

NO. 34694-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RICHARD PARISH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson E. Hunt

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Improper comments made by the prosecutor in closing argument deprived Mr. Parish of his right to a fair trial, requiring reversal.

2. The sentencing condition requiring Mr. Parish to provide a DNA sample deprived him of his Fourth Amendment right to be free of unreasonable searches absent a warrant and of his privacy rights under Article 1, § 7 of the Washington Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecution may not bolster the credibility of a prosecution witness against a defense witness or give a personal opinion as to a witness's credibility. In the instant case, the prosecutor's closing argument pitted Mr. Parish's credibility against the Muirs's credibility and vouched for his witnesses' veracity. Did the prosecutor's comments rise to a level of misconduct requiring reversal? (Assignment of Error 1)

2. The Fourth Amendment prohibits unreasonable searches and seizures and generally requires a judicially issued warrant based on individualized suspicion. Is the suspicionless collection of a biological sample for purposes of DNA analysis a search pursuant to the Fourth Amendment? (Assignment of Error 2)

3. Is the collection of DNA samples for purposes of future identification and prosecution beyond the normal need for law enforcement and therefore not excepted from the Fourth Amendment's warrant requirement? (Assignment of Error 2)

4. Although individuals convicted of a crime generally have a lessened expectation of privacy under the federal constitution and diminished privacy rights under the state constitution, does a warrantless search not based on individualized suspicion violate even these lessened constitutional rights? (Assignment of Error 2)

C. STATEMENT OF THE CASE

Mr. Parish was charged by information filed in Lewis County Superior Court with residential burglary, contrary to RCW 9A.52.025(1). CP 29.

At the jury trial, Tyler Muir testified that on December 20, 2005, he was asleep in his bedroom, when he heard a knock on the back door. 2/27/06RP at 8. Tyler did not respond but then heard someone come into the house, go upstairs, come back downstairs, and walk past his bedroom door. Id. at 9. Tyler got up to investigate, walked down the hallway to his father's room, and saw Mr. Parish bend over a nightstand going through his father's belongings. Id. at 9-10.

Tyler recognized Mr. Parish as an old family friend. Id. at 11. Tyler asked Mr. Parish what he was doing, and when Mr. Parish responded that he was supposed to be there to do trim work, Tyler said his father would have forewarned him and told Mr. Parish to leave. 3/27/06RP at 12. Tyler saw his father's jars of change he left on his dresser and nightstand all laid out on his father's bed, and said to Mr. Parish, "I don't think going through my dad's change has anything to do with working on the trim." Id. at 13, 17. Mr. Parish left the house as directed. Id. at 13.

Tyler telephoned his father at work and told him what had occurred. Id. at 14. Tyler's father, Todd Muir, testified he received a telephone call from his son Tyler at work and told Tyler he would call the police and take care of it. 3/27/06RP at 20. Mr. Muir called 911 and reported the incident. Id. Mr. Muir testified he never asked Mr. Parish to do any work in his house, never gave Mr. Parish permission to enter his house, and never gave Mr. Parish permission to touch or take any of his jars of change or anything else in his house. Id. at 21. Mr. Muir testified nothing was missing from his house. Id. at 22. Mr. Muir testified he had not seen Mr. Parish in a few years. Id. at 23.

Lewis County Sheriff Detective Matt Wallace was dispatched to Mr. Muir's house on December 20, 2005, at about 10:20 a.m. Id. at 24. Another deputy had located and stopped Mr. Parish, and Detective Wallace drove to that location. Id. at 26. Detective Wallace testified Mr. Parish admitted he had entered the house, but explained that he had been hired to do trim work for Mr. Muir. Id. at 28. Mr. Parish told Detective Wallace that Mr. Muir had spoken with him about nine months before and just went to his house to begin the work. Id. at 30. Mr. Parish said he heard someone respond "come in" when he knocked and denied touching any coin jars. Id. at 28, 31. Detective Wallace discovered about \$1.20 worth of change on Mr. Parish's person, which included a silver dollar Mr. Parish claimed was his. Id. at 31.

Mr. Parish testified he and Mr. Muir had talked about Mr. Parish doing some work for him in the summer of 1995. 3/27/06RP at 38. Mr. Parish did some trim work in his own house in the Spring of 1995, and with the extra trim, decided to go to Mr. Muir's house to determine whether he could use the extra trim on Mr. Muir's house. Id. at 38-39. According to Mr. Parish, Christmas was fast approaching, he was trying to earn some extra money, and thought he could do the planned trim work for Mr. Muir. Id. at 43-44. Mr.

Parish had lost his job a year and a half ago, recently lost his house, and had bills he had to pay. 3/27/06RP at 47-48.

When Mr. Parish arrived at the Muir house, Mr. Parish saw Mr. Muir's Subaru Station Wagon, which indicated he was at home. Id. at 39. After he first knocked on Mr. Muir's door, Mr. Parish heard someone say "come in." Id. at 38. Mr. Parish testified he went straight down the hallway looking for Mr. Muir and merely walked into the door way of Mr. Muir's bedroom, when he was confronted by Tyler. Id. at 41. Mr. Parish tried to explain to Tyler that he was there to do trim work for Mr. Muir, but Tyler was suspicious and told him to leave. Id. at 42. Mr. Parish fully complied with Tyler's order. Id.

Mr. Parish further testified that the silver dollar was his coin that he always carried with him. Id. at 42. Mr. Parish denied taking anything from the house and denied seeing any coin jars. Id. at 41. Mr. Parish thought someone was home, heard "come in," and had no idea that his subsequent entering into his friend's house constituted a burglary. Id. at 38. Mr. Parish denied taking anything or intending to take anything. Id. at 43.

During closing arguments, the deputy prosecutor argued the case was all about credibility:

That comes down to credibility, and that's what this case is about is credibility because you have two stories and you have very consistent stories to a certain degree and then you have the defendant's variation.

And it's interesting to look at the facts that – the defendant's variations are very self-serving. The defendant's variations speak directly to the legal elements. Somebody told me I could come in. Oh, so it wasn't unlawful. Tyler says no, but yeah, he had contact with Tyler. So it's self-serving. Oh, it was a recent contact. Oh, it was within nine months. There wasn't any contact.

In order to believe the defendant and to believe his version of these events you have to subscribe to a conspiracy theory. You have to believe that Todd and Tyler Muir somehow set the defendant up. Sure, come over and work on our house, do the trim work, called the police on him for whatever reason, set him up to get him in trouble. That's what you have to believe to believe the defendant. There's no evidence of that. There's no evidence at all that was the plan.

And if they had done that, if they had this conspiracy, why didn't they make their case stronger? . . .

3/27/06RP at 63. Mr. Parish argued the jury did not have to find a conspiracy to find him not guilty. Id. at 64. Mr. Parish argued that instead the State must prove the elements of the crime beyond a reasonable doubt. Id. In rebuttal argument, the prosecutor again hammered the conspiracy argument:

The defendant was caught going through coins, and there is no reason for Tyler Muir or Todd Muir to lie.

The defendant is using the truth as a blueprint for his story. There are things he can't deny, that he was there, that Tyler confronted him, but then he's trying to fit things in to get rid of the elements of the offense, and if defendants could get on the stand and list the elements and say I didn't do that, I didn't do this, we would never have any

convictions. You are here to determine credibility. You are here to determine what makes sense in these facts.

Defense counsel talked a lot about reasonable doubt. . . What he wants you to swallow has to be reasonable, and a conspiracy theory is not reasonable. Tyler and Todd Muir did not have any motive. No motive was presented to say that the [sic] they would set the defendant up, but the defendant has motive. . . .

3/27/06RP 72-73.

Following the testimony and closing arguments, the jury found Mr. Parish guilty as charged. CP 2. The Honorable Nelson E. Hunt found Mr. Parish was a first time offender and imposed a sentence of 45 days, with up to twelve months of community custody. 4/12/06RP at 82. As part of his sentence, Judge Hunt required Mr. Parish give a biological sample for DNA analysis under RCW 43.43.754. CP 5 (paragraph 4.2).

Mr. Parish appeals. CP 1.

D. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DENIED MR. PARISH A FAIR TRIAL

a. Prosecutorial misconduct is properly before this Court. Generally, any objection to prosecutorial misconduct during closing argument is waived by failure to timely object and request a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d

610 (1990), cert. denied, 498 U.S. 1046 (1991). However, this issue may be addressed for the first time on appeal when the misconduct was so “flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect.” (Citations omitted.) Id.; see also, State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). “When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor’s comments affected the verdict.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

In this case, the prosecutor’s comments during closing argument were “flagrant and ill-intentioned” and irrevocably prejudiced the jury against Mr. Parish – unfairly affecting the verdict in this case. As such, this conviction is a result of the prosecutorial misconduct and cannot stand.

b. Prosecutors have special duties which limit their advocacy. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173

(1976)); see also State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). The Huson Court noted the importance the impartiality on behalf of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. . . . We do not condemn vigor, only its misuse. . . . No prejudicial instrument, however, will be permitted. His zealously should be directed to the introduction of competent evidence. . . .

(Citation omitted). Huson, 73 Wn.2d at 663; see also, Reed, 102 Wn.2d at 147.

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and, if so, whether a “substantial likelihood” exists that the comments affected the jury. Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct, requiring a new trial. State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

c. The prosecutor’s comments concerning Mr. Parish’s credibility during closing argument constituted misconduct.

As this Court made clear in State v. Wright, prosecutorial misconduct occurs where a prosecutor pits the credibility of the

State's witnesses against that of the defendant, in essence requiring the jury to decide that one side is lying to reach its verdict. 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), rev. denied, 127 Wn.2d 1010 (1995); see also, Stith, 71 Wn. App. At 19; State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

It is also improper for the prosecutor to give a personal opinion as to a witness' credibility. Reed, 102 Wn.2d at 145.

Here, it is substantially likely that the jury was affected by the prosecutor's comments when the deputy prosecutor in solely a credibility case compared the credibility of witnesses and then proceeded to argue that the only way to believe Mr. Parish's version was to believe Mr. Muir and his son had conspired against Mr. Parish to set him up and get him in trouble. 3/27/06RP at 63. The prosecutor argued there was no reason for the Muirs to lie, while all of Mr. Parish's statements were "self-serving." Id. at 63, 72-73. By comparing the credibility of the witnesses and interjecting his own opinion as to credibility in this case calling Mr. Parish a liar, the prosecutor's comments during closing argument rose to the level of misconduct. Wright, 76 Wn. App. at 826; Reed, 102 Wn.2d at 145.

d. The prosecutorial misconduct requires reversal.

The danger of prosecutorial misconduct is that it “may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial.” Charlton, 90 Wn.2d at 665 (citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)). Once an appellant has proven improper prosecutorial statements, he must show he was prejudiced by them. Reed, 102 Wn.2d at 145. This requires appellant to show that there was a “substantial likelihood” that the comments influenced the outcome of the trial. Id.

The prosecutor's misconduct in closing was prejudicial and inflammatory, thereby denying Mr. Parish a fair trial. The deputy prosecutor improperly commented on the credibility of the parties and gave his opinion that his witnesses told the truth while Mr. Parish lied. Given that the evidence was far from overwhelming and rested solely on credibility, the prosecutor's comments undoubtedly affected the jury's verdict. Reversal of Mr. Parish's conviction and remand for retrial is the appropriate remedy. State v. Belgarde, 110 Wn.2d at 508.

2. THE COLLECTION OF DNA WITHOUT A WARRANT OR INDIVIDUALIZED SUSPICION VIOLATES MR. PARISH'S CONSTITUTIONAL RIGHT TO PRIVACY AND AGAINST UNREASONABLE SEARCH AND SEIZURE.¹

RCW 43.43.754 authorizes a sentencing court to require every person convicted of a felony and certain misdemeanors to submit to collection of a biological sample for purposes of identifying their DNA and creating a DNA database.² The trial court issued such an order in this case. CP 5 (paragraph 4.2).

a. The collection and analysis of biological samples is subject to the warrant requirement of the Fourth Amendment.

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

¹ Division One of the Court of Appeals has rejected a challenge identical to the grounds asserted herein to the DNA sample collection procedure authorized by RCW 43.43.754 in State v. Surge, 122 Wn.App. 448, 94 P.3d 345 (2004), rev. granted, 153 Wn.2d 1008 (2005). The issue was argued on May 26, 2005, in the Washington Supreme Court and that opinion is still pending. Declining to follow the reasoning of United States v. Kincade, 345 F.3d 1095 (9th Cir. 2003) rehearing en banc granted, opinion vacated by United State v. Kincade, 354 F.3d 1000 (2004), Division One distinguished persuasive United States Supreme Court authority and adhered to the Washington Supreme Court's opinion in State v. Olivas, 122 Wn.2d 73, 856 P.2d 1076 (1993). Mr. Parish presents the issue herein in order to preserve his rights to further appellate review of the issue.

² The statute provides, “Every adult or juvenile individual convicted of a felony . . . must have a biological sample collected for purposes of DNA identification analysis . . .”

shall not be violated. . . .” The collection and subsequent analysis of biological samples from an individual constitutes a search for purposes of the Fourth Amendment. Ferguson v. City of Charleston, 532 U.S. 67, 76, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001); Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); State v. Olivas, 122 Wn.2d 73, 83-84, 856 P.2d 1076 (1993).

In the present case, the court, pursuant to RCW 43.43.754, ordered the collection of a biological sample from Mr. Parish for DNA testing. CP 10. The collection of such a sample is a search pursuant to the Fourth Amendment. Ferguson, 532 U.S. at 76; Olivas, 122 Wn.2d at 83-84.

b. A warrantless search conducted in the absence of individualized suspicion may be constitutional if it is justified by special needs other than law enforcement. A search is not reasonable unless it is pursuant to a judicial warrant based upon probable cause or falls within an exception to the warrant requirement. Skinner, 489 U.S. at 619 (citing Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)). Among the recognized exceptions to the warrant

requirement is the “special needs” doctrine. The doctrine provides that a warrant is not necessary where “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” New Jersey v. T.L.O., 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

In two recent cases, the United States Supreme Court clarified that the special-needs doctrine does not justify a warrantless search that serves only to gather evidence for future prosecution. In City of Indianapolis v. Edmond, the Supreme Court considered the constitutionality of suspicionless highway narcotics checkpoints conducted for the purpose of narcotics interdiction. 531 U.S. 32, 42-43, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). The Court explained that such checkpoints cannot be justified by the special-needs exception, and, absent individualized suspicion, such checkpoints run afoul of the Fourth Amendment. Id. The Court noted “we are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.” Id.

The Court distinguished the case from others in which it had concluded that warrantless searches and seizures could occur absent individualized suspicion even where those searches or seizures could serve a law enforcement end. For instance, the Court noted that highway sobriety checkpoints fell within the special-needs exception even though they resulted in the arrest of intoxicated drivers. The distinction was that the primary focus of these constitutional checkpoints was highway safety (immediately removing hazardous drivers from the road) as opposed to crime control (subsequently prosecuting those drivers). Id. at 39 (citing Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990)).

As another example, the Edmond Court distinguished the narcotics interdiction checkpoints program from a program subjecting railroad employees to generalized drug testing, a program approved of in Skinner. Edmond, 531 U.S. at 36 (citing Skinner, 489 U.S. 602). Again the Court noted that drug testing railroad workers was principally aimed at ensuring transportation safety and not at generalized law enforcement. Edmond, 531 U.S. at 36.

Following Edmond, the Court issued another opinion explaining that the special-needs exception cannot apply where the search is principally aimed at aiding law enforcement. In Ferguson, the Court refused to apply the special-needs exception to a state hospital's generalized policy of testing pregnant women for illicit drugs and reporting positive results to the police as evidence in child abuse prosecutions. 532 U.S. at 83. The Court reiterated the point of Edmond: Where the immediate objective of a search is law enforcement, the special-needs doctrine does not apply. Ferguson, 532 U.S. at 83; Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885, 888-89, 157 L.Ed.2d 843 (2004) (recognizing continued validity of rule of Edmond).

c. The court's order that Mr. Parish provide a biological sample for DNA testing pursuant to RCW 43.43.754 violates the Fourth Amendment. The purpose of RCW 43.43.754 "is explicitly for future identification and prosecution." Olivas, 122 Wn.2d at 90-91. When the Legislature expanded DNA testing to include juvenile offenders in 1994, it stated, "DNA identification is an accurate and useful law enforcement tool for identifying and prosecuting sexual and violent offenders." Laws 1994, ch. 271 § 401. When DNA testing was further expanded in 1999 to include

all felonies, the Legislature found,

[T]here is a high rate of recidivism among certain types of violent and sex offenders Creating an expanded DNA bank bears a rational relationship to the public's interest in enabling law enforcement to better identify convicted violent and sex offenders who are involved in unsolved crimes, who escape to reoffend, and who reoffend after release.

Laws 1999, ch. 329 § 1.

The sole purpose of RCW 43.43.754 is to facilitate law enforcement ends. Because the immediate objective of the search ordered pursuant to RCW 43.43.754 is law enforcement, the special-needs doctrine cannot apply, and the search must be based on individualized suspicion. Edmond, 531 U.S. 32, 42-43; Ferguson, 532 U.S. at 83.

Mr. Parish recognizes that the Washington Supreme Court found that the provisions of RCW 43.43.754 do not violate the Fourth Amendment. Olivas, 122 Wn.2d at 91-92. The Olivas court reasoned the creation and expansion of a DNA database would act as a deterrent to recidivism and was thus not a "normal" law enforcement activity. Id. at 92 (citing Jones v. Murray, 763 F.Supp. 842 (W.D.VA 1991), rev'd in part, 962 F.2d 302 (4th Cir. 1992)). In the face of subsequent legislative findings and Supreme Court

decisions, Olivas can no longer be considered good law.

The Olivas court attempted to distinguish the goal of deterrence of recidivism from “normal” law enforcement activity.³ This line drawing is contrary to the Legislature’s statements of intent in 1995 and 1999. The legislative findings that accompany these amendments make no mention of deterrence as a goal of the testing statute. Instead, with each of these amendments, the Legislature made clear its sole intent was to provide a “law enforcement tool” to prosecute unsolved crimes. Laws 1994, ch. 271 § 401; Laws 1999, ch 329 § 1. Accordingly, the Olivas court found “future identification and prosecution” of crimes to be the explicit purpose of RCW 43.43.754. 122 Wn.2d at 91. Ferguson and Edmond have clearly held that such a goal cannot fall within the special-needs exception. Thus, Olivas is no longer good law.

Because Olivas recognizes the explicit purpose of RCW 43.43.754 is the “future identification and prosecution” of offenders, a normal law enforcement activity, the special-needs exception cannot justify its requirement of suspicionless searches. Edmond,

³ It is illogical to claim that the prevention of recidivism is not a “normal” law enforcement aim. If this were so then one must believe that police are “normally” only concerned with apprehending first-time offenders. Clearly law enforcement is concerned with the prevention of crime and the apprehension of those that commit crimes, whether it is their first offense or their tenth.

531 U.S. at 41; Ferguson, 532 U.S. at 83.

d. The search in this case violates even the lessened expectation of privacy Mr. Parish has following his conviction. This court has previously determined that although a probationer has diminished privacy protections and may be subject to searches based on less than probable cause, Article 1, § 7 of the Washington Constitution demands that the search of a probationer be based on a “well-founded suspicion” of a violation.⁴ State v. Lucas, 56 Wn. App. 236, 244, 783 P.2d 121, rev. denied, 114 Wn.2d 1009 (1989); see also State v. Lampman, 45 Wn. App. 228, 235, 724 P.2d 1092 (1986). RCW 43.43.754, on the other hand, requires those convicted of a felony to submit to a search in the absence of any suspicion at all. The fact that those convicted of a crime have a lessened expectation of privacy cannot save RCW 43.43.754 from running afoul of Article 1, § 7.

Even under the Fourth Amendment, RCW 43.43.754 cannot be justified as a proper probation search. Again, individuals convicted of a crime have a lower expectation of privacy under the

⁴ Mr. Parish has not set forth a full analysis of the broader protections of the State Constitution pursuant to State v. Gunwall, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986), as this Court’s decision in Lucas specifically addressed the applicable standard for determining whether the privacy rights of a probationer have been violated.

Fourth Amendment while serving their sentence; they nonetheless maintain some degree of privacy. United States v. Knights, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). In Knights, the Court upheld the warrantless search of probationer's home conducted pursuant to an expressly acknowledged condition of probation, noting the search was based on reasonable suspicion, and this level of suspicion was sufficient in light of the probationer's lessened privacy expectation. Id. at 121. Thus, the rule that emerges from Knights is that even with a lessened expectation of privacy, a search of a probationer's home must be based on individualized and reasonable suspicion. Id.

The DNA extraction required by RCW 43.43.754 is entirely suspicionless. In other words, the State need not possess *any* suspicion of *any* criminal activity before requiring the convicted person to provide a biological sample. As such, requiring Mr. Parish to submit to such a search violates the Fourth Amendment.

e. The Court must suppress the fruits of the warrantless search of Mr. Parish. Where there has been a violation of the Fourth Amendment, courts must suppress evidence discovered as a result of the search as well as evidence that derives from the illegality, i.e., the "fruits of the poisonous tree."

Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

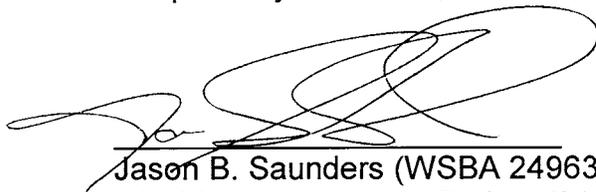
In the present case, this court should strike the condition of Mr. Parish's sentence and bar the collection of a biological sample from if one has not yet been collected. If a sample has been collected, the court should order the sample destroyed along with any data obtained from the sample.

E. CONCLUSION

The prosecutor's comments rose to the level of misconduct. Mr. Parish respectfully requests this Court reverse his conviction and dismiss the charge. Moreover, Mr. Parish requests this Court strike the order for biological testing.

DATED this 18th day of July 2006.

Respectfully submitted,



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