcome of the case. First, as already indicated, similar silencer components were found in the trunk of Kozol's car, along with a manual on how to build silencers. Kozol has not challenged admission of this evidence. Second, Kozol testified that he had undertaken research into silencers and admitted that he knew how to build one.

Finally, contrary to Kozol's assertion, the alleged silencer parts were not a major part of the State's case. A neighbor reported seeing Kozol drive away from the victim's home on the afternoon of the assault. The victim's blood, which had been spattered throughout the home during the assault, was found on the seat of Kozol's car. A taser gun used during the attack was purchased by Kozol eight days earlier. Bullets found at the scene matched the type of firearm that Kozol owned. A briefcase containing the victim's identification, bank statements, and blank checks was found in a car belonging to Kozol's girlfriend.

In sum, the independent evidence of Kozol's guilt was overwhelming. Kozol has failed to demonstrate any likelihood the alleged knowingly false testimony affected the jury's decision. See In re Benn, 134 Wn.2d at 938.

(Dkt. No. 11, Ex. 9 at 2-4.)

The Washington Supreme Court found no error in the Court of Appeals' decision. The Supreme Court Commissioner explained as follows:

Mr. Kozol mainly argues that a police detective falsely testified at a pretrial suppression hearing that items found in Mr. Kozol's garage while executing a search warrant, which the detective believed "as a whole" constituted components of a homemade silencer, were in "close proximity" with one another, thus leading the trial court to rule that they were lawfully seized under the "plain view" exception to the

> warrant requirement.[3] Mr. Kozol also asserts that additional items introduced at the hearing as having been found in the garage were in fact found later in the trunk of his car.
>
> But the acting chief judge noted that Mr. Kozol did not dispute the admissibility of the items found in his trunk nor did he deny that they also constituted components of a homemade silencer.[4] Nor did Mr. Kozol dispute the admissibility of a book on how to build silencers found in his trunk. The acting chief also observed that Mr. Kozol himself testified that he had undertaken research on how to build a silencer. And finally, the acing chief judge found any error harmless because the independent evidence of guilt was overwhelming. In his motion for discretionary review, Mr. Kozol focuses on the claimed perjury of the police detective, but he does not shown that the acting chief judge erred in finding no prejudice. *See In re Pers. Restraint of Benn*, 134 Wn.2d 868, 937-38, 952 P.2d 116 (1998) (must demonstrate reasonable likelihood that claimed false testimony affected verdict).

(Dkt. No. 11, Ex. 11 at 1-2.)

Petitioner makes no showing that the conclusion of the state courts with respect to his claim of false testimony was contrary to, or constituted an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. While the record before this Court supports petitioner's contention that Detective Gulla's pretrial testimony was erroneous, this record does not reveal whether Detective Gulla's testimony was intentionally misleading or just carelessly inaccurate. The record does suggest, however, that both Detective Gulla and the prosecutor who elicited Detective Gulla's testimony at the suppression hearing should have known that the testimony was erroneous. Nonetheless, petitioner can only obtain relief in these proceedings if he

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[3] [Supreme Court footnote 1] The trial court determined that the items were not otherwise within the scope of the search warrant.

[4] [Supreme Court footnote 2] The silencer issue was relevant because the victim had provided information to police suggesting the assailant's firearm had been fitted with a silencer.

can establish that the false testimony *affected* the jury's judgment. Petitioner makes no such showing.

Petitioner fails to demonstrate that evidence of the silencer components would not have been deemed admissible even absent the errors in Detective Gulla's pretrial testimony. Moreover, the silencer evidence, though relevant, was not the most compelling part of the state's case against petitioner. At trial, the state established through testimony and through documentary evidence that petitioner had purchased a Taser a few days before the attack on Thomas Wolter (*see* Dkt. No. 11, Ex. 18 at 166-176; Ex. 20 at 67-71), and physical evidence found at the scene connected petitioner's Taser to the attack (*see id.*, Ex. 18 at 77-86, 141-157). Bullets found at the scene of the crime also matched the type of gun owned by petitioner. (*See id.*, Ex. 19 at 89-91; Ex. 20 at 77-79.) Moreover, the state established that the victim's blood was found on the seat of petitioner's car (*see id.*, Ex. 18 at 53-58; Ex. 19 at 47-48), and that financial documents belonging to the victim were found in a briefcase in petitioner's car. (*Id.*, Ex. 17. at 63.)

While petitioner offers detailed explanations in these proceedings as to why this evidence is not entitled to the weight assigned it by the prosecution, petitioner fails to demonstrate to this Court that there is any reasonable likelihood that the false testimony of Detective Gulla at the pre-trial suppression hearing ultimately affected the jury's verdict. Accordingly, petitioner's federal habeas petition should be denied with respect to his second ground for federal habeas relief.

Ineffective Assistance of Counsel

Petitioner asserts in his third ground for relief that he was denied his right to the effective assistance of counsel when his trial counsel failed to identify or challenge the state's false testimony and evidence at the pretrial suppression hearing.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland*. Under *Strickland*, a defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness and, (2) that a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. at 688, 691-92.

When considering the first prong of the *Strickland* test, judicial scrutiny must be highly deferential. *Id.* at 689. There is a strong presumption that counsel's performance fell within the wide range of reasonably effective assistance. *Id.* The Ninth Circuit has made clear that "[a] fair assessment of attorney performance requires that every effort by made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (quoting *Strickland v. Washington*, 466 U.S. at 689).

The second prong of the *Strickland* test requires a showing of actual prejudice related to counsel's performance. *Strickland v. Washington*, 466 U.S. at 693. The petitioner must demonstrate that it is reasonably probable that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. The reviewing Court need not address both components of the inquiry if an insufficient showing is made on one component. *Id.* at 697. Furthermore, if both components are to be considered, there is no prescribed order in which to address them. *Id.*

The Court of Appeals rejected petitioner's ineffective assistance of counsel claim in petitioner's personal restraint proceedings. The Court of Appeals explained its conclusion as follows:

> Kozol next contends that he was denied effective assistance when defense counsel failed to cross-examine Det. Gulla or otherwise challenge his allegedly false testimony at the suppression hearing. He maintains that had defense counsel conducted the same cross-examination at the suppression hearing as he did later at trial, Det. Gulla would have been impeached, and the trial court would have granted the suppression motion as to those items allegedly found in "plain view" in Kozol's garage. A petitioner alleging ineffective assistance of counsel must demonstrate both (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) resulting prejudice. See Strickland v. Washington, 466 U.S. 668, 687, 104 C. Ct. 2052, 80 L. Ed. 2d 91984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). There is a strong presumption that the defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). If the petitioner has failed to demonstrate resulting prejudice, a court need not determine whether counsel's performance was deficient. In re Pers. Restraint of Davis, 152 Wn.2d 647, 709, 101 P.3d 1 (2004).
>
> As already indicated, silencer components and a manual for building homemade silencers were found in the trunk of Kozol's car as well as in his garage. Kozol has not challenged the admission of that evidence. Consequently, exclusion of all of the items found in plain view in Kozol's garage would not have had any meaningful effect on the substance of the silencer evidence admitted at trial. Moreover, the silencer evidence was not a significant part of the State's case. The remaining independent evidence of Kozol's guilt was overwhelming. Accordingly, Kozol has failed to demonstrate any prejudice resulting from counsel's alleged deficient performance at the suppression hearing.[5]

(Dkt. No. 11, Ex. 9 at 4-5.)

Petitioner's makes no showing that this conclusion of the Court of Appeals was contrary to, or constituted an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.[6] The Court of Appeals applied the correct standard in evaluating

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[5] [Court of Appeals' footnote 1] Kozol also alleges that Det. Gulla moved or manipulated the items found in his garage in order to satisfy the plain view requirements. But he has not submitted any evidence that supports these assertions.

[6] The Washington Supreme Court Commissioner did not address petitioner's ineffective assistance of counsel claim in his ruling denying petitioner's motion for discretionary review.

petitioner's ineffective assistance of counsel claim and reasonably concluded that petitioner had demonstrated no prejudice.

The record before this Court reveals that petitioner's counsel did not cross-examine Detective Gulla at the pretrial suppression hearing, but that he did cross-examine him at trial and elicited testimony which might have been relevant to the suppression issues considered pretrial. (*See* Dkt. No. 11, Ex. 17 at 97-106.) The record does not reveal why counsel did not further challenge the admission of the evidence which petitioner sought to suppress pretrial. However, there is insufficient evidence in the record to clearly establish that counsel's performance was deficient in this regard. And, more significantly, petitioner has made no showing of prejudice. This Court explained above its reasons for concluding that there is no reasonable likelihood that the false testimony presented by the prosecution in the pretrial suppression hearing affected the judgment of the jury. The Court necessarily concludes, for the same reasons, that petitioner was not prejudiced by the alleged deficiencies in his counsel's performance. Accordingly, petitioner's federal habeas petition should be denied with respect to petitioner's third ground for federal habeas relief.

Juror Impartiality

Petitioner asserts in his sixth ground for relief that he was denied his right to a fair trial by an impartial jury when three of the seated jurors were either victims of crimes similar to those petitioner was on trial for, or had close family members who had committed such crimes, thus creating implied bias. Petitioner also asserts, in his seventh ground for relief, that his counsel rendered ineffective assistance when he failed to seek to excuse the allegedly biased jurors for cause. The jurors identified by petitioner in these claims include one juror who had been the victim of a residential burglary, one juror who had had his boat shed broken into and whose ex-son-in-law was in prison

for killing his drug supplier, and one juror whose ex-husband had been convicted of stealing checks from mail boxes.

It is well established that a criminal defendant has a right to a trial before "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961). However, the Supreme Court explained in *Irvin* that

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. at 723.

The relevant question is whether the jurors had "such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035 (1984) (citing *Irvin*, 366 U.S. at 723). The burden is on the defendant to establish the actual bias of a juror. *Smith v. Phillips*, 455 U.S. 209, 215-17 (1982).

The Supreme Court has acknowledged that the bias of a particular juror may be actual or implied. *See United States v. Wood*, 299 U.S. 123, 133 (1936). *See also*, *Smith v. Phillips*, 455 U.S. at 214-215 and 221-224 (O'Connor, J., concurring); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556-557 (1984) (Blackmun, Stevens, O'Connor, JJ., concurring). However, the Supreme Court has never specifically identified what standard should be applied in evaluating claims of implied jury bias and, in fact, has indicated only that a finding of implied jury bias should be reserved for extraordinary cases.[7] *See id.*

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[7] Justice O'Connor, in her concurring opinion in *Smith v. Phillips*, 455 U.S. at 222, did identify some examples of circumstances which might justify a finding of implied bias, including circumstances where there is a revelation that a juror is an employee of the prosecuting agency, a juror

In petitioner's personal restraint proceedings, the state courts rejected petitioner's claims that he was denied an impartial jury and that his counsel rendered ineffective assistance when he failed to challenge three jurors for cause. The Court of Appeals explained its conclusion as follows:

> Kozol next contends that he was denied an impartial jury because defense counsel failed to challenge three jurors for cause. Bias, either actual or implied, is a basis for a challenge for cause. See RCW 4.44.170. Kozol does not identify any statement in the record or other evidence suggesting that these jurors had an actual bias. Rather, he asserts they should be conclusively presumed to have an "implied bias" because they disclosed they had been the victim of a burglary in the past or had a family member who had been convicted of a crime.
>
> But these circumstances do not fall within those constituting an implied bias under RCW 4.44.180. Nor has Kozol cited any Washington authority suggesting that the trial court must conclusively presume bias under such circumstances. Finally, federal authority cited by Kozol is not controlling and is, in any event, factually distinguishable. See, e.g., United States v. Gonzalez, 214 F.3d 1109 (9th Cir. 2000) (juror repeatedly responded equivocally when asked if she could be fair); United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979) (juror failed to disclose material information in response to question); United States v. Torres, 128 F.3d 38 (2nd Cir. 1997) (juror disclosed participating in activity that was very similar to charged offense).
>
> As the petitioner, Kozol bears the burden of demonstrating that any error "worked to his actual and substantial prejudice, even if the error could not have been considered harmless beyond a reasonable doubt on direct review." In re Pers. Restraint of Smith, 117 Wn. app. 846, 859, 73 P.3d 386 (2003). Nothing in the record suggests that any of the challenged jurors were unable to try the issues impartially. Because Kozol has made no showing that a challenge for cause would have been granted, he cannot demonstrate prejudice from counsel's alleged deficient performance. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 309, 868 P.2d 835 (1994).

(Dkt. No.11, Ex. 9 at 5-6.)

The Washington Supreme Court agreed with the conclusion of the Court of Appeals. The Supreme Court Commissioner briefly explained his conclusion as follows:

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was a close relative of one of the participants in the trial or the criminal transaction, or a juror was a witness or otherwise involved in the criminal transaction.

> Mr. Kozol also argues that three jurors were biased because two were victims of past burglaries and one was married to a person convicted of theft and forgery. But Mr. Kozol demonstrates no actual bias, nor do these circumstances give rise to implied bias.

(Dkt. No. 11, Ex. 11 at 2.)

As noted above, the United States Supreme Court has not identified any standard for evaluating claims of implied bias. Thus, it cannot be said that the conclusion of the state courts, which was based on state statutory law, is contrary to any clearly established federal law as determined by the Supreme Court. Even if this Court were to apply the relatively generic "extraordinary case" standard suggested in the concurring opinions in *Smith* and *McDonough*, none of the circumstances presented by this case can reasonably be considered so extreme as to warrant a finding of implied bias.[8] Moreover, as noted by the state courts, petitioner makes no showing that any of the jurors identified in his claims were unable to try the issues impartially. Petitioner therefore fails to demonstrate that he was prejudiced by his counsel's failure to challenge these jurors for cause.

As the state courts reasonably concluded that petitioner had not demonstrated any prejudice

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[8] Petitioner directs this Court's attention to a Ninth Circuit case, *United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000), in which the court identified the following standard to be applied in cases presenting the question of implied bias:

> [W]e have held that prejudice is to be presumed where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances. We have also stated that the relevant question is whether [the] case present[s] a relationship in which the potential for substantial emotional involvement, adversely affecting impartiality, is inherent.

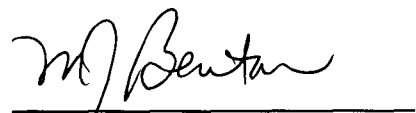
Gonzalez, 214 F.3d at 1112. However, even under this standard petitioner cannot prevail in these proceedings.

as a result of counsel's failure to challenge the three jurors for cause, and that petitioner had not presented any basis for a finding of either actual or implied bias, petitioner's sixth and seventh grounds for federal habeas relief should be denied.

CONCLUSION

For the reasons set forth above, this Court recommends that petitioner's federal habeas petition be denied and that the petition and this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 4th day of May, 2007.



Monica J. Benton
United States Magistrate Judge

FILED
THE HONORABLE MICHAEL TRICKEY
10 JUL 15 AM 8:30

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 07-1-04039-7 SEA

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. SIONE P. LUI, Defendant.	No. 07-1-04039-7SEA AGREED ORDER FOR REMOVAL OF TRIAL EXHIBITS

To resolve Defendant's renewed motion for DNA testing, the State has agreed to facilitate the testing of certain items by Orchid Cellmark. Three of those items are currently maintained by the Court as trial exhibits. Accordingly, it is hereby ORDERED that a representative of the King County Sheriff's Department may remove the following items from the exhibit room and package them for shipping to Orchid Cellmark:

- Exhibit 113 (victim's pants)
- Exhibit 114 (victim's underwear)
- Exhibit 115 (victim's shirt)

The attorney for Defendant may be present at the time the exhibits are opened and repackaged.

Dated this _____ day of July, 2010.

HONORABLE MICHAEL J. TRICKEY

LAW OFFICE OF
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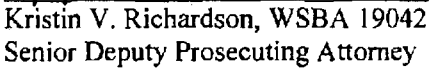
Presented by:

David B. Zuckerman, WSBA 18221
Attorney for Defendant

Approved for entry:



Kristin V. Richardson, WSBA 19042
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King County Superior Court
Judicial Electronic Signature Page

Case Number: 07-1-04039-7
Case Title: STATE OF WASHINGTON VS LUI, SIONE PISUMU

Document Title: ORDER AGREED ORDER RE: TRIAL EXHIBITS

Signed by Judge: Michael Trickey
Date: 7/15/2010 8:30:00 AM

Judge Michael Trickey

This document is signed in accordance with the provisions in GR 30.
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SHERIFF
KING COUNTY

KCSO Case # 01-041133
Suspect Statement
SIONE LUI

DET: Detective CHRISTINA BARTLETT, 06378, unit number: 183; case number: 01-041133. This is a statement of SIONE LUI.

SUS: Correct.

DET: Today's date is 4-6 of 2007. Time now is 06:57 hours, and we are at the Shoreline Police Department. Also present during this interview is Detective SUE PETERS (DET2). And SIONE, are you aware that I'm tape recording this?

SUS: Yes.

DET: Is that okay with you?

SUS: Yes.

DET: Okay. And if you could identify yourself for the tape, Detective PETERS (DET2).

DET2: Detective PETERS, serial number: 05802.

DET: Okay. And so I just want to get some background on your girlfriend, deceased girlfriend, ELAINA. I can't pronounce her name. BOUCSI.

SUS: BOUCSIACOS.

DET: BOUCSIACOS, and but you called her NINA.

SUS: Yes. We, she goes by NINA, all the, her family calls her by NINA, and all her relatives, friends from California.

DET: Did you call her NINA?

SUS: Yeah. We call (unintelligible) NINA.

DET: Okay. And how long have you known NINA?

SUS: Probably, I would say about year and a half or so.

DET: Okay. Do you remember where you met?

DET: Okay.

SUS: She was very, very, very helpful in a lot of ways. Um, but all her sisters know a lot about her friends in California. Most of her friends are there. And her ex-husband, ah, (unintelligible) um, the only, I don't know much about ELAINA's friends in California, um, and I don't know much about her ex-husband. All I know that she's very, that they in a um, crip gang before.

DET: Oh, he was.

SUS: In California, um, they were, um, and I remember her, you know, she was just very, very, she was scared of him 'cause they were in a, some tough life before, you know. She never tell me anything, but I remember she was, she had a tattoo on her back. Um, there's a smile on it, and ah, she was very, very um, (unintelligible) to say not proud, but she was very, like she doesn't like to talk about it, you know, about that ah, the tattoo. Um, but that was from her past life, you know. She, she's, she's, she's, she was living a good life. She was, she came through, and that's one of the things that I was really, really in love with her because she was strong enough to, to leave all that past behind her and willing to, to live a better life. And in the same token she was still living under, she was still struggle with raising her son because of her ex-husband, you know, and (unintelligible) It's hard for her to make decisions. She's always, he always wins, and then I'm just a boyfriend, so I have nothing to do with it. We're not married, you know, anything. So but she was, she was just living, you know, a hard life, trying to, you know, to make it easier for her son and trying to (unintelligible) the family. It was, it was, it was very, you know, that's why I fell in love with her because she can do it. She can do it.

DET: When, so Monday when you're doing all this, what did you, what did you think happened?

SUS: Things came to, to my mind. I start thinking back about the (unintelligible) that she had told me about, you know, and ah, um, 'cause she, she told me things that like you know, her and JAMES, that's her ex, you know, JAMES used to kill people, you know, but.

DET: JAMES used to kill people.

SUS: No. That's what she was saying.

DET: She told you though.

SUS: Yeah.

DET: That JAMES killed people.

SUS: They were in the gangs. Yeah, that she seen shooting, that, you know; it what gang do. But she overcame that. She, that's totally out (unintelligible) no longer. There's the past (unintelligible)

DET: So did you think, I'm a little confused. Did you think she went back to a gang?

SUS: No. No.

DET: Or did you think that maybe JAMES had something to do with her disappearance?

SUS: Ah, it's, it's something, 'cause it was, it was done by a professional. There's, there's no.

DET: Tell me about that.

SUS: There, there, there was, there was, what, what, what happened ELAINA is, when all this came together and I, I sit back thinking about it, this is, was done by somebody professional, someone that knows her, someone that had something in the past and ah, some, some sick, I don't, some very sick, sick person that very professional. They have connections to, to her. They have done this to her because that's, you know, she's taken self defense classes. She works out. She's fit, you know. I go out jogging with her. I, she outruns, she, she's fitter than I am, and then I'm, I'm the one that I was out, you know, I been playing, you know, rugby and, and ah, football and you know, volleyball and, and I stayed pretty active.

DET: Um hum.

SUS: And I'm out there playing baseball, you know. It, it, with her, she's, we ride the bike. She, I, I, I gotta catch up with her, you know. She's, she's strong. And ah, she's the kind of girl that, you know, if you don't show me, I'll show you, but what happens to her, it was, is some, somebody very, very professional. And then it was, it wasn't fair for her, you know, and ah, because she's, she's, she's, she's real.

DET: So what, what is it that made you think it was professional? And is there something that made you think that?

SUS: Well, I just don't understand the, you know, you, you look back at, at, at NINA's life and why, why her, you know. Who is, who is, who is, who is, who is, you know, she was leaving on a trip, and you know, the only thing I can think of that, that NINA does differently from me is that she'd been trying to overcome smoking, you know, and she's been hiding it from me, and there is only one time I, she got caught from me, and it was the only time I regret, you know, I actually had to call her the B word, you know. This is when we were