

39448-1

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

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In re the Personal Restraint Petition of  
  
NICHOLAS HACHENEY,  
  
Petitioner.

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**PERSONAL RESTRAINT PETITION**

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

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**PETITIONER MAY FILE THE  
PETITION WITHOUT PAYMENT OF  
A FILING FEE**

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COURT CLERK 6/24/09

**A. STATUS OF PETITIONER**

Nicholas Hacheny (hereinafter “Hacheny”) challenges his Kitsap County conviction for first-degree murder. Mr. Hacheny is currently incarcerated at the Reformatory in Monroe, Washington, serving a 320-month sentence.

This is Hacheny’s first collateral attack on this judgment. In fact, he has an on-going appeal in this Court challenging his current judgment arising from his resentencing hearing (Case No. 38015-3).

By separate motion, Hacheny has sought leave to supplement and/or amend this “placeholder” petition.

**B. FACTS**

1. Introduction

Mr. Hacheny may be a cad, but he is not a killer. However, the State, aided by an improper instruction, argued that the fact he was a cad, meant he *must* be a killer. RP 5017 (“Here’s where we get into the *strongest mode* of evidence, that is circumstantial evidence of consciousness of guilt...the affairs and the relationships...”) (emphasis added).

The original conclusion of investigators was that Dawn Hacheny died in an accidental fire. This opinion changed only after and *entirely as the result* of a witness, Sandy Glass, coming forward, demanding and receiving immunity, and then stating that Hacheny confessed that he

murdered his wife. Thus, Ms. Glass' credibility was central to this case. Inexplicably, after promising such evidence in opening, counsel failed to cross-examine Ms. Glass about the "prophecy" she says she received that led her to devise a murderous plan, a plan she projected onto Hacheney.

The case against Hacheney was also built on improper, suspect forensic opinions, including opinions that vouched for the credibility of other witnesses. To make matters worse, in two separate instances Hacheney could not cross-examine the witness who actually conducted the scientific test at issue, but instead was faced with the prospect of examining a witness with no personal knowledge of how the test was conducted, but who nonetheless vouched for the reliability of the outcome.

The investigation conducted since trial, unaided by discovery or access to investigators or experts (counsel represents Hacheney *pro bono*), has nevertheless called into question significant portions of the State's case. In addition, that investigation has shone new light on what this Court called the "closest" issue on direct appeal, the use of several video depositions at trial, calling into serious question the State's earlier claim that it made good faith efforts to obtain the presence of those witnesses at trial.

This is not a case where Mr. Hacheney almost got away with murder. It is, instead, an unfortunate case where Mr. Hacheney was wrongfully convicted of murder for the death of his wife in an accidental fire.

2. Procedural History

On December 26, 1997, Nicholas and Dawn Hacheney's house burned. A firefighter discovered Dawn, deceased, in her bed. Originally, the officials who examined the case concluded that the fire and Mrs. Hacheney's death were accidental.

In 2001, Sandy Glass went to the police with her lawyer, sought and was granted complete immunity (RP 2353),<sup>1</sup> and then claimed that Mr. Hacheney confessed the murder of his wife to her.

In September 2001, the State charged Hacheney with first degree premeditated murder. In February 2002, the State amended its charge to aggravated first-degree murder. Hacheney was tried by a jury and convicted.

Following entry of the original judgment in this case, Mr. Hacheney appealed. After this Court affirmed, the Washington Supreme Court granted review and reversed Hacheney's conviction for aggravated murder based on the insufficiency of the State's proof that Dawn was murdered in the course of arson. *State v. Hacheney*, 160 Wn.2d 503, 158 P.3d 1152 (2007). Thus, the Court remanded for "resentencing without consideration of the improper aggravating circumstance." 160 Wn.2d at 524.

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<sup>1</sup> "RP" refers to the verbatim report of proceedings. "CP" refers to the clerk's papers. By separate motion, Hacheney will request that the direct appeal file be consolidated with this PRP.

Hacheney was resentenced on June 20, 2008. Mr. Hacheney has no criminal history. Therefore, his “standard range” was 240-320 months. Hacheney was sentenced to the top of the range—320 months.

Following entry of the new judgment, Hacheney filed a notice of appeal. That appeal is currently pending in this Court (No. 38015-3).

This PRP, accompanied by a motion to proceed *in forma pauperis* and seeking leave to supplement and amend, timely follows.

### 3. Facts

Dawn Hacheney’s deceased body was found after a fire destroyed part of the Hacheney home.

Nicholas Hacheney has consistently maintained his innocence. *See Declaration of Nicholas Hacheney.*

On January 26, 1998, Hacheney was interviewed Scott Rappleye, a fire investigator for the Bremerton Fire Department and Detective Daniel Trudeau. Hacheney said that he and Dawn had opened Christmas presents in the bedroom, that they had strewn wrapping paper around the room, and that the bedroom space heater was the only source of heat in the house. He had been duck hunting when the fire occurred. The fact of the duck hunting trip has never been contested—although the exact timing of the trip is a critical fact.

### 4. Sandy Glass

During the summer and fall of 1997, Hacheney was having an affair

with a woman named Sandra Glass. During the spring of 2001, Glass mentioned to her then-boyfriend that while she and Hacheny had been alone in the basement of their church in 1998, Hacheny had admitted giving Dawn some Benadryl and lying awake until God told him, “(G)o take something that you want.” RP 2335. According to Ms. Glass, Hacheny held a plastic bag over Dawn's head until she was no longer breathing, set the fire, and left. *Id.*

#### 5. Forensic Investigation

On December 29, 1997, Dr. Emmanuel Lacsina performed an autopsy. He initially formed the opinion that Dawn had been asphyxiated when, during a flash fire, her larynx had spasmed reflexively.

John Rapple, a fire investigator for the Bremerton Fire Department, also initially thought the fire was accidental. He also noted that some of the propane canisters had “vented” during the fire, and that the area around the canisters had burned more heavily than other areas in the room. RP 1260. Unfortunately, the propane canisters were discarded during the investigation preventing any scientific examination.

During the autopsy, Dr. Lacsina collected blood and lung samples that were later tested by Egle Weiss, an employee of the state toxicology laboratory. Ms. Weiss unexpectedly died before trial. Dr. Logan testified to being Weiss' supervisor in late 1997 and to the lab's general procedures for handling and testing blood and tissue samples. Over Hacheny's

objections, the trial court admitted Exhibit 323, the report in which Weiss described her test results. Hacheney will seek by separate order to include Exhibit 323 in the record for this PRP. According to Dr. Logan, who was permitted to recite and vouch for her test results, her report indicated she found little carbon monoxide and no propane in the lungs, no carbon monoxide in the blood, and an elevated level of Benadryl.

Based in part on the lab report in which Weiss had described the results of her tests, Drs. Lacsina and Selove, another pathologist, opined that Dawn had died from suffocation prior to the fire.

The facts relevant to the forensic testimony at trial are discussed in greater detail in the first four claims in this petition.

#### Closed Courtroom "Depositions" Used at Trial

On June 28, 2002, over Hacheney's objection, the trial court granted the State's request to take depositions from three witnesses who were planning to be in other countries at the time of trial. Two of those witnesses, Michael and Julia DeLashmutt, were moving to Scotland. The third, David Olson, was moving for at least six months to a rural area in Bolivia. Hacheney's father asked to attend the depositions, but the trial court denied his request.

At the time of trial, the State represented that all three witnesses refused to return for trial, despite the State's good faith efforts to secure their presence. The trial court accepted the State's representations, which

were also heavily relied on by this Court in affirming Hachenev's conviction.

6. The Admission of "Bad Act" Evidence

Prior to trial, the trial court held that certain evidence was admissible under ER 404(b). At trial, the State offered Hachenev's alleged statement, made before the fire, that he could not wait to go to heaven because then he could have sex with whomever he wanted. The State also offered that shortly after the fire, Hachenev had begun sexual relationships with women named Latsbaugh, Anderson, and Matheson; and that at Dawn's funeral, he had given Anderson a hug of questionable propriety. Hachenev objected. Later, the court gave the following limiting instruction:

Evidence has been introduced in this case on the subject of the Defendant's relationships with several women for the limited purposes of whether the Defendant acted with motive, intent or premeditation, or as *evidence of consciousness of guilt*. You must not consider this evidence for any other purpose.

CP 1355 (emphasis supplied).

7. Extra-Record Evidence Relied On in This Petition

Hachenev discusses his extra-record evidence in greater detail in each respective section below. However, he summarizes that evidence, which he groups into four appendices attached to this petition.

First, Hachenev has always maintained his innocence. He has written a declaration (Appendix A), which states that he is neither an arsonist, nor a murderer.

Second, Hachenev has discovered a wealth of information regarding the practices at the Washington State Patrol Toxicology Lab, which conducted tests heavily relied on by a number of the State's witnesses in this case, which demonstrates what a three judge panel called a "culture of compromise." In short, the protocols were not followed and Dr. Logan, who vouched for the reliability of his staff, either knew about this malfeasance or, as he later claimed, was stretched too thin to properly supervise his staff. In any event, the true picture is much different than portrayed to Hachenev's judge and jury. These documents are contained in Appendix B.

Appendix C consists of documents obtained since trial through public disclosure requests which show two things: (1) a complete absence of any efforts by the State to insist that the three witnesses who were earlier deposed return for trial; and (2) assistance to those same witnesses by the State in claiming unavailability. In short, the new evidence calls into serious question the good faith that this Court found barely passed muster to justify "unavailability" on direct appeal.

Finally, this petition is based on extensive new information about where Mr. Hachenev was when the fire (that burned his house and caused the death of his wife) started. Those documents, which establish a much different timeline than proposed by the State and which make it impossible for him to have started the fire, are contained in Appendix D.

C. ARGUMENT

1. Claims of Error

CLAIM NO. 1: MR. HACHENEY'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BY TESTIMONY DESCRIBING THE RESULTS OF TWO SCIENTIFIC EXAMINATIONS WHERE THE PERSONS WHO CONDUCTED THOSE TESTS WERE NOT SUBJECT TO CROSS-EXAMINATION.

*Facts*

During Hachenev's trial several witnesses testified to the results of scientific tests performed by other witnesses, who were not present at trial and not subject to cross-examination.

For example, Dr. Lacsina, who performed the autopsy in this case, testified to the results of a blood test conducted by Olympic Medical Laboratories that he indicated revealed a lack of carbon monoxide in the Dawn Hachenev's blood. RP 901. This finding was heavily relied on by both Dr. Lacsina and Dr. Selove to support their opinions. The defense objected, arguing both that the foundation had not been laid and that Hachenev could not cross-examine the results. RP 893-900. The defense objection was overruled.

Next, Dr. Barry Logan, the toxicologist at the Washington State Patrol Crime Laboratory, was permitted to testify concerning the protocol and the results of tests performed on lung tissue—tested for the presence or absence of propane. The actual tests were conducted by Egle Weiss, an

employee of the crime lab who had died between the time of testing and trial. Dr. Logan was not present during any of the tests, but nevertheless was permitted to opine that Ms. Weiss followed the protocol (RP 1539, 1548), making the test results reliable.

Dr. Logan was asked: Based upon the answers she gave and the case file, do you have an opinion as to the validity, then, of the samples that were taken, and the testing that was conducted by Miss Weiss. He answered:

A. Yes.

Q. What is that opinion?

A. Is that it was properly conducted in compliance with the protocols that were in place at that time.

RP 1547. *See also* RP 1582 (rendering opinion that propane was not detected by Ms. Weiss).

Both scientific tests figured large in this case because they both concerned the presence or absence of propane in Dawn Hachenev's body, a key element in the State's suffocation theory. *See* RP 1383 (Dr. Selove testifies to his reliance on the toxicology report); RP 1412 (same); RP 5151-52, 5172 (State argues that the "undisputed" fact is that no propane was found in the deceased's lungs and no carbon monoxide in her blood—of course, it was impossible for Hachenev to dispute this evidence without being able to cross-examine the person who conducted the test).

### *Argument*

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” The Sixth Amendment's Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The Supreme Court will soon address the question of the testimonial character of laboratory reports used in criminal prosecutions. It issued a writ of *certiorari* this term to consider whether a forensic analyst's laboratory report is testimonial under *Crawford*. *Melendez-Diaz v. Massachusetts*, --- U.S. ----, 128 S.Ct. 1647, 170 L.Ed.2d 352 (2008). Thus, barring an order calling for rehearing, the decision will be announced by the end of the Term—which is later this month. In fact, the decision may come down today, in which case Petitioner will submit a supplemental statement of authorities.

However, even without the aid of *Melendez-Diaz*, Petitioner provides new, persuasive grounds to revisit this issue.

The Supreme Court in *Crawford*, rather than specifically defining “testimonial,” provided examples that constitute the “core class of

‘testimonial’ statements.” 541 U.S. at 51, 124 S.Ct. 1354. Among these are “pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* The Court further clarified the meaning of “testimonial” in *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), stating that courts should also consider the “primary purpose” of the statement. A statement is not testimonial, for example, if its “primary purpose...is to enable police assistance to meet an on-going emergency.” *Id.* at 2273. A statement is testimonial, on the other hand, “when the circumstances objectively indicate...that the primary purpose of the [statement] is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 2273-74.

Consistent with this reasoning, lab reports are categorized as testimonial statements requiring Confrontation Clause protection in the following cases: *Smith v. State*, 898 So.2d 907, 916-18 (Ala. Crim. App.2004) (autopsy report); *Thomas v. United States*, 914 A.2d 1, 12-18 (D.C.2006) (chemist's report); *Martin v. State*, 936 So.2d 1190, 1192-93 (Fla. Dist.App.2006) (drug analysis report); *People v. Lonsby*, 268 Mich. App. 375, 387-93, 707 N.W.2d 610 (2005), *appeal denied* 477 Mich. 854, 720 N.W.2d 742 (2006) (lab report); *State v. Caulfield*, 722 N.W.2d 304, 308-10 (Minn.2006) (lab report of drug test); *State v. March*, 216 S.W.3d 663, 665-67 (Mo.2007) (lab report); *City of Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203, 207-08 (2005) (nurse affidavit), *cert. denied* *Gehner v.*

*City of Las Vegas*, 547 U.S. 1071, 126 S.Ct. 1786, 164 L.Ed.2d 519 (2006); *State v. Kent*, 391 N.J. Super. 352, 364-75, 918 A.2d 626 (2007) (report prepared for trial to prove element of crime); *People v. Rogers*, 8 A.D.3d 888, 891-92, 780 N.Y.S.2d 393 (2004) (blood test).

There are compelling, “real world” reasons why the right to confront a forensic scientist is integral to the truth finding function. Over the past 35 years, a belief has taken hold in the criminal justice system that critical elements of any given case can be conclusively and irrefutably resolved through the use of forensic evidence. This belief stems from the assumption that state forensic examiners are highly-trained scientists, who conduct widely-recognized tests, and can then provide an objective and unimpeachable report about their results for use in criminal trials. The supposedly objective and “neutral” nature of these reports render the need for direct testimony and cross-examination superfluous.

This is unfortunately not true—in general or in this case, as the following section provides.

However, even if all forensic examiners operated under ideal “scientific” circumstances—solid techniques performed by qualified professionals, conducted in an accredited laboratory with meaningful supervision and controls—their reports would still be subject to the same dangers that prompted the Framers to adopt the Confrontation Clause in the

first place. This is because, at bottom, the evidentiary worth of forensic evidence cannot be boiled down to a simple mathematical calculus. Instead, the probative value of forensic evidence always depends on a variety of factors, including the training and skill of the forensic examiner, the validity and reliability of the technique, the precision of the recording methods, the existence of supervisory controls, and the absence of context and confirmation bias undermining the accuracy and objectivity of the forensic examiner in reporting the results.

The trials of the wrongly convicted reveal a widespread pattern of forensic errors. Although some of these errors involve forensic practices that have given way to new testing methods, there is no reason to believe these errors are purely or even largely a function of technology. As the Framers recognized more than 200 years ago when they included the Confrontation Clause in the Bill of Rights, simple mistakes and even more culpable ones are likely to continue regardless of how much technological progress occurs. Technological advances cannot eliminate the forensic errors that have plagued the exoneration cases, and these errors highlight the need for the sort of vigorous confrontation right this Court has described in its *Crawford* line of cases.

Confrontation is the best mechanism yet devised for safeguarding against precisely the sorts of witness mistakes, overreaching, bias and

outright fabrication exposed by the exonerations and their aftermath. Indeed, these are precisely the sorts of errors most likely to occur when, as often occurred during the *Ohio v. Roberts* era, the state's testimonial evidence is shielded from the opportunity for adversarial scrutiny. See e.g., *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (importance of confrontation in exposing falsehood); *Delaware v. Van Arsdall*, 475 U.S. 673, 682-83 (1986) (importance of confrontation in exposing bias); see generally *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004) (describing confrontation as “procedural” guarantee that reflects Framers' substantive judgment about “how reliability can best be determined.”).

This Court should revisit this issue and reverse Mr. Hachenev's conviction.

CLAIM NO. 2: NEWLY DISCOVERED EVIDENCE REGARDING THE PERFORMANCE STANDARDS OF THE WASHINGTON STATE PATROL CRIME LAB JUSTIFIES A NEW TRIAL.

CLAIM NO. 3: THE STATE FAILED TO DISCLOSE MATERIAL INFORMATION REGARDING THE PERFORMANCE STANDARDS OF THE WASHINGTON STATE PATROL CRIME LAB IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

CLAIM NO. 4: MR. HACHENEV WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO COMPETENTLY INVESTIGATE THE PERFORMANCE STANDARDS OF THE WASHINGTON STATE PATROL CRIME LAB.

*Facts*

On direct appeal, this Court concluded that the report prepared by

Egle Weiss was admissible because the person conducting the test was a “professional” acting under a “business duty.” Indeed, Dr. Logan’s opinion was not based on how Ms. Weiss performed the test in question, but instead on the “normal practice” of both Ms. Weiss and the entire lab. The trial court admitted the evidence concluding she “acted reliably and trustworthily.”

Prior to trial, the State did not disclose to the defense any information to the contrary. Likewise, the defense apparently did not undertake an investigation and discover otherwise.

In the years since trial, a wealth of information has been discovered by post-conviction counsel bringing into question both Dr. Logan’s oversight and raising significant doubts about whether all the employees of the crime lab acted “reliably and trustworthily.” *See* Appendix B. This new information sheds new light on whether the internal procedures of the Washington State Patrol Toxicology Lab in 1998 provided sufficient guarantees of trustworthiness and whether it was safe to “assume” that all employees of the crime lab acted reliably and trustworthily. Indeed, we now know that in a disturbing number of cases, they did not.

In July 2004, the *Seattle Post Intelligencer* published a series of articles outlining several problems with the crime lab. *See* Appendix B. Most importantly for purposes of this case, the reports revealed significant problems with the oversight of WSP Crime Lab employees.

In March 2007, the first of two anonymous tips from a whistleblower led to an investigation of the WSP Toxicology Lab. Dr. Logan asked lab scientist Ann Marie Gordon to lead the investigation into the accusation that lab employees were falsifying reports, that evidence was being destroyed, and that protocol was not being followed. In April 2007, Ms. Gordon reported that she had completed her investigation, revealing no fraud.

In July 2007, a second tip was received asking to investigate Ms. Gordon's performance more closely (suggesting that if her schedule was compared against some of her signed certificates that it would show fraud). When Dr. Logan met with Ms. Gordon to inform her that another investigation would be commenced, Ms. Gordon admitted that she had acted fraudulently, signing certificates for work she had not performed, including stating that she had calibrated machines when she had not done the work (*i.e.*, one of the aspects of Ms. Weiss' work that Logan assured Hachenev's jurors had been correctly performed because it always was). Ms. Gordon resigned on July 20, 2007.

As a result, several requests were made to conduct a full investigation of the State Patrol crime lab. *See* Appendix B. The Washington Foundation for Criminal Justice stated: "It represents a departure from integrity so profound that you can't believe anything about the lab." *See* Appendix B.

In January, 2008, a panel of judges in King County ruled that “the work product of the WSTL (Washington State Toxicology Lab) has been so compromised by ethical lapses, systemic inaccuracy, negligence and violations of scientific principals that the WSTL simulator solution work product would not be helpful to the trier of fact.” *State v. Ahmach*, Appendix B, *Ruling* at 25.

Included in the judges’ ruling were a number of findings highly relevant to the case at bar:

- a. Lab Manager Gordon had been taught by her predecessor to falsify test results conducted by other scientists;
- b. Dr. Logan was aware of this practice as early as 2000 (two years before Hachenev’s trial);
- c. Although Dr. Logan and Ms. Gordon discussed the impropriety of this practice, in 2003, Ms. Gordon adopted the practice herself;
- d. At least two other employees adopted the practice;
- e. The tests in question were run through the gas chromatograph;
- f. Worksheets from machine testing were often drafted weeks later by personnel not present when the tests were conducted. These worksheets were inaccurate in some cases;
- g. Declarations for certification of the solutions were prepared by support personnel and then signed by the analysts—sometimes weeks later. There were at least 150 instances of non-software related errors discovered.
- h. In one instance, a gas chromatograph machine was malfunctioning, resulting in abnormal readings. This

machine remained online for some time despite the fact that individual toxicologists knew it was not functioning properly;

- i. Results from a 2004 audit revealed the following conclusions:
  - i. The WSLT was noncompliant with policies and procedures in eight major categories;
  - ii. The simulator solutions logbooks were not properly kept;
  - iii. The required self-audits were not performed;
  - iv. Lab Manager Gordon indicated she did not have time to follow WSP policies and would not do so;
  - v. WSP policies and required procedures appear to be of secondary concern to lab personnel;
- j. Results from a 2007 audit revealed the following conclusion: "The department is unnecessarily exposed to litigation due to insufficient documentation and disregard for evidence handling policies and procedures."

These and other factors led the panel of judges to conclude the WSTL had developed a culture of compromise. Calling the problems with the lab "pervasive," the judges summarized their concerns to include a failure to "pursue an ethical standard" expected of an agency that serves as an integral part of the criminal justice system; the failure to create and abide by procedures to catch and correct human error; and the failure to maintain scientific standards reasonably expected of an agency involving critically probative evidence.

The application of the information underlying these conclusions to Mr. Hachenev's case is obvious.

The panel then went on to discuss Dr. Logan's role, responsibility,

and knowledge of the fraud. “While it is not clear from the testimony of the various parties just when Dr. Logan knew of the fraud, he should have known after the first tip. As previously stated, it is most likely that everyone in the WSTL was fully aware of the fraud.” *Id.* at 23. “This litany of problems is indicative of a pervasive culture which has been allowed to exist in the WSTL. In this culture, the WSTL compromises the accuracy of the work product. Accuracy becomes secondary to the accomplishment of the work.” *Id.* at 25.

In February 2008, Dr. Logan resigned. An investigation conducted by the Forensic Investigations Council concluded that Dr. Logan had too many responsibilities. “However, everyone who supervises a large number of employees...realizes that sometimes employees do not follow the rules, do not follow the directives and do not follow the law.” *See* Appendix F.

Dr. Logan admitted no such difficulty or problems during his testimony in this case.

However, in response to the King County judges’ ruling he complained that the workload of his department was two to five times that of other labs, that complacency about failing to follow protocol had set in; and that the protocols themselves were open to interpretation. Dr. Logan suggested the opposite to Hacheney’s jury. Undersigned counsel has contacted Dr. Logan and discussed some of these discrepancies. As of this writing, Dr. Logan has not provided a declaration—something that counsel

cannot compel at this stage of these proceedings.

Keeping in mind that two additional lab employees (Zink and Case), who initially handled the evidence, were also not available for cross-examination in 2007 the Risk Management Division included the following findings in their "Report to the Chief":

- a. The evidence storage area was accessible to anyone;
- b. The evidence vault door was often propped open;
- c. There was no record of who entered the storage area;
- d. Auditors observed the removal of items without appropriate accompanying notations;
- e. Accountability to the chain of custody was noticeably absent;
- f. Minimal chain of custody directives existed;
- g. An environment of non-compliance with protocol developed;
- h. Personnel were not held accountable for failing to follow directives;
- i. Dr. Logan failed to implement changes suggested in 2005.

In response to a public disclosure request regarding one of the absent witnesses who handled the evidence in this case, Glenn Case, it was learned that he left the lab under questionable circumstances shortly before Hachenev's trial. However, none of this information was revealed by Dr. Logan or the State to Hachenev, the trial court, or Hachenev's jury.

This previously suppressed and newly discovered evidence must be measured by the assurances of quality control repeatedly pronounced

during Hachenev's trial. Here is a quick summary of the WSTL's handling of the lung tissue:

- a. Dr. Lacsina had no memory of how he collected or stored the lung tissue. He was not sure to whom he gave the tissue—"it might have been Ted Zink." RP 903-04;
- b. Ted Zink, a crime lab employee, was not called to testify;
- c. Zink supposedly delivered the sample to Glen Case;
- d. Case was not called to testify;
- e. There was no documentation of Zink's work;
- f. The samples were then examined and tested by Egle Weiss;
- g. Ms. Weiss, who died before trial, obviously did not testify;
- h. Dr. Logan, who admitted that he did not have Ms. Weiss' bench notes and did not personally observe any of her examination of the item testified to his opinion that she followed the protocols and to the reliability of her test results (RP 1548);

The rationale supporting the admission of Dr. Logan's testimony was based on a set of assumptions proffered by the State and adopted by the trial court and later, this Court, which have now been proven false. At the time of the hearing, Dr. Logan professed that all of his employees followed protocol. We now know, and it appears Dr. Logan knew then, that the WSTL had a pervasive practice of cutting corners. Given this new information, it is impossible to conclude that "Ms. Weiss performed the applications in the acceptable way, following accepted and appropriate protocol." CP 190.

Likewise, Dr. Logan's assurances of oversight have been undermined—by his own admission. As early as 2000, Dr. Logan was aware of a pattern of noncompliance and fraud. He nevertheless assured Hachenev's jury of the opposite proposition. Dr. Logan simply could not reasonably personally vouch for the test results where he had no personal knowledge of how the test was conducted.

Petitioner has framed this claim in three alternative ways: newly discovered evidence, a *Brady* violation, and Sixth Amendment ineffectiveness for failing to investigate.

In the end, no matter how the claim is framed, one thing is clear: Hachenev's jury was not given anything close to accurate information about Dr. Logan's ability to vouch for the reliability of the test results offered in this case.

CLAIM NO. 5: MR. HACHENEV'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN VIDEO DEPOSITIONS WERE ADMITTED AT TRIAL. THIS CLAIM IS BASED ON NEWLY DISCOVERED EVIDENCE THAT THE STATE DID NOT MAKE GOOD FAITH EFFORTS TO OBTAIN THE PRESENCE OF THE WITNESSES AT TRIAL.

On direct appeal, this Court held:

The closest question in this case is whether the trial court, before permitting the use of Olson's and the DeLashmutts' depositions at trial, properly found that the State made good faith efforts, through 'process or other reasonable means,' to obtain their presence at trial. Hachenev contends that when the trial court admitted the three witness' pre-trial depositions in lieu of their live testimony, it violated his Sixth Amendment right to confront the witnesses against him.

This Court continued:

The State served all three witnesses with enforceable trial subpoenas before they left Washington. As far as the record shows, the State never hinted to them that they did not have to obey, or that they would not be punished if they failed to obey. Reasoning that the witnesses' depositions said or implied, 'We're leaving and not coming back,' [RP 3833] and that the prosecutor had 'revealed {that} all three witnesses refused to come and refused to honor the subpoena,' [*id.*] the trial court seems to have inferred that the witnesses would not have returned for trial even if the State had offered to reimburse them for their reasonable travel expenses. That inference was reasonably available from the record, which as a consequence is sufficient to support findings that the State could not procure the witnesses' attendance 'by process or other reasonable means and that the State was acting in good faith.

Although we resolve this question in favor of the State, we consider it close because the State, quite inexplicably, failed to offer to pay the travel expenses that the DeLashmutts and Olson would reasonably and necessarily incur to return for trial. *We might reach a different result if the record showed that the State had suggested or even hinted to a witness that the witness could ignore his or her subpoena once he or she had been deposed, for such a showing might have precluded the trial court's finding that the State had made a good faith effort to obtain the witness's attendance at trial.* Because the record is devoid of such facts, however, we conclude that the trial court did not abuse its discretion.

121 Wn. App. 1061, 2005 WL 1847160 (emphasis added).

Evidence has now been developed that the State did much more than "hint" to the witnesses that they were free to ignore their subpoenas.

Through a public disclosure request, Petitioner has discovered the following:

1. David Olson wrote a letter on June 5, 2002, asking to have his testimony taped instead of appearing at trial. *The State did not disclose its response to that letter.*

2. That same day, Julia DeLashmutt sent an email to the Prosecutor's Office stating that she and her husband (Michael) would be in Scotland in mid-October and asking what was needed before they left. *Once again, the State did not provide information regarding its response.*
3. On June 12, 2002, the State moved for videotape depositions, citing only the financial hardship to the witnesses, if required to travel back to the United States. *See CP 158.*
4. On June 28, 2002, at a hearing, the State once again argued that it would be "burdensome" for the witness to be forced to return for trial.
5. The video depositions were taken in early August 2002.
6. On September 9, 2002, Amanda Jarrett of the Kitsap County Prosecutor's Office sent an email to DPA Clair Bradley indicating she was in the process of writing a letter instructing the DeLashmutts to contact her "regarding getting a witness unavailability letter faxed to us on the day of trial." *The State has not provided the actual letter sent to the witnesses.*
7. On September 23, 2002, Ms. Jarrett sent another email to DPA Bradley with the DeLashmutts' contact information. The email also references that she sent a letter to them "re: getting something from her and Michael on 10/16 saying they are located in Scotland." She also indicates that she spoke to Julia's mother about the matter. *Once again, the State did not provide the email sent to the DeLashmutts claiming that it was deleted.*
8. On September 25, 2002, Ms. Jarrett sent an email to David Olson requesting that he fax her an "unavailability letter" on the first day of trial. She then went on to suggest language, specifically, *"I am therefore unable to return to Kitsap County to testify in the trial...."* The email instructs Olson to fax the letter to their office.
9. On September 27, 2002, Mr. Olson sent an email to Ms. Jarrett indicating he had received her email.

10. On October 16, 2002, Olson faxed a letter to the Prosecutor's Office that included Ms. Jarrett's proposed language nearly verbatim.
11. That same day, a faxed letter was also received from the DeLashmutts, which also contained identical language proposed by Ms. Jarrett.
12. Nowhere in the correspondence released by the Prosecutor's Office does any one of the three witnesses indicate that they refuse to return for trial.
13. Nowhere in the correspondence released by the Prosecutor's Office does the State indicate to any witness that she or he has an obligation to obey their subpoena nor mention the penalty for failing to honor that legal obligation.
14. On February 26, 2009, John Guinn, an attorney assisting undersigned counsel in this case, spoke with David Olson. When asked by Guinn what the prosecutors told him about his obligations after he was deposed, Olson stated, "as far as I knew, I was done." When asked to memorialize this conversation, Olson read a proposed declaration, agreed that it was accurate, but refused to sign—stating the he "did not want to get involved in the case." *See First Declaration of Guinn.*
15. Mr. Guinn has also contacted the DeLashmutts. However, as of this writing, they have not responded.

*See generally* Appendix C.

As this Court noted on direct appeal, the Sixth Amendment provides that the accused shall enjoy the right to confront the witnesses against him. It bars the use of a witness' deposition unless the witness was previously cross-examined and is unavailable at the time of trial despite the State's good faith efforts to obtain his or her presence "by process or other reasonable means." ER 804(a)(5); *Ohio v. Roberts*, 448 U.S. 56, 65-66,

100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Mancusi v. Stubbs*, 408 U.S. 204, 210-213, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *Barber v. Page*, 390 U.S. 719, 723-25, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

According to *State v. Aaron*, 49 Wn.App. 735, 740, 745 P.2d 1316 (1987), whether the State has made a sufficient effort to satisfy the good faith requirement of ER 804 is a determination that necessarily depends on the specific circumstances of the case and rests largely within the discretion of the trial court. In *State v. Aaron*, the defendant was charged with burglary. He failed to appear in court as scheduled, but was arrested and arraigned ten days later. At his arraignment, the State moved to depose the key eyewitness, who wanted to leave for England the next day. The court granted the motion and the deposition took place that same afternoon, over defense counsel's objection. When the witness failed to appear at trial, the State moved to admit the deposition, and the trial court granted the motion. Emphasizing that the State had made 'no effort' to procure the witness' return for trial, Division One reversed. 49 Wn.App. 735.

In *State v. Hobson*, 61 Wn.App. 330, 810 P.2d 70, *review denied*, 117 Wn.2d 1029 (1991), on the other hand, the defendant was charged with second degree theft. His trial was set for September 15, reset for October 3, then reset again for October 21. On October 19, the State moved to

continue the October 21st trial date because a witness whom it had previously subpoenaed for trial planned to be gone on a pre-paid hunting trip. The trial court denied the motion. The State then moved to depose the witness, the trial court granted that motion, and the witness was deposed. Later, at trial, the witness failed to appear. The State then moved to admit the deposition, representing that even though the witness had remained under subpoena, ‘he had indicated that he would not forgo his trip to testify at Hobson's trial.’ 61 Wn.App. at 333. The trial court granted the motion, and Division One affirmed. *See also Crawford, supra* (requiring witness to be demonstrably unavailable).

One of the core elements of the Confrontation Clause is that it requires the witness to relate the fact *in open court* while under oath before the “watchful eyes of the jury.” *State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997). For centuries this process, dispensed with for these three witnesses, has been held to maximize the accuracy of the truth finding process.

This Court originally concluded “The facts and circumstances here resemble *Hobson* more than *Aaron*.”

The reverse is now true.

This new evidence certainly casts the trial court’s ruling, not to mention the State’s credibility in a different light. In the present case, not only did the State fail to make efforts to secure the three witnesses at trial,

they gave the witnesses a roadmap to avoid their obligation. Nowhere in any of the documents and correspondence retained by the State and obtained by the defense does any one of the three witnesses indicate they are refusing to appear at trial. Instead, the documents provided support the conclusion that the State suggested to the witnesses that all they needed to do was to repeat language suggested by the State in order to be free of their obligation.

To make matters worse, the documents and correspondence obtained by Petitioner are inconsistent with what the State told the trial court. For example, the prosecutor told the trial court that Olson “would not be honoring the subpoena” and that he would “be difficult to reach in any sort of routine or regular basis.” RP 3809-10. The State made these remarks despite actively exchanging emails with Olson—a fact conveniently omitted.

Further, Petitioner obtained all of this information without the aid of discovery devices. At an evidentiary hearing, Petitioner will be able to avail himself of those devices. RAP 16.11. Thus, if the State contests this new evidence, then an evidentiary hearing should be held.

If, on the other hand, the State does not offer its own, competent contesting evidence, then this Court should reverse and remand for a new trial.

CLAIM NO. 6: BECAUSE THE STATE DID NOT MAKE THE NECESSARY EFFORTS TO OBTAIN THE PRESENCE OF THE “DEPONENTS” AT TRIAL, THE DEPOSITIONS CONSTITUTED PART OF THE TRIAL. THEREFORE, CLOSING THE COURTROOM VIOLATED HACHENEY’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO AN OPEN AND PUBLIC TRIAL.

On direct appeal, Hachenev argued that the trial court violated his constitutional right to a public trial by not allowing his father to attend the depositions. Both the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution give an accused the right to a public trial. If that right is violated, the remedy is to reverse and remand for a new trial. Washington courts have scrupulously protected the accused’s and the public’s right to open public criminal proceedings. *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant’s public trial rights); *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents); *State v.*

*Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), *review denied*, 146 Wn.2d 1006 (2002). *See also In re Oliver*, 333 U.S. 257, 266, 68 S.Ct. 499, 504, 92 L.Ed. 682 (1948) (federal constitutional right to a public trial applicable to the states through 14<sup>th</sup> Amendment).

On direct appeal, this Court concluded that the Constitutional rights were not violated because the public was excluded from a deposition, not a portion of the trial. However, the new evidence presented in the section above supports the conclusion that the State never intended to attempt to attempt to bring the witnesses back for trial. Instead, the deposition was part of the trial. Thus, the State misled both the trial court and this Court to conclude that the closed court hearing was merely a discovery deposition and not part of the trial.

Further, the fact that the deposition was played during trial does not cure the error. One of the critical underpinnings of the right to a public and open trial is that it serves to discourage perjury. *See Waller v. Georgia*, 467 U.S. 39, 46 104 S.Ct. 2210, 2215-16, 81 L.Ed.2d 31 (1984). *See also, United States v. Brazel*, 102 F.3d 1120, 1155 (11<sup>th</sup> Cir. 1997) (public trials ensure participants act responsibly, encourage witnesses to come forward, and discourage perjury). That protection is virtually non-existent where the witnesses testified in a private setting and then were out of the country at the time the depositions were played at trial.

“Prejudice is necessarily presumed where a violation of the public trial right occurs.” *Easterling*, 157 Wn.2d at 181, 137 P.3d 825. “The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” *Id.*

The remedy is reversal and a new trial. *Id.* at 174.

Once again, new facts cast this claim in a different light and merit a different outcome.

CLAIM NO. 7: MR. HACHENEY WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE WHERE COUNSEL FAILED TO INVESTIGATE AND PRESENT AN ACCURATE TIMELINE WHICH WOULD HAVE BEEN COMPELLING PROOF THAT IT WAS IMPOSSIBLE FOR MR. HACHENEY TO HAVE STARTED THE FIRE.

Mr. Hacheny could not have started the fire that caused his wife’s death if he was either hunting or on his way to hunt. Thus, constructing an accurate a timeline was critical to his defense.

Certainly, the State understood the importance of the timeline. The State alleged that Hacheny left home at 6:45 a.m. and arrived in the hunting blinds at 7:50 a.m. RP 5028. The State also argued presented evidence through a police officer that he made the drive from Hacheny’s house to the hunting site in 51 minutes. Finally, the State argued that Hacheny and the two other hunters left the duck hunting site at 8:25, giving them approximately 30 minutes of hunting time, arriving at the restaurant where they ate breakfast and Hacheny paid the bill at 9:27 a.m. (as evidenced by a credit card receipt). According to the State’s argument,

( ) ( )

this timeline allows for Mr. Hacheny to have set the fire, met his companions and arrived at the hunting site prior to the break of daylight, spent time hunting, eat breakfast, and finally for Hacheny to return to his now-burned house.

In fact, the timeline is speculative and, more importantly, could have been easily contradicted by competent evidence. *See Appendix D.*

While the defense theory also depended on the timeline, the defense case merely amounted to a weak criticism of the State's evidence in closing. RP 5102-04. The reason for the defense failure is simple. The defense failed to conduct the necessary investigation despite the repeated urgings of Mr. Hacheny and his father.

Petitioner has now conducted the investigation that trial counsel failed to conduct. That evidence, which is admittedly difficult to explain and/or fully appreciate without the aid of a hearing, provides additional convincing evidence of Hacheny's innocence. If this evidence had been discovered and presented there is a reasonable likelihood that jurors would have reached a different outcome.

It is important to begin by identifying the facts that are uncontested and beyond dispute. Those facts are critical to establishing the most accurate timeline possible. There are several: arrival in the hunting blinds 20-30 minutes before daylight, the time that Hacheny paid for breakfast, and the time of the first 911 call reporting the fire. Hacheny uses those

uncontested facts as “markers” to aid in the most accurate determination of the time of the events that took place on the day of Dawn’s death.

Arrival in the Hunting Blinds:

Establishing the time that Hachenev and the two other hunters arrived in the “hunting blinds” allows us to establish the time that Hachenev left his house. Obviously, according to the State’s theory, Hachenev started the fire as he left.

Phil Martini, one of Mr. Hachenev’s hunting partners that morning and a witness for the State, testified that the group had been at the hunting site for 20-30 minutes when he saw two birds, but that it was not “fully daylight.” RP 541-42. Thus, it is important to establish when it became “fully daylight.” It is indisputable that “sunrise” was 7:58 a.m. that morning. However, it is also indisputable that “civil twilight” was at 7:22 a.m. See US Naval Observatory Astronomical Applications Department ([http://aa.usno.navy.mil/cgi-bin/aa\\_pap.pl](http://aa.usno.navy.mil/cgi-bin/aa_pap.pl)). Before sunrise and again after sunset there are intervals of time, twilight, during which there is natural light provided by the upper atmosphere, which does receive direct sunlight and reflects part of it toward the Earth’s surface.

After his son’s conviction in 2003, Mr. Hachenev’s father traveled to the hunting site on December 29<sup>th</sup> and took pictures to establish how light it was at certain times. The images show the first signs of light 7:11 a.m., “civil twilight” at 7:22 a.m., and that it was “fully daylight” by no later than

7:30 a.m.





The full photographic evidence is provided on an accompanying CD, part of Appendix D.

If it was “fully daylight” by 7:30 a.m. (not 7:58—as posited by the State), then figuring in Mr. Martini’s arrival time of 20-30 minutes earlier, means that the hunters arrived at that place between 7:00 and 7:10 a.m.. This is 40 to 50 minutes earlier than the (largely unanswered and misleading) timeline presented by the State.

Next, we work backwards in time to determine when Mr. Hacheny left his home.

Evidence was readily available, but sadly uninvestigated and not presented, to dispute the police officer’s testimony of 51 minutes. Google maps shows the distance between the Hacheny house and Indian Island as 41 miles with a driving time of 1 hour and 14 minutes. This does not include the time to walk to the duck blinds which adds an additional 5-10

minutes.

In fact, when Daniel Hachenev traveled the route with Gregg Olsen after trial, they drove the route and then walked to the duck blinds. The distance traveled was 42 miles. It took 1 hour and 25 minutes. Later, John Guinn, an attorney assisting on this case, traveled the route (quickly) with a videographer and recorded a total time of 1 hour and 14 minutes from house to duck blinds. Taking the shortest time and calculating from 7:10 a.m., **Hachenev left home at 5:56 a.m.—at the latest.**

This information could have been extremely powerful if presented along with the testimony of defense expert, Jim White of Western Fire Center. After conducting extensive fire modeling, Mr. White concluded that the burn patterns in the house were consistent with a flash fire. RP 4594. He further opined that the fire lasted about 20 minutes. RP 4599. Finally, Mr. White opined that “given the physics of this universe,” ATF Agent Wetzel’s smoldering fire theory could be conclusively ruled out. RP 4562-63.<sup>2</sup>

The fire was first reported in a “911 call” at 7:13 a.m.. It was extinguished at approximately 7:25 a.m..

Using White’s testimony, the fire started around 7:00 a.m.

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<sup>2</sup> It is important to note that it is impossible to say that the jury verdict represents a rejection, in whole or in part, of White’s testimony. For purposes of this ineffectiveness claim, Hachenev need only show a “reasonable probability” of a different outcome.

**Thus, it was impossible for Hachenev to have started the fire.**

**He had been gone from the house for over an hour.**

However, the timeline evidence fully supports Hachenev's innocence even using the testimony—presented by the State—of fire investigator Scott Roberts. After fully establishing Mr. Roberts credentials earned during 22 years of work involving nearly 2000 fires (RP 3421-23), Roberts testified that, although he could not give an exact duration time for the fire, his opinion was that it burned an hour or less. RP 3573, 3592-93.

Utilizing Roberts' "up to one hour" opinion, the fire began around 6:25 a.m.. At that time, Hachenev had been gone for at least 30 minutes.

This evidence, even standing alone, could have easily created a reasonable doubt in the minds of Hachenev's jurors. Further, there was no tactical downside to it. Thus, counsel had a duty both to investigate and present this evidence.

Effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and art. 1, § 22 of the Washington constitution. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). To establish that trial counsel's representation was constitutionally inadequate, Hachenev must first establish that counsel's performance was deficient, and then demonstrate that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687, 104 S. Ct. at

2064. The measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688, 104 S. Ct. at 2065. “Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 691, 104 S. Ct. at 2066.

Over the last decade, counsel’s duty to thoroughly investigate before making tactical decisions has been clearly defined. *See e.g., Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). These three cases further elucidated the rule that counsel must conduct a competent investigation before making tactical choices, established in *Strickland v. Washington*, 466 U.S. 688 (2000).

The touchstone of the prejudice inquiry is the fairness of the trial and the reliability of the jury’s verdict in light of any errors made by counsel. *Id.* at 696, 104 S. Ct. at 2069. The petitioner must show deficient performance which is “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687, 104 S. Ct. at 2064. If there is a reasonable probability that, but for counsel’s act or omission, the outcome of the proceeding would have been different, the defendant was prejudiced. *Id.* at 694, 104 S. Ct. at 2064. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*; *Thomas*, 109 Wn.2d 222, 226, 742, P.2d 816 (1987). The Supreme Court clarified that a

“reasonable probability” of a different result is shown when the new information “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the jury verdict.” *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995) (footnote omitted).<sup>3</sup> The Supreme Court in *Kyles* emphasized that materiality, or, here, prejudice, is not a sufficiency of the evidence test. *Kyles*, 115 S. Ct. at 1566.

The "reasonable probability" standard has been uniformly described by courts around the country as "not stringent," requiring a showing by less than a preponderance of the evidence that the outcome of the proceeding would have been different had the claimant's rights not been violated. *See, e.g., Skaggs v. Parker*, 235 F.3d 261, 270-271 (6th Cir. 2000) ("[A] petitioner [claiming error under this standard] need not prove by a preponderance of the evidence that the result would have been different, but merely that there is a reasonable probability that the result would have been different."); *Hull v. Kyler*, 190 F.3d 88, 110 (3rd Cir. 1999) (the reasonable probability standard "is not a stringent one," and is "less demanding than

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<sup>3</sup> *Kyles* argued the State had suppressed exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Court's analysis of *Brady* "materiality" guides the prejudice analysis of ineffective assistance of counsel claims as the two standards are historically linked. The Supreme Court in *Strickland* relied upon the materiality prong of *Brady* in defining prejudice in a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068 ("the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information to disclose to the defense by the prosecution"). *See also United States v. Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383. The Court in *Kyles* again acknowledged this connection between the two standards. *Kyles*, 115 S. Ct. at 1565-66 (relying on both *Brady* and *Strickland* and their respective progeny in defining materiality).

the preponderance standard") (citation omitted); *Paters v. United States*, 159 F.3d 1043, 1049 (7th Cir. 1998) (Rovner, J., concurring) (the reasonable probability standard "clearly is less demanding than a preponderance of the evidence standard"); *Belyeu v. Scott*, 67 F.3d 535, 540 (5th Cir. 1995) (under the reasonable probability standard, "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the [error] cannot be shown by a preponderance of the evidence to have determined the outcome").

Like the other claims that depend on extra-record evidence both elements of Hachenev's *Strickland* claim—deficient performance and prejudice—must be measured at an evidentiary hearing.

However, if Hachenev can prove at a hearing what he alleges in this Petition, he is entitled to a new trial.

CLAIM NO. 8: MR. HACHENEV WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO DR. SELOVE'S TESTIMONY THAT DAWN HACHENEV DIED AS A RESULT OF BEING SUFFOCATED WITH A PLASTIC BAG, WHERE THAT CONCLUSION EXPLICITLY INCLUDED AN OPINION THAT MS. GLASS WAS CREDIBLE, AND WHERE IT EMBRACED THE ULTIMATE ISSUE.

CLAIM NO. 9: MR. HACHENEV WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO ASSIGN ERROR TO DR. SELOVE'S COMMENT ON DIRECT APPEAL.

Dr. Daniel Selove is a pathologist who testified to his opinion about the cause of Dawn Hachenev's death. Although he admitted the science supported two possibilities (undetermined and homicide), he offered a

definitive conclusion: “the cause of death is asphyxia by suffocation.” RP 1416. More precisely, he concluded that the cause of death was “suffocation by plastic bag.” RP 1417; 1500.

In offering this opinion, Dr. Selove repeatedly vouched for the credibility of Ms. Glass. *See* RP 1415-15 (Noting that he expressly relied on statements by Glass, “(a)nd because of reliance on those statements, I can exclude strangulation.”). In summarizing the facts supporting his opinion, Dr. Selove prominently mentioned that “in fact, plastic bag suffocation occurred.” RP 1500.

Although the defense cross-examined Dr. Selove and established that if Ms. Glass was not truthful, then his opinion would change (RP 1467), the defense failed to object to Dr. Selove’s repeated incorporating an opinion regarding the truthfulness of Glass’ accusation in his “medical” opinion. Further, in rebuttal, the State blunted the defense cross-examination by once again asking Dr. Selove to comment on the credibility of other witnesses:

Q. So, some of the facts that Mr. Talney asked you about, would those cause you to change your opinion at all as to the cause of death?

A. No, none that I have heard today would cause me to change my interpretation of...the autopsy and investigative reports.

RP 1500.

Despite a solid line of cases condemning testimony that constitutes a

comment on the credibility of another witness, Hachenev's appellate counsel failed to raise the issue on direct appeal.

Hachenev now raises this claim in two, alternate postures: ineffective assistance of trial counsel for failing to object and ineffective assistance of appellate counsel for failing to raise the issue on direct appeal. In each case, Hachenev must show a reasonable probability of a different outcome. What that means, practically speaking, is that he must undermine confidence in the trial outcome *or* he must show a reasonable likelihood of a different decision on appeal. The latter test is significant because, if the issue had been raised on direct appeal, the State would have had to demonstrate the harmlessness of the error beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (A constitutional error is harmless only if the reviewing court is "convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.").

The case law is clear that testimony containing opinions on a defendant's guilt are unconstitutional. "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." Such an opinion violates the defendant's right to a trial by an impartial jury and his right to have the jury make independent evaluation of the facts." *State v. Wilber*, 55 Wn.App. 294, 297, 777 P.2d 36

(1989) (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)).

The case law also clearly shows that witness opinion as to another witness' credibility is improper. “[N]o witness may give an opinion on another witness' credibility.” *State v. Carlson*, 80 Wn.App. 116, 123, 906 P.2d 999 (1995). Comments on the credibility of a key witness may also be improper because issues of credibility are reserved for the trier of fact. *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993). This infringement on the province of the fact-finder is also an error of constitutional magnitude. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

A “manifest error,” an error that can be raised on direct appeal without a contemporaneous objection at trial, requires a nearly explicit statement by the witness that the witness believed the accusing victim. *See State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).

Hachenev satisfies that standard. Dr. Selove testified that Hachenev was guilty of murder. His words could not be more clear—“**in fact**, plastic bag suffocation occurred.” RP 1500. It would be hard to imagine testimony that more fully embraced an opinion on guilt.

Further, while Dr. Selove admitted that his opinion would change if Ms. Glass was not credible, he consistently vouched for her credibility, a necessary component to his conclusion.

Frankly, Dr. Selove's testimony, like several of the State's

professional witnesses, went beyond the limits of science. Rather than using his expertise to enlighten the jury and then entrusting them to make credibility determinations, he stepped far across the lines of science into advocacy.

CLAIM NO. 10: MR. HACHENEY WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CROSS-EXAMINE MS. GLASS REGARDING HER PLAN TO KILL HER HUSBAND WHERE THE EVIDENCE WAS ADMISSIBLE AND WHERE DEFENSE COUNSEL PROMISED TO PRODUCE IT FOR THE JURY IN OPENING STATEMENT.

Sandy Glass was the singular key witness in this case. Not only did she testify that Hachenev confessed the murder of his wife to her—a highly contested point—her statement to that effect resulted in a number of the State’s forensic experts changing their opinions, not because of some new scientific test, but based merely on her statements. *Compare* RP 1467 (Dr. Selove’s opinion regarding cause of death relies “completely and solely on the statements of Sandy Glass”); RP 1493 (“on the basis of the autopsy and the toxicology alone, I would say that the cause of death and manner are undetermined.”).

As her testimony revealed, Ms. Glass also had some unusual beliefs about “prophesies” from God.

In short, Ms. Glass’ testimony was critical, but her reliability was certainly not unquestionable.

One prophesy “received” by Ms. Glass was that her husband was

soon to die. RP 69 (“...her husband, Jimmy, was going to die, and that prophesy didn’t just disappear, it continued, and she believed it.”). This prophecy and Ms. Glass’ reaction to it was central to the defense attack on her credibility. Very early in the defense opening, counsel told jurors about Ms. Glass’ “prophesies” and her response—suggesting that Ms. Glass had a difficult time separating reality from her beliefs. *See* RP 67-70.

Defense counsel then told Hacheney’s jurors:

The evidence will show, and it will come from Sandy’s mouth, that she went so far as planning the death of her husband. It was going to be a car accident.

RP 69.

Ultimately, the Court reserved ruling on the admissibility of this testimony. RP 102-07. Later in the trial, the defense sought to admit the evidence, noting:

It was more than just a thought. She actually had a specific plan in which to kill her husband.

RP 2157; CP 104.

Then, quite inexplicably, defense counsel stated that he no longer sought to admit the evidence that co-counsel had explicitly promised Hacheney’s jurors would “come from Sandy’s mouth.” RP 2158. Given this agreement, the Court excluded the evidence. RP 2173. In short, one defense attorney abandoned what Hacheney’s other attorney promised his jurors to produce and inferentially suggested was the most vital piece of the

defense attack on Ms. Glass' credibility.

As discussed earlier in this Petition, the right to counsel includes the right to reasonable effective representation by counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). In order to prevail on an ineffective assistance of counsel claim, the respondent must meet the two part test set forth in *Strickland*: deficient performance and prejudice.

“(L)ittle is more damaging than to fail to produce important evidence that had been promised in an opening” because the “jurors would believe, in the absence of some other explanation, that the witnesses were unwilling, viz., unable, to live up to their billing.” *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir.1988). Of course, the ultimate question of ineffective assistance as a result of a broken opening statement promise to produce particular testimony from a particular witness depends on the facts and circumstances of the case.

In *Anderson*, defense counsel in opening asserted that he would call a psychologist and a psychiatrist to testify that the “defendant was ‘walking unconsciously toward a psychological no exit....Without feeling, without any appreciation of what was happening...like a robot programmed on destruction.’” *Anderson*, 858 F.2d at 17. He failed to deliver any of the promised expert medical testimony. The court characterized the promise as

“dramatic” and the indicated testimony as strikingly significant. *Id.* at 18.

In *Ouber v. Guarino*, 293 F.3d 19, 28 (1st Cir.2002), trial counsel “promised, over and over, that the petitioner would testify and exhorted the jurors to draw their ultimate conclusions based on her credibility.” The petitioner's testimony would have sharply conflicted with the testimony of a main trial witness. Despite the repeated promises, however, the petitioner was not called to testify. The *Ouber* court concluded that trial counsel had “structured the entire defense around the prospect of the petitioner's testimony that was never delivered.” *Id.*

It is true that Ms. Glass was called as a witness in this case. But, that is not the point. Instead, the defense theory in opening was that Ms. Glass was seriously psychologically confused, strongly suggesting that her claims about Hacheney's confession were simply a projection onto him of her own thoughts. Psychological projection (or “projection bias”) is when a person's personal attributes, thoughts, and/or emotions are ascribed onto another person or people. In classical psychology, “projection” is always seen as a defense mechanism which occurs when a person's own unacceptable or threatening feelings are repressed and then attributed to someone else.

This theory was certainly much more plausible than the State's claim that Hacheney's sexual indiscretions demonstrated his guilty knowledge. Indeed, Ms. Glass' testimony provided additional support for this theory when she was asked about the source of the “voice” she heard that

prophesized her husband's death.

Q: Is it your own voice?

A: Not that I am aware of.

Q: Isn't it possible, ma'am, that these were your own private thoughts?

A: It is certainly possible.

RP 2389.<sup>4</sup>

However, there were two critical elements to this theory—both promised in opening statements. Without the second element—the fact that Glass devised a homicidal plan—the projection theory utterly failed. *See* RP 5000 (State uses Glass' prophecy testimony against Hacheney).

Ms. Glass' plan to kill her husband was admissible under a variety of theories. For example, it was admissible as part of one of the perceived benefits that Glass received from the State when she received complete immunity. Indeed, the only portion of her statement that even remotely suggests of criminal activity is her thoughts and actions relating to her plan to kill her husband.

Like a number of the other claims raised in this petition, this claim, which is clearly not frivolous, can only be decided at an evidentiary hearing. However, at such a hearing Petitioner expects he will be able to satisfy both *Strickland* prongs. The defense failed to deliver what it

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<sup>4</sup> Unfortunately, defense counsel also missed this perfect opportunity presented by the witness by moving on to questions about where and when Glass heard this voice in her head.

promised to Hachenev's jurors and what was the linchpin to evaluating Glass' credibility. This self-inflicted blow to the defense case undermines confidence in the outcome of the case—especially where Hachenev's guilt or innocence turned so completely on this single witness.

CLAIM NO. 11: THE INSTRUCTION WHICH TOLD JURORS THEY COULD CONSIDER HACHENEV'S "RELATIONSHIPS WITH WOMEN" AS "CONSCIOUSNESS OF GUILT" CONSTITUTED A COMMENT ON THE EVIDENCE IN VIOLATION OF ARTICLE IV, SECTION 16 OF THE WASHINGTON CONSTITUTION.

CLAIM NO. 11: THE "CONSCIOUSNESS OF GUILT" LIMITING INSTRUCTION VIOLATED DUE PROCESS BECAUSE MR. HACHENEV'S SEX LIFE HAD NO PROBATIVE VALUE TO THAT ISSUE, THE INSTRUCTION WAS NOT CLEARLY PHRASED AS A PERMISSIVE INFERENCE, AND WHERE NO CAUTIONARY LANGUAGE WAS INCLUDED IN THE INSTRUCTION.

CLAIM NO. 12: MR. HACHENEV'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED WHEN THE TRIAL COURT, AFTER DECIDING TO GIVE AN INSTRUCTION ON "CONSCIOUSNESS OF GUILT," DID NOT FURTHER GIVE AN INSTRUCTION ON "MULTIPLE HYPOTHESIS," DID NOT REQUIRE THE STATE TO PROVE THE INFERENCE BEYOND A REASONABLE DOUBT, FAILED TO GIVE A CORRESPONDING "CONSCIOUSNESS OF INNOCENCE" INSTRUCTION, OR FAILED TO DO ALL OF THE ABOVE.

CLAIM NO. 13: MR. HACHENEV'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL FAILED TO REQUEST THAT THE "CONSCIOUSNESS OF GUILT" INSTRUCTION INCLUDE LANGUAGE STATING THAT THE INFERENCE WAS NOT MANDATORY, AND THAT WHERE THE EVIDENCE WAS SUSCEPTIBLE OF TWO EQUALLY VALID CONSTRUCTIONS THE JURY MUST DRAW THE INFERENCE CONSISTENT WITH INNOCENCE.

CLAIM NO. 14: MR. HACHENEV'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL FAILED TO REQUEST A CORRESPONDING "CONSCIOUSNESS OF INNOCENCE" INSTRUCTION.

After his wife's death, Mr. Hacheney had romantic relationships with several women, one of whom he eventually married.

The trial court instructed Hacheney's jury they could consider Hacheney's relationships with other women as "consciousness of guilt."

The instruction read:

Evidence has been introduced in this case on the subject of the defendant's relationship with several women solely for the question of whether the defendant acted with motive, intent, premeditation, or consciousness of guilt. You must not consider this evidence for any other purpose.

RP 4978. The instruction was created in part based on a limiting instruction offered by the defense. However, the defense objected to the "consciousness of guilt" language. Thus, the final instruction was crafted by the trial court. The defense failed to propose any additional limiting language.

This instruction is highly problematic. It constitutes a comment on the evidence. It allows the jury to draw an impermissible and unwarranted inference. It fails to contain necessary limiting language. This is precisely why the State used the instruction to their great (unfair) advantage. RP 5017. The State argued:

Here's where we get into the strongest mode of evidence, that is circumstantial evidence of consciousness of guilt, and the instructions do allow you to use the affairs and the relationships to look at this issue of consciousness of guilt.

*Id.*

In stark contrast to the instruction that Hacheney’s jurors received, Washington law does not support a consciousness of guilt instruction even in what is usually thought of as the preeminent proof of consciousness of guilt—flight. *See* WPIC 6.21, comment (“It is the view of the committee that an instruction on flight singles out and emphasizes particular evidence and for that reason should not be given.”); *State v. Reed*, 25 Wn. App. 46, 604 P.2d 1330 (1979) (Even though a defendant’s flight to avoid prosecution may be admissible evidence to prove guilt, it should not be the subject of a jury instruction).

This is consistent with the common law rule that presumptions and inferences are generally not favored in the criminal law. *See State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006). For this reason, Washington cases strongly suggest that jury instructions should be written in terms of what the jury “may infer,” rather than in terms of a presumption, even when the statute uses presumption language. *See, e.g., State v. Johnson*, 100 Wn.2d 607, 674 P.2d 145 (1983), *overruled on other grounds in State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985).

A permissive inference suggests a possible conclusion that the jury can reach if it finds that a predicate fact has been proved. Sometimes an inference is so apparent that it does not need to be, and should not be, stated for the jury. There are an unlimited number of inferences that jurors may make, yet these are not singled out for special jury instructions. Where a

Court singles out one or more permissive inferences in an instruction, it is likely that the instruction could be construed by jurors as a judicial comment on the evidence. Article IV, section 16 of the Washington Constitution strictly prohibits such comments. The harm, frankly, is even more pronounced where the inference is speculative, as it was in this case.

Permissive inferences are constitutional only if fact B flows “more likely than not” from fact A. While the evidence is arguably relevant on the issue of motive, it is absurd to argue that the evidence proves or tends to prove “consciousness of guilt.” The fact that Mr. Hachenev had several sexual partners after his wife’s death is simply not the equivalent of post-crime flight, destruction of evidence, the creation of false exculpatory evidence, or threats made to silence a witness. *See e.g., State v. Van Alcorn*, 665 P.2d 97, 100 (Ariz. Ct. App. 1983) (noting that courts have approved consciousness-of-guilt instructions in cases involving flight, use of false names, disguises and other concealment, hiding evidence, and attempting to influence witnesses); *Commonwealth v. Martinez*, 769 N.E.2d 273, 280 (Mass. 2002) (upholding consciousness-of-guilt instruction based on evidence that the defendant “fled, hid, made intentionally false statements, used a false name, destroyed evidence, or intimidated a witness”).

However, the “limiting instruction” permitted Hachenev’s jurors to consider this evidence as proof of *guilt*. Indeed, in cases in which the

inference is the sole and sufficient proof of only an element, a higher standard of reasonable doubt may well be triggered. *See State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997); *State v. Hanna*, 123 Wn.2d 704, 710–11, 871 P.2d 135 (1994); *State v. Sandoval*, 123 Wn.App. 1, 5, 94 P.3d 323 (2004) (referring to opinions that have discussed a higher standard of reasonable doubt, but noting that the state Supreme Court has not yet applied it). That higher presumption should likewise be triggered where the Court is instructing jurors that they can draw an inference of guilt from the evidence. *See Herring v. State*, 501 So. 2d 19, 20 (Fla. 3d Dist. App. 1986) (defendant's behavior is circumstantial evidence probative of his consciousness of his guilt, and ultimately guilt itself, only when it can be said that the behavior is susceptible of no *prima facie* explanation except consciousness of guilt).

Telling jurors that they can infer guilt from certain acts is much different from telling jurors that they can draw an inference of motive. Motive is never sufficient to prove guilt. Consciousness of guilt has only one implication.

Mis-instructing jurors on permissive inferences can raise other problems as well. When a trial court gives such an instruction, either on request or on its own motion, the court must be careful to instruct the jury correctly as to the limited purpose for which the evidence is admitted. *United States v. Back*, 588 F.2d 1283, 1287 (9<sup>th</sup> Cir. 1979). An improper

limiting instruction may even enhance prejudice to a point where unfair prejudice outweighs probative value. *Id.* at 1287.

Hachenev raises a constitutional challenge to this instruction. Thus, this court must determine “whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.” *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). In such cases, the question is “whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,...not merely whether ‘the instruction is undesirable, erroneous, or even ‘universally condemned.’” *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736-37 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400 (1973)).

Moreover, in deciding whether an instructional error violates fundamental fairness, *i.e.*, whether it rises to the level of constitutional error the court must consider the instructional error “in the context of the instructions as a whole and the trial record.” *Estelle*, 502 U.S. at 72, 112 U.S. at 482. “When the claim is an instructional error ‘[w]hether a constitutional violation has occurred will depend upon the evidence in the case and the overall instructions given to the jury.” *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997) (quoting *Ducker v. Godiner*, 67 F.3d 734, 745 (9th Cir. 1995)). *See also Meeks v. Moore*, 216 F.3d 951, 969 (11th

Cir. 2000) (“In determining whether a state jury charge was deficient, federal habeas courts are required to examine the instruction in light of all the instructions and indeed all of the trial, to determine if any prejudice occurred from the instruction given.”). Among other things, the court may consider counsels’ closing arguments in determining whether the instructional error rose to the level of a constitutional violation. See *McLaughlin v. State Farm Mut. Auto. Ins. Co.*, 30 F.3d 861, 868 (7th Cir. 1994) (considering counsels' arguments in determining sufficiency of jury instruction).

If this Court considers the instruction together with the State’s capitalizing on the instruction during closing, the Due Process violation becomes both obvious and overwhelming.

Given the Court’s decision to give the “consciousness of guilt” instruction, defense counsel had every incentive to restrict or limit it. For example, the defense should have proposed additional language:

If two inferences can be drawn from defendant's conduct, one consistent with innocent purpose and one consistent with consciousness of guilt, you must draw the inference consistent with innocent purpose. Such evidence of consciousness of guilt may be used to strengthen other evidence of guilt. However, evidence of consciousness of guilt is not sufficient, in and of itself, to convict the defendant of any crime charged in the indictment, nor does it in any way shift the burden of proving the defendant's guilt beyond a reasonable doubt from the prosecution.

Moreover, defense counsel could have sought a corresponding instruction:

There has been evidence presented that Mr. Hachenev voluntarily

spoke to investigators about the fire and his wife's death. You may consider whether Mr. Hacheny's cooperation with the investigation indicates consciousness of innocence on his part.

*See Commonwealth v. Porter*, 429 N.E.2d 14, 19 n.10 (1981).

Indeed, other actions and statements by Hacheny after his wife's death provide stronger support for a "consciousness of innocence" instruction than Mr. Hacheny's sexual history. For example, Hacheny indicated that he felt responsible for his wife's death because he had not installed fire detectors in the house.

In sum, the "limiting" instruction produced the opposite effect. Allowing jurors to use this evidence as proof of guilt constituted a comment on the evidence; singled out an improper purpose and gave jurors and the State the "green light" to use the evidence for this purpose; and violated due process. Given the trial court's erroneous decision to give the instruction, the defense was ineffective for failing to propose an instruction that would have either properly guided jury deliberations or an instruction that would have permitted the opposite inference.

No matter how this claim is framed, Hacheny was unfairly prejudiced.

CLAIM NO. 15: CUMULATIVE ERROR

Where the cumulative effect of multiple errors so infected the proceedings with unfairness a resulting conviction or death sentence is invalid. *See Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131

L. Ed.2d 490 (1995). As the Ninth Circuit pointed out in *Thomas v. Hubbard*, 273 F.3d 1164 (9th Cir.2001), “[i]n analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.” *Id.* at 1178 (internal quotations omitted) (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996)); *see also Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir.1984) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

It is also overwhelmingly clear that a Sixth Amendment claim of ineffectiveness *must* be analyzed cumulatively. *Williams v. Taylor*, 529 U.S. 362 (2000). A defendant may prove that he has suffered ineffective assistance of counsel based on the cumulative effect of errors. *See Wade v. Calderon*, 29 F.3d 1312, 1319 (9th Cir. 1994), *cert. denied*, 513 U.S. 1120 (1995). “In analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.” *Thomas v.*

*Hubbard*, 273 F.3d 1164, 1178 (9th Cir. 2001) (internal quotations omitted), citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); see also *Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000) (noting that cumulative error applies on habeas review); *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

There are two primary types of errors in this case that must be measured cumulatively. First, the several claims of ineffectiveness resulted in a much weaker case presented on Hachenev’s behalf than reasonably competent counsel would have presented. Counsel’s errors simultaneously made it easier for the State to convict Mr. Hachenev.

In addition, the failure of many of the State’s forensic experts to confine their testimony to the limits of science was highly prejudicial. The State’s forensic experts vouched, both explicitly and implicitly, for the reliability of the work of other scientists where they had no personal knowledge of that work and, at least in the case of Dr. Logan, without mentioning the problems that he knew existed. In addition, Dr. Selove self-appointed himself judge and jury and told jurors that his expertise as a pathologist led him to one, sure conclusion: Hachenev suffocated his wife. Not only was Dr. Selove wrong, he opinion far exceeded the usefulness of

the medical expertise he legitimately could offer.

2. Requisite Showing Necessary for an Evidentiary Hearing

Because most of Hacheney's claims are based on extra-record evidence, he begins by describing the low threshold showing required in order to merit an evidentiary hearing—a threshold showing that he has clearly satisfied.

After a PRP is filed and briefed, the “Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits.”

RAP 16.11.<sup>5</sup> The rule further provides:

If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing.

*Id.* Thus, the Chief Judge has the option of sending the entire PRP to the trial court for both an evidentiary hearing or referring those issues based on contested extra-record facts to the trial court for the conduct of an evidentiary hearing and entry of factual findings. In the latter case, this Court then applies those factual findings to the applicable law.

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<sup>5</sup> Although not defined in the rule, frivolousness is generally defined as “wholly without merit.” This petition is clearly far from frivolous.

As a threshold matter, the petitioner must state the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. RAP 16.7(a)(2)(i). Bald assertions and conclusory allegations will not support the holding of a hearing. *See In re Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988). Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient.

Rather, with regard to the required factual statement, the petitioner must state *with particularity* facts which, if proven, would entitle him to relief. Where Petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. Where facts are outside of the trial record and especially where the facts are disputed and/or involve credibility determinations, the need for an evidentiary hearing is at its zenith. *See Frazer v. United States*, 18 F.3d 778, 784 (9th Cir.1994) (“Because all of these factual allegations were outside the record, this claim on its face should have signaled the need for an evidentiary hearing.”). Borrowing from the analogous habeas standard (a comparatively higher standard), in showing a colorable claim, a petitioner is “required to allege specific facts which, if true, would entitle him to relief.” *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir.1998) (internal quotation marks and citation omitted).

Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

In short, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. An evidentiary hearing plays a central role in sorting through and ensuring the reliability of the facts upon which legal judgments are made.

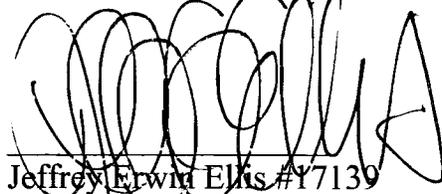
Once briefing is complete, this Court should decide whether any of Mr. Hacheney's "record based" claims merit reversal. If any such claim merits a new trial, then an evidentiary hearing is not necessary. Next, if the State fails to dispute the facts of any extra-record claim, then the Court should decide whether that claim justifies relief. Finally, the Court should remand any disputed claims for a hearing.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above and after the completion of an evidentiary hearing, this Court should reverse Mr. Hachenev's murder conviction and remand for a new trial.

DATED this 22<sup>nd</sup> day of June, 2008.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'JEFFREY ELLIS', written over a horizontal line.

Jeffrey Erwin Ellis #Y7139  
*Attorney for Mr. Hachenev*

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(206) 262-0300 (ph)  
(206) 262-0335 (fax)

Appendix A

DECLARATION OF  
NICHOLAS DANIEL HACHENEY

I, Nicholas Daniel HacheneY, declare the following:

On December 26<sup>th</sup> 1997, I woke up at approximately 5:00 am and got ready for a hunting trip with Phil Martini and Lindsey Smith (now Latsbaugh.) I gathered up my hunting gear and I took our dog, Hope outside and let her run and then put her in the kennel in my Jeep. I then loaded the gear in the Jeep and left. The last time I saw my wife, Dawn HacheneY, she was alive and sleeping in bed. She woke up momentarily when the alarm clock went off, I gave her a kiss goodbye, she said goodbye and then went back asleep. I did not murder my wife and I did not light our house on fire.

To the best of my recollection I left the house sometime around 5:30-5:45 am. After leaving the house I went to the nearby Texaco station and bought a cup of coffee. My wife did not drink coffee and we did not have a coffeepot in the house. Upon arriving at the Hood Canal Bridge, I got out of the Jeep and walked over to Phil Martini's truck. We talked for a few minutes and I explained the route we would be going. We discussed all riding together in my Jeep but Phil had his young dog along and so he followed in his truck. Lindsey got in the Jeep and we drove to Indian Island. When we arrived at the parking lot we got out and let the dogs run a little bit. It was still dark when we were in the parking lot. As

Phil was a relatively new hunter, we talked about what we needed to do once we got out to the blinds. Phil changed the choke on his shotgun. We then walked down to the hunting blinds. I put Phil and his dog in one blind and I went to the other blind with my dog. Lindsey came with me. It was just starting to get light enough to see when we got to the blinds but it was still well before shooting light. We hunted for awhile (probably an hour or so.) It was one of those days when very few birds were flying and eventually Lindsey and I walked back over to Phil's blind and we all discussed going to breakfast at the Chimacum Café. We all agreed to go to breakfast.

We then walked back to the vehicles and drove to Chimacum. When we got there it was closed so we decided to try Mitzel's restaurant in Poulsbo. When we got to Mitzel's I told Phil and Lindsey that I couldn't stay long because I had promised to open presents with Dawn that morning. I don't remember what I ordered but it probably was something like a Danish and coffee because both Lindsey and Phil ordered full breakfasts and the bill for all three of us with tax and tip only came to \$21.67. After awhile I said I needed to get going and paid the bill and left.

Upon arriving at my house, there were fire engines parked in front. An officer came to my door as I got out of the Jeep and I told him this was my house. He took me to a woman (Jane Jermy) who sat me on the back of the fire truck and told me that they had found a body in the house. She asked me who was in the house and I said my wife Dawn was. When I realized that Dawn was dead, I

collapsed onto the street and began crying. Ms. Jermy helped me back onto the truck and asked if there was anyone she could call for me. I asked her to call my Pastor.

In the days that followed my wife's death, I had numerous conversations where I stated that I felt that her death was my fault. One of the issues that came up was the fact that the house did not have smoke detectors. We had been remodeling the house and I had not installed the smoke detectors. I felt that the fact that the house was in disarray and we didn't have smoke detectors contributed to the fire.

At the time we were part of a fundamental charismatic church that believed that when bad things happened, it was God's punishment. The church was in the middle of a major power struggle between the senior pastor and the apostle."

Approximately 4 months prior to Dawn's death, I had an affair with a woman named Sandy Glass. I had confessed that affair to Dawn and we were working on dealing with it. I had not told anyone else about the affair. As I was a pastor in the church, we were trying to extract ourselves from the church without having it turning into a huge scandal. The church regularly ex-communicated people in a very public and painful way and we did not want to go through that.

In the weeks following Dawn's death I told Sandy Glass that I felt that it was my fault that Dawn died, that if I hadn't had an affair and had taken care of the house and my wife that she would still be alive. Sandy Glass said that she had

received "prophecies" from God that Dawn was a lamb and that it was all part of God's plan and that we were now free to "take the land." She told me that the angel Gabriel was living at her house and that all of what was taking place was ordained by God. I told her that I didn't believe that. (Much of what Sandy Glass testified to at trial, regarding these conversations, took place after Dawn's death but it was portrayed as having taken place before.) Sometime after that, Sandy Glass came to me and told me that her husband was going to die soon and that God had shown her how it was going to happen. I told her that I didn't believe that God worked that way and that it was all just fantasy. I had little or no contact with her after that. I certainly did not tell her that I committed murder or that I had anything to do with the fire.

I soon quit my pastor job and left the church. In the months that followed my wife's death, I made a complete mess of my life. I got drunk almost daily and slept with anyone that was willing. It was an extremely painful and confusing chapter of my life and I have a lot of regrets for my actions during that time. Much of that time I spent looking for answers and trying to find some meaning to all that had happened. I was deeply ashamed of the choices that I made and I kept it all secret.

I eventually extracted myself from that cycle and got my life back on track. I had no contact with Sandy Glass until the summer of 2001 when it was brought to my attention that she was going to make the news of our affair public. I contacted her by phone and asked her why she was choosing to come forward with

the affair now. She kept saying "it's the truth." I told her that it was going to hurt a lot of people and it seemed like it was more about hatred than the truth. She stated that she was having the investigation into Dawn's death re-opened. I asked her what she was talking about and she said that she knew that Dawn had not died in the fire. I then asked her if this was something that God had revealed to her. She said that God was truth. I hung up the phone. Later that night I received a phone call in the middle of the night from a man (later identified as Sandy Glass' boyfriend) who had a bunch of threats.

The next day I contacted an attorney friend of mine and asked for his advice. He said to ignore it and to avoid any contact with those people. The news of the affairs eventually did come out and I dealt with all of the fall out from that. I did not hear anything else until Sept 12<sup>th</sup> 2001 when I was arrested and charged with murder. I have protested my innocence from day one until today. I was offered a plea bargain for 7 years and I refused it even though I was being threatened with the death penalty.

I am not guilty of murdering my wife and I did not set fire to our house.

I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.



Nicholas Daniel Hacheney



Dated June 16, 2009

## Appendix B

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

EAST DIVISION, REDMOND COURTHOUSE

STATE OF WASHINGTON,

Plaintiff,

vs.

AHMACH, SANAFIM, ET AL.

Defendants

) Case No. C00627921, ET AL.

) ORDER GRANTING DEFENDANTS'  
) MOTION TO SUPPRESS

Each of the Defendants joined in this motion ask that this three judge panel of the King County District Court suppress the Defendants' breath test readings, arguing that the Washington State Toxicology Laboratory (WSTL) engaged in practices which were both fraudulent and scientifically unacceptable. The State, while agreeing that many of the activities of the WSTL were unacceptable, argues that suppression is not the appropriate remedy, both because none of the Defendants' tests were directly affected at any critical point and because the issues raised by the Defendants could be raised before each trier of fact and given their appropriate weight.

For the reasons stated in this Order, the breath tests in each of the Defendants' cases are suppressed.

**Findings of Fact**

Each of the Defendants herein were arrested for an alcohol related traffic offense, and each submitted to a test of his or her breath at the request of the arresting officer. These tests

1 were performed on the Datamaster or Datamaster CDM machines located throughout King  
2 County and Washington.

3 These instruments operate under the principal of comparing the unknown (the breath of  
4 the arrestee) to a known standard of alcohol to measure the amount of alcohol in the breath.  
5 There are multiple checks performed by the instrument to ascertain the accuracy of the result.  
6 One of the checks is the external standard, which measures the headspace alcohol vapor content  
7 of an external simulator solution (field solution). This solution is a mixture of ethanol and water  
8 in a known quantity prepared by the WSTL.

9 These instruments are periodically checked, calibrated and maintained by the Washington  
10 State Patrol Breath Test Section (breath test section). For this purpose they also use solutions of  
11 ethanol and water prepared to known standards by the WSTL (QAP solutions).

12 The procedure for preparation of QAP and field simulator solutions is set forth in  
13 protocols created and/or promulgated by the State Toxicologist, Dr. Barry Logan. An analyst  
14 mixes the solutions according to the protocol, and then each of 16 analysts test the solutions by  
15 preparing vials of the mixture and submitting them to headspace gas chromatography along with  
16 control vials and blank vials. The results are recorded for each analyst, and ultimately published  
17 to the web for access by the public. The analysts then "certify" that they have performed the  
18 tests, and that the results as published are correct. These certifications are intended to be used in  
19 court in lieu of live testimony by the toxicologists.  
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21  
22 This three judge panel has found many irregularities in the preparation, use and  
23 documentation of these solutions and tests, as set forth below:  
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25

**False Certifications**

1. Ann Marie Gordon (AMG) became lab manager at WSTL by appointment of Dr. Logan.
2. AMG informed Dr. Logan that her predecessor as lab manager had engaged in a practice of having other toxicologists prepare and test simulator solutions for him and yet certify that he had prepared and tested the simulator solutions.
3. AMG told Dr. Logan that she did not approve of this procedure and was then also informed by Dr. Logan that it was not acceptable for a toxicologist to engage in this practice.
4. Nonetheless, AMG did engage in this practice beginning in 2003. Ed Formoso was a lab supervisor; he prepared and tested simulator solutions for AMG from 2003 to 2007. This involved 56 simulator solution tests.
5. Each test was accompanied by a CrRLJ 6.13 certification that AMG had performed the test and that the test was accurate and correct.
6. Melissa Pemberton was the quality control manager at the WSTL during a part of this time, and knew that AMG was not performing tests but was certifying them.
7. This deception was uncovered after two anonymous tips received by the Chief of the Washington State Patrol.
8. The first was received on March 15, 2007. Dr. Logan was directed by Assistant Chief Beckley to investigate this complaint.
9. Dr. Logan directed AMG and Formoso to investigate the complaint.
10. AMG and Formoso discussed the procedure and agreed that Formoso would no longer perform tests on behalf of AMG.

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11. AMG informed Dr. Logan that she did not perform the tests of the solutions but that she signed the forms indicating that she did.

12. AMG and Formoso prepared a report stating that there was no problem with the certifications and that no solution had left the lab with an incorrect solution in 20 years.

13. Dr. Logan, AMG and Formoso knew, or should have known, that this report was incorrect and misleading, but took no steps to correct it or provide for another investigation.

14. Melissa Pemberton had run vials prepared for AMG by Formoso through the gas chromatograph along with her own samples, knowing that these were to be attributed to AMG, and that AMG would sign certificates alleging that she did the tests.

15. Dr. Logan was aware of this, by August of 2007.

16. DR. Logan and Pemberton both testified under oath that no one other than Formoso ever ran tests for AMG.

**Defective and Erroneous Certification Procedures**

17. The software used to perform calculations for simulator solution worksheets was defective from its inception in that it omitted the fourth data entry from the fourth toxicologist who performed the tests.

18. Beginning in August 2005 a change in the software resulted in a failure to include data from 4 of the 16 toxicologists performing tests in calculations to establish accuracy.

19. Lab protocols require the inclusion of all analysts' data in these calculations.

1 20. No one checked the software program to ascertain accuracy and compliance with  
2 protocols. There was no procedure or protocol propounded to check or verify  
3 software used by the WSTL.

4 21. Analysts were not trained or directed to check the calculations performed by the  
5 software.

6 22. Analysts regularly signed declarations which stated the mean concentration of alcohol  
7 in the solutions. These declarations were prepared by support staff, and were not  
8 checked for accuracy by the analysts before signing. In at least six instances these  
9 declarations were in error. At least one analyst signed them a second time still  
10 reflecting the errors.

11  
12 **Software Failure, Human Error, Equipment Malfunction and Violation of Protocols**

13 23. The software used for calculations to determine the acceptability of simulator  
14 solutions was developed by computer programmer(s) within the Washington State  
15 patrol and was not subject to rigorous testing and/or checking such that substantial  
16 errors resulted and significant data was deleted from calculations.

17 24. No procedure or protocol within the WSTL required this software to be validated for  
18 accuracy or fitness for purpose, and no Lab personnel conducted such testing at  
19 anytime, nor verified that the data produced was correct.

20 25. Errors based on software miscalculations existed within almost all field simulator  
21 solution certifications issued between August 2005 and August 2007. At least one  
22 QAP solution was similarly affected.

23 26. When analysts conducted gas chromatograph tests, the machine printed results  
24 automatically. These were maintained in the test files. Thereafter (sometimes weeks  
25

1 after), worksheets were prepared by support personnel detailing the testing results for  
2 each toxicologist. Thereafter analysts signed the worksheets to acknowledge their  
3 correctness. These worksheets were not checked against the original chromatographs  
4 to determine if they were accurate before signing, and incorrect data was in fact  
5 inserted into some worksheets. These worksheets were posted to the web and relied  
6 upon in determining the accuracy and precision of the breath testing machines in the  
7 field.

8 27. Declarations by toxicologists for certification of the solutions are prepared by support  
9 personnel and then given to analysts to sign, sometimes weeks after the actual testing.  
10 These were not checked against chromatographs or worksheets to insure accuracy.  
11 There were at least 150 instances of similar non-software related errors committed by  
12 analysts and revealed in the record. These include:

- 13
- 14 a. Entering incorrect data into certification spreadsheets for use in calculations to  
15 determine mean solution values and compliance with protocols.
  - 16 b. Entering incorrect test values for controls.
  - 17 c. Entering data for the wrong solutions into certification spreadsheets.
  - 18 d. Signing declarations indicating testing of the solution prior to the solution even being  
19 prepared.
  - 20 e. Signing declarations indicating that a solution had been tested before the testing had  
21 taken place.
  - 22 f. Incorrect dates for testing and/or signing of declarations.

23 28. The WSTI was equipped with several gas chromatograph machines for use by the  
24 analysts. A machine that malfunctioned was not repaired or maintained adequately  
25

1 and this resulted in different operational and measurement characteristics and  
2 abnormal variations in readings. The machine remained on line for some time even  
3 though individual toxicologists knew that it was not functioning properly. Once  
4 repaired this abnormality disappeared.

5 **Improper Evidentiary Procedures**

6 29. In 2004 the Washington State Patrol conducted an internal audit of the WSTL. The  
7 report included the following conclusions:

- 8 a. The WSTL was noncompliant with policies and procedures in 8 major categories.  
9 b. The simulator solution logbooks were not properly kept.  
10 c. The required self audits were not performed.  
11 d. AMO indicated that she did not have time to follow WSP policies and would not do  
12 so.  
13 e. "WSP policies and required procedures appear to be of secondary concern to Lab  
14 personnel....Accurate recordkeeping and quarterly auditing as required by patrol  
15 Policies and CALEA standards is severely deficient."  
16

17 30. In 2007 another internal audit was conducted by the Washington State Patrol. The  
18 report included the following conclusions:

- 19 a. "The department is unnecessarily exposed to litigation due to insufficient  
20 documentation and disregard for evidence handling policies and procedures."  
21 b. "Mandatory audits are not being completed.... Non-standard evidence handling  
22 procedures and insufficient documentation to ensure the same...and failure to perform  
23 required audits jeopardizes operational performance as well as CALEA accreditation.  
24 ..  
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**Inadequate and Erroneous Protocols and Training**

- 1  
2 31. The accuracy of breath alcohol measurements is determined by the use of simulator  
3 solutions. These must be accurately prepared and certified as such to gain the trust  
4 and confidence of the courts and public.
- 5 32. Accuracy of these solutions is assured by the adherence to proper protocols for their  
6 preparation and use.
- 7 33. Contrary to protocol requirements, toxicologists were trained to discard data  
8 generated by the tests if any single data entry lay outside the range for the mean value  
9 of the solution as dictated by the protocol. This tended to create a testing system that  
10 would not fail a solution as every value outside the range was discarded and only  
11 those that were within the accepted range were included in the calculations of  
12 accuracy.
- 13 34. Discarding of data is appropriate in some circumstances where identifiable reasons  
14 exist or where there is appropriate statistical justification (outliers). However, a  
15 decision to discard data must be governed by appropriate protocols and must be  
16 properly documented so that these decisions can be reviewed. Such a protocol was  
17 not promulgated until this legal proceeding was well underway, and documentation  
18 was not required or provided.
- 19 35. Several toxicologists discarded data without identifiable or statistical reasons for  
20 doing so. Inadequate or no documentation was provided, so that in those situations  
21 this Court cannot determine why data was discarded.  
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36. At least one toxicologist was not taught that testing of simulator solutions followed different procedures than testing of other materials, and conducted multiple tests, discarding the results of at least one test.

37. Protocols for solution preparation and machine testing were contradictory or inconsistent, resulting in field solutions being used for QAP testing in some cases.

**Impact on Tests Conducted In the Field**

38. Field solution #2018 was never properly certified due to errors committed by the analyst. This solution was used as the external standard in 2,018 tests.

39. Field solution #2019 was never properly certified due to similar errors committed by the same analyst. These two batch errors were likely caused when the analyst switched data. This solution was used as the basis for QAP's performed on at least 39 breath test machines. There were approximately 7,928 tests conducted on the affected machines.

40. QAP batch solution #06028 was certified after data was discarded improperly. QAP procedures were performed on 32 Datamaster machines using this solution. This had an impact on 3,445 tests.

41. Field solution #05008 was used as a QAP solution to test and calibrate the Datamaster. Though, perhaps, not a violation of protocol since the protocols were in conflict, Dr. Logan conceded that field solutions were never intended to be used for the QAP process. This solution was improperly certified by AMG. If the data from her tests were removed, the solution has a mean alcohol concentration of .1022, outside the acceptable range for QAP solutions. The tests conducted using machines tested and calibrated with this solution number 1,679.

- 1 42. Field solution batch #06003 was used as a QAP solution. This solution had a mean  
2 alcohol concentration of .1024, outside the range deemed acceptable for QAP  
3 solutions. Two machines were tested using this solution, affecting 392 individual  
4 tests.
- 5 43. Field solution #06048 was qualified using software which provided incorrect results.  
6 When correct figures are computed, it was determined that the solution would not  
7 have qualified as a QAP solution. At least one Datamaster QAP was performed with  
8 this solution, affecting 21 individual tests.
- 9 44. This same solution was also used as a field solution, but when proper calculations are  
10 made, it is apparent that it would have affected all tests conducted using this machine.  
11 However, the number of tests affected has not been determined.
- 12 45. QAP solution #06037 was certified using software that incorrectly calculated the  
13 equivalent vapor concentration. The machines calibrated using this solution affected  
14 2,691 individual breath tests.
- 15 46. Field solution #06043 was tested by one analyst using a defective gas chromatograph.  
16 The test should have been repeated to determine accuracy. The number of individual  
17 test impacted by this has not been ascertained.
- 18 47. Not all (or possibly any) of the defective solutions noted above would have resulted  
19 in substantial changes in every test result. Some test results would be of greater  
20 importance than others if they are at or near the absolute standards for violations  
21 created by statute, i.e. .02, .04, .08, and .15. However, every test conducted with an  
22 improperly certified or defective solution is affected in some way.
- 23  
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25 **Non-disclosure of Machine Bias**

1 48. All measuring machines have some bias, and Datamaster breath test machines have  
2 bias which is identified in the QAP process.

3 49. This bias is not determinable without testing; sometimes creating readings lower than  
4 actual and sometimes higher.

5 50. The bias of any particular machine can be determined from the information created  
6 during the QAP process by applying mathematical formulas and calculations. This  
7 information is not readily available to the public, though it is published on the web.  
8 Due to the complexity of the calculations and formula involved, few in the legal  
9 community are aware of this bias. The Breath Test Section of the Washington State  
10 Patrol does, however, provide this information to attorneys and defendants when  
11 requested.

12 51. The machine bias information could be easily made available to the defendants,  
13 attorneys and public by the State Toxicologist.

#### 16 Analysis

#### 18 BAC Admissibility Post Jensen

19 The Washington legislature conveyed its "frustration with the inadequacy of previous  
20 attempts to curtail the incidence of (Driving Under the Influence) DUI" with the adoption of  
21 SHB 3055<sup>1</sup> in 2004. City of Puyallup v. Jensen, 158 Wn.2d 384, 388 (2006). Central to SHB

22  
23 <sup>1</sup> In part, the legislature indicated its intent in the adoption of SHB 3055 as follows:  
24 "The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been  
25 inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at  
unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To  
that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.  
To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood  
or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays

1 3055 were amendments to RCW 46.61.506, by which the legislature sought to curtail pretrial  
2 motions seeking the suppression of breath tests in DUI cases. As amended, RCW 46.61.506  
3 required that trial courts assume the "truth of the prosecution's... evidence and all reasonable  
4 inferences from it in a light most favorable to the prosecution." RCW 46.61.506(4)(b). While  
5 the amendments would still allow defendants to challenge the reliability or accuracy of breath  
6 tests, those challenges would "not preclude the admissibility of the test once the prosecution ...  
7 has made a prima facie showing" of each of eight basic admissibility requirements set forth in  
8 the statute. RCW 46.61.506(4)(a). Ultimately then, SHB 3055 constituted a legislative attempt  
9 to eliminate the trial court's role as the gatekeeper<sup>2</sup> for a critical piece of evidence in DUI  
10 prosecutions.

11 Thus, when the Washington Supreme Court considered this issue in *Jensen*, supra, the  
12 court could have found that the legislation violated the inherent right of the judicial branch to  
13 control its own court procedures, i.e., a violation of the Separation of Powers doctrine. Instead,  
14 the Court determined that it could harmonize RCW 46.61.506, as amended, with the rules of  
15 evidence and give effect to both. *Jensen*, 158 Wn.2d at 399. The court held that, once the  
16 prosecution had met its prima facie burden under RCW 46.61.506(4), the breath test thereafter  
17 became "admissible," meaning that the court could still serve in its role as the gatekeeper under  
18 the applicable rules of evidence. *Id.* By analogy, the *Jensen* court referenced DNA testing:

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21 caused by challenges to various breath test instrument components and maintenance procedures. Such challenges,  
22 while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the  
23 finder of fact in deciding what weight to place upon an admitted blood or breath test result."  
24 Laws of 2004, ch. 68.

25 <sup>2</sup> A trial court is said to be the "gatekeeper" for the admissibility of evidence under both the *Frye* test (*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) and under the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *State v. Copeland*, 130 Wn.2d 244, 259-260 (1996). "In *Daubert*, the Supreme Court held that a trial judge should act as a "gatekeeper" to ensure that all scientific evidence admitted is both relevant and reliable." *Reese v. Strout*, 74 Wn. App. 550, 559 (1994). The court also acts as the gatekeeper when it rules on motions to suppress scientific evidence under ER 403 or ER 702.

1 In the DNA analogy, DNA admissibility has been accepted under Frye<sup>3</sup>; however,  
 2 challenges to the weight of the DNA evidence, including laboratory error, the size,  
 3 quality, and randomness of Federal Bureau of Investigation (FBI) databases, and the  
 4 methodology and practices of the FBI in declaring a DNA match, are subject to ER 702  
 5 admissibility as determined by the trial court.

6  
 7 Jensen, 158 Wn.2d at 397. Continuing this analogy to the cases herein, the trial court's  
 8 determination that the prosecution had, prima facie, met the requirements of RCW 46.61.506(4),  
 9 would be comparable to acceptance under Frye, meaning that the court would then move on to  
 10 consideration of any rules of evidence that might be applicable.

11

#### 12 ER 702 and Laboratory Evidence

13 A breath test reading is not admissible absent expert testimony, either in person or by  
 14 affidavit as allowed by CrRLJ 6.13(c)<sup>4</sup>. Pursuant to ER 702, however, an expert may only testify  
 15 "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand  
 16 the evidence or to determine a fact in issue." In a criminal prosecution, a post Frye analysis of  
 17 the admissibility of expert testimony under ER 702 is a consequential activity with independent  
 18 force and effect. "In this state ER 702 has a significant role to play in admissibility of scientific  
 19 evidence aside from Frye." State v. Copeland, 130 Wn.2d 244, 259-260 (1996).

20

21 <sup>3</sup> Frye requires that the court determine whether (1) the scientific theory has general acceptance in the scientific  
 22 community, (2) the techniques and experiments that currently exist can produce reliable results and are  
 generally accepted by the scientific community, and (3) the laboratory performed the accepted scientific techniques  
 in the particular case. Frye v. United States, *Supra*.

23 <sup>4</sup> A breath test technician must testify that the BAC Verifier Datamaster or Datamaster CDM was tested, certified  
 24 and working properly on the date of the test, and a state toxicologist must testify that the simulator solution was  
 properly prepared and tested. Both would also have to testify that each activity was performed in conformance with  
 the rules established by the Washington State Toxicologist. RCW 46.61.506(3); CrRLJ 6.13(c).  
 25 The Defendants here have sought suppression of their breath tests based upon the failure of the WSTL to properly  
 prepare, use and certify simulator solutions. The Defendants have not raised any issues relating to the Washington  
 State Patrol Breath Test Section or Breath Test Technicians.

1 Under Jensen, therefore, after the prosecution has met its prima facie burden for the  
2 admission of a BAC reading, a trial court must engage in a meaningful review of the  
3 admissibility of the BAC evidence involving, under ER 702, a two part test. State v. Cauthron,  
4 120 Wn.2d 879, 890 (1993). As in Copland, supra, the Cauthron court was concerned with the  
5 admissibility of DNA evidence:

6  
7 The 2-part test to be applied under ER 702 is whether: (1) the witness qualifies as  
8 an expert and (2) the expert testimony would be helpful to the trier of fact. Part 2 of this  
9 standard should be applied by the trial court to determine if the particularities of the DNA  
10 typing in a given case warrant closer scrutiny. If there is a precise problem identified by  
11 the defense which would render the test unreliable, then the testimony might not meet the  
12 requirements of ER 702 because it would not be helpful to the trier of fact.

13  
14 Cauthron, 120 Wn.2d at 890. In each of the following cases, the Supreme Court engaged in both  
15 a Frye analysis and an ER 702 review of challenged forensic laboratory conclusions. In each case  
16 discussed, the court began with the proposition that the "determination of whether expert  
17 testimony is admissible is within the discretion of the trial court. Unless there has been an abuse  
18 of discretion, this court will not disturb the trial court's decision." Cauthron, 120 Wn.2d at 890.  
19 In each case the trial court admitted the scientific evidence and none of the ER 702 challenges to  
20 the trial court decisions were overruled, both for the factual reasons noted for each below, and  
21 because in each case the court was upholding a discretionary ruling of the trial court.

- 22  
23 • In State v. Cauthron, supra, the court noted that the defense had only presented  
24 "potential problems" with the DNA evidence. Moreover, the court noted that "the  
25 defense presented its own experts to rebut the State's conclusions. Dr. Ford and

1 Dr. Libby both testified that they found the autorads in this case inconclusive, and  
2 discussed their reasons at length. In addition, they each pointed out the possible  
3 pitfalls of DNA testing, such as degradation, starrng, cross contamination, etc.,  
4 and the lack of controls employed in the testing procedure. The jury was  
5 presented with a balanced picture of the DNA evidence<sup>5</sup>. Cauthron, 120 Wn.2d  
6 at 899.

- 7
- 8 • In State v. Kalakosky, 121 Wn.2d 525 (1993), the court quickly dealt with the two  
9 errors cited by the defense. (1) "The defense asserts that semen samples taken  
10 from the C.F. crime scene were spilled in 'close working proximity to samples of  
11 defendant's blood'. The record does not support this". Kalakosky, 121 Wn.2d at  
12 540. (2) "The defense also alleges that there was evidence of a mislabeled  
13 autoradiograph which compromised the reliability of the DNA testing. This also is  
14 unsupported by the record." Id.
  - 15
  - 16 • In Copeland, supra, the court considered the admissibility of lab results which had  
17 been challenged for a lack of external testing of lab procedures and for allegedly  
18 simplistic proficiency testing procedures. In dismissing these challenges, the  
19 court noted that "while a completely independent audit may be ideal, there was no  
20 evidence that the FBI procedures compromised the test results in this case."  
21 Copeland, 130 Wn.2d at 271. The court concluded that the "issues of laboratory  
22 error and lack of proficiency testing can be and were the subject of cross-

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24 <sup>5</sup> The Cauthron court ultimately reversed the trial court, not for lab error, but because a critical underlying  
25 assumption for the admissibility of DNA testing was absent. "Testimony of a match in DNA samples, without the  
statistical background or probability estimates, is neither based on a generally accepted scientific theory nor helpful  
to the trier of fact." Cauthron, 120 Wn.2d at 907.

1 examination and defense expert testimony at Copeland's trial. Id.; See also, State  
2 v. Cannon, 130 Wn.2d 313 (1996).

3  
4 Thus, in each of the above cases dealing with potential lab errors and poor lab  
5 procedures, the errors and poor procedures were relatively insignificant. Moreover, the Supreme  
6 Court stressed the importance of a trial court's role in evaluating lab evidence under the  
7 mandates of ER 702.

8 In Kalakosky, while the court noted that alleged infirmities in the performance of a test  
9 will usually to go to the weight of the evidence, not its admissibility, it also stated that:

10  
11 If the testimony before the trial court shows that a given testing procedure was so  
12 flawed as to be unreliable then the results might be excluded because they are not  
13 "helpful to the trier of fact". The issue of human error in the forensic laboratory is  
14 analyzed under ER 702 and is not a part of the Frye test....

15  
16 Kalakosky, 121 Wn.2d at 541. See also, Cannon, 130 Wn.2d at 325; and Copeland, 130 Wn.2d  
17 at 270. That this is still the standard in DUI cases post Jensen is reflected in Justice Madsen's  
18 concurrence in City of Seattle v. Ludvigsen, 2007 Wash. LEXIS 953 (2007):

19  
20 When deviations from additional testing procedures or machine maintenance protocols  
21 are so serious as to render test results unreliable, a court has discretion to exclude them in  
22 accordance with the rules of evidence.

23 Ludvigsen, at page 35.

24 The State argues a violation of protocols by the WSTL could not provide any basis for  
25

1 suppression of breath tests, citing State v. Mee Hui Kim, 134 Wn. App. 27 (2006). Kim,  
2 however, does not stand for the proposition that a breath or blood test may never be suppressed  
3 for a violation of WSTL protocols under ER 702. The defendant in Kim did not contend that the  
4 WSTL failed to comply with a protocol; rather the defendant in Kim argued that the State had  
5 failed to *show* compliance with a protocol:

6  
7 Specifically, Kim points to the State's failure to show that preparation of the volatile  
8 standards in the "Alcohol Standard Logbook" met the requirements in the Head Space  
9 GC Protocol.

10  
11 Kim, 134 Wn. App. at 35-36. Ann Marie Gordon, testifying at the Kim motion hearing, stated  
12 that the protocol had been complied with and that the logbook was available at the lab for  
13 defense review. Upon these facts the trial court held that the State had shown compliance with  
14 the WAC and that the defense could (when, after the motion hearing they had been able to  
15 review the logbook) renew their motion to suppress. Kim, 134 Wn. App. at 36-37. Thus, trial  
16 courts are still able to weigh the failure of the WSTL to follow its own protocols in a motion to  
17 suppress under ER 702.

18  
19 In each of the Defendants' cases herein, the defense cannot point to specific errors  
20 directly compromising the breath test results at critical BAC levels. For this reason the State  
21 argues that this court should decline to suppress the results of the breath tests and should instead  
22 admit the evidence at trial and allow the trier of fact to weigh each of the issues raised. While  
23 the State's position is generally preferable when disputes arise relating to the quality of scientific  
24 evidence, it is not always the last word on the subject. Indeed, if the court were always to admit  
25

1 questionable evidence at trial, ER 702 would serve little purpose. Here we find, for the reasons  
2 documented in this court's findings of fact and more fully explained below, that the decision to  
3 suppress or admit tips considerably in favor of suppression.

4 Under the current statutory scheme, a charge of DUI is most commonly proven by two  
5 different means: proving that an individual drove a motor vehicle while under the influence of or  
6 affected by intoxicating liquor, or by proof that the person had, within two hours after driving, an  
7 alcohol concentration of 0.08 or higher as shown by analysis of the person's breath<sup>6</sup>. RCW  
8 46.61.502 (1). Proof of DUI via analysis of the persons breath is considered a per se violation,  
9 i.e., the state is not required to show that the defendant was affected by the alcohol, merely that  
10 the level of alcohol in the defendants breath was at or above 0.08. Thus, a crime which carries a  
11 potential sentence of one year in jail, carries a mandatory minimum of some amount of jail time,  
12 and which will result in the mandatory loss of the privilege to drive a motor vehicle, may be  
13 proved by evidence from an instrument alone.

14  
15 The 0.08 BAC level is not the only critical level for breath alcohol which has been set by  
16 the legislature. The first critical level is 0.02, the level at which a person under the age of 21  
17 may be convicted of Driving or Being in Physical Control of a Motor Vehicle After Consuming  
18 Alcohol. RCW 46.61.503. The next critical breath alcohol level is 0.04, the level at which a  
19 commercial driver will lose his or her commercial drivers license (CDL) for one year. RCW  
20 46.25.090; RCW 46.25.120. Finally, in a DUI prosecution, in addition to the 0.08 breath alcohol  
21 level, the 0.15 level is also critical. A breath alcohol level of 0.15 or above carries greater  
22 mandatory minimum sentencing requirements. RCW 46.61.5055. Moreover, for breath tests  
23  
24

25 <sup>6</sup>The state may also prove the charge of DUI by proof that the defendant was under the combined influence of  
liquor and any drug or by proof that the defendant's blood alcohol concentration was 0.08 or higher. RCW  
46.61.502 (1).

1 registering above 0.02, 0.04 and 0.08, an individual may lose his or her privilege to drive without  
2 the benefit of a prior hearing<sup>7</sup>. RCW 46.20.3101; RCW 46.25.120.

3 Thus, even errors in the range of 1 or 2% can have a profound effect on a breath test  
4 reading. Nonetheless, each expert witness who offered testimony<sup>8</sup> stated that there was not a  
5 process or a machine that would not insert some amount of inherent error in any result. That is  
6 also the case with the Datamaster and Datamaster CDM. In the process of breath test instrument  
7 calibration, the protocols indicate that breath test instrument is still functioning properly if it is  
8 accurate to within +/- 5%, and if the precision of the readings stand at +/- 3%<sup>9</sup>. Rod Gullberg  
9 testified that the lack of accuracy in a breath test machine is referred to as "bias." A breath test  
10 machine normally has a bias of 1-2%, with the smaller fraction of the machines registering a bias  
11 of 5% or less<sup>10</sup>. The breath test program is not, however, set up to account for any of the  
12 potential bias inherent in a breath test machine<sup>11</sup>. Thus, a process that already allows potential  
13 bias in each reading only underscores the importance of ensuring that the WSTL eliminates all  
14 other possible sources of error.  
15

16 Throughout Washington State, over 40,000 breath tests are administered annually. In  
17 light of the importance of each one of these tests for the state and for individual defendants, it is  
18 vital that each aspect of the breath test program operate effectively. As stated in the findings, the  
19 WSTL prepares and tests both field simulator solutions and quality assurance procedure  
20

21  
22 <sup>7</sup> In the case of a 0.04 reading, a CDL is lost. In each situation the defendant may request a hearing prior to  
revocation.

23 <sup>8</sup> The court heard testimony from the following expert witnesses: Rod Gullberg, Dr. Barry Logan, Dr. Ashley Emery  
and Dr. Nayak Pollisar.

24 <sup>9</sup> The WAC defines accuracy and precision as follows: "accuracy" means the proximity of a measured value to a  
reference value; "precision" means the ability of a technique to perform a measurement in a reproducible manner.  
WAC 449-16-030 (1) & (10).

25 <sup>10</sup> The bias allowed in the protocols, however, does not include improper procedures or mistakes.

<sup>11</sup> For instance, readings are not adjusted at any of the critical levels to account for actual or for potential bias, nor  
are defendants informed of the potential bias before or during trial.

1 simulator solutions. These solutions serve as a critical check on breath test instruments to ensure  
2 that each will provide accurate and precise breath alcohol readings. The CrRLJ 6.13 certificates,  
3 or a toxicologist's in-court testimony, allow a breath test technician to "close the loop" and  
4 testify that the breath test reading was correct.

#### 5 6 **A Culture of Compromise**

7 The Cauthron, Kalasky and Copeland cases, discussed above, generally dealt with  
8 questions of lab mistakes and process errors. While many of our findings concern lab mistakes  
9 and process errors, the remaining findings indicate that the problems in the WSTL are much  
10 more pervasive.

11 Generally, our concerns regarding the WSTL fall into three general categories:

- 12 1. The failure to pursue the ethical standard which should reasonably be expected of an  
13 agency that operates as an integral part of the criminal justice system;
- 14 2. The failure to establish procedures to catch and correct human, and software and machine  
15 errors within the lab; and
- 16 3. The failure to pursue the rigorous scientific standards which should be reasonably  
17 expected of an agency that contributes a key component of critical evidence that may,  
18 almost standing alone, result in a criminal conviction.

#### 19 20 21 **Ethical Compromises**

22 Ann Marie Gordon falsely signed CrRLJ 6.13 certifications under penalty of perjury  
23 indicating that she prepared and tested field simulator solutions and that the solutions were found  
24 to conform to the standards established by the State Toxicologist. This and other ethical  
25 compromises documented in the findings adopted in this order may at the same time be viewed

1 as both petty and alarming. The ethical compromises were petty because they were frustratingly  
2 unnecessary, and alarming because the WSTL exists primarily to provide accurate information to  
3 state trial courts<sup>12</sup>. It is, therefore, reasonable to expect that those employed in an office with  
4 such a direct link to courts, whose primary duty is the discovery of the truth, would fully  
5 understand the importance of truth in all of their activities. The State has argued that there isn't  
6 any evidence that Ann Marie Gordon ever actually testified in court that she had prepared and  
7 tested a simulator solution. Yet, CrRLJ 6.13 exists to allow the admission of simulator solutions  
8 (via affidavits) in the absence of direct court testimony by the toxicologist who prepared the  
9 solution. We do not know whether any false Ann Marie Gordon CrRLJ 6.13 certificates were  
10 ever used in court in lieu of live testimony, but considering the number of DUI trials, it is more  
11 than likely that some were.

12 There are several other factors that highlight the disturbing nature of this practice. This  
13 was a procedure which:

- 14 • Ann Marie Gordon herself had specifically recognized was inappropriate;
- 15 • violated the protocols of the WSTL;
- 16 • required that she not only state that she performed an activity which she did not perform  
17 but also that she sign an affidavit to that effect under penalty of perjury;

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22 <sup>12</sup> The WSTL was created to provide forensic information to prosecuting attorneys as well as coroners and medical examiners.  
23 Prosecuting attorneys will, of course, request information from the WSTL in the hope that it will assist in the prosecution of  
24 anyone who may be guilty of committing a crime. In the case of breath alcohol testing, the link to trial courts is strong because  
25 the WSTL runs essentially independent of specific requests from individual prosecuting attorneys.  
The WSTL was specifically established by RCW 68.50.107:

"There shall be established in conjunction with the chief of the Washington state patrol and under the authority of the  
state forensic investigations council a state toxicological laboratory under the direction of the state toxicologist whose  
duty it will be to perform all necessary toxicologic procedures requested by all coroners, medical examiners, and  
prosecuting attorneys."

- 1 • required the active participation of at least one other member of the WSTL (Edward
- 2 Formoso) in the fraud (but we have also found that this pernicious fraud ultimately
- 3 required the participation of toxicologist Melissa Pemberton and perhaps others)<sup>13</sup>; and
- 4 • set the ethical tone for the entire toxicology lab<sup>14</sup>.

5 While such fraud can never be justified by necessity, it is, nonetheless, baffling to consider the  
6 risk the toxicology lab was willing to take for little, if any, gain. If Ann Marie Gordon never  
7 testified in court that she prepared and tested a simulator solution, and if this means that she,  
8 perhaps, never intended to so testify, why was she so ready to commit perjury by signing false  
9 certifications?

10 The State Toxicologist, Dr. Barry Logan, is ultimately responsible for the WSTL, and he  
11 bears a good deal of the responsibility for its shortcomings. He hired and supervised Ann  
12 Marie Gordon. Ms. Gordon testified that she continued to "test" solutions and sign the CrRLJ  
13 6.13 certificates because she believed Dr. Logan wanted her to. Dr. Logan testified that he had  
14 been told in 2000 by Ms. Gordon that her predecessor in the WSTL had fraudulently signed  
15 CrRLJ 6.13 certificates when he was manager of the WSTL. Yet, not only did Dr. Logan fail to  
16 detect that this same fraudulent procedure was occurring from 2003 to 2007, but he also  
17 professed not to know that toxicologists even signed CrRLJ 6.13 certificates. Because of this  
18 ignorance, he testified that he did not understand the meaning of the first tip that came into the  
19 State Patrol. The tip indicated that "Simulator solutions are being falsified as far as the  
20

21 <sup>13</sup> Although we cannot know with certainty whether this fraud was known to the other members of the WSTL, we  
22 believe that it is unlikely that anyone working in such a small office could have failed to see that one of their  
23 members was failing to test a solution and that, nonetheless, her name would appear on the paperwork they all had  
24 to sign indicating that they had each completed their testing.

25 <sup>14</sup> This conclusion is not meant to indicate that all members of the toxicology lab engaged in unethical practices. It  
is rather, a comment on the culture of the office itself. If the top of the chain of command engages in questionable  
practices, it should not surprise anyone to find that this poor behavior has infected the culture of the entire office.  
Again however, we caution anyone from making any specific conclusions about employees of the WSTL. Good  
people are quite capable of resisting poor behavior, even if a poor example is set at the top; and during the course of  
this motion we heard the testimony of many competent, dedicated and ethical people from the WSTL.

1 certification." Thereafter, in a situation screaming with irony, Dr. Logan assigned the  
2 perpetrator of the fraud, Ann Marie Gordon, the task of investigating the tip. To complete the  
3 circle, Ms. Gordon enlisted the assistance of lab supervisor Ed Formoso, her co-conspirator in  
4 the fraud, as her co-investigator. While they both ended their fraudulent practice at the time the  
5 first tip was received, their investigation also concluded that no fraud was occurring.

6 While it is not clear from the testimony of the various parties, just when Dr. Logan knew  
7 of the fraud, he should have known after the first tip. As previously stated, it is most likely that  
8 everyone in the WSTL was fully aware of the fraud, and if 16 toxicologists knew, why didn't  
9 Dr. Logan? When informed that the certifications were being falsified, why didn't he consider  
10 the possibility that his current lab manager was engaging in the same activity that had occurred  
11 a few years before? Why was Ann Marie Gordon assigned the task of investigating the tip?  
12 While these questions may never be answered, they cast a long shadow over Dr. Logan's ability  
13 to serve as the State Toxicologist.

#### 14 **Systemic Inaccuracy, Negligence and Violation of Scientific Principles**

15 Dr. Nayak Polissar, an expert called by the State, testified that only superior methods will  
16 ensure accuracy, and that the accuracy and precision necessary for a particular laboratory task is  
17 dependent upon the particular use intended for the final product. As stated by the National  
18 Institute of Standards and Technology (NIST), "accuracy... is judged with respect to the use to  
19 be made of the data." NIST Special Publication 260-100.2 (1993).

#### 21 Data Transfer

22 When each of the 16 toxicologists tested simulator solutions, the data from their tests was  
23 recorded on documents known as chromatograms. The data was thereafter transferred to  
24 worksheets, a problematic step, unless the WSTL required a review to ensure that the data was  
25

1 correctly transferred. The WSTL did not require that the data transfer be checked, and  
2 toxicologists signed certifications which were unverified and later found incorrect. Many errors  
3 in diverse areas were subsequently discovered.

#### 4 5 Computer Software

6 The computer software used to enter and calculate simulator solution lab results on the  
7 worksheets was not created by an individual with the requisite knowledge and skill necessary to  
8 ensure that the data was correctly analyzed and recorded. Moreover, no one checked the  
9 software to determine if it was operating properly. Nor was this a mistake that one can charge  
10 to an individual employee. The WSTL itself never considered that it was necessary to check  
11 the software to ensure that it was fit for its purpose. The software contained errors which were  
12 not revealed until the WSTL came under close scrutiny because of the Ann Marie Gordon  
13 investigation.  
14

#### 15 16 Malfunctioning Gas Chromatograph

17 The WSTL suffered through a time period during which a gas chromatograph machine  
18 was malfunctioning. During this period of time, the gas chromatograph could, under certain  
19 circumstances, provide incorrect readings. The WSTL chose to ignore rather than address this  
20 issue for a considerable period of time.  
21

#### 22 Thousands of Tests Affected

23 Literally thousands of breath tests performed in recent years were affected through a  
24 multiplicity of errors in the toxicology lab. A very brief recitation of the errors include: the  
25

1 improper rejection of data; erroneously switched data; the use of field simulator solutions to  
2 conduct quality assurance procedures; the use of software that improperly computed data and  
3 that improperly ignored the data of the last four of the toxicologists providing data for field  
4 simulator solutions; and, the use of simulator solutions that were outside of the allowable range.

5 Rod Gullberg effectually ran the breath test section for the Washington State Patrol for 25  
6 years. Mr. Gullberg, who, along with Trooper Ken Denton, completed a lengthy review of the  
7 solution preparation worksheets from the WSTL, is also well acquainted with the WSTL and its  
8 processes. In his opinion, the problems in the WSTL are not the result of bad faith. Instead,  
9 Mr. Gullberg believes that the WSTL failures are the result of carelessness and complacency.

#### 11 Motion to Suppress Granted

12 While we agree that trial courts should generally admit scientific evidence if it satisfies  
13 the requirements of Frye, we also agree that trial courts should thereafter engage in a  
14 meaningful ER 702 analysis, as we have here, when the circumstances require. Having done  
15 so, we conclude that, under ER 702, the work product of the WSTL is sufficiently compromised  
16 by ethical lapses, systemic inaccuracy, negligence and violations of scientific principals that the  
17 WSTL simulator solution work product would not be helpful to the trier of fact<sup>15</sup>. This litany of  
18 problems is indicative of a pervasive culture which has been allowed to exist in the WSTL. In  
19 this culture, the WSTL compromises the accuracy of the work product. Accuracy becomes  
20 secondary to the accomplishment of the work itself. Thus, because of this culture of the  
21 expedient, the WSTL has lost its effectiveness.

22  
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24  
25 <sup>15</sup> Although many of the problems within the WSTL are of a general nature, our decision today concerns only the simulator solutions prepared and tested by the WSTL. Our decision does not, therefore, directly relate to any of the other work of the WSTL.

1 This conclusion is especially troubling because of the critical role the WSTL plays in  
2 combating the crime of DUI. The criminal justice system is appropriately assigned the task of  
3 discovering the truth. Simply stated, without the reliable evidence that a correctly functioning  
4 breath test instrument can provide, the discovery of the truth in DUI cases suffers; the innocent  
5 may be wrongly convicted, and the guilty may go free.

6 We wish to emphasize that our decision to suppress today results from the unique  
7 multiplicity of WSTL problems highlighted during this motion. Because the identified problems  
8 are multiple and diverse, and because the WSTL may find it difficult to prove, in any reasonable  
9 manner, that they have corrected each individual problem, we are not able to indicate with  
10 specificity, each correction required.

11 Therefore, while we provide a list of our concerns below, we emphasize that the WSTL is  
12 not required to show that each has been corrected. Any one or two problems, standing alone,  
13 would not likely have resulted in suppression.

14 While the WSTL has attempted to modify its practices and procedures as a result of many  
15 of the problems noted in the findings herein, and improvements have been made,<sup>16</sup> additional  
16 effort is required.

17  
18  
19 Ethics

20 The WSTL has not been able to explain how Ann Marie Gordon and Ed Formoso (and  
21 perhaps the lab manager prior to Ann Marie Gordon), over a multiple year period, decided that it  
22 was acceptable to engage in a practice of falsely signing CrRLJ 6.13 certificates. We are not  
23 persuaded that this fraudulent activity should simply be laid at their feet. This apparently long  
24

25 <sup>16</sup> Indeed, in reaction to a continuing series of discoveries, the State Toxicologist, Dr. Barry Logan amended protocols several times within a recent three month period.

1 standing ethical lapse is more likely a symptom of a greater problem; a WSTL culture that was  
2 tolerant of cut corners.

3  
4 Errors

5 While the WSTL has made several policy changes to deal with many of the prolific errors  
6 within the WSTL, it has not been able to point to the reasons for what Rod Gullberg stated was a  
7 sense of complacency in the WSTL. The WSTL has, to date, simply corrected the systemic  
8 errors that have been called to its attention or were discovered as a result of a review of other  
9 problems called to its attention. The WSTL must establish procedures that, in the years ahead,  
10 ensure that their processes are double checked for accuracy<sup>17</sup>.

11  
12 Forensic Science

13 The State appropriately relies on the WSTL to produce (as is the case with the simulator  
14 solutions) and analyze evidence. The WSTL was not created, however, as an advocate or  
15 surrogate for the State. While the WSTL will always assist the State, it must never do so at the  
16 cost of scientific accuracy or truth.

17  
18 In City of Seattle v. Clark-Munoz, 152 Wn.2d 39 (2004), the Supreme Court agreed with  
19 the statement that:

20  
21 If the citizens of the State of Washington are to have any confidence in the breath testing  
22 program, that program has to have some credence in the scientific community as a whole.  
23

24  
25 <sup>17</sup> Here we use the word accuracy in its colloquial, non-scientific sense. By the use of the word accuracy, we mean  
that the WSTL must establish a system which ensures reliability appropriate to the importance of the purpose of  
each specific task.

1  
2 Clark-Monoz, 152 Wn.2d at 47. Although the Clark-Monoz holding has been brought into some  
3 question as a result of the ruling in Jensen, supra, the proposition that robust scientific standards  
4 are expected in the WSTL, still remains. And while Rod Gullberg testified that, after the changes  
5 made in the WSTL, in the fall of 2007, he now has more confidence in the WSTL, more work is  
6 required. In the summer of 2008 the WSTL plans to adopt the General Requirements for the  
7 Competence of Testing and Calibration Laboratories, ISO/IFC 17025:1999(E), promulgated by  
8 the International Organization for Standardization. These standards are neither required for a  
9 toxicology laboratory, nor are they a panacea for the past and current problems in the WSTL.  
10 Their adoption, however, is likely to move the WSTL a long way toward the type of reliable  
11 forensic science which should be expected of a state toxicology lab.  
12

#### 13 14 Conclusion

15 We hold that, under ER 702, the work product of the WSTL has been so compromised by  
16 ethical lapses, systemic inaccuracy, negligence and violations of scientific principals that the  
17 WSTL simulator solution work product would not be helpful to the trier of fact. The State,  
18 perhaps expecting the suppression of some of the work product of the WSTL, has asked this  
19 panel to be as specific as possible in our ruling. Specificity is made difficult, however, because  
20 of the nature of the problems identified. The State may, therefore, request that this panel  
21 reconvene at such time that the State believes it has sufficient evidence that the WSTL has  
22 adequately addressed the issues noted in this Order<sup>16</sup>.  
23

24  
25 <sup>16</sup> The alternative, of course, is to seek the admission of breath test evidence before each individual judge who adopts this ruling and then, when the defendants raise the issue, argue case by case that the WSTL simulator solutions currently meet the requirements of ER 702.

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Dated this 30<sup>th</sup> day of January, 2008

  
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Judge David Steiner

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Judge Darrell Phillipson

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Judge Mark Chow

**Forensic Investigations Council Report on the Washington  
State Toxicology Laboratory and the Washington State Crime  
Laboratory  
April 17, 2008**

The Forensic Investigations Council (FIC) was created in 1995 by the Washington State Legislature to oversee Forensic Laboratory Services Bureau that is part of the Washington State Patrol. The Council is composed of twelve members representing county government, city legislative authority, private practice pathologists and the Chief of the Washington State Patrol.

In 2006 and 2007 a number of problems and allegations of problems arose regarding the work of a forensic scientist in the State Crime Laboratory and also employees of the State Toxicology Laboratory. Dr. Barry Logan, the Director of the Forensic Laboratory Services Bureau (FLSB) responded to these issues and a number of audits were conducted to evaluate the services provided by the FLSB and examine the procedures and policies that were in place. These matters were initially reported to the FIC by Dr. Logan and the progression of the audits was passed on to the Council. In addition, the Washington Association of Criminal Defense Lawyers (WACDL) and the American Civil Liberties Union (ACLU) both asked the FIC to investigate allegations relating to the FLSB in October and November of 2007.

The Washington State Crime Laboratories and the Washington State Toxicology Laboratory form the Forensic Laboratory Services Bureau (FLSB) in the Washington State Patrol. The Director of the FLSB was Dr. Barry Logan, who reports to the Chief of the Washington State Patrol and the Forensic Investigations Council. The Crime Laboratory System consists of seven laboratories throughout the State and conducts forensic investigations on evidence secured by law enforcement in criminal cases. The Toxicology Laboratory system consists of one laboratory in the State and conducts testing as requested by County Coroners and medical examiners and law enforcement agencies and also runs the Breath Testing Program. The FLSB has 198 employees and eight laboratories.

### **Crime laboratory**

The Crime Laboratory has a system of peer review for work done by the forensic scientists prior to the issuance of laboratory reports. There are also levels of supervision of these employees. During the ordinary course of peer and supervisory review of the work of Forensic Scientist Evan Thompson, deficiencies were discovered. Due to concerns he was placed on a work improvement program in April of 2006. During this review process an error was discovered on Mr. Thomson's work relating to bullet trajectory analysis. Due to concern raised about this type of work by Mr. Thompson, he was removed from bullet trajectory casework on October 2, 2006. As the review by Crime Laboratory supervisors took place, technical errors and violations of laboratory operating procedures were discovered, and Mr. Thompson was removed from all casework responsibilities on November 13, 2006. Mr. Thompson's case files were reviewed and irregularities were discovered, and then a focused casework review was undertaken of Mr. Thompson's work. During this process Mr. Thompson resigned from the State Crime Laboratory effective April 6, 2007.

In order to fully examine Mr. Thompson's work, Dr. Barry Logan contracted with two independent firearms examiners, Matthew Noedel, and Dwight Van Horn. They were initially directed to examine 13 cases that Mr. Thompson had completed. Other casework was also examined by the two examiners. Mr. Nodell reported that he discovered work that was poorly organized and poorly documented, but the conclusions did not appear to be wrong.

During the pendency of this review an independent Forensic Consultant, Larry Lorsbach of American Society of Crime Laboratory Directors/Laboratory Accreditation Board [ASCLAD/LAB] was retained by the Washington State Patrol to audit the firearms function of the Seattle, Spokane, and Tacoma Crime Laboratories. The audit findings related to documentation of findings and for explaining why definite conclusions could not be reached in some cases. These recommendations were reviewed and adopted by the FLSB. The discovery and actions taken relating to Mr. Thompson, and the audit that was conducted, showed that the firearms division of the Crime Laboratory was functioning properly and appropriate safeguards were in place to identify work that was not up to the

standards that the lab requires. Once work quality was questioned, the employee was taken off casework and his work was examined. The process worked well in this instance and peer review and quality control issues were well positioned to insure that if work product was not thorough and professional in nature, it would be observable and remedied.

### **Problems in the State Toxicology Laboratory**

In order to understand the problems that occurred in this section of the FLSB, that became apparent in the month of July, 2007, it is important to review the annual audits as well as the special audits conducted by the Washington State Patrol. As part of normal procedure internal audits are conducted annually on the evidence system at the State Toxicology Laboratory. In addition, independent audits were undertaken after discovering problems with the certifications of simulator test solutions submitted by Lab Manager Ann Marie Gordon relating to the Breath Test Program. The Risk Management Division of the Washington State Patrol conducted an audit of the evidence system at the State Toxicology Laboratory that was completed on September 4, 2007. This audit traced prior audits that had been conducted on the evidence system since 2004.

#### **Evidence Audit in 2004**

In 2004 the audit revealed no evidence of theft, tampering, or misappropriation, but outlined a number of findings. One of the major concerns of this audit was the storage of blood tubes and breakage due to freezing of the tubes. The audit also made findings relating to documentation and the shortcomings of the lab in this area. There was no destruction authorization documentation, no recording of discovery requests and no retention schedule relating to records. Ms. Gordon, the lab manager indicated that she did not have the time to follow the Toxicology Lab's Standard Operating Procedure (SOP) Manual relating to documenting disclosure requests. She stated that she would not be able to do this in the future due a lack of staffing. The audit indicated that the Lab Manager expressed frustration with the level of workload that the lab personnel had to deal with while still complying with the paperwork requirements of the agency. There appeared to

be a shortage of personnel to accomplish the tasks the lab was directed to perform. The audit findings were responded to by both Ms. Gordon and Dr. Barry Logan.

#### **Evidence Audit in 2005**

Another evidence audit was conducted in 2005 by the Washington State Patrol. This audit specifically commended Ms. Gordon for the effort she had shown in responding to the prior audit concerns. There were no major findings in this audit.

#### **Evidence Audit in 2006**

Another evidence audit was conducted by the Washington State Patrol in 2006 and there were no findings for this audit.

#### **Evidence Audit in 2007**

Another evidence audit was completed by the Washington State Patrol in 2007 and there were no findings for this audit. The auditors commended Mr. Formosa for managing the sizeable inventory stored by the lab. Responses from the staff during this audit showed that the recommendations from the prior audits had been implemented. In addition, staff had been added to assist in the evidence handling.<sup>1</sup>

#### **Breath Testing Section**

On March 15, 2007, the Washington State Patrol's anonymous tip line received a call which stated that the "Simulator solutions are being falsified as far as the certification." On March 23, 2007, Dr. Logan was given a copy of the message. He then asked Ann Marie Gordon, the Toxicology Lab Manager to investigate the message. Breath instruments used in the State of Washington are BAC DataMaster and BAC DataMaster CDM. These machines utilize a simulator solution during the initial phases of the breath test to determine whether the breath test machine is accurately measuring

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<sup>1</sup> It was apparent from this progression of evidence audits that lack of staffing in the Toxicology Lab was one of the major reasons for problems maintaining the proper documentation of records that had been cited earlier.

breath alcohol content. The external simulator solutions are prepared by the Toxicology Laboratory analysts pursuant to protocols established the State Toxicologist. The process of preparing and testing the solutions is called "certification." No less than three analysts must certify the simulator solution prior to its certification. The practice of the Toxicology Lab was to have up to sixteen analysts certify the simulator solution, which allowed all to testify if necessary on court cases. This was believed to be less intrusive to the lab work processes, since more analysts were available for trial testimony.

Ms. Gordon and Mr. Formosa responded in writing to Dr. Logan's request for an investigation on April 11, 2007. They indicated that all data had been reviewed from January 2007, through March, 2007, and all was found to be accurate. Ms. Gordon later met with Dr. Logan and revealed that she had not been testing her simulator solutions and had delegated this to another analyst. Dr. Logan told her that as the manager she should not be testing the simulator solutions and asked her to cease doing this.

On July 9, 2007, the Washington State Patrol's anonymous tip line received a second call, which stated, "Ann Marie Gordon doesn't really certify all those simulator solutions. If you look in the file you'll find a grammetigram with her name on it, but if you also check over the years of where she really was on the days that those things were certified you'll find once in a while she was in DC or Alaska, or somewhere else. She had somebody else do it and then she'll sign the form that says, under penalty of perjury I analyzed this. If you don't think that's a big deal just think what Francisco Duarte would think of that." Dr. Logan met with Ms. Gordon after he received the second anonymous message and told her that an investigation would be begun on this matter. Ms. Gordon indicated that there was no need for an investigation since she had signed the documents. She stated that Mr. Formosa had done her testing and she then signed the certification forms. Dr. Logan initiated an internal affairs investigation and Ms. Gordon subsequently resigned on July 20, 2007.

#### **ASCLAD Audit Conducted by Michael Hurley**

After these problems were brought to light, the Chief of the Washington State Patrol demanded an audit of the operational and management practices of the Toxicology Laboratory as they relate to the Breath Testing Program. This audit came under the Risk

Management section of the Washington State Patrol, but was contracted to an independent evaluator, Michael Hurley, an assessor with the American Society of Crime Laboratory Directors Consulting.[ASCLAD]. This audit was conducted during September, 2007. The procedures in place for the preparation and testing of simulator solutions and an assessment of the calculation error on breath test results were major areas in which Mr. Hurley concentrated his efforts. Mr. Hurley made a number of findings in this audit relating to the operational and management practices of the breath test program. He found that there was little communication between the Toxicology Laboratory and the Breath Testing Program. He also found that the Toxicology Laboratory management had not applied the same operational and quality control to the Breath Testing Program that had been applied to other parts of the laboratory. In addition, breath testing functions had not been evaluated by external auditors and were not part of the accreditation by ABFT.

The Toxicology Laboratory ordinarily prepares two different types of solutions for use in the breath testing machines: (1) The first is a 0.08 Simulator External Standard Solution mentioned above; (2) The second is a Quality Assurance Solution used to verify the accuracy and precision of the instruments. Both of these solution preparation procedures require a minimum of three analysts to do the required testing to be certified. However, in actual practice 12-16 analysts performed the tests in order to qualify all to testify in court relating to the solutions. During the audit Mr. Hurley found a calibration error on tests run on the breath test solutions. All of the tests were not calculated for the total number of analysts testing the data. In regard to this problem Mr. Hurley stated the following, "The laboratory policy did not create the problem, but the policy of having all analysts do the testing for convenience of having more people to go to court contributed to the subsequent, identified error."

Mr. Hurley identified a number of findings during this audit. The Washington State Patrol then provided a "Breath Test Audit Summary and Target Date Checklist", outlining agency action and steps to cure the problems that he found. The findings from this audit and recommendations from Mr. Hurley were adopted by the Chief of the

Washington State Patrol and almost all have been put into place. The remainder that have not yet been completed have completion dates and will be finalized during this year.<sup>2</sup>

### **ABFT Data Quality Audit**

An additional audit was conducted on October 24-26, 2007 by the Risk Management Division of the Washington State Patrol to test the toxicology files signed or co-signed by Manager Ann Marie Gordon for the period of time from July, 2005, through June of 2007. The Risk Management Division contracted with the American Board of Forensic Toxicology (ABFT) and auditors Dr. Graham Jones, and Dr. Iain McIntyre as external auditors. In conducting this audit the auditors selected 300 cases at random during the target time period that were signed or co-signed by Ann Marie Gordon. During this review the auditors found ten files with reporting issues. Three cases contained clear errors that should have been noticed on review, but were not. Three cases contained errors that fall into the category of “typographical” errors. Four of the remaining ten cases had errors that were classified as “forensically significant.” Some of these may be a matter of differing professional judgment rather than errors.

Drs. McIntyre and Jones congratulated the Toxicology Laboratory and Ann Marie Gordon for establishing two levels of report reviews, which is not done in other labs. The audit report concluded with the statement that although the noted errors were unfortunate, the reviews conducted by Ms. Gordon were professionally done and appear to reflect isolated oversights rather than unprofessional conduct.

### **Case Law Decisions**

The problems associated with Ann Marie Gordon’s false certifications and also the errors in the database and computations culminated in a number of court decisions relating to the admissibility of the breath test results in DUI prosecutions.

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<sup>2</sup> See “Breath Test Audit Summary and Target Date Checklist” attached to this report as Appendix #1.

In Arntson v. Department of Licensing, [DOL case] the court admitted the breath test results, but gave them no weight due to the problems associated with the actions of Ms. Gordon and the culmination of errors dealing with the simulator solution. The action to suspend Mr. Arntson's driving privileges was dismissed.

In State v. Gilbert, et al [Skagit County cases], the court denied the motions to dismiss the charges or suppress the breath test results, but was very critical of the Toxicology Laboratory and Dr. Logan.

In State v. Lang, et al, [Snohomish County cases] the motion to suppress the breath test result was granted due to Ms. Gordon's actions.

In State v. Ahmach, et al, [Redmond cases] the court granted the motion to suppress due to Ann Marie Gordon's actions, and the errors committed by the lab personnel. The case was very critical of the Toxicology Laboratory and Dr. Logan's supervision.

### **Efforts to Correct Problems Discovered Crime Laboratory**

The FLSB under the supervision of Dr. Barry Logan and the Washington State Patrol has taken very thorough steps to examine and solve the problems in the Crime Laboratory relating to Forensic Scientist Evan Thompson and in the Toxicology Laboratory relating to the Breath Test Program.

The crime laboratory peer review, quality control analysis and supervision, were all adequate to identify problems with a forensic scientist's work and rectify them. This was done in an open manner and was remedied. The systems worked in the way that was intended when the checks and balances were put into place in the crime laboratory. In order to fully understand the checks and balances instituted in the crime laboratory it is important to review the audits that are done annually and also the creation of the Standards and Accountability Section (SAS). In 2006 Dr. Logan decided that it was important to create a section devoted to the demand for quality processes and to increase the vigilance of forensic quality issues such as audits and accreditation oversight. This section has been increased from one person to seven full time positions.

In order to insure compliance with ASCLAD/LAB Accreditation Criteria, Washington State Patrol Regulations, legal criteria, CALEA Accreditation Criteria and

Federal Requirements, many audits are required. The following are audits presently conducted on the crime laboratories:

1. Four Quarterly Evidence Audits per year per laboratory performed by the laboratory manager or designee;
2. One 100% Evidence Audit per year per laboratory performed by the Washington State Patrol Risk Management Division;
3. One 10% Spot Evidence Audit per year per laboratory performed by the Washington State Patrol Risk Management Division;
4. Three Firearms Reference Collection Audits performed by the SAS;
5. Six Controlled Substance Reference Collection Audits per year performed by the SAS;
6. One Quality and Technical Audit per year per laboratory performed by the SAS;
7. Six alternating internal and/or External DNA and CODIS Audits per year as required by the Federal FBI Guidelines; (Set up by the SAS;
8. Yearly ASCLAD/LAB Assessments performed by each of the seven laboratories and performed by the Laboratory Manager, monitored by the SAS.

After each audit is completed the SAS completes a report and the Laboratory Manager must file a response. This puts the focus on problems and their solutions. After a solution is reached the SAS Section conducts follow ups to check and see how the problem has been remedied. This program has changed the laboratory system from a reactive to a proactive environment. In addition, the ASCLAD/LAB is converting from a forensically nationally based Legacy Accreditation Program to the International ISO Program based on ISO testing and calibration laboratory criteria. This change will more than quadruple the essential accreditation criteria used, and is based on international standards and applications. The current Legacy Accreditation Program has an external assessment every five years, while ISO has a yearly assessment for the first five years and then adjusted based on the laboratories record of success. This project is the responsibility of the SAS and will result in a better laboratory system and product for the laboratory users.

## **Toxicology Laboratory**

The external and internal audits that were conducted on the Toxicology Laboratory after the disclosure by Ms. Gordon of her false certifications, are certainly indicative of how seriously the Chief of the Washington State Patrol viewed this problem. In addition, after all of the audits, the Washington State Patrol and the FLSB have adopted all of the audit findings, in an effort to prevent this from ever happening again and to insure that checks and balances will be adequate to forestall this in the future.

In order to insure compliance with ABFT Accreditation Criteria, Washington State Patrol Regulations, legal criteria, CALEA Accreditation Criteria and Federal Requirements, many audits are required. The following are audits presently conducted on the Toxicology Laboratory:

1. Four Quarterly Evidence Audits per year performed by the laboratory manager or designee;
2. One 100% Evidence Audit per year performed by the Washington State Patrol Risk Management Division;
3. One 10% Spot Evidence Audit per year performed by the Washington State Patrol Risk Management Division;
4. One ABFT Accreditation Audit [The Toxicology Laboratory was accredited last year and will go through a mid-year assessment this year];
5. SAS Audit to insure the findings from the lat year's audits are being implemented;
6. One evidence handling audit performed for the CALEA Accreditation.

After each audit is completed the laboratory manager must respond to any findings and make certain that problems are remedied. In addition, the Toxicology Laboratory is converting from ABFT Accreditation Program to the International ISO Program based on ISO testing and calibration laboratory criteria. This change will more than quadruple the essential accreditation criteria used, and is based on international standards and applications. ISO has a yearly assessment for the first five years and then is adjusted based on the laboratories record of success.

## **Conclusion**

It is extremely unfortunate that Toxicology Manager Gordon filed false certifications on tests that were conducted by another analyst. The fact that this was done

by a high level laboratory employee is repugnant and antithetical to the goals and standards of the entire laboratory system. This was not a certification that was essential to any part of the program and truly defies logic. This action has prevented the utilization of breath test results in courts all over the State of Washington, and has raised a cloud of doubt over the Toxicology Laboratory. The crime and toxicology laboratory employees are a very dedicated, hard working, honest group of people and certainly did not deserve to have the actions of two people affect the public perception of their work. Dr. Logan has dedicated many years of his professional life to the goal of creating a laboratory system that is dedicated to the most efficient, well run, and ethical standards of forensic science. Under his leadership the Crime Lab and Toxicology Laboratory systems have grown to attempt to meet the need in this State for such services, and to keep abreast of the cutting edge technology in forensic science. The Toxicology Laboratory has doubled in size under his leadership and has achieved national accreditation. The crime laboratories have greatly increased in size, are fully accredited and have placed a major focus on DNA casework. The focus that Dr. Logan placed on quality assurance and the creation of the SAS division will ensure high quality laboratory processes and results in the future.<sup>3</sup>

The Forensic Investigations Council makes the following recommendations for the FLSB:

1. Adopt all of the findings of the audits conducted as set forth above.<sup>4</sup>
2. Appoint a State Toxicologist as a separate position from the FLSB Chief.<sup>5</sup>
3. Appoint a Laboratory Manager position for the Toxicology Laboratory.<sup>6</sup>

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<sup>3</sup> We are not unmindful of the criticism of Dr. Logan by a number of judges in the above-cited opinions. However, everyone who supervises a large number of employees, which does not include the aforementioned judges, realizes that sometimes employees do not follow the rules, do not follow directives and do not follow the law. If this is done in a manner which is not readily apparent, the results can be disastrous. That is exactly what happened here. The captain of the ship ultimately is always responsible, but it does not mean that he was asleep at the helm or was complicit in the activities of the employee or employees. Dr. Logan has built an extremely excellent crime laboratory and toxicology system in the State of Washington. He has contributed more to the forensic laboratory systems than anyone in the State. His vision and organizational ability will be felt in this system for years to come.

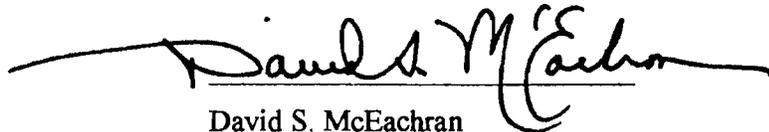
<sup>4</sup> This has been done by the Washington State Patrol and all will be effective by mid year, 2008.

<sup>5</sup> The duties associated with the State Toxicologist and the Bureau Chief of the FLSB are too numerous for one person to complete. [This recommendation has been completed and Dr. Fiona Couper was appointed as the State Toxicologist effective on March 10, 2008].

<sup>6</sup> This position has been filled for the State Toxicology Laboratory and will provide support for the State Toxicologist.

4. Complete the ISO accreditation on both the Crime Laboratory System and the State Toxicology Laboratory System.
5. Expand the current Standards and Accountability Section to ensure vigilance for quality processes and to conduct audits and oversee accreditation over both the Crime Laboratories and the State Toxicology Laboratory.
6. Management of the crime laboratories and the toxicology laboratory should constantly monitor the staffing levels to insure adequate staffing levels to process the lab requests in a timely manner and to insure high quality, thorough casework.

The problems described above that occurred in the Toxicology Laboratory cannot overshadow the excellent, high quality forensic casework that has been completed day in and day out by the employees of the Forensic Laboratory Services Bureau. The above recommendations will ensure that these problems will not reoccur and will increase the quality of the laboratory results.



David S. McEachran  
Chairman FIC

## APPENDIX 1

Type of Audit	Target Date	Action Step	Completion date
BTA	08/01/07	Breath test attend training for new program offered by ASCLD-LAB for accreditation	done
BTA	09/01/07	Simulator solution certification database form updated to include date beside analysts name reflects the date analyzed.	done
BTA	10/05/07	Update & develop procedures for preparing, testing, certifying, and conducting quality control on simulator external solutions and QA solutions	done
BTA	10/05/07	Quality assurance check performed by breath test section on receipt of solution. Recalculate results.	done
BTA	10/05/07	Documentation of absolute ethanol w/simulator solution log	done
BTA	10/05/07	Language standardized to reduce any confusion about what documents are being referred to	done
BTA	10/05/07	Revisions to simulator solution & QA procedures dated 10/5/07 and beyond, require to be included in batch file.	done
BTA	10/05/07	Validation of filemaker database. Old file locked to prevent editing or tampering	done
BTA	10/05/07	4-stage process for review of analytical data. Toxicology Supervisor assigned to oversee this process.	done
SSA	11/01/07	Refrigerator/freezer moved to vault. Evidence moved to vault each night.	done
SSA	11/01/07	Seattle Crime Lab PEC assigned to ToxLab 40% time.	done
BTA	11/07/07	Weekly training sessions for Tox Staff	ongoing
BTA	11/15/07	Analysts divided into 2 teams for simulator solution batches. 8-9 analysts performing tests rather than 16	done
SSA	11/22/07	Save sample process assigned to Barry Fung.	done
SSA	12/14/07	Audit of 2005 Samples	done
BTA	12/19/07	Joint meeting between Tox staff & Breath test program staff	done
SSA	01/01/08	Seattle Crime Lab PEC = ToxLab PEC 100%	done
SSA	01/01/08	Access to evidence vault limited to PEC & Supervisors only	done
SSA	01/01/08	Filemaker Pro installed on evidence officers computers	done
SSA	1//2008	Return/disposal of evidence process for PCME & KCME	done
SSA	1//2008	Steering committee meetings to start for returning ALL SAMPLES	done
SSA	01/01/08	Development of evidence disposal and return process w/documentation	done

**APPENDIX 1**

<b>Type of Audit</b>	<b>Target Date</b>	<b>Action Step</b>	<b>Completion date</b>
SSA	02/01/08	Identify conflicts between lab & agency policies.	done
SSA	02/01/08	Draft changes assigned to PEC Linda Edwards & Susan Sabillo	done
SSA	02/01/08	2nd ToxLab PEC expected hire date	done
SSA	02/01/08	Assessment of CITE system before final decision on LIMS	done
SSA	02/01/08	Recommendations for improvement on save process	done
BTA	02/04/08	Summary of the process used for calculating with mean and standard deviation - prepared by Breath Test program staff. Incorporate as an appendix in SOP	done
SSA	02/15/08	Draft policy on state wide evidence policy for Toxicology Laboratory due from steering committee	done
SSA	03/01/08	2 PEC's responsible for receiving evidence, entering into evidence system, etc	done
BTA	03/01/08	IIA compliant quarterly external audits will be developed by FLSB Standards and Accountability Section	done
BTA	04/01/08	Technical work group to be formed by new Toxlab management staff	
SSA	04/01/08	Audit of 2006 & 2007 Samples	in progress
BTA	07/01/08	Application for accreditation ASCLD-LAB	
BTA	07/01/08	Additional communication venues developed by Technical working group.	
BTA	07/01/08	Periodic internal audits on simulator solution program	
BTA	07/01/08	Create new database w/individual passwords and audit capabilities.	
BTA	07/01/08	Technical group will develop intergrated SOP for all aspects of breath test support functions by lab	
SSA	07/01/08	Return of all evidence upon completion of analysis	

# *Washington State Patrol*

REPORT TO THE CHIEF

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**FORENSIC LAB SERVICES BUREAU**

Evidence Audit  
Toxicology Lab  
Seattle, WA

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Issue Date  
September 4, 2007

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**RISK MANAGEMENT DIVISION**

Dr. Donald Sorenson, CFE

## EXECUTIVE SUMMARY

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At the direction of the Chief, the Risk Management Division conducted an audit of the evidence system at the Washington State Patrol's Toxicology Laboratory in Seattle. Fieldwork was conducted August 6-15, 2007.

Procedures, processes, operations, and organizational efficiencies regarding the handling of evidence were examined to assess accuracy, compliance, and effectiveness. Issues were noted in the following areas:

1. **Division Manual** - A review of the division's Standard Operating Procedure (SOP) manual revealed some policies, rules, or regulations addressing the handling of property and evidence in conflict with department policies. Prior recommendations were made by RMD regarding these issues and can be found in attachment A.
2. **Evidence Intake/Packaging, Storage, and Disposal** – Approximately sixteen different personnel process the intake and storage of evidence and access the evidence vault on a continual basis. Incomplete records of the "Saved Samples" freezer prevented accurate accounting of the inventory. Timely disposal of evidence from adjudicated/closed cases did not occur.
3. **Case Files** - Files were generally well organized. Some inconsistencies in documentation were noted.
4. **Mandatory Audits** – Neither the required audits of the "Saved Samples" freezer, nor the quarterly audits, were performed.
5. **Supervision** – The Lab Manager performed the majority of tasks associated with the disposal of evidence in addition to other duties associated with the operation of the laboratory. Delegation of duties to the Quality Lead Technician was limited.

### SCOPE

The audit scope was to test the accounting of evidence held in the "Saved Samples" freezer. Focusing on the handling and storage of evidence in the evidence vault at the Toxicology Laboratory, the audit included an inventory of contents held in the "Saved Samples" freezer and a review of approximately three hundred (300) case files for the years 2001-2007. Additionally, compliance testing of records to all governing policies, rules, regulations, and statutory requirements was performed. All items and paperwork presented were

thoroughly examined for compliance, accuracy, processing methods, and accountability.

### **ACCOUNTABILITY OF EVIDENCE**

Audit team members found it necessary to conduct an inventory of the "Saved Samples" freezer. The auditors expanded portions of the existing evidence database to include 700 non-recorded cases and added a descriptive field for all items found within the freezer.

### **METHODOLOGY**

The audit included a visual review of all paperwork and case files associated with the handling of evidence. RCW and CALEA compliance/non-compliance was determined through first-hand examination of supporting documents and observation of personnel.

Fieldwork included a review of the division manual and select Toxicology Lab computer databases, interviews of personnel, and a visual accounting of the evidence stored in the "Saved Samples" freezer. Fieldwork was completed on August 15, 2007.

Audit findings are detailed on the following pages. Twelve recommendations appear at the end of the write-up.

## Audit Findings

## Division Manual

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**Finding:** Division manual "evidence storage area" procedures are in conflict with department policies. Prior recommendations from RMD have not been incorporated.

**Description of Condition:** The division manual does not restrict access to the evidence storage area. Approximately sixteen people have unrestricted access to the evidence vault at all times. Additionally, the "temporary storage" location housing evidence recently delivered and awaiting initial analysis is not located in the evidence vault. This refrigerator/freezer is located in the work area utilized by the scientists and is accessible to anyone entering the Toxicology Laboratory.

At Dr. Logan's request, RMD provided written recommendations for the division manual in April 2005. The majority of RMD's recommendations were not incorporated into the 2007 manual revisions.

**Cause of Condition:** Unknown.

**Effect of Condition:** The division manual provides standards regarding policy and procedural requirements. When those of the division conflict with those of the department, confusion emerges and non-standard practices develop. For example, the evidence vault door, which is a keycard restricted entry, is often "propped" open with the use of an implement (an empty tube storage rack or a container lid) placed between the door and the door jamb. During a previous audit, the Quality Lead Technician was questioned about this practice. The response provided was that the door was only propped open when a scientist was working inside of the vault. This practice originated due to the warmth caused by the seven freezers in the room. During this audit, team members arrived and found the evidence vault door propped open with a biohazard container lid. There was no one in the evidence vault and no scientists present in the work areas adjacent to the vault. It is unknown how long the door was propped open. Additionally, while the door was propped open, scientists entering the vault did not swipe their keycards. Audit team members observed numerous scientists entering the vault and removing evidence from the other freezers. There was no record of the scientist's entries on these occasions.

In April 2005, Dr. Logan requested that RMD review proposed changes to the Toxicology Laboratory Standard Operating Procedure (SOP) manual. A three page list of recommendations was forwarded to Dr. Logan. A review of the manual indicated that the majority of the recommendations were not incorporated.

At the start of the fieldwork portion of the audit (August 6, 2007), the audit team posted a notice restricting access to the "Saved Samples" freezer. The notice simply requested that personnel refrain from accessing or replacing items in the "Saved Samples" freezer until the conclusion of the audit. Two days later (August 8, 2007), the audit team observed that the bottom two shelves of the "Saved Samples" freezer had been accessed and "straightened-up." No explanation was offered or discovered as to why the notice was ignored.

## Evidence Intake/Packaging, Storage, and Disposal

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**Finding:** Access to the evidence vault area is restricted to authorized keycard holders. The restriction is not enforced. The computer database record of the "Saved Samples" freezer was found to be incomplete (it did not contain any description of the evidence held). Timely disposal of evidence from adjudicated/closed cases has not occurred.

**Description of Condition:** Access to the evidence vault is restricted by a keycard device. Approximately sixteen individuals have access to the evidence vault. Additional personnel may access the vault at any time when the evidence vault door is propped open. Access to the scientist's work areas is also restricted by keycard devices, but is also accessible by additional personnel. There is a refrigerator/freezer appliance storing newly arrived evidence in preparation for initial testing in this area. All evidence is not stored in the evidence vault. This is a direct violation of both department policy and CALEA standards.

Responsibility for the "Saved Samples" computer database is shared and assigned to one scientist at a time. The responsible individual is provided a copy of the database from the previous individual responsible for maintaining it. If errors occur, they are passed along as there is no validation of the accuracy of the information when the database assignment changes. The database used at the Toxicology Lab for the "Saved Samples" has no description field for the evidence stored. It is not possible to determine what evidence is actually stored in the freezer short of viewing it directly. Case files also contain a description of the evidence items submitted, but file notations regarding movement of evidence to the "Saved Samples" freezer is inconsistent. Validation is lacking.

A review of the case files revealed that timely disposal of evidence from adjudicated/closed cases is not occurring. A number of files contained documentation permitting the destruction of the evidence, or requesting a return of the samples provided, but the items were still stored in the "Saved Samples" freezer. During this audit, no analysis of intake versus disposal was conducted due to time constraints and inaccessibility of records - some of which could only be accessed by the former lab manager's computer.

**Cause of Condition:** Failure of personnel to comply with written policies and procedures. Failure of supervisor to access appropriate resources to ensure authenticity of computer database information. Failure of supervisor to delegate responsibilities.

**Effect of Condition:** An environment developed that operates outside the guidelines of the Washington State Patrol. Accountability to the chain-of-

command was noticeably absent as was delegation of responsibilities from the lab manager to Toxicology Lab personnel. Guidance in the form of written policies and procedures address testing processes in evaluating evidence, but minimal direction regarding chain-of-custody standards is provided.

The department is unnecessarily exposed to litigation due to insufficient documentation and disregard for evidence handling policies and procedures.

## Case Files

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**Finding:** Documentation in case files is inconsistent.

**Description of Condition:** A review of the case files for "Saved Samples" during the years 2001-2007 was conducted. Discrepancies were minor and took the form of incomplete or missing notations and paperwork.

**Cause of Condition:** High rate of staff turnover combined with failure of supervisor to provide adequate training and oversight to comply with established policies and procedures.

**Effect of Condition:** Successful prosecution of cases is compromised. The department is unnecessarily exposed to potential litigation.

## Mandatory Audits

---

**Finding:** Mandatory audits are not being completed.

**Description of Condition:** The division manual identifies an audit of the evidence stored in the "Saved Samples" freezer. The audit is to provide for a 95% confidence level with a +/-5% confidence interval. The lab manager indicated in a memo to Dr. Logan that she would have a 100% inventory of the "Saved Samples" freezer completed by March 30, 2005. The audit concluded that the annual audit of the saved samples did not occur at any time during the last two years as the Toxicology Laboratory did not have a complete inventory of the "Saved Samples" freezer from which to generate a report.

Quarterly audits were not conducted for the latter half of 2006, and no reports have been received by RMD for 2007.

**Cause of Condition:** Failure to comply with established policies and procedures requiring an annual audit of the "Saved Samples" freezer.

**Effect of Condition:** Non-standard evidence handling procedures and insufficient documentation to ensure the same jeopardizes operational performance as well as CALEA accreditation.

## Supervision

---

**Finding:** Proper delegation of tasks by the lab manager did not occur. Personnel are not held accountable for following departmental policies and procedures.

**Description of Condition:** The lab manager had a very large staff to supervise and voiced unwillingness to delegate tasks to employees that would "take them away from their primary tasks." As a result, disposal of evidence did not occur on a regular basis and, when it did happen, appeared to coincide with that time immediately before an audit.

Responsibility for completion of the Quarterly Audit was given to the Quality Lead Technician. The lab manager did not hold the Quality Lead Technician accountable for failure to complete and submit the quarterly audits.

**Cause of Condition:** Failure of the lab manager to take appropriate corrective action in a timely manner.

**Effect of Condition:** Non-standard evidence handling procedures and failure to perform required audits jeopardizes operational performance as well as CALEA accreditation.

## Recommendations

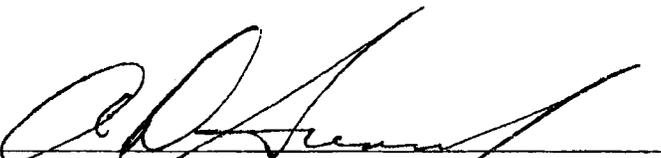
1. Immediate relocation to the evidence vault of the refrigerator/freezer housing incoming evidence.
2. Immediate temporary reassignment of one Property and Evidence Custodian from the Seattle Crime Laboratory to oversee the movement of evidence items in and out of the evidence vault for the Toxicology Laboratory until additional personnel can be hired.
3. Immediate lockdown of the evidence vault, thereby limiting access to the Property and Evidence Custodian and Quality Lead Technician only.
4. Immediate 100% inventory of all evidence held both in the evidence vault and at any other locations on the premises.
5. Establishment of a computer database system capable of tracking evidence items and reporting their status.
6. Transfer of database tracking of saved samples responsibilities to the Property and Evidence Custodian responsible for evidence handling for the Toxicology Laboratory.
7. Disposal of all evidence from adjudicated/closed cases.
8. Return of all samples submitted by the Pierce County Medical Examiner.
9. Addition of two Property and Evidence Custodians: one to oversee the vault and a second to oversee the file room and all paperwork associated with the evidence items.
10. Re-evaluate the procedure/policy addressing the long-term storage of evidence for other agencies.
11. Bring the Toxicology Laboratory's SOP into compliance with department evidence handling policies and procedures.
12. Copy the RMD with respective quarterly audit reports.

## Acknowledgements

An audit requires the participation of individuals familiar with the processes in place and able to respond to questions for clarification. Toxicology Laboratory personnel were courteous and professional throughout this process. Without their understanding and assistance this task would have been much more difficult.

Special thanks to: Professional Staff Kim Miller, Sandra Distefino, and Forensic Scientists Brianne Akins and Amanda Black who provided information necessary to complete the task. RMD would also like to thank Property and Evidence Custodians Susan Sabillo and Barry Fung who assisted with completion of the inventory associated with this audit.

Respectfully submitted,

  
\_\_\_\_\_  
Dr. Donald Sorenson, CFE  
Administrator: Risk Management Division

*04 Sept 2007*  
\_\_\_\_\_  
Date

**Destruction File**

**Non-Compliant**

**Violation: RCW 40.14.160**

No file was available for review

One (1) "Destruction Authorization Form" was found. Ms. Gordon indicated that she has not had time to file it.

**Recommendation:** Review all files and follow prescribed procedures for destruction or archiving as necessary. Develop and maintain a "Destruction Authorization" file.

---

**Databases**

**Non-Compliant**

**Violation: RCW 40.14.060.**

A current listing of databases used at the Toxicology Lab was provided by Linda Collins. The list includes:

- Tox Database
- Discovery Excel (PD Tracking)
- Saving Samples Database

No databases were able to be audited for retention as no retention schedule has been established.

**Recommendation:** Schedule immediately.

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**Disclosure Requests**

**Non-Compliant**

**Violations: RCW 42.17.260**

**Regulation Manual 6.01.040 Public Records Requests  
CALEA 46.1.4, 54.1.1, 54.1.3, 82.1.1, 82.2.5.**

Ms. Gordon refers to all records requests received by the Tox Lab as Discovery requests. Under WSP Regulation, all such requests are all to be retained and tracked as disclosure requests. Tox Lab's SOP Manual indicates adherence to WSP regulations for disclosure. Ms. Gordon indicated that that she didn't have time to follow WSP policies and therefore wouldn't be doing it.

- Redactions are being made without exemptions being explained to requestor.
- Not using WSP database for tracking – using excel spreadsheet.
- Not keeping requests in proper files, but rather in binders all together, or in envelopes.
- No tracking # assigned.
- Blood work requests are filed by the case #, BAC requests alphabetically by the requestor and/or date.

- No billing being done for non subpoenaed requests.

**Recommendation:** That the Bureau Director be informed of the gravity of these matters and request a mitigation plan within thirty (30) days.

---

**Performance Records (DOC Books)**

**Non-Compliant**

**Violations: Regulation Manual 7.01.030, 15.00.030  
CALEA 26.1.8, 35.1.10, 35.1.13**

- No signed SCAN logs were found in the files.
- Two (2) of four (4) records reviewed contained materials past the retention period.
- One (1) Doc book was not transferred with employee when he transferred out of the Tox Lab.

**Recommendation:** Review all DOC books for proper contents and take appropriate inclusion or purging actions.

---

**Case Files**

**Non-Compliant**

**Violations: Regulation Manual 10.04.100.  
CALEA 11.4.2, 11.5.1, 11.5.2, 11.5.1, 11.6.4**

Multiple sets of copies were found in the files.  
Form numbers were present on only a few of the forms utilized.

**Recommendation:** Clarify and identify what documents are to be included in case files.  
Ensure that all forms utilized have been assigned a WSP form number.

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**TARs**

**Non-Compliant**

**Violation: TAR Manual**

- TARs are stored in various places, with majority being stored in three-ring binders.
- TARs are unsecured.
- January 1, 2000 to June 30, 2000 TARs were discovered in an off-site storage area.
- Copy of an original TAR found with an attached note that read: "Original at HRD?"

**Deleted:** <#>One (1) TAR was found in an expandable file folder with eight (8) other employees.¶

**Recommendation:** Secure all TARS at one location at the respective employee's duty station. Create and utilize consistent filing system, either by date or employee.

---

**Simulator Solution Logbooks****Status: Non-Compliant****Violation: Retention:** Ten (10) years for in-house records. No copies of archived files/records are to be kept locally.

A random sample of the Simulator Solution Logbooks (records of quality control results for simulator solutions produced by the lab) dating from 1991-1992, 1995-1997, and 2001-2003, were examined.

- Thirteen (13) years worth of records were found on file.
- All files examined were copies; no originals found.
- Ms. Gordon indicated that the originals were archived. This has not been confirmed.

**Recommendation:** Originals files/records are to be retained for full retention period, and then archived. Copies are to be destroyed.

---

**Email****Status: Non-Compliant****Violation: Retention**

Checked four (4) employee's email systems. All four (4) had emails on the server more than a year old. Two (2) had emails 2-3 years old.

**Recommendation:** Review retention rules related to email and perform required compliance-driven activity.

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**Visitor Book****Compliant**

**Recommendation:** There is a five (5) year retention requirement. Current visitor book is a bound volume with multiple years of records. It contains pages which cannot be easily removed for destruction. Therefore it is recommended that the lab use a binder with removable pages.

---

**Forensic Toxicology Case Files**

The technical content of the files prohibited the auditors from determining a measure of accuracy for file contents.

**Recommendation:** A master list of required file components is to be prepared.

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CHRISTINE O. GREGOIRE  
Governor



JOHN R. BATISTE  
Chief

STATE OF WASHINGTON  
WASHINGTON STATE PATROL

General Administrative Building, PO Box 42600 • Olympia, WA 98504-2600 • (360) 753-6540 • [www.wsp.wa.gov](http://www.wsp.wa.gov)

February 12, 2008

Chief John R. Batiste  
Washington State Patrol  
PO Box 42601  
Olympia WA 98504-2601

Dear Chief Batiste:

As of February 12, 2008, I am submitting my voluntary resignation from the exempt position of Forensic Laboratory Services Bureau Director/State Toxicologist with the Washington State Patrol. I agree to officially resign from my employment with the Washington State Patrol on April 30, 2008.

My last official day as the Forensic Laboratory Services Bureau Director/State Toxicologist will be March 14, 2008. From March 14 through April 30, 2008, I will be available to answer any operational questions and to respond to any subpoenas that may be served regarding the Toxicology Lab.

Sincerely,

Dr. Barry Logan

BL:sjs

A large, stylized handwritten signature in black ink, appearing to be "Barry Logan".



ISSUE PAPER PREPARED BY DR. BARRY LOGAN

This is a summary of the basis for the current legal challenges to simulator solutions prepared by the State Toxicology Laboratory and used in the state's evidential breath testing program. Simulator solutions are alcohol and water mixtures used to calibrate and check the calibration of evidential breath testing instruments.

***Issue:***

Following the departure of the Toxicology Laboratory manager in July, ongoing records review in the State Toxicology Laboratory has uncovered errors in processes and data that may impact breath test results in DUI cases.

***Background:***

In March 2007, WSP received an anonymous complaint alleging that "simulator solutions were being falsified as far as certifications". This complaint was assigned to Ms. Ann Marie Gordon, the Toxicology Laboratory manager to investigate. She evaluated the issue by tasking the Quality Manager to audit the records through the beginning of 2007 to ensure analytical data to support the results reported. The simulator solution process was also discussed with staff. Neither analytical review nor staff input revealed discrepancies.

At a follow up meeting with Ms. Gordon and Dr. Logan a few days later, she indicated that she was delegating testing to one of her staff due to time constraints. It was concluded her delegation of the testing was likely the behavior that was the subject of the complaint, and she was directed to stop delegating that testing. There was no expectation that she personally test simulator solutions in her capacity as laboratory manager. She complied with that direction.

In July 2007, a second call was received by WSP on the same subject containing more specificity. In addition to delegating the testing of simulator solutions, the complaint alleged Ms. Gordon had been signing a declaration under penalty of perjury that she had personally examined and tested the solutions. Affidavits from early 2007 posted on the WSP web site were reviewed and confirmed the substance of the complaint. The matter was referred to the WSP Office of Professional Standards (OPS). It is important to note that there is no evidence that results were being fabricated or falsified. All the tests reported were being correctly performed, however the alleged misconduct was that Ms. Gordon was taking credit in a sworn statement for having personally performed the test.

The complaint and accompanying documentation was reviewed and a criminal investigation to determine potential evidence of false swearing was initiated by the WSP. Ms. Gordon resigned from the WSP on July 20, 2007 when notified that criminal and administrative investigations would be conducted.

The WSP criminal investigation was completed and referred to the King County Prosecutor's office for a charging decision. On September 20, the WSP was verbally notified by King County that charges will not be filed due to the absence of intent on the part of Ms. Gordon.

In July, exhaustive reviews of toxicology laboratory processes and procedures were initiated. A review of calculations used to determine the average alcohol concentration of the simulator solutions revealed an error in the programming of the database, which omitted some of the test results from the average value. This calculation error occurred on 33 batches of simulator solutions prepared and tested between August 2005 and July 2007. Analysis of the impact of the error identified a potential material impact on eight breath tests conducted on one instrument in Spokane (out of ~70,000 tests statewide).

WSP immediately notified the prosecutor's office and continues the process of contacting those individuals.

In early September an audit of the simulator solution process was initiated by WSP, using an outside auditor. That report is expected to be delivered to the WSP in October. During the audit process, additional errors in the simulator solution database records have been identified, including inconsistent dates, transcription and data entry errors, and an error in the calculation of the standard deviation. The errors are mostly clerical, or affect numbers in a mathematically insignificant way, but it may be argued that they have legal significance. Some of the errors may affect the computed average for some simulator solutions in the third or fourth decimal place. WSP is working to secure independent experts review its process for identifying, reporting, and publishing corrections of these errors.

At a Department of Licensing (DOL) hearing on September 10, 2007, incomplete testimony and evidence concerning the above issues led to an adverse ruling for the state which may impact future license suspensions. Defense attorneys argued that employees from the State Toxicology Laboratory had committed perjury by signing affidavits containing the calculation error result. Without any legal representation for the state, these allegations were not rebutted.

***Analysis:***

The above deficiencies are traced to the following root causes:

1. Laboratory management and staff were overtaxed leading to inadequate delegation of authority and accountability. A survey has identified that the Washington State Toxicology Laboratory has a per FTE workload two to five times that of similar state labs. Management focus was highly attuned to

customer needs, which were successful. However, this was not balanced with attention to internal controls and agency policy compliance.

2. The Laboratory did not utilize an external process for evaluating the original complaint regarding the certification of simulator solutions.
3. The simulator solution testing process was a legacy program which had grown in scale and become overly complex due to the addition of staff (each solution tested over seventy times) without any assessment of its liabilities or the need for that complexity.
4. The process had been in place for over twenty years and had gone unchallenged, leading to complacency. This in turn led to under-emphasis of the significance of the procedure during staff training.
5. The process was a peer-to-peer reporting process with no end point supervisory or management review for accuracy.
6. Although the Toxicology Laboratory was accredited in 2005 by the American Board of Forensic Toxicology (ABFT) – one of only 22 laboratories in the country to be so accredited - the accreditation does not encompass the simulator solution process so there had been no external review of procedures or risk.
7. Written laboratory procedures were not comprehensive, and were open to varied interpretation by staff revealing management and training needs.
8. Washington State has a very aggressive and experienced DUI defense bar, which shares resources, insight, and market issues and challenges around the state leading to higher scrutiny than experienced in other states.

9. Inconsistent communication between DOL and the WSP Toxicology Laboratory has lead to incomplete information being provided at administrative hearings.

***Remedies:***

The following steps have been taken to address the root cause deficiencies.

1. Mr. Kevin Jones, Laboratory Accreditation Manager for the Crime Laboratory Division has been assigned to manage the change process in the Toxicology Laboratory. Mr. Jones brings fifteen years of management and supervision in the WSP to this role. He is an expert in ISO (International Organization of Standards for Forensic Laboratories) standards and well acquainted with WSP policies and regulations.
2. Mr. Jones' priorities have been assigned as follows:
  - i) Pursue all means to restore public confidence in the Laboratory and meet stakeholder needs.
  - ii) Work with WSP risk management to identify any remaining weaknesses or deficiencies in the simulator solution process, and conduct any necessary retraining.
  - iii) Conduct the necessary notifications to prosecutors, defendants and the courts through the WSP website and other means.
  - iv) Assess the external audit report, once available, and secure additional auditing as necessary.

- v) **Re-establish and hire a full time state toxicologist (PhD, ABFT Certified) to provide full-time, technical program oversight.**
  
- 3. **An assistant attorney general with special responsibility for toxicology issues is being retained by the WSP to assist the Laboratory, the DOL and County prosecutors in consistently addressing these issues.**
  
- 4. **Laboratory procedure will continue to be scrutinized to identify changes and improvements needed to clarify each individual's role and the steps required. Additional layers of validation, documentation and supervisory review are being added to the simulator solution preparation and testing process.**
  
- 5. **The WSP will pursue ongoing discussions with the Forensic Investigations Council for additional oversight of the laboratories and a consistent process for dealing with complaints regarding quality or allegations of impropriety.**
  
- 6. **ASCLD-LAB International, an ISO based forensic accrediting body is establishing accreditation standards for breath alcohol programs. WSP is participating in this previously unavailable process and will take steps to become one of the first accredited programs in the nation.**
  
- 7. **WSP has requested ABFT, the Laboratory's accrediting body, to conduct a data quality audit. This will be performed in October 2007.**
  
- 8. **WSP is seeking legislative funding to restore a full time state toxicologist and additional staff to provide better technical management oversight of the laboratory, reduce the risk of technical errors, and improve the quality standards.**

***Unrelated but linked events:***

Ms. Gordon, the former Laboratory manager is also the individual who in 2004 inadvertently destroyed the blood samples in the ongoing vehicular homicide prosecution of Frederick Russell in Whitman County. In that case the defense has sought to impeach Ms. Gordon's credibility by invoking the recent allegations, making the two events appear to be related when they are not.

Also revealed in the Russell trial are internal WSP audit reports critical of the Laboratory's sample handling and storage methods. The reports show procedures that are out of compliance with WSP requirements, and describe inadequate documentation of destruction of specimens, which were authorized to be destroyed. Audit recommendations made to Ms. Gordon by the WSP auditor in 2005 for changes in procedures were not immediately implemented.

The WSP and the Toxicology Laboratory are committed to scientific excellence in support of Washington's evidential breath testing program, and are acutely aware of the need for public confidence and accountability.

**SEATTLE POST-INTELLIGENCER**

http://seattlepi.nwsource.com/local/183203\_crimelab23.html

**Oversight of crime-lab staff has often been lax**

Friday, July 23, 2004

By RUTH TEICHROEB

SEATTLE POST-INTELLIGENCER REPORTER

A crime lab chemist snorts heroin on the job for months, stealing the drug from evidence he was testing.

A senior DNA analyst lies to a defense attorney, fearing his testing error would be used to undermine a case against a suspected rapist.

A forensic scientist is accused of sloppy drug analysis, after a national watchdog group complains about his misleading court testimony.

In all of these cases, internal checks and balances failed. The system for double-checking work broke down in one case. In another, officials overlooked warning signs until faced with a crisis. And the work of discredited senior staffers was almost never audited, an investigation by the Seattle Post-Intelligencer found.

A close look at the Washington State Patrol crime labs reveals a stressed system in which officials have been slow to deal with misconduct by long-time employees -- dating back to one of the first scientists hired more than 30 years ago.

Crime lab officials say these are isolated incidents that don't reflect the high-quality work done by their 120 employees on thousands of cases a year, despite caseload and budget pressures.

"It's a constant process of learning from our mistakes and trying to do better," said Barry Logan, director of the State Patrol's Forensic Laboratory Services Bureau.

A single inept or dishonest forensic scientist, though, can undermine the integrity of the legal process, given the pivotal role the crime labs play in determining a suspect's guilt or innocence.

"It's only as good as the weakest link," said Steven Benjamin, co-chairman of the forensic evidence committee for the National Association of Criminal Defense Lawyers. "When a laboratory has an inept or dishonest examiner and an inadequate response, then that whole lab becomes the weakest link."

A review of two dozen crime lab disciplinary records also raise questions about the professionalism of some scientists on the state payroll. In the past five years, a lab supervisor was caught viewing pornography on his office computer, a lab manager was fired for sexually harassing female co-workers and a DNA analyst was found sleeping on the job.

Crime labs are subject to minimal federal or state oversight. Even the last industry-led, voluntary accreditation review of Washington's system, however, found problems in all seven labs in 1999.

The lack of government scrutiny has become a national issue in the wake of high-profile scandals plaguing crime labs from Houston, where shoddy DNA work led to a wrongful conviction, to a string of problems at the FBI's pre-eminent facility in Quantico, Va.

Two months ago, Oregon attorney Brandon Mayfield was jailed for two weeks as a material witness after FBI fingerprint experts mistakenly linked him to the March 11 Madrid bombings that killed 191 people.

Over the objections of Spanish investigators, three veteran FBI fingerprint examiners declared they had a "100 percent" match with Mayfield -- a claim soon proved to be false.

The case not only prompted questions about the reliability of fingerprint evidence; it left people wondering whether experienced forensic scientists had let biases cloud their judgment.

And it lent credence to the complaint that too many crime lab staff see themselves as cops in white lab coats rather than objective scientists.

**'I tried to conceal it'**

A simple error on a DNA test would lead to the undoing of 16-year forensic scientist John Brown.

**related features**

- Crime labs too beholden to prosecutors, critics say
- Previously: "Shadow of Doubt" special report



Washington State Patrol crime labs' Director Barry Logan says most of his forensic scientists do top-notch work on thousands of cases each year.

Embarrassed by his mistake, Brown made a decision that would shatter his credibility and impugn the integrity of the entire system.

It began when Seattle police submitted vaginal swabs in an unsolved rape case to the state crime lab. Brown came up with a DNA profile of a possible male suspect but didn't find a match the first time he searched the convicted-felon DNA databank in November 1997.

During an internal review, his boss, Don McLaren, noticed that Brown had missed one of the markers in the DNA test. Brown reran the correct profile and produced a match with Craig Barfield, then 35, who had served time for burglary convictions.

Brown issued a final report linking Barfield to the DNA profile, but made no mention of his first test.

"A mistake like this is like leaving fresh salmon on the counter and ... leaving your cat in the kitchen," Brown, 54, said recently, speaking publicly for the first time.

"I saw it as much more harm that the defense would get hold of the data saying there's no match in the database, and they'd prance around and say it proves the innocence of their client."

He also destroyed his erroneous draft report, a common practice at that time, according to Brown and McLaren, but one that contradicted the legal system's basic tenet of full disclosure.

A few months later, in April 1998, Barfield's public defender, Stephanie Adraktas, grilled a nervous Brown about discrepancies in his lab notes during a pre-trial interview.



Brown

By then, Brown said he knew Barfield had been accused of a previous rape, and wanted to help bolster the case. "I didn't want this mistake to come up," he told the P-I. "So I tried to conceal it."

One of the founders of the lab's DNA section almost a decade earlier, Brown had testified in 40 DNA cases. He'd tested evidence in 300 DNA cases, according to his resume.

He said defense attorneys had begun personally attacking forensic scientists because they could no longer challenge irrefutable DNA evidence in court. They wanted to "destroy him."

"The legal stuff was a battlefield," he said.

During the interview with Adraktas, Brown was at first evasive, then lied about the existence of the draft report. As the hours ground on, Adraktas extracted the truth. "Every defense attorney wants to go out hunting and to capture a forensic scientist and I was the big buck with a full rack," Brown would later tell State Patrol investigators.

Brown's attitude stunned Adraktas. "I do find it disturbing and sad that someone whose job was to be objective and evaluate evidence fairly would do this," she said. "It wasn't his role to decide if the charged person was guilty. That was up to a jury."

To do damage control, King County Deputy Prosecutor Steven Fogg immediately sent the crucial DNA evidence to a private California lab, which confirmed the match with Barfield.

At Barfield's trial two years later, Brown, who had just been promoted to supervisor of the lab system's DNA program, admitted that he'd lied about his first test.

The State Patrol put Brown on administrative leave and launched an internal investigation. Administrators concluded Brown's credibility was tarnished, and his "untruthfulness" could be used to discredit his prior work -- and the entire system.

On the verge of being fired, Brown resigned in September 2000.

The lab, in response, began limiting defense attorneys to two-hour time blocks during pre-trial interviews to ease psychological pressures on forensic scientists.

"I'm not going to defend what John Brown did," said Logan, the crime labs chief. "He got into a difficult situation and made it worse by how he handled it."

Lab officials didn't audit Brown's other cases for problems after his resignation because his previous track record was "excellent," Logan said. They did write a policy requiring staff to keep all draft reports.

"I believe we have an excellent record in disclosing as much as we believe will be relevant," Logan said.

After Barfield was convicted of rape and burglary, however, the court fined the state \$5,000 for failing to disclose memos revealing Brown had been suspended during the trial.

"A fine was just an inadequate response to that," Adraktas said. "If that's all an agency will suffer as a result of withholding information in a serious case, what will prevent them from doing it again?"

The crime labs' habit of destroying erroneous draft reports was "chilling" and raises the possibility of wrongful convictions, she said.

Adraktas also questions why the agency waited two years to investigate Brown's conduct, even promoting him. She said she submitted a transcript of Brown's false statements to the State Patrol's legal counsel soon after the interview.

Logan said he didn't know about Brown's dishonesty until the trial, and isn't sure if anyone else did. Officials did know he'd destroyed the draft report, which wasn't against policy at the time. Logan said they took action as soon as Brown testified to lying.

Today, Brown in part blames what happened on the stress of dealing with defense attorneys -- something police agencies discount, because employees are expected to "handle this stuff."

"We were facing on a monthly basis people who were trying to destroy our reputations," Brown said. "There was no acceptance of that."

### **Scientist falsified his report**

From the earliest days of the state system, crime lab officials have floundered at reining in problem employees.

One glaring example is Donald K. Phillips, a forensic scientist hired in 1971 after a brief stint in the Seattle Police Department lab.

Phillips' skills were soon called into question, but those concerns had little effect on what would be a 15-year career with the State Patrol.

"They let him through probation even though they knew he was a problem," recalled Kay Sweeney, a former crime lab quality assurance manager for the State Patrol. "Once you passed probation, it's very hard to be terminated."

In August 1973, Phillips failed an 11-month trial run as a supervisor. His job evaluation, while praising his loyalty, cited poor communication with fellow employees and "an inability to properly perceive the necessary approach" to casework. It recommended he not be put in charge of cases.

Over the next two years, Phillips was promoted twice. By 1977, he was regularly collecting evidence at major crime scenes. Four years later, he was supervising homicide and rape crime-scene investigations.

It became clear in the mid-'80s that Phillips had misrepresented his credentials. On the witness stand, he'd testified more than once to having a chemistry major. In reality, he had majored in agricultural science at Ohio State University.

"I just didn't tell them what kind of chemistry," Phillips said in a recent interview.

In April 1985, lab officials fired Phillips for misconduct after he frightened a hotel maid by showing her gruesome crime scene photos in his room while out of town for a trial. The maid told police she feared he might be the Green River Killer.

Phillips said he was really fired for filing too much overtime. Eight months later, he won an appeal and was reinstated. Lab officials at first restricted him to drug cases.

Phillips said he was surprised when his boss, Sweeney, sent him to collect evidence at a Kitsap County crime scene on Sept. 29, 1986. After reminding Phillips about proper procedures, Sweeney gave him the green light to search a garage where police believed 16-year-old Tracy Parker had been bludgeoned to death two weeks earlier. It would become a capital case, ultimately putting the killer -- Brian Keith Lord -- behind bars for life.

Police soon reported that Phillips had sprayed a claw hammer with too much of a chemical used to detect blood, preventing further testing.

Phillips denies doing anything wrong. "To this day, I believe there was enough blood to get a typing."

The real problem wasn't Phillips' mistake but his attempt to cover it up by denying he'd sprayed the hammer -- to the point of stating that in his lab report, according to Sweeney and State Patrol documents.

"He chose to falsify what he'd done. If he was going to do that to me, his supervisor, I couldn't trust him," Sweeney said.

When the State Patrol launched an internal investigation, Phillips resigned in December 1986.

"I still dream about it -- I loved the lab," said Phillips, 65, who moved to Oklahoma and started a business -- his own perennial greenhouse. "I thought I'd be there forever."

Despite Phillips' turbulent history, lab officials did not audit any of the thousands of cases he'd handled, or review his testimony in more than 50 cases.

### Flaws on proficiency tests

Lab officials often point to proficiency tests as proof of forensic scientists' competence.

Crime lab workers must pass one test annually in each specialty to satisfy voluntary rules set by the American Society of Crime Laboratory Directors' Laboratory Accreditation Board. Staff know they're being tested, rather than having exams slipped in with regular casework.

Some say the system needs tightening.

Tacoma lab forensic scientist Charles Vaughan took a routine proficiency exam in September 1998, testing his ability to interpret footprint evidence.

When accreditation inspectors visited the Tacoma lab in September 1999, they couldn't find any record of Vaughan's exam.

It soon became apparent that Vaughan's supervisor, Terry McAdam, had never reviewed the test -- or realized that Vaughan failed to correctly match all of the footprints with the right shoe.

Vaughan was pulled off that type of casework for about six weeks until he could redo the test, plus pass another exam.

The same year Vaughan bungled his proficiency test, he mistakenly linked hairs found at a Thurston County burglary to a suspect, according to the suspect's attorney, Richard Woodrow.

Woodrow said he hired a private Seattle forensic scientist who concluded the hairs didn't match. The prosecutor dismissed the burglary charge in September 1998.

During the lab system's last accreditation, inspectors identified two other forensic scientists whose proficiency testing was not up to date. They also noted that technicians doing DNA work for the convicted felon databank had never taken a proficiency test, although that was not mandatory.

Since the last accreditation, several lab employees have made mistakes on proficiency tests, according to internal lab documents.

In the past year, a firearms examiner in Spokane and one in Seattle both flunked tests. The year before, a Seattle forensic scientist failed a shoeprint exam.

When employees fail a test, they're taken off casework until they can pass another exam. If problems persist, a supervisor monitors their work or puts them on a work-improvement plan.

"The work is being done by human beings and human beings sometimes make mistakes," Logan said.

That doesn't reassure critics who say proficiency testing is already too easy.

"It's such a hokey test," said Dan Krane, a biology professor at Wright State University in Ohio who runs a forensic consulting firm. "They all do it at the same time and use pristine samples which aren't anything like casework."

What Phillips said happened in the early 1980s was even worse.

"Everybody would put their heads together and get the right answers," he recalled. "We wanted to be right."

### Drug analyst under surveillance

The chemist's odd behavior raised co-workers' suspicions as far back as 1998. Yet two years would pass before the State Patrol intervened.

After starting work at the Marysville lab in April 1997, James Boaz noticed that his colleague, Michael Hoover, handled an inordinate number of heroin cases. Sometimes Hoover even took over Boaz's cases without permission.

Boaz began locking up his files in his drawer when he wasn't at his desk. He also heard "loud snorting" coming from Hoover's desk, Boaz would later tell State Patrol investigators.



Hoover

Chemist David Northrop said he first noticed problems in 1999 when Hoover posted a note soliciting heroin cases from the intake clerks. Northrop complained to his boss, Erik Neilson. By summer 2000, Boaz and Northrop reported that Hoover was secretive when handling heroin cases and assigned himself too many. They suspected he was making up results.

When Neilson confronted Hoover in September 2000, the 11-year employee claimed he was stashing heroin for police to use in training drug-sniffing dogs. Neilson warned him to stop.

Two months later, Boaz and Northrop reiterated their suspicions and Neilson contacted the State Patrol to report that Hoover might be stealing heroin from evidence.

The State Patrol immediately launched an internal investigation, installed a hidden video camera above Hoover's desk and later questioned him.

Hoover confessed, saying he sniffed heroin in the lab to ease chronic back pain.

"I don't want anything bad to reflect on the State Patrol," Hoover told investigators on Dec. 22, 2000. "I found that if I sniff a little bit of ... heroin once in a while, it makes the pain go away where I can sleep at night."

Snohomish County prosecutors charged him with one count of tampering with evidence and one count of official misconduct, both misdemeanors. Felony charges weren't filed because no heroin was found in Hoover's possession.

Hoover resigned, pleaded guilty to the charges and received an 11-month jail sentence in November 2001. The scandal led to the dismissal of hundreds of pending drug cases in Snohomish, Island, Skagit, Whatcom, Jefferson and Clallam counties. The state Court of Appeals also overturned convictions in two drug cases because Hoover had tested the evidence.

"He stands by his test results," said Hoover's former attorney, Stephen Garvey. "I suspect juries would have still convicted."

The State Patrol did its best to minimize the damage, emphasizing that "the system worked" because lab employees turned Hoover in.

Asked about the delay in investigating Hoover's suspicious behavior, Logan said he and others have thought long and hard about what might have led to earlier detection and are now more likely to see the red flags: "They were seeing these things and they never wanted to put two and two together about someone who was a colleague and a friend."

### Official concedes safeguards lax

The State Patrol lab relies on peer review as its primary safeguard for catching mistakes. Lab notes and reports for every case must be reviewed by at least one other forensic scientist before being released.

While effective to a point, peer review has its limits.

Interpersonal conflicts get played out during reviews. Overloaded scientists do only cursory looks. Errors are missed due to inexperience.

A troubling breakdown in that system came to light during an internal audit of the work of Spokane forensic scientist Arnold Melnikoff.

Lab officials decided to review his work after Melnikoff was accused of helping wrongfully convict a Montana man of rape based on erroneous hair-analysis work he did for that state's lab in the 1980s.

The April 2003 audit examined 100 of Melnikoff's felony drug cases dating back four years and found troubling flaws in 30, ranging from insufficient data to identify substances to mistakes in documentation. The report described Melnikoff's drug-analysis work as "sloppy" and "built around speed and short-cuts."



Melnikoff

Melnikoff, who had been on paid leave since November 2002, contested every finding in the audit. In a written rebuttal, he wrote that he'd never failed a proficiency test or had a negative performance review in his 14-year employment.

And he pointed out that every drug case he'd analyzed had passed peer review: "If there was a 'problem,' it was a statewide laboratory problem," Melnikoff wrote.

The State Patrol fired Melnikoff in March, saying his 1990 testimony in a Montana rape trial had undermined his credibility. Melnikoff is appealing his firing.

Logan conceded that Melnikoff's case revealed employees had become lax about peer review, especially when dealing with a difficult co-worker. "The people doing peer review were only taking him on on the major errors," said Logan, who now requires supervisors to do spot checks as well.

What's really needed is more rigorous science, said Edward Blake, a California forensic scientist whose work has helped free dozens of wrongly convicted prisoners.

"This is an operation like 'I'm OK, you're OK,' " Blake said.



It was Marysville lab manager Erik Neilson, above, who told the State Patrol that Hoover might be stealing heroin from evidence.

## Lab workers violate conduct code

Moral integrity and honesty are key qualities for crime lab employees whose work will help convict or exonerate suspects.

Job applicants take lie-detector tests that include questions about illegal drug use. One-third of applicants are disqualified because they've smoked marijuana in the previous three years.

Once hired, crime lab scientists are supposed to follow the State Patrol's code of conduct. But over the last five years, 25 of them have been disciplined for violating those rules. Complaints included everything from arguing with co-workers or leaving a loaded rifle propped against a workbench to lying about travel and releasing confidential documents to a family member.

One-third of the scientists received a written reprimand. Others were suspended briefly or counseled. Seven were fired, although one of them won back his job.

Timothy Nishimura, then manager of the Marysville lab, was fired in September 2000 for misconduct, including sexual harassment of female employees dating back to 1991, according to State Patrol documents.

Nishimura appealed his firing, and was reinstated with back pay in March 2002. He was demoted to a document-examiner job in the Seattle lab. He refused comment for this story.

In another case, Kevin Fortney, supervisor in the Spokane lab, was investigated in December 2000 for cruising Internet porn sites at work. Fortney admitted his behavior and was suspended for two days. He has since been promoted to manager of that lab. Fortney didn't respond to requests for comment.

Crime labs seem hard-pressed to find scientists who are not only well-educated but can analyze complex cases, said Blake, the California expert. "Just because they can extract DNA doesn't mean they can think through problems," he said.

The most common problem isn't testing errors but incorrect interpretation of the data, said Ray Grimsbo, a Portland forensic scientist who runs a private lab.

"It's what they do with the results that gets them into trouble," said Grimsbo, attributing that to lack of experience or arrogance.

Pushing evidence too far is what some critics say happened when former Seattle crime lab manager Mike Grubb testified in a Vancouver, Wash., murder case.

Grubb told the court an earprint found at the scene in 1994 likely belonged to the accused, David Kunze. An expert from the Netherlands went further, testifying that the earprint was definitely left by Kunze's left ear.

The earprint evidence convinced a jury, who convicted Kunze in July 1997 of aggravated murder in the beating death of his ex-wife's fiancé. Kunze was sentenced to life in prison.

Two years later, the Court of Appeals overturned Kunze's conviction, criticizing the earprint testimony as "not generally accepted as reliable in the relevant scientific community."

"It was junk science," said John Henry Browne, Kunze's attorney. Kunze was set free in 2001 after a second trial ended in a mistrial.

It wasn't the first time an appeals court had taken issue with Grubb's conclusions. His testimony in a 1994 rape-murder trial, in which he claimed he could determine the age of semen found in the body of the teenage victim, was criticized as scientifically unsound.

Grubb stands behind his conclusions in both cases, saying he based his findings on years of experience and forensic studies.

"My testimony was well within the bounds of reasonableness," said Grubb, who left the lab in 1998 to run the San Diego Police Department crime lab.

## Experts say reforms needed

Some critics believe a host of reforms are needed, including weeding out incompetent or dishonest crime lab employees, and requiring more rigorous outside reviews.

Washington's crime labs are inspected once every five years to retain voluntary accreditation. During the last review, in September 1999, all of the labs initially fell short of meeting key standards, records show.

Inspectors cited problems ranging from proficiency tests that weren't up to date to an unlocked evidence freezer. Those problems were soon corrected.

Said Logan: "They didn't come up with anything that they felt was a problem with the quality of the work."

Failing to meet voluntary standards, however, is a red flag because accreditation is done by former crime lab insiders who set the bar low, experts say.

"It's an old boys' network," said William C. Thompson, a criminology and law professor at the University of California-Irvine. "It's the absolute bare bones that's needed to run a lab. It isn't the best scientific work that can be done."

"The labs have manufactured credentials for themselves," said Blake, who won't accredit his California lab. "If you have people who are willing to manufacture credentials, what else are they making up?"

Unlike most critics, Frederick Whitehurst has been on the other side.

Whitehurst, an attorney and former FBI explosives expert, went public in 1995 about flaws in that lab.

He now heads the non-profit Forensic Justice Project.

While he favors requiring the nation's crime labs to undergo independent audits, he also remembers what it was like to have a two-year backlog of cases on his desk.

He hasn't forgotten the frustration of trying to do his best in the face of unrelenting demand.

"They can't go back and check. There's no time, there's no money," he said. "... And they will fall to the pressures."

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## State Forensics Council Asked to Investigate Crime Lab

Leaders of a statewide legal organization today asked the state's Forensic Investigations Council to investigate alleged negligence or misconduct by the Washington State Patrol's crime laboratory system. The request comes in the wake of several incidents that point to systematic problems in the operations of the state's forensics lab.

"We want to ensure that innocent people are not imprisoned, and that people who have committed crimes are brought to justice. Accurate forensic work is essential to the fair administration of the law," said Bill Bowman, president-elect of the Washington State Association of Criminal Defense Lawyers (WACDL).

In a letter to the Forensics Investigations Council, Bowman and current WACDL president Kevin Curtis urged it to examine problems stemming from several serious allegations about crime laboratory operations that have come to light:

- that toxicology lab manager Ann Marie Gordon gave assurances that she had tested quality assurance solutions used for breath testing when in fact she had not conducted such testing;
- that recordkeeping and data analysis was severely deficient during Gordon's tenure (Gordon resigned on July 20, 2007, after allegations of misconduct were made public); and
- that ballistics analyst Evan Thompson provided misleading and unfounded testimony in an unknown number of cases;

The Forensic Investigations Council is responsible for looking into allegations of serious negligence or misconduct in forensic work relating to crimes. WACDL leaders requested that the council investigate and issue a public report on the causes of the alleged problems; make recommendations for corrective actions, including changes in crime laboratory protocols; and evaluate the effectiveness and completeness of any internal investigations conducted by the State Patrol.

"The public became aware of deficiencies in the forensic lab only because a whistleblower came forward. An independent body needs to look into the situation, so that we can minimize the possibility of forensic investigation errors in the future," said Kevin Curtis.

The Washington Association of Criminal Defense Lawyers was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 1000 members – private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system.

# Test Anxiety

Scandal at the state's DUI lab has defendants lathered

By Bob Geballe

**T**he state's toxicology lab has a headache worthy of a three-day binge.

It all started when Ann Marie Gordon, manager of the laboratory—whose purpose is to provide the technological clout behind the state's DUI laws—got caught falsifying verifications of breath-test equipment.

"I call it 'Ann Marie Gordon and the Temple of Perjury,'" says Kenneth Fornabai, an Auburn lawyer and president of the Washington Foundation for Criminal Justice, an organization of DUI lawyers. "It represents a departure from integrity so profound that you can't believe anything about the lab."



MASTERS TOUCH PHOTOGRAPHY

The state lab has lost all credibility, according to Kenneth Fornabai.

The Washington Association of Criminal Defense Lawyers sent a letter to the state Forensics Council asking for an investigation into the conduct of the entire State Patrol toxicology and criminal laboratory program, and saying that negligence or misconduct at the labs "has substantially affected the integrity of forensics results in Washington state."

Gordon resigned last summer after a whistleblower in the lab reported that she was signing certificates saying she had calibrated

breath-testing units for use in the field when she actually hadn't performed the calibrations. In fact, someone else in the lab had run the tests. The whistleblower told the State Patrol about the situation in March 2007. However, it took two months for the State Patrol to acknowledge the problem publicly, announcing it was withdrawing all the certifications done by Gordon.

It was a shocking revelation for attorneys involved in DUI defense, who say it calls into question the outcome of perhaps thousands of cases.

"We heard about it in June, when the State Patrol Web site said they were pulling all the certifications for breath-test units," says Fornabai. The accuracy of breath tests is crucial, he says, because minuscule differences in measured blood-alcohol levels can have large legal consequences. "If it's a first offense and your blood alcohol is over 0.15, there are more severe penalties than under 0.15. For example, right now, I have a client whose blood alcohol was measured at 0.151."

The repercussions are rippling across the state. The state Department of Licensing reinstated licenses for nearly 40 people arrested on suspicion of drunk driving, then decided the courts were better prepared to handle the remaining onslaught of cases. Defense attorneys in DUI cases are asking for the dismissals of cases, or the suppression of breath- and blood-test data. And several counties have been conducting hearings to decide how to handle the contested cases.

Several judges in King County threw out breath tests in their courtrooms and said they wouldn't accept any readings again until the state improves the lab's procedures. The Snohomish County District Court also suppressed about 40 breath tests. In Skagit County, judges refused to dismiss 51 DUI

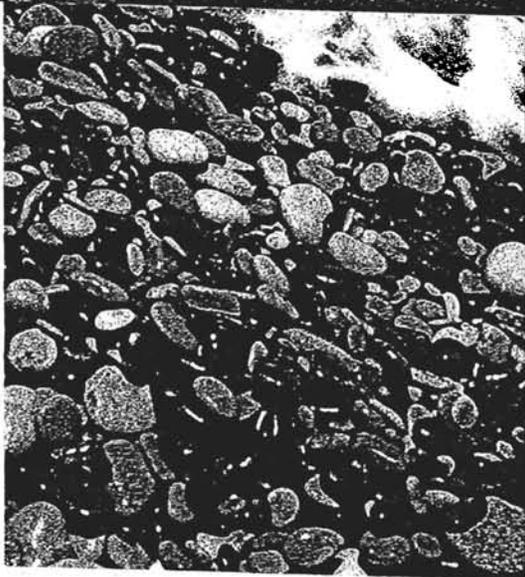
## Trouble in the East

While the entire state is dealing with the fallout from botched breath-test certifications, Spokane County has an additional issue, also involving DUI cases. Attorney Breean Beggs with the Center for Justice in Spokane helped two defendants get their convictions overturned because they were arrested within Spokane city limits but tried by a district judge. The city and county had an agreement that let district court judges—who are elected countywide—preside in Spokane's municipal court. But Beggs pointed out that state law says judges who hear municipal cases must be elected only by city residents.

The state Court of Appeals Division III agreed in November with Beggs, and the ruling threatens to upend a decade of litigation involving thousands of cases—traffic violations, DUIs, domestic violence, shoplifting—decided by the Spokane Municipal Court. The case now goes before the state Supreme Court. If it stands, dealing with the enormous volume of potential conviction reversals could have "unimaginable" effects lasting for years, Superior Court Judge Sam Cozza said in a *Spokesman-Review* article.

—Bob Geballe

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"It represents a departure from integrity so profound that you can't believe anything about the lab."

—Auburn attorney Kenneth Fornabai

cases but castigated the lab and its director, Dr. Barry Logan.

The uproar doesn't end with the falsified documents. Defense attorneys are unhappy that King County Prosecutor Dan Satterberg has declined to prosecute Gordon. Gordon, who resigned on July 20, acknowledged that she signed certificates for tests she hadn't run, according to documents released by the State Patrol. She could have faced legal sanctions, but a statement released by Satterberg's office said there was "little to be accomplished by any criminal prosecution" because "the public has not suffered any harm."

The breath-test issue comes on top of several other instances of questionable performance at state crime labs. In April, State Patrol forensic scientist Evan Thompson resigned over questions of poor documentation. Thompson had provided crucial testimony in more than 1,000 cases since 1999.

That's not all. Francisco Duarte, also with Fox Bowman Duarte, was the lead attorney for Fred Russell, convicted in a drunk-driving accident in Eastern Washington that resulted in the deaths of three college students. During that trial, it came to light that vials containing blood from Russell were



STEWART TILGER PHOTOGRAPHY

Jon Fox thinks prosecutors are letting the lab manager off too easy.

Not so, says Jon Fox, with Fox Bowman Duarte's Bellevue office. "The prosecuting attorneys are understating this because of the magnitude of the problem," he says. "Allowing the prosecutor to make this decision is a conflict of interest. But it's clear to us that it's an incredible injustice. The charging decision should have been given to an independent prosecutor, like the state AG [attorney general's office] or the FBI."

destroyed at the lab before the trial. "There was complete disregard of proper handling of blood tests," Duarte says.

Gordon, who was in charge of the vials, resigned before testifying at the trial.

As these cases work their way through various courts, the fallout will have prosecutors, defenders and accused drunk drivers holding their breath for some time to come. L&P

American Board of  
**ABFT**  
Forensic Toxicology™

410 North 21<sup>st</sup> Street, Colorado Springs, CO 80904

Phone: (719) 636-1100 • Fax: (719) 636-1993 • Web-site: [www.abft.org](http://www.abft.org)

July 23, 2007

Barry K. Logan, Ph.D., D-ABFT  
Washington State Patrol  
Forensic Laboratory Services Bureau  
2203 Airport Way South, Suite 360  
Seattle, Washington 98134-2027

Dear Dr. Logan: **Review of May 10/11, 2007 Inspection Report**

Our review of the report of your recent inspection is complete. While the report reflects largely satisfactory performance, three issues were raised that require your attention prior to reaccreditation being granted.

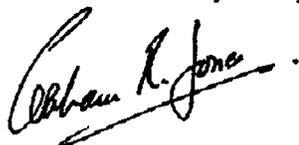
**E-17 (E)** was answered “no”, with the comment that the laboratory director (Dr. Logan) does not directly sign off on proficiency test reports “in real time”. The PT result forms should be reviewed and signed by the laboratory director shortly after receipt. It is recognized that QA staff prepare summary reports for periodic review by Dr. Logan. However, there were one or two instances that arose during the previous mid-cycle review that indicated not all PT deficiencies were being addressed with corrective action in a timely manner. *Please indicate the actions that have been or will be, taken to address these concerns.*

**G-7 (E)** was answered “yes”, but with a comment that the current guidelines in the SOP do not always make it clear what the criteria were for deciding, for quantitative GC/MS/NP assays, which calibration should be accepted, or how to proceed if both curves meet acceptability but the quantitative values from each differ significantly (e.g. by more than x% from each other). It was also felt that guidance should be given on action to be taken when the intercept of the graph deviated substantially from the origin. The inspection team did note that overall, the quality of data was good, but that additional guidance would help both the less experienced analysts, and the forensic defensibility of the work. *Please indicate the actions that have been or will be, taken to address these concerns.*

**G-15 (E)** was answered “no”. The main concern was that, in postmortem cases, some unconfirmed EMIT cannabinoid results were reported “pos” on the final report without an appropriate comment. We understand that this has been addressed by addition of a comment near the bottom of the report. *Please confirm that the comment is used now and provide an example (if not already sent).*

Please address the first two items within 60 days of receipt of this letter. Do not hesitate to contact me if you have any questions, or if you feel we have misunderstood any of the issues raised. Evidence of corrective action should be sent directly to me.

I will forward a copy of the inspection report separately. You are encouraged to address the “non-essential” deficiencies. Thank you for your interest in the ABFT Accreditation Program.



Graham R. Jones, Ph.D., DABFT  
Chair, ABFT Accreditation Committee



STATE OF WASHINGTON  
WASHINGTON STATE PATROL  
FORENSIC LABORATORY SERVICES BUREAU

2203 Airport Way South, Suite 360 • Seattle, Washington 98134-2027 • (206) 262-6000 • FAX (206) 262-6018

July 26, 2007

Graham R. Jones, Ph.D., DABFT  
Chair, ABFT Accreditation Committee  
c/o Office of the Chief Medical Examiner  
7007 - 116 Street,  
Edmonton, Alberta  
Canada T6H 5R8

Dear Dr. Jones:

This is to follow up on our telephone conversation of July 20, 2007, in which I notified you that Ann Marie Gordon had resigned her position as Toxicology Laboratory Manager. I informed you that Ms. Gordon had resigned and there was an ongoing investigation into her certification of breath alcohol simulator solutions. We discussed that the simulator solution process was outside of the scope of accreditation by ABFT, and not an accreditation issue.

Ms. Gordon played a major role in the Laboratory as manager and was the principal signatory on many of the case reports issued. Until her position is filled, these reports will be signed by me, Jayne Thatcher, and by designated supervisors.

Please let me know if ABFT needs any further information at this time.

I am in receipt of your inspection follow up letter and will respond within the 60 day window.

Sincerely,

  
Barry K. Logan, Ph.D., DABFT  
Washington State Toxicologist

BKL:kj







**Simpson, Melissa (WSP)**

---

**From:** Logan, Barry (WSP)  
**Sent:** Sunday, August 19, 2007 12:14 PM  
**To:** Simpson, Melissa (WSP)  
**Subject:** FW: ABFT response

**From:** Graham Jones [mailto:Graham.Jones@gov.ab.ca]  
**Sent:** Monday, August 13, 2007 4:44 PM  
**To:** Logan, Barry (WSP)  
**Subject:** RE: ABFT response

Barry:

If you get a chance, can you give me call sometime morrow (Tuesday)? The ABFT Executive is having a brief conference call Wednesday afternoon to discuss how to respond to the lawyers that have asked for information (I think Yale copied you on their request). However, I mainly wanted to chat briefly to you about what, if any investigation the WSP will be made into Ann Marie's conduct in the lab. My concern is not specifically with the breath alcohol program (which is currently not within the scope of the ABFT accreditation), but whether there are broader issues we (i.e. ABFT) should be concerned with. These comments are made from a "global" perspective and do not reflect any specific concerns I/we have.

I should be in soon after 7.30 Pacific time. Our switchboard is open until 3.30 pm (PST), although I can arrange to take a call later if necessary.

Thanks Barry,

Graham

Graham R. Jones, Ph.D.  
Chief Toxicologist  
Office of the Chief Medical Examiner  
7007 - 116 Street NW  
Edmonton, Alberta  
Canada T6H 5R8  
Phone: (780) 427-4987  
Fax: (780) 422-1265

---

**From:** Barry.Logan@wsp.wa.gov [mailto:Barry.Logan@wsp.wa.gov]  
**Sent:** Monday, August 13, 2007 4:45 PM  
**To:** Graham Jones  
**Subject:** ABFT response

Graham; Can you give me your own take on the attached draft which is attempting to address the issue of which quantitative results to report when we have several. If it looks like we're on track, I have some more editing to do but are close to submitting a formal response. If I'm not addressing the issue you were raising let me know.

Thanks much

BKL

*I. Quantitative Results Reporting*

8/19/2007



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# NEWS

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Date: Feb. 18, 2009  
Contacts: Sara Frueh, Media Relations Officer  
Luwam Yeibio, Media Relations Assistant  
Office of News and Public Information  
202-334-2138; e-mail <[news@nas.edu](mailto:news@nas.edu)>

FOR IMMEDIATE RELEASE

## 'BADLY FRAGMENTED' FORENSIC SCIENCE SYSTEM NEEDS OVERHAUL; EVIDENCE TO SUPPORT RELIABILITY OF MANY TECHNIQUES IS LACKING

WASHINGTON -- A congressionally mandated report from the National Research Council finds serious deficiencies in the nation's forensic science system and calls for major reforms and new research. Rigorous and mandatory certification programs for forensic scientists are currently lacking, the report says, as are strong standards and protocols for analyzing and reporting on evidence. And there is a dearth of peer-reviewed, published studies establishing the scientific bases and reliability of many forensic methods. Moreover, many forensic science labs are underfunded, understaffed, and have no effective oversight.

Forensic evidence is often offered in criminal prosecutions and civil litigation to support conclusions about individualization -- in other words, to "match" a piece of evidence to a particular person, weapon, or other source. But with the exception of nuclear DNA analysis, the report says, no forensic method has been rigorously shown able to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source. Non-DNA forensic disciplines have important roles, but many need substantial research to validate basic premises and techniques, assess limitations, and discern the sources and magnitude of error, said the committee that wrote the report. Even methods that are too imprecise to identify a specific individual can provide valuable information and help narrow the range of possible suspects or sources.

"Reliable forensic evidence increases the ability of law enforcement officials to identify those who commit crimes, and it protects innocent people from being convicted of crimes they didn't commit," said committee co-chair Harry T. Edwards, senior circuit judge and chief judge emeritus of the U.S. Court of Appeals for the District of Columbia Circuit. "Because it is clear that judicial review alone will not cure the infirmities of the forensic science community, there is a tremendous need for the forensic science community to improve."

Strong leadership is needed to adopt and promote an aggressive, long-term agenda to strengthen forensic science, the report says. To achieve this end, the report strongly urges Congress to establish a new, independent National Institute of Forensic Science to lead research efforts, establish and enforce standards for forensic science professionals and laboratories, and oversee education standards. "Much research is needed not only to evaluate the reliability and accuracy of current forensic methods but also to innovate and develop them further," said committee co-chair Constantine Gatsonis, professor of biostatistics and director of the Center for Statistical Sciences at Brown University. "An organized and well-supported research enterprise is a key requirement for carrying this out."

To ensure the efficacy of the work done by forensic scientists and other practitioners in the field, public forensic science laboratories should be made independent from or autonomous within police departments and prosecutors' offices, the report says. This would allow labs to set their own budget priorities and resolve any cultural pressures caused by the differing missions of forensic science labs and law enforcement agencies.

The report offers no judgment about past convictions or pending cases, and it offers no view as to whether the courts should reassess cases that already have been tried. Rather, the report describes and analyzes the current situation in the forensic science community and makes recommendations for the future.

### CERTIFICATION AND ACCREDITATION SHOULD BE MANDATORY

Many professionals in the forensic science community and the medical examiner system have worked for years to achieve excellence

in their fields, aiming to follow high ethical norms, develop sound professional standards, and ensure accurate results in their practice. But there are great disparities among existing forensic science operations in federal, state, and local law enforcement agencies. The disparities appear in funding, access to analytical instruments, and availability of skilled and well-trained personnel; and in certification, accreditation, and oversight. This has left the forensic science system fragmented and the quality of practice uneven. Except in a few states, forensic laboratories are not required to meet high standards for quality assurance, nor are practitioners required to be certified. These shortcomings pose a threat to the quality and credibility of forensic science practice and its service to the justice system, concluded the committee.

Certification should be mandatory for forensic science professionals, the report says. Among the steps required for certification should be written examinations, supervised practice, proficiency testing, and adherence to a code of ethics. Accreditation for laboratories should be required as well. Labs should establish quality-control procedures designed to ensure that best practices are followed, confirm the continued validity and reliability of procedures, and identify mistakes, fraud, and bias, the report says.

Setting standards for certification and accreditation should be one of the responsibilities of the new National Institute of Forensic Science recommended in the report. The institute should work with the National Institute of Standards and Technology, government and private labs, Scientific Working Groups, and other partners to develop protocols and best practices for forensic analysis, which should inform the standards.

Existing data suggest that forensic laboratories are underfunded and understaffed, which contributes to case backlogs and makes it hard for laboratories to do as much as they could to inform investigations and avoid errors, the report says. Additional resources will be necessary to create a high-quality, self-correcting forensic science system.

#### EVIDENCE BASE OFTEN SPARSE, VARIES AMONG DISCIPLINES

Nuclear DNA analysis has been subjected to more scrutiny than any other forensic discipline, with extensive experimentation and validation performed prior to its use in investigations. This is not the case with most other forensic science methods, which have evolved piecemeal in response to law enforcement needs, and which have never been strongly supported by federal research or closely scrutinized by the scientific community.

As a result, there has been little rigorous research to investigate how accurately and reliably many forensic science disciplines can do what they purport to be able to do. In terms of a scientific basis, the disciplines based on biological or chemical analysis, such as toxicology and fiber analysis, generally hold an edge over fields based on subjective interpretation by experts, such as fingerprint and toolmark analysis. And there are variations within the latter group; for example, there is more available research and protocols for fingerprint analysis than for bitemarks.

Nuclear DNA analysis enjoys a pre-eminent position not only because the chances of a false positive are minuscule, but also because the likelihood of such errors is quantifiable, the report notes. Studies have been conducted on the amount of genetic variation among individuals, so an examiner can state in numerical terms the chances that a declared match is wrong. In contrast, for many other forensic disciplines -- such as fingerprint and toolmark analysis -- no studies have been conducted of large populations to determine how many sources might share the same or similar features. For every forensic science method, results should indicate the level of uncertainty in the measurements made, and studies should be conducted that enable these values to be estimated, the report says.

There is some evidence that fingerprints are unique to each person, and it is plausible that careful analysis could accurately discern whether two prints have a common source, the report says. However, claims that these analyses have zero-error rates are not plausible; uniqueness does not guarantee that two individuals' prints are always sufficiently different that they could not be confused, for example. Studies should accumulate data on how much a person's fingerprints vary from impression to impression, as well as the degree to which fingerprints vary across a population. With this kind of research, examiners could begin to attach confidence limits to conclusions about whether a print is linked to a particular person.

Disciplines that are too imprecise to identify an individual may still be able to provide accurate and useful information to help narrow the pool of possible suspects, weapons, or other sources, the report says. For example, the committee found no evidence that microscopic hair analysis can reliably associate a hair with a specific individual, but noted that the technique may provide information that either includes or excludes a subpopulation.

In addition to investigating the limits of the techniques themselves, studies should also examine sources and rates of human error, the report says. As part of this effort, more research should be done on "contextual bias," which occurs when the results of forensic analysis are influenced by an examiner's knowledge about the suspect's background or an investigator's knowledge of a case. One study found that fingerprint examiners did not always agree even with their own past conclusions when the same evidence was presented in a different context.

#### COURT TESTIMONY SHOULD BE GROUNDED IN SCIENCE, ACKNOWLEDGE UNCERTAINTIES

The committee was not asked to determine whether analysis from particular forensic science methods should be admissible in court,

and did not do so. However, it concluded that the courts cannot cure the ills of the forensic science community. "The partisan adversarial system used in the courts to determine the admissibility of forensic science evidence is often inadequate to the task," said Edwards. "And because the judicial system embodies a case-by-case adjudicatory approach, the courts are not well-suited to address the systemic problems in many of the forensic science disciplines."

The committee also concluded that two criteria should guide the law's admission of and reliance upon forensic evidence in criminal trials: the extent to which the forensic science discipline is founded on a reliable scientific methodology that lets it accurately analyze evidence and report findings; and the extent to which the discipline relies on human interpretation that could be tainted by error, bias, or the absence of sound procedures and performance standards.

The report points out the critical need to standardize and clarify the terms used by forensic science experts who testify in court about the results of investigations. The words commonly used -- such as "match," "consistent with," and "cannot be excluded as the source of" -- are not well-defined or used consistently, despite the great impact they have on how juries and judges perceive evidence.

In addition, any testimony stemming from forensic science laboratory reports must clearly describe the limits of the analysis; currently, failure to acknowledge uncertainty in findings is common. The simple reality is that interpretation of forensic evidence is not infallible -- quite the contrary, said the committee. Exonerations from DNA testing have shown the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis.

#### STRONG, INDEPENDENT LEADERSHIP NEEDED

The existing forensic science enterprise lacks the necessary governance structure to move beyond its weaknesses, the report says. The recommended new National Institute of Forensic Science could take on its tasks in a manner that is as objective and free of bias as possible -- one with the authority and resources to implement a fresh agenda designed to address the problems found by the committee. The institute should have a full-time administrator and an advisory board with expertise in research and education, the forensic science disciplines, physical and life sciences, and measurements and standards, among other fields.

The committee carefully considered whether such a governing body could be established within an existing agency, and determined that it could not. There is little doubt that some existing federal entities are too wedded to the current forensic science community, which is deficient in too many respects. And existing agencies have failed to pursue a strong research agenda to confirm the evidentiary reliability of methodologies used in a number of forensic science disciplines.

The report was sponsored by the National Institute of Justice at the request of Congress. The National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and National Research Council make up the National Academies. They are private, nonprofit institutions that provide science, technology, and health policy advice under a congressional charter. The Research Council is the principal operating agency of the National Academy of Sciences and the National Academy of Engineering. A committee roster follows.

Copies of STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD are available from the National Academies Press; tel. 202-334-3313 or 1-800-624-6242 or on the Internet at [HTTP://WWW.NAP.EDU](http://www.nap.edu). Reporters may obtain a copy from the Office of News and Public Information (contacts listed above). In addition, a podcast of the public briefing held to release this report is available at [HTTP://NATIONAL-ACADEMIES.ORG/PODCAST](http://national-academies.org/podcast).

# # #

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Division on Policy and Global Affairs  
Committee on Science, Technology, and Law

#### COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE COMMUNITY

HARRY T. EDWARDS (CO-CHAIR)  
Senior Circuit Judge and Chief Judge Emeritus  
U.S. Court of Appeals for the District of Columbia Circuit  
Washington, D.C.

**Guth, Dinah**

---

To: Olson, Paula  
Subject: RE: Retirement  
Priority: High

I can attach this e-mail to his IOC indicating his intention to retire and just change the date. However, do we pay him through 5 p.m. on 7/31/00? He will be cashed out on his annual leave and entitled to 1/4 of his sick leave on VEBA.

Our regulation manual states an employee with five or more years of service will receive a laser plaque and a certificate for the spouse. Because the Tox Lab people came to us on 7/1/99, based on Legislative action, am I to order the plaques for Glenn or not?

-----  
From: Olson, Paula  
To: Guth, Dinah  
Subject: FW: Retirement  
Date: Tuesday, August 01, 2000 8:57AM  
Priority: High

Dinah: Please see the e-mail below. Do we need anything else from Glenn, or is this e-mail enough. Also, what needs to be done about leave, etc.? Thank you!

-----  
From: Logan, Barry  
To: Olson, Paula (HRDPO)  
Subject: FW: Retirement  
Date: Monday, July 31, 2000 7:52PM

Paula; Glenn Case was involved in an argument with some coworkers last Friday. He behaved inappropriately responding angrily to a minor scheduling conflict. I counseled him on this and told him his response was unacceptable. He felt aggrieved but we parted amicably. He came in this morning and told his supervisor was he was retiring today, cleaned out his desk and left. Where do we go from here?

BKL

-----Original Message-----

From: OCasey8@aol.com [mailto:OCasey8@aol.com]  
Sent: Monday, July 31, 2000 2:38 PM  
To: blogan@wsp.wa.gov  
Subject: RE: Retirement

Barry  
I am retired. Could you tell Beth so I can cash out my vacation and sick leave.  
Glenn



## Appendix C



# Kitsap County Prosecuting Attorney's Office

**Russell D. Hauge**  
Prosecuting Attorney

Please reply to: Civil Division

April 17, 2009

**Carol I. Maves**  
Office Administrator

Jack Guinn  
Ellis, Holmes & Witchley, PLLC  
705 Second Avenue, Suite 401  
Seattle, Washington 98104

**Christian C. Casad**  
Case Management  
Division Chief

**Timothy A. Drury**  
Felony and Juvenile  
Division Chief

RE: Public Records Act Request, April 3, 2009 Correspondence

Dear Mr. Guinn:

**Claire A. Bradley**  
District/Municipal  
Division Chief

I am writing to respond to your letter dated April 3, 2009 concerning the County's response to your firm's public records request. You have alleged four potential "missing" communications from our files. I have verified that these communications do not exist, nor did they exist at the time of your initial request to the County last year.

**Jacquelyn M. Aufderheide**  
Civil/Child Support  
Division Chief

The emails that you received were stored in hard copy, in one of the fourteen boxes of materials from the Hacheney aggravated murder trial. None of them were printed in response to your firm's record requests. After your April 3, 2009 letter, I arranged for the County's Information Services (IS) department to search for emails on any county servers with the names of David Olson, Michael Delashmutt or Julia Delashmutt. No such emails could be found. I also arranged for the IS department to search for emails to and from all email addresses known to be used by those persons up to and during the time of trial, and no such emails could be found. These were the email addresses:

- David Olson: [dolson@mde.com](mailto:dolson@mde.com)
- Julia Delashmutt: [jjdelash@yahoo.com](mailto:jjdelash@yahoo.com) and [jdelashmutt@attbi.com](mailto:jdelashmutt@attbi.com)
- Michael Delashmutt: None known; all email communications were with his wife Julia.

IS informs me that any emails that were generated in the county during the year 2002 were overwritten in the year 2007, unless those emails were saved on an individual county employee's email account at the time of the overwriting. IS searched through

Adult Criminal & Administrative Divisions • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7174 • FAX (360) 337-4949  
Juvenile Criminal Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-5500 • FAX (360) 337-5509  
Special Assault Unit • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7148 • FAX (360) 337-7229

Bainbridge Island Municipal Court Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7174 • FAX (360) 337-4949  
Bremerton Municipal Court Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 478-2334 • FAX (360) 478-2303  
Port Orchard Municipal Court Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7174 • FAX (360) 337-4949  
Poulsbo Municipal Court Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7174 • FAX (360) 337-4949

Civil Division • 614 Division Street, MS-35A • Port Orchard, Washington 98366-4681 • (360) 337-4992 • FAX (360) 337-7083  
Child Support Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7020 • FAX (360) 337-5733



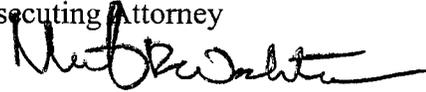
the account for each current and former employee for whom it possessed records. Therefore, if an email was not saved in "paper" form, it no longer exists in any form.

You have also alleged that a written response should exist in response to David Olson's June 5, 2002 letter. Our office previously searched everything in the boxes of Hacheny records for the presence of any of the relevant names, and pulled every document with any of those names. As you know, you visited our office and were afforded the opportunity to look through each document on which any of those names appeared. I do not believe such a letter exists in our files.

Thank you for your courtesy during the process of working through this public records request. As always, please do not hesitate to contact me if I can assist you further.

Sincerely yours,

RUSSELL D. HAUGE  
Prosecuting Attorney



NEIL R. WACHTER  
Senior Deputy Prosecuting Attorney

cc: Jeff Ellis  
Don Burger, Kitsap County Public Records Coordinator

DECLARATION OF JOHN A. GUINN

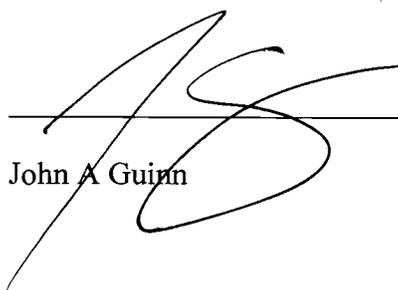
I, John A. Guinn declare:

1. I received a phone call from David Olson on or about February 26, 2009. I had previously contacted Mr. Olson's son Karl and asked him to ask his father to contact me.
2. During our conversation, I asked Mr. Olson what he remembered about the video deposition he gave in the Hacheney murder trial. Specifically, I asked him what prosecutors told him with respect to his responsibility to return and testify at the trial. Mr. Olson said, "as far as I knew, I was done."
3. I asked Mr. Olson if he would be willing to put that information in a signed declaration. He told me that if I sent him a declaration, he would sign it if it accurately reflected his recollection of the events.
4. I emailed the declaration to Mr. Olson. He expressed no reservations about the accuracy of the statements it contained, but he refused to sign it. He told me that he was retired and did not want to get involved in the case. He further stated that he felt the information contained in the declaration was already part of the record, so he saw no reason to sign it.

I declare under penalty of perjury of the laws of the State of Washington that the above is true and correct.

4/24/09 SEATTLE, WA

Date and Place

  
\_\_\_\_\_  
John A Guinn

June 5, 2002

Russell D. Hague  
Prosecuting Attorney  
Kitsap County Prosecuting Attorney's Office  
614 Division Street MS 35  
Port Orchard, WA 98366-4681

Reference: State of Washington v. Nicholas Daniel Hachney  
Kitsap County Superior Court No. 01-1-01311-2  
MDE file #: 8671

Dear Mr. Hague,

I received your letter of May 28<sup>th</sup> advising me that the above trial has been rescheduled for mid October of 2002. I appreciate your keeping me informed.

I am planning to take a leave of absence from MDE for between 6 and 9 months. My wife and I will be traveling to South America to assist in the construction of a Christian Radio network. We were there last October for a short time to install the first transmitter. I returned in February for a design phase. We plan to return in late September and remain there until late spring. This is a trip that requires a great deal of coordination as it involves working with a construction team set to arrive at that time.

Is it possible to video tape my testimony in light of the fact that I will not be available during the trial? Do you have any other suggestions?

Sincerely,  
MDE Engineers, Inc.



David B. Olson, P.E.  
Vice President/Electrical Engineer  
e-mail: [olson@mde.com](mailto:olson@mde.com)

DBO/dim

**From:** "Julia DeLashmutt" <jdelashmutt@attbi.com>  
**To:** "Claire Bradley" <CABradle@MAIL1.CO.KITSAP.WA.US>  
**Date:** 6/5/02 5:32PM  
**Subject:** RE: Nick Hachenev Case

*Delashmuts*

Hello Claire,

Michael and I got our letters about the trial now being scheduled for October. As you well know we will be setting up home in Scotland by then. I just wanted to touch bases with you about what might be needed before we go.

Also, we have sold our home and will be moving by the 23rd of this month! Our address from June 23rd until we go to Scotland on Sept. 2nd, will be:

3950 NE Rova Road  
Poulsbo, WA 98370

Our phone number, 360-697-4345 will still be effective until June 22nd or so. After that we will be using Michael's cell 360-981-5460 until we leave.

My email also will be changing as of this Friday. It is now [jjdelash@yahoo.com](mailto:jjdelash@yahoo.com).

Let us know what might be required of us, so that we can get it planned. We will be gone from June 9-20, 1 week in July (14-20) and 2-3 weeks in August, the dates are not quite nailed down yet.

Thanks,  
Julia DeLashmutt

-----Original Message-----

**From:** Claire Bradley [mailto:CABradle@MAIL1.CO.KITSAP.WA.US]  
**Sent:** Monday, April 22, 2002 4:53 PM  
**To:** jdelashmutt@attbi.com  
**Subject:** Re: Nick Hachenev Case

Thank you so much for checking in! You sound like a busy woman!

You are correct that the trial date was delayed (again) until May 14. We sincerely hope it goes then, but I've stopped trying to predict as I am always wrong! I can tell you the recent delays are due to defense expert testing that was requested rather late in the game. We expect to be ready, but I just do not know. Expect another subpoena to arrive soon.

I would love to have both you and Michael come in and speak with me one more time, and I'll want to show you the courtroom like we talked about. Plan that we'll do that in early May/ closer to trial date IF I think we have a good chance of going out on May 14 or thereabouts. I'll know better about that in late April/early May.

Please give me the dates that you are planning to leave for Scotland (for good) or if you have any smaller vacation plans-- I can work around your vacations. Hang in there-- we'll get this done!

*6/12/02 left  
mssg*

*6/9-6/20  
gone  
July 14-20  
gone  
Aug. - a few  
wks*

00034

**From:** Amanda Jarrett  
**To:** Bradley, Claire; Wachter, Neil  
**Date:** 9/23/02 11:56AM  
**Subject:** Re: Hachenev - Delashmutts

Everyone. I just spoke to Julia Delashmutt's mother. For the record, the Delashmutt's new address is as follows:

Michael and Julie Delashmutt  
5 Thornwood Gardens  
Flat 2/1  
Glasgow  
G117PJ  
Scotland

Julia's email address, [jjdelash@yahoo.com](mailto:jjdelash@yahoo.com) is still good.

OR

We can send mail for the Delashmutts to Julia's mother, Darlene Buckner, at:  
3950 NE Rova Road  
Poulsbo, WA 98370  
(360) 779-5008

I just shot another email off to Julia re: getting something from her and Michael on 10/16 saying they are located in Scotland. Her mother is also going to try to contact them about this.

Amanda

>>> Claire Bradley 09/09/02 01:11PM >>>  
I THOUGHT I SENT AN EMAIL AWHILE BACK THAT LAYED OUT THEIR WHEREABOUTS, ETC.  
I COULDN'T FIND IT IN MY GW THOUGH. IS THERE ANY NOTE IN DAMION? IS THERE ANY INFO IN  
THE TRANSCRIPT?

Claire A. Bradley  
Deputy Prosecuting Attorney  
360-337-4978

>>> Amanda Jarrett 09/09/02 12:41PM >>>  
I have been trying to reach the Delashmutts by phone off/on for the last 2 weeks. Being unsuccessful,  
today I set out to write them a letter to contact me regarding getting a witness unavailability letter from  
them faxed to us on the day of trial.

I noticed deposition transcripts outside Neil's office, and decided to check in there to see if by chance they  
were asked at the beginning of the depo what their phone number is. Instead I discovered they left for  
Scotland September 2. Do we have ANY way now of contacting them?

Sorry!

Amanda

**CC:** Pederson, Leslie

00032

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**To:** Bradley, Claire; Wachter, Neil  
**Date:** 9/23/02 11:56AM  
**Subject:** Re: Hachenev - Delashmutts

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Sorry!

Amanda

**CC:** Pederson, Leslie

00032

**From:** "David B. Olson, P.E." <dolson@mde.com>  
**To:** "Amanda Jarrett" <AJarrett@MAIL1.CO.KITSAP.WA.US>  
**Date:** 9/27/02 10:49AM  
**Subject:** RE: Hacheny Murder Trial

Ms. Jarrett,

I have a letter ready to fax you on the 16th. I have a reminder in my calendar so hopefully I won't forget to send it. We are now in Pennsylvania visiting family but will be on our way to Bolivia next Tuesday.

Dave Olson

-----Original Message-----

**From:** Amanda Jarrett [mailto:AJarrett@MAIL1.CO.KITSAP.WA.US]  
**Sent:** Wednesday, September 25, 2002 5:11 PM  
**To:** Dave Olson  
**Subject:** Hacheny Murder Trial

Mr. Olson,

Sorry to take this long to get back to you regarding an unavailability letter faxed to us on the day of trial. We are aware of the difficulty you might have getting to a fax machine on October 16 (beginning of trial), but it really is necessary to have something signed by yourself, dated and faxed to us on that day. This letter may follow the general format below (whatever is accurate).

-----  
October 16, 2002

To the Honorable Anna M. Laurie:

Re: Trial in State of Washington v. Nicholas Hacheny 01-1-01311-2

This letter is to confirm that am presently in \_\_\_\_\_. I traveled here on \_\_\_\_\_ to participate in a mission trip with the Evangelical Free Church of Canada. I will be here until \_\_\_\_\_. I am therefore unable to return to Kitsap County to testify in the trial of State v. Nicholas Hacheny.

Thank you for your attention.

Sincerely yours . . . . .

/s/ David Olson (dated 10/16/02)

-----  
This letter should be faxed to us at 360-337-7229 on the morning of October 16. Please reply that you have received this email. Thank you for your understanding and continued cooperation.

Amanda

00007

700 South Industrial Way  
Seattle, WA 98108  
(206) 622-2007  
(206) 622-2248

**MDE Engineers, Inc.**

# Fax

<b>To:</b> Amanda L. Jarrett	<b>From:</b> David B. Olson, P.E.
<b>Fax:</b> (360) 337-7229	<b>Pages:</b> 1
<b>Phone:</b> (360) 337-4446	<b>Date:</b> October 16, 2002
<b>Re:</b> Unable to testify at trial	<b>CC:</b>

Urgent     For Review     Please Comment     Please Reply

To the Honorable Anna M. Laurie:

Re: Trial in State of Washington v. Nicholas Hachenev 01-1-01311-2

This fax letter is to confirm that I am presently in Santa Cruz, Bolivia, South America. I departed Washington State on September 25, 2002 and arrived in Santa Cruz on October 3, 2002. I am here serving the Evangelical Free Church of Canada Mission as a broadcast engineer to install a Christian Radio Network.

My return date is indefinite but is expected to be sometime in the month of July 2003. Depending upon the progress of the project I may extend my stay.

I am therefore unable to return to Kitsap County to testify in the trial of State v. Nicholas Hachenev.

Thank you for your consideration.

Sincerely yours,

  
/s/ David Olson (dated 10/16/02)



## FACSIMILE TRANSMITTAL SHEET

ATTN:

Ms. Amanda Jarrett

FROM:

Mr. Michael W. DeLashmutt

DATE:

15/10/2002

FAX NUMBER:

001 360 337 7229

TOTAL NO. OF PAGES INCLUDING COVER:

2

RE:

Trial in State of Washington v. Nicholas  
Hachenev 01-1-01311-2 URGENT  FOR REVIEW  PLEASE COMMENT  PLEASE REPLY  PLEASE RECYCLE

NOTES/COMMENTS:

Amanda:

Attached is the letter for the Honourable Anna M. Laurie, in regards to our absence from the trial in State of Washington v. Nicholas Hachenev 01-1-01311-2.

Regards,

  
Michael DeLashmutt

This fax cost us £2.  
If possible, please send  
Reimbursement.

5 Thomwood Gardens  
Flat 2/1  
Broomhill  
Glasgow  
G11 7PJ  
Scotland, United Kingdom

16 October 2002

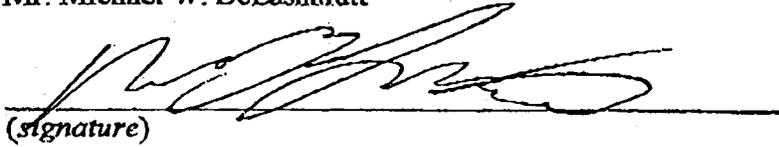
To the Honourable Anna M. Laurie:

Re: Trial in State of Washington vs. Nicholas Hacheny 01-1-01311-2

This letter is to confirm that we (Mr. and Mrs. Michael DeLashmutt) presently reside in Glasgow, Scotland, United Kingdom of Great Britain and Northern Ireland (UK). We moved here on 3<sup>rd</sup> September, 2002 and will remain residents of the UK for at least three years. The purpose of our residency is so that I, Mr. Michael DeLashmutt, can pursue my PhD at the University of Glasgow, Faculty of Arts, School of Theology and Religious Studies. We will live here in the UK until at least 30<sup>th</sup> October 2005, and will not be leaving the UK at any time during the remainder of the year 2002. We are therefore unable to return to Kitsap County to testify in the trial of State vs. Nicholas Hacheny.

Regards,

Mr. Michael W. DeLashmutt

  
(signature)

16-10-2002  
(date: dd/mm/yyyy)

Mrs. Julia J. Delashmutt

  
(signature)

16-10-02  
(date: dd/mm/yyyy)

## Appendix D

## **DECLARATION OF DANIEL M. HACHENEY**

I Daniel M. Hachenev, declare as follows:

1. I am the father of Nicholas Hachenev.
2. Both prior to and during my son's trial, I made several attempts to demonstrate to defense counsel Mark Yelish and Aaron Talnev, that the timeline the state was proposing was not possible. I have been hunting with my son on several occasions at this sight and I knew a trip to this location in less than one hour was impossible. I purchased a map of the hunting area and delivered it to the attorneys. I also offered to take them to the site. They did not use the map at trial.
3. I attended every day of my son's trial and every hearing, except for the deposition hearings where I was excluded. As the evidence was presented and the State alleged that the party was in the duck blinds at 7:50 a.m., I again went to the attorneys and explained the difference between "shooting light" and sunrise.
4. I again offered to take them to the sight at 7:00 a.m. so that we could take photos to show the lighting conditions. Neither attorney accepted my offer.
5. On the morning of December 29, 2003, I traveled to the public hunting blinds on Indian Island and took video footage from approximately

6:47 a.m. until 7:45 a.m.. I verified the time stamp on the camera with my cell phone. I did this to be able to show the appellate attorneys in my son's case that the time line used by the prosecution was not possible.

6. Because appellate counsel was not able to use this footage on direct appeal, I stored the original footage in my office and maintained sole access to it.

7. On February 15, 2009, I copied the video onto a CD-Rom and sent it to Jeffrey E. Ellis.

8. I did so to illustrate the fact that the State's timeline of events was impossible the morning my daughter-in-law died.

9. I attest that the footage taken is in its original format and is accurate as to date, time and lighting conditions.

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

DATED this 18<sup>th</sup> day of June, 2009

6-18-09 Home office  
Date and Place

Daniel M. Hachaney  
Daniel M. Hachaney

## DECLARATION OF JOHN A. GUINN

I, John A. Guinn declare:

1. On January 16<sup>th</sup>, 2009, I met with Daniel Hacheny and Christopher Davenport, and we drove the route Nicholas Hacheny and his companions, Phillip Martini and Lindsey Smith (now Latsbaugh), used on their December 26<sup>th</sup>, 1997 hunting trip to Indian Island. Mr. Davenport recorded the journey on a video camera. It is my understanding that sunrise happened at the same time on both days. The weather on the morning of our trip was similar to the weather reported on the day of the hunt.
2. We left 2005 Jensen Avenue at approximately 6:45 a.m., the time that the State alleged Mr. Hacheny had left his home on December 26<sup>th</sup>, 1997, in order to portray – and, ultimately, to test – the State’s version of that morning’s journey. We drove the speed limit the entire trip and experienced no significant traffic delays.
3. We made the same stops the hunters did along the route to the site, but we deliberately made each stop shorter than it would have been had we done the things they did. We stopped for less than a minute at the filling station where Mr. Hacheny stopped for coffee. We stopped for less than two minutes at the east side of the Hood Canal Bridge where the hunters met, got out, and changed cars. We stopped for less than five minutes at the hunting site parking lot where they prepared for the hunt. (Mr. Martini changed the choke on his shotgun and Mr. Hacheny put on hip boots.)
4. It was already becoming light when we arrived at the Hood Canal Bridge at 7:23 a.m. According to the testimony, it was dark when the hunters were there. When we crossed the bridge to Indian Island at approximately 7:35 a.m., it was fully daylight. We reached the hunting blinds at the time the State alleged the hunters arrived, 7:50 a.m. According to the testimony, it was just beginning to get light when the hunters reached the blinds; obviously, it was still fully daylight when we arrived.
5. The trip from 2005 Jensen to the hunting site parking lot covered 42 miles. Including the walk to the hunting blinds, it took 74 minutes – not 51 minutes as the State alleged.
6. The walk down to hunting blinds took about five minutes. We were running short of video tape, so we only stayed a few minutes before walking back to the car. According to the testimony, the hunters spent 30-90 minutes in the blinds.

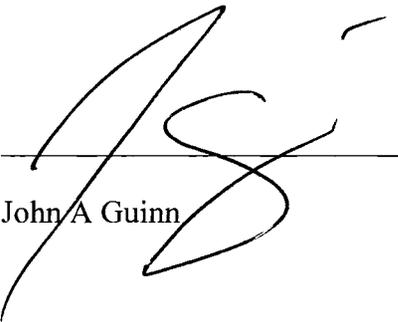
7. We stopped for less than a minute at the Chimacum Café, which had been closed on the day of the hunt. According to the testimony, the hunters took time to decide where else they could go to eat breakfast.

8. The trip from the hunting site to the site where Mitzel's Restaurant was located took 48 minutes. Had we stayed at the hunting blinds for the minimum possible time according to the testimony, 30 minutes, we would have arrived at the restaurant location at about 9:13 a.m., just 14 minutes before Mr. Hacheney used his credit card to pay for breakfast – clearly, not enough time to be seated, order, be served, and eat.

I declare under penalty of perjury of the laws of the State of Washington that the above is true and correct.

10/21/09 SEATTLE, WA

Date and Place

  
\_\_\_\_\_  
John A Guinn

Digital copy of video of drive to and from Indian Island hunting site to be provided.

# January 2009

## Seattle, Washington

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1 Sunrise: 7:57am Sunset: 4:27pm	2 Sunrise: 7:57am Sunset: 4:28pm	3 Sunrise: 7:57am Sunset: 4:29pm
4 Sunrise: 7:57am Sunset: 4:30pm	5 Sunrise: 7:57am Sunset: 4:31pm	6 Sunrise: 7:58am Sunset: 4:32pm	7 Sunrise: 7:58am Sunset: 4:34pm	8 Sunrise: 7:58am Sunset: 4:35pm	9 Sunrise: 7:55am Sunset: 4:36pm	10 Sunrise: 7:55am Sunset: 4:37pm
11 Sunrise: 7:55am Sunset: 4:38pm	12 Sunrise: 7:54am Sunset: 4:40pm	13 Sunrise: 7:54am Sunset: 4:41pm	14 Sunrise: 7:53am Sunset: 4:42pm	15 Sunrise: 7:52am Sunset: 4:44pm	16 Sunrise: 7:52am Sunset: 4:45pm	17 Sunrise: 7:51am Sunset: 4:46pm
18 Sunrise: 7:50am Sunset: 4:48pm	19 Sunrise: 7:49am Sunset: 4:49pm	20 Sunrise: 7:49am Sunset: 4:51pm	21 Sunrise: 7:48am Sunset: 4:52pm	22 Sunrise: 7:47am Sunset: 4:54pm	23 Sunrise: 7:46am Sunset: 4:55pm	24 Sunrise: 7:45am Sunset: 4:57pm
25 Sunrise: 7:44am Sunset: 4:58pm	26 Sunrise: 7:43am Sunset: 5:00pm	27 Sunrise: 7:42am Sunset: 5:01pm	28 Sunrise: 7:41am Sunset: 5:03pm	29 Sunrise: 7:39am Sunset: 5:04pm	30 Sunrise: 7:38am Sunset: 5:06pm	31 Sunrise: 7:37am Sunset: 5:07pm

Standard/Winter Time for entire month.  
 Courtesy of www.sunrisesunset.com  
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## February 2009

### Seattle, Washington

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1 Sunrise: 7:36am Sunset: 5:09pm	2 Sunrise: 7:34am Sunset: 5:10pm	3 Sunrise: 7:33am Sunset: 5:12pm	4 Sunrise: 7:32am Sunset: 5:14pm	5 Sunrise: 7:30am Sunset: 5:15pm	6 Sunrise: 7:29am Sunset: 5:17pm	7 Sunrise: 7:27am Sunset: 5:18pm
8 Sunrise: 7:28am Sunset: 5:20pm	9 Sunrise: 7:24am Sunset: 5:21pm	10 Sunrise: 7:23am Sunset: 5:23pm	11 Sunrise: 7:21am Sunset: 5:25pm	12 Sunrise: 7:20am Sunset: 5:26pm	13 Sunrise: 7:18am Sunset: 5:28pm	14 Sunrise: 7:16am Sunset: 5:29pm
15 Sunrise: 7:15am Sunset: 5:31pm	16 Sunrise: 7:13am Sunset: 5:32pm	17 Sunrise: 7:11am Sunset: 5:34pm	18 Sunrise: 7:10am Sunset: 5:36pm	19 Sunrise: 7:08am Sunset: 5:37pm	20 Sunrise: 7:06am Sunset: 5:39pm	21 Sunrise: 7:04am Sunset: 5:40pm
22 Sunrise: 7:03am Sunset: 5:42pm	23 Sunrise: 7:01am Sunset: 5:43pm	24 Sunrise: 6:59am Sunset: 5:45pm	25 Sunrise: 6:57am Sunset: 5:46pm	26 Sunrise: 6:55am Sunset: 5:48pm	27 Sunrise: 6:54am Sunset: 5:49pm	28 Sunrise: 6:52am Sunset: 5:51pm

Standard/Winter Time for entire month.  
 Courtesy of [www.sunrisesunset.com](http://www.sunrisesunset.com)  
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## December 2008

### Seattle, Washington

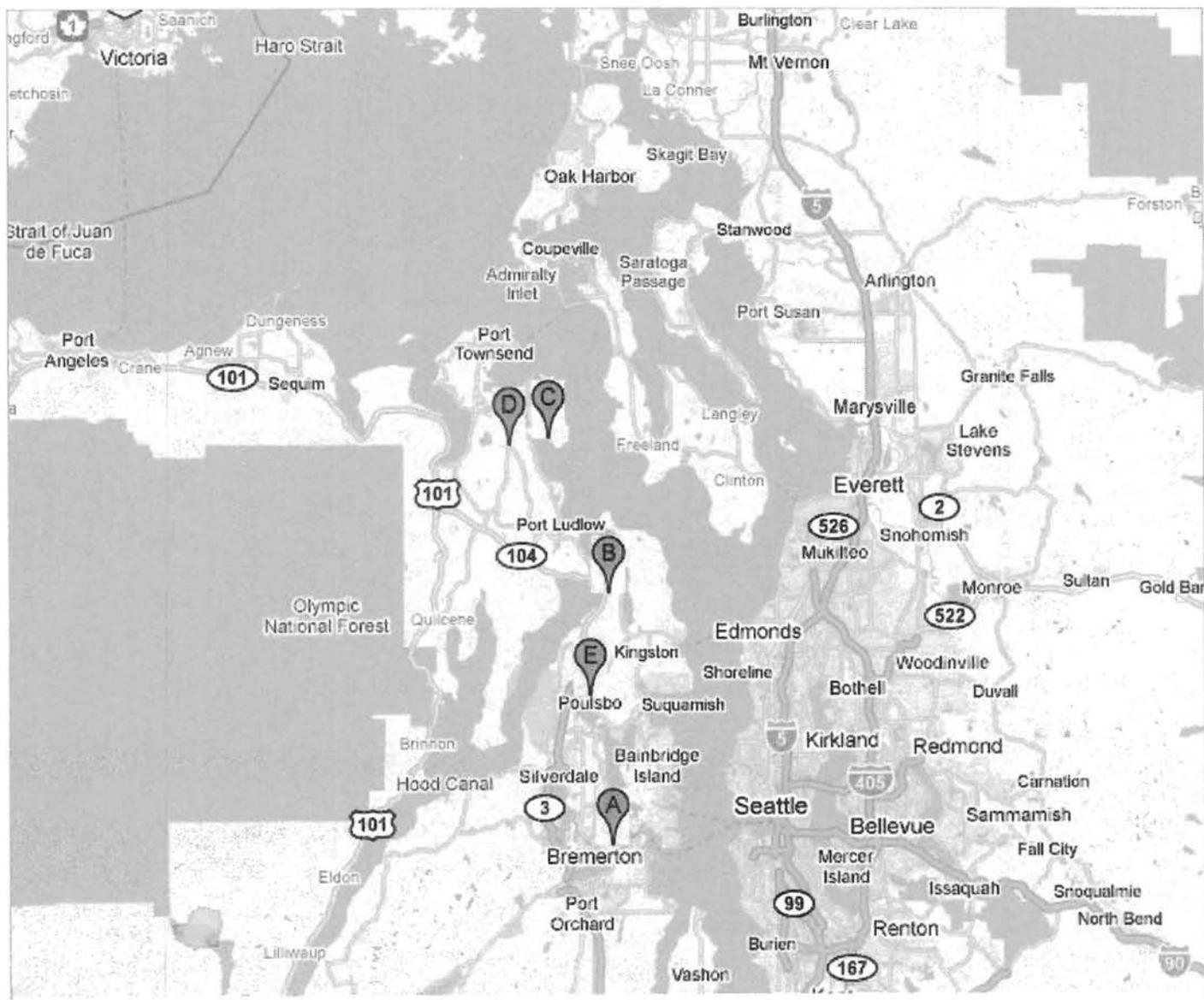
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1 Sunrise: 7:36am Sunset: 4:20pm	2 Sunrise: 7:37am Sunset: 4:19pm	3 Sunrise: 7:38am Sunset: 4:19pm	4 Sunrise: 7:39am Sunset: 4:18pm	5 Sunrise: 7:41am Sunset: 4:18pm	6 Sunrise: 7:42am Sunset: 4:18pm
7 Sunrise: 7:43am Sunset: 4:17pm	8 Sunrise: 7:44am Sunset: 4:17pm	9 Sunrise: 7:45am Sunset: 4:17pm	10 Sunrise: 7:46am Sunset: 4:17pm	11 Sunrise: 7:47am Sunset: 4:17pm	12 Sunrise: 7:48am Sunset: 4:17pm	13 Sunrise: 7:49am Sunset: 4:17pm
14 Sunrise: 7:49am Sunset: 4:17pm	15 Sunrise: 7:50am Sunset: 4:17pm	16 Sunrise: 7:51am Sunset: 4:18pm	17 Sunrise: 7:52am Sunset: 4:18pm	18 Sunrise: 7:52am Sunset: 4:18pm	19 Sunrise: 7:53am Sunset: 4:19pm	20 Sunrise: 7:54am Sunset: 4:19pm
21 Sunrise: 7:54am Sunset: 4:19pm	22 Sunrise: 7:55am Sunset: 4:20pm	23 Sunrise: 7:55am Sunset: 4:20pm	24 Sunrise: 7:55am Sunset: 4:21pm	25 Sunrise: 7:56am Sunset: 4:22pm	26 Sunrise: 7:56am Sunset: 4:22pm	27 Sunrise: 7:56am Sunset: 4:23pm
28 Sunrise: 7:57am Sunset: 4:24pm	29 Sunrise: 7:57am Sunset: 4:25pm	30 Sunrise: 7:57am Sunset: 4:26pm	31 Sunrise: 7:57am Sunset: 4:26pm			

Standard/Winter Time for entire month.  
 Courtesy of [www.sunrisesunset.com](http://www.sunrisesunset.com)  
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### Directions to NE Jensen Ave/Jenson Rd NE 89.0 mi – about 2 hours 36 mins

**Save trees. Go green!**  
 Download Google Maps on your phone at [google.com/gmm](http://google.com/gmm)



 2005 NE Jensen Ave, Bremerton, WA 98310

- 1. Head **north** on **NE Jensen Ave/Jenson Rd NE** toward **Cascade View** go 141 ft  
total 141 ft
-  2. **NE Jensen Ave/Jenson Rd NE** turns slightly **left** and becomes **Cascade View** go 0.2 mi  
total 0.2 mi
-  3. Turn **right** at **Trenton Ave**  
About 1 min go 0.3 mi  
total 0.5 mi
-  4. Turn **left** at **NE Stone Way**  
About 1 min go 0.2 mi  
total 0.8 mi
-  5. Turn **right** at **Perry Ave**  
About 5 mins go 1.6 mi  
total 2.4 mi
-  6. **Perry Ave** turns slightly **left** and becomes **NE Riddell Rd**  
About 2 mins go 0.7 mi  
total 3.1 mi
-  7. Turn **right** at **WA-303**  
About 11 mins go 5.9 mi  
total 9.0 mi
- 8. Take the **State Hwy 3** exit toward **Silverdale** go 0.3 mi  
total 9.2 mi
-  9. Merge onto **WA-3 N**  
About 15 mins go 13.7 mi  
total 22.9 mi
-  10. Turn **left** at **WA-104** go 223 ft  
total 23.0 mi

**Total: 23.0 mi – about 35 mins**

 WA-104 total 0.0 mi

-  11. Head **northwest** on **WA-104** toward **Shine Rd**  
About 2 mins go 1.7 mi  
total 1.7 mi
-  12. Turn **right** at **Paradise Bay Rd**  
About 12 mins go 6.0 mi  
total 7.7 mi
-  13. Turn **right** at **Oak Bay Rd**  
About 18 mins go 8.6 mi  
total 16.3 mi
-  14. Turn **right** at **Flagler Rd/WA-116**  
About 3 mins go 0.8 mi  
total 17.1 mi

- 116** 15. Slight **right** to stay on **Flagler Rd/WA-116** go 1.6 mi  
total 18.7 mi  
About 4 mins

**Total: 18.7 mi – about 38 mins**

 **Flagler Rd/WA-116** total 0.0 mi

- 116** 16. Head **west** on **Flagler Rd/WA-116** toward **Indian Island Ferry Rd** go 1.5 mi  
total 1.5 mi  
About 4 mins

- 116** 17. Slight **left** to stay on **Flagler Rd/WA-116** go 0.9 mi  
total 2.4 mi  
About 3 mins

- 116** 18. Turn **right** at **Oak Bay Rd/WA-116** go 0.9 mi  
total 3.3 mi  
About 2 mins

-  19. Turn **left** at **Chimacum Rd** go 1.6 mi  
total 4.8 mi  
About 5 mins

- 19** 20. Turn **right** at **Rhody Dr/WA-19** go 404 ft  
total 4.9 mi  
Destination will be on the right  
About 1 min

**Total: 4.9 mi – about 14 mins**

 **Chimacum Cafe** total 0.0 mi  
9253 Rhody Dr, Chimacum, WA 98325 - (360) 732-4631

- 19** 21. Head **east** on **Rhody Dr/WA-19** toward **Chimacum Rd** go 9.2 mi  
total 9.2 mi  
Continue to follow WA-19  
About 14 mins

- 104** 22. Turn **left** at **WA-104** go 6.6 mi  
total 15.8 mi  
About 9 mins

- 3** 23. Turn **right** at **WA-3** go 6.7 mi  
total 22.5 mi  
About 8 mins

24. Take the **State Hwy 305 S** exit toward **Poulsbo** go 0.4 mi  
total 22.9 mi

- 305** 25. Turn **left** at **Olympic College Way/WA-305** go 1.7 mi  
total 24.5 mi  
Continue to follow WA-305  
About 4 mins

-  26. Turn **right** at **NE Liberty Rd** go 79 ft  
total 24.6 mi

Total: 24.6 mi – about 36 mins

-  Liberty Way total 0.0 mi

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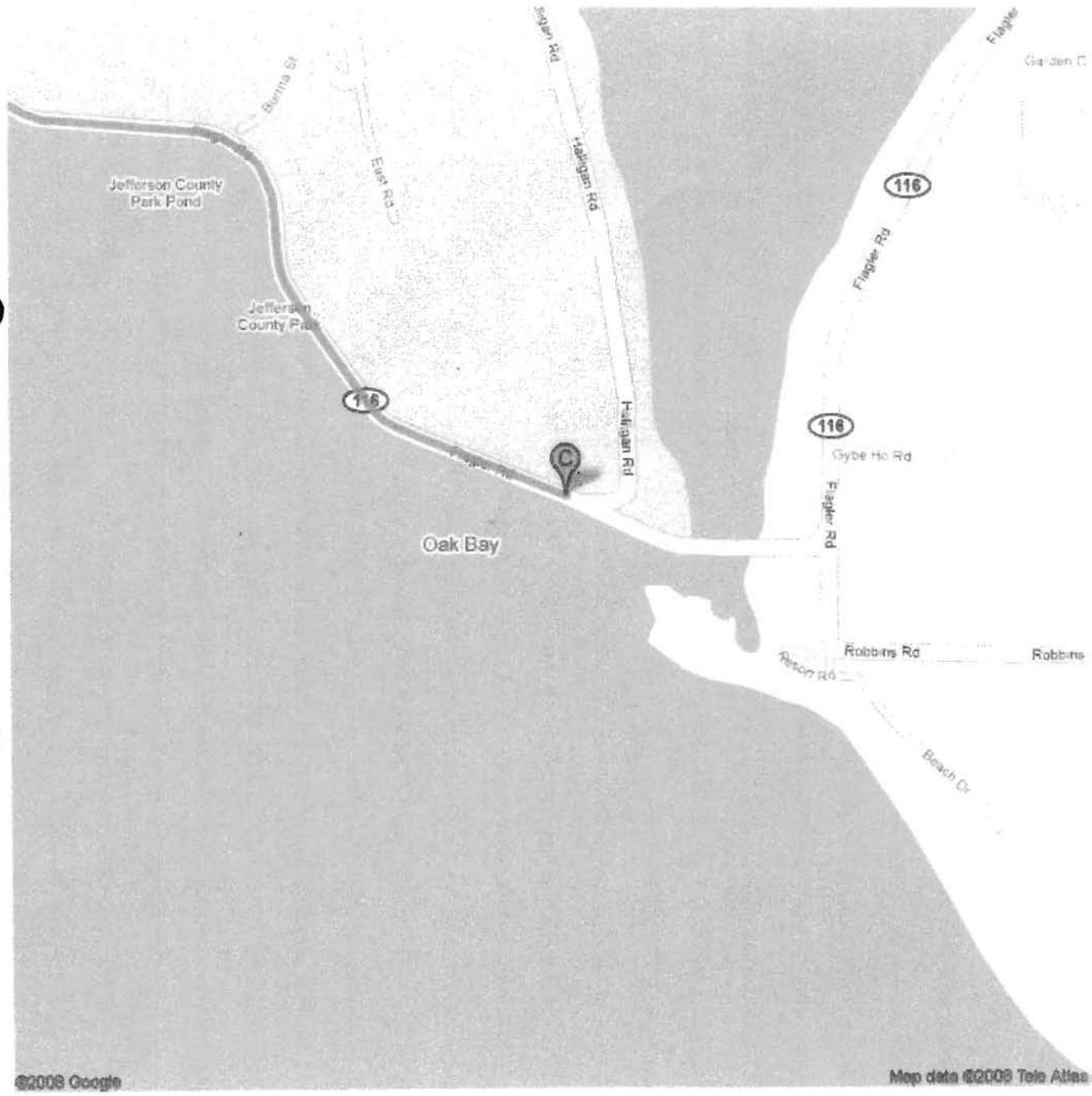
- 27. Head east on Liberty Way toward WA-305 go 79 ft  
total 79 ft
-  28. Turn left at WA-305 go 1.5 mi  
total 1.6 mi  
About 5 mins
-  29. Take the ramp onto WA-3 S go 7.1 mi  
total 8.6 mi  
About 8 mins
- 30. Take exit 45 for State Hwy 303 S toward E Bremerton/Silverdale go 0.2 mi  
total 8.9 mi
-  31. Turn left at WA-303/NE Waaga Way go 6.7 mi  
total 15.6 mi  
Continue to follow WA-303  
About 11 mins
-  32. Turn left at NE Sylvan Way/WA-306 go 1.0 mi  
total 16.6 mi  
About 3 mins
-  33. Turn right at Trenton Ave go 1.1 mi  
total 17.7 mi  
About 4 mins
-  34. Turn left at Cascade View go 0.2 mi  
total 17.9 mi
-  35. Cascade View turns slightly right and becomes NE Jensen Ave/Jenson Rd NE go 66 ft  
total 17.9 mi  
Destination will be on the right

Total: 17.9 mi – about 31 mins

 NE Jensen Ave/Jenson Rd NE

These directions are for planning purposes only. You may find that construction projects, traffic, weather, or other events may cause conditions to differ from the map results, and you should plan your route accordingly. You must obey all signs or notices regarding your route.

Map data ©2008 , Tele Atlas

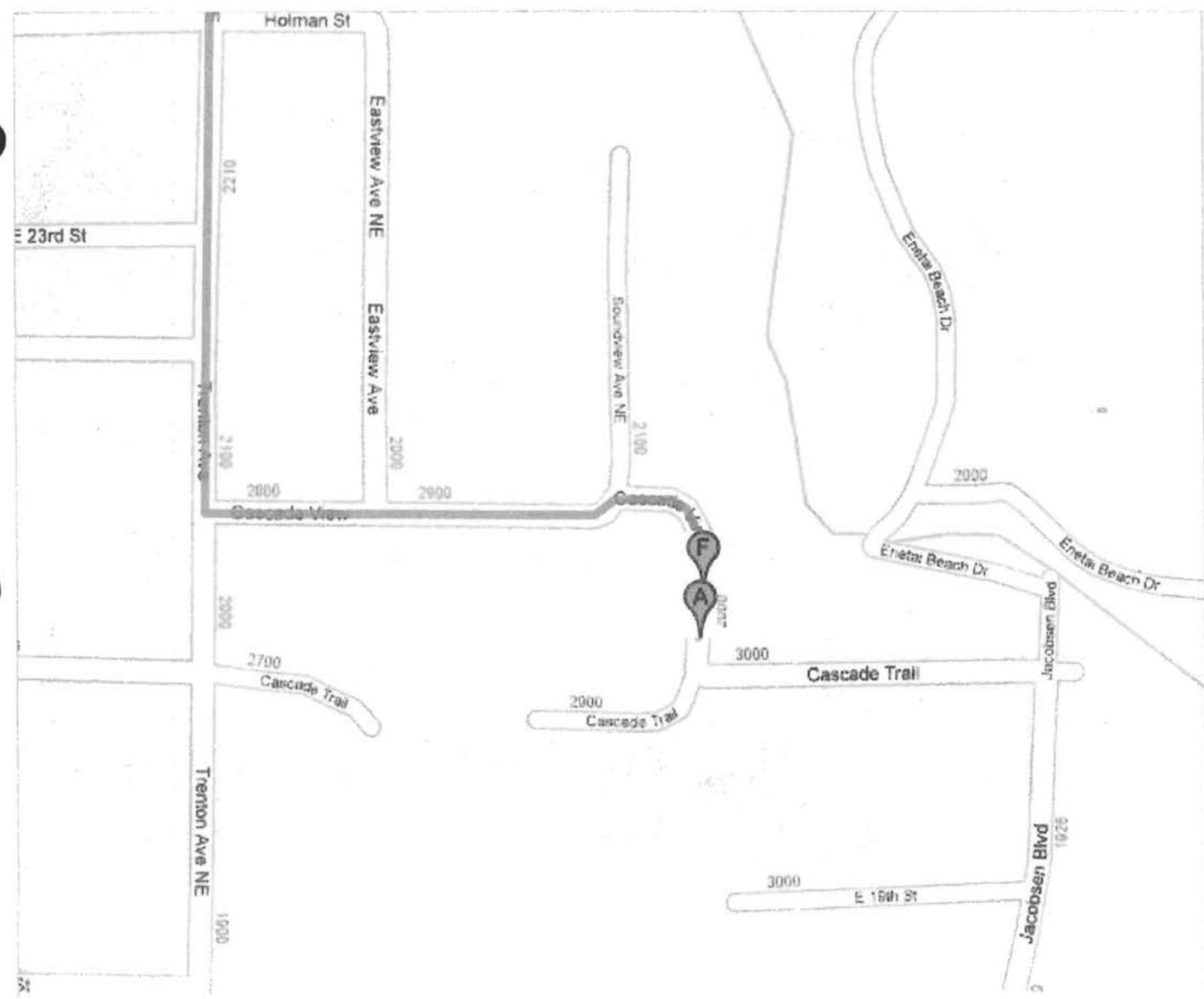


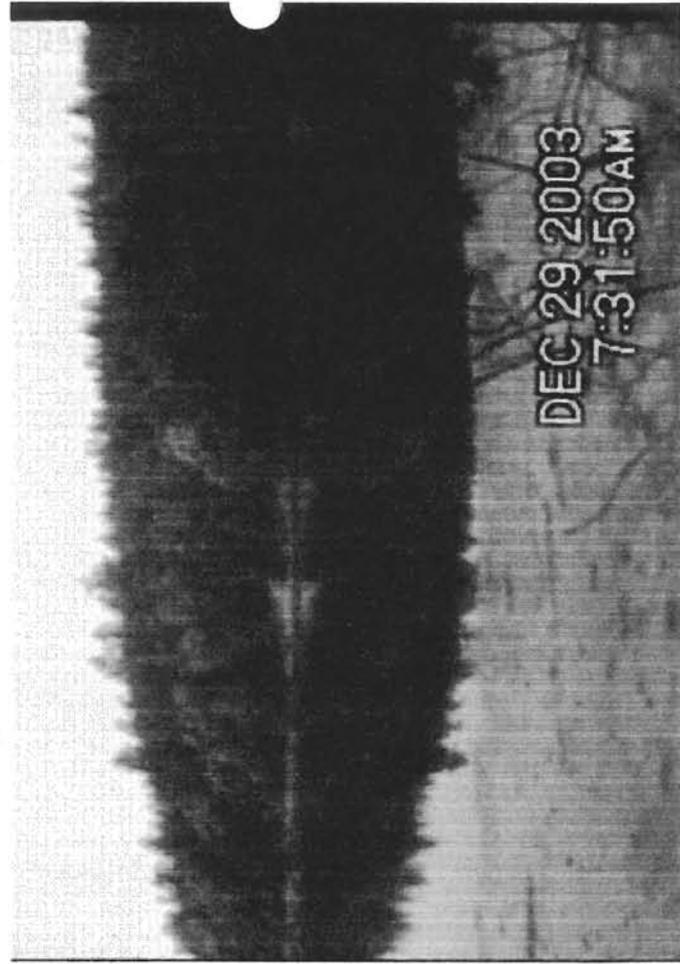
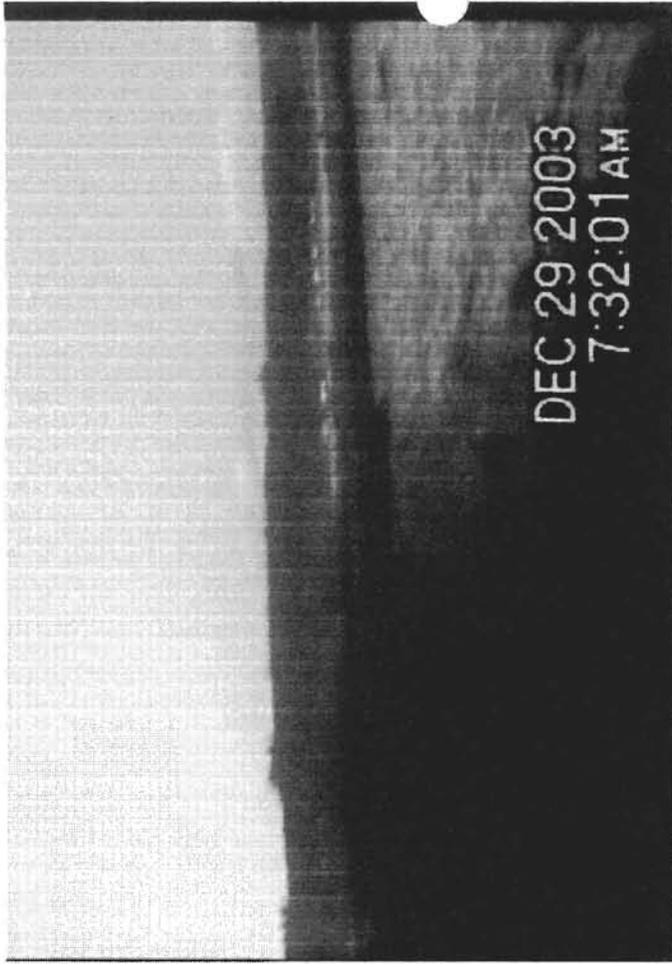
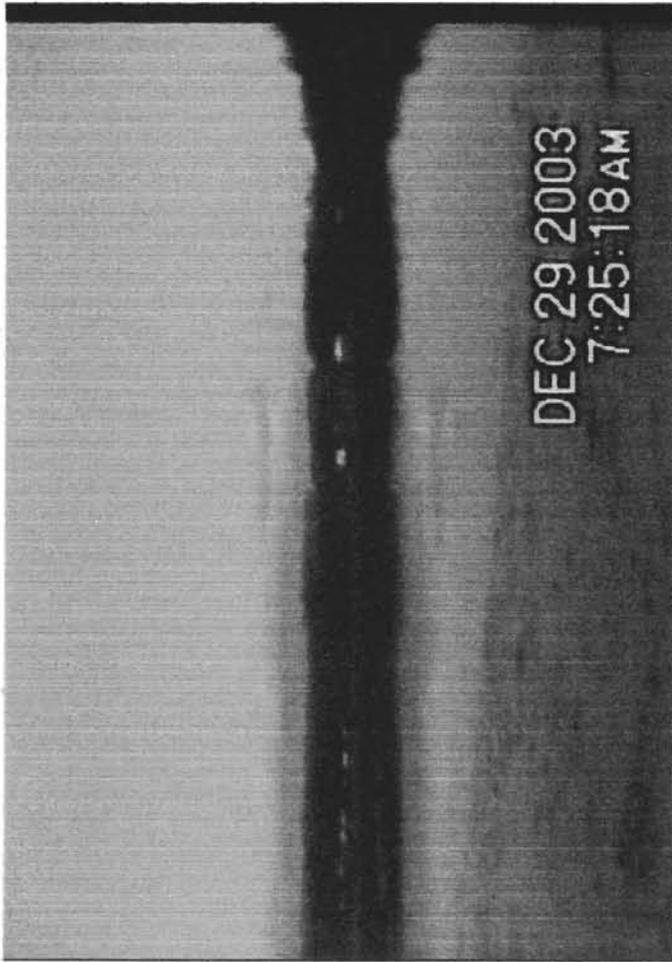


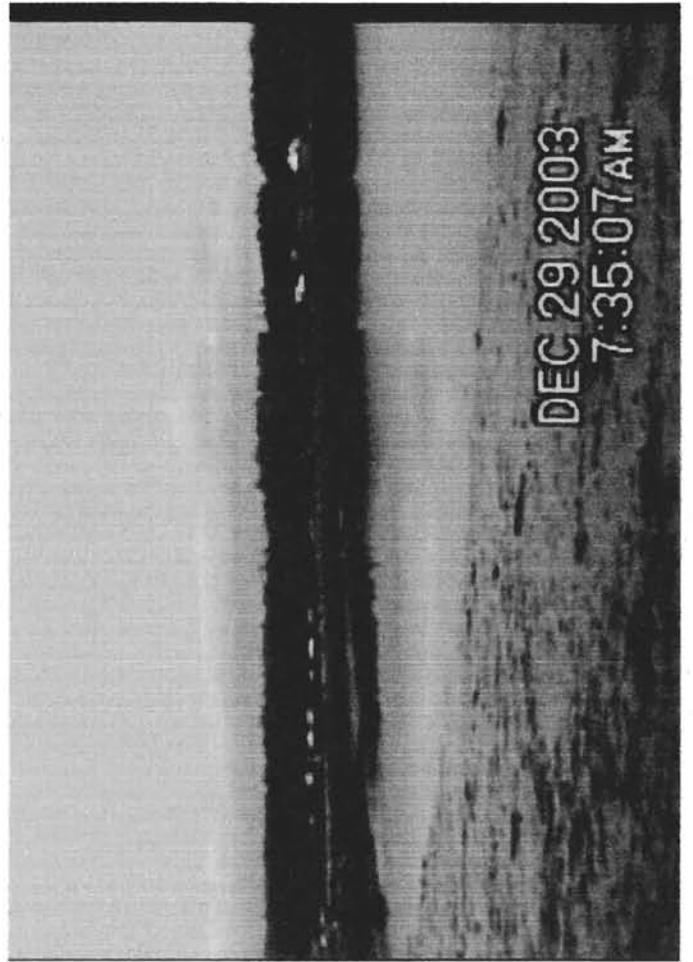
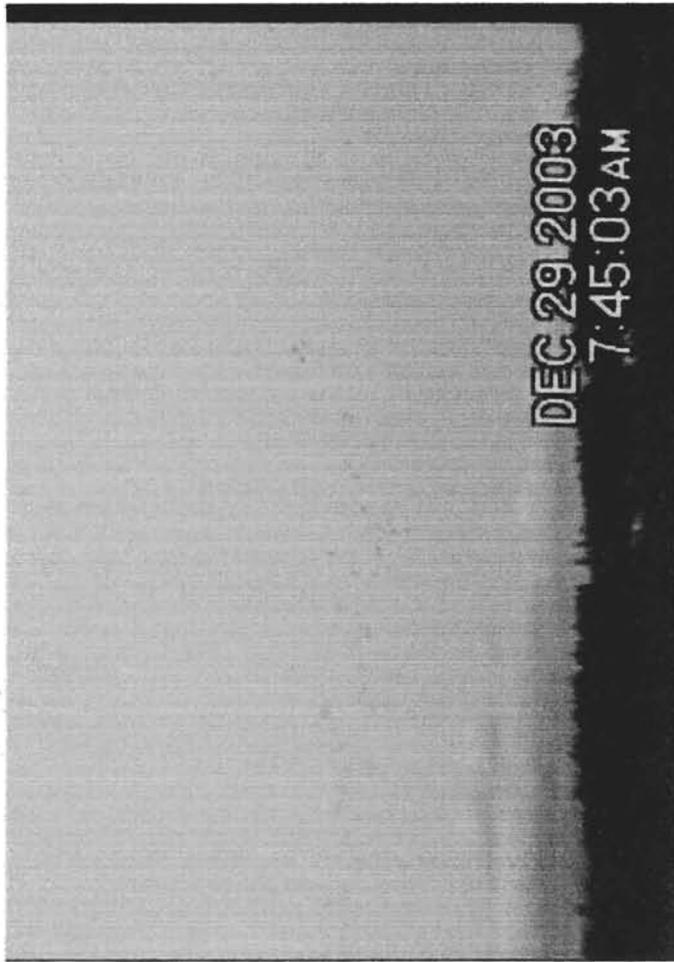
### Directions to NE Jensen Ave/Jenson Rd NE

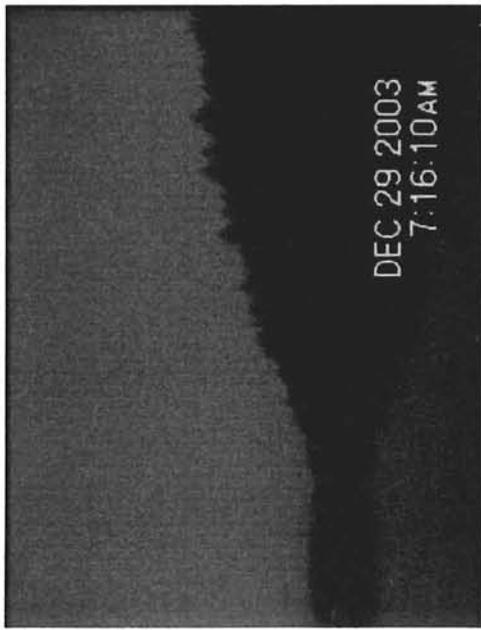
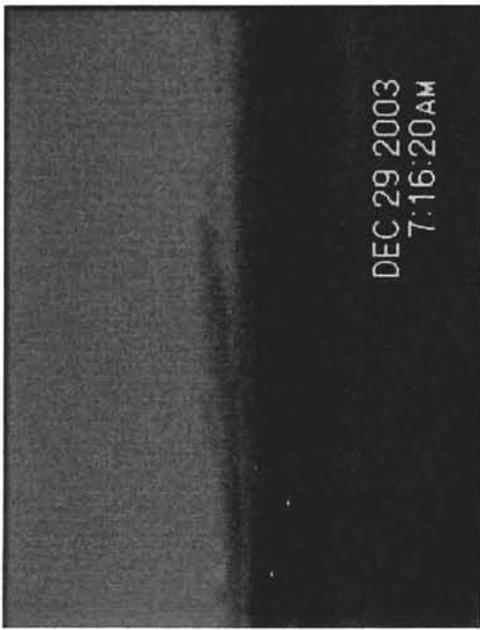
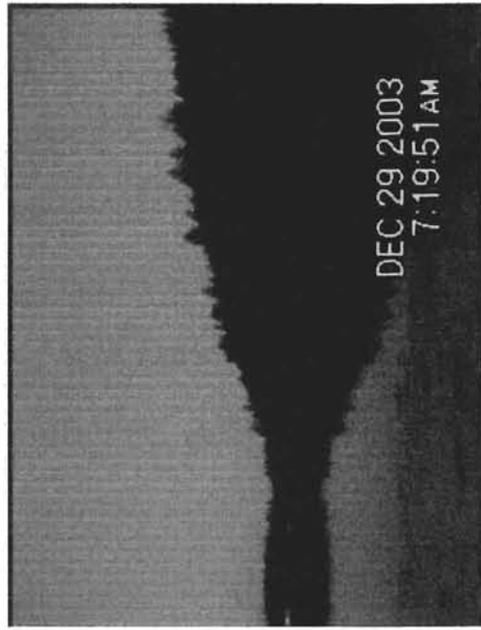
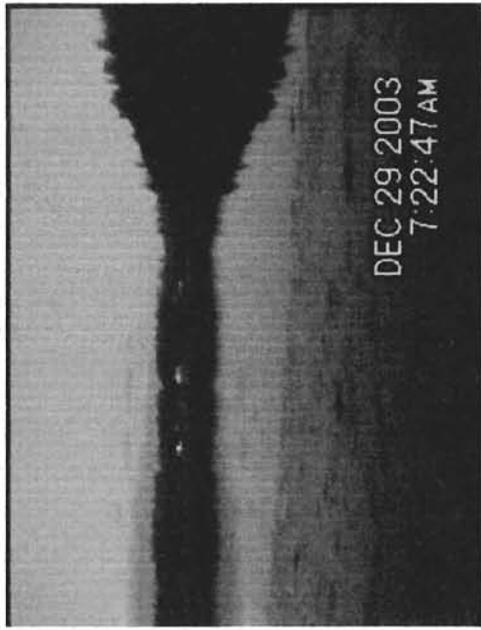
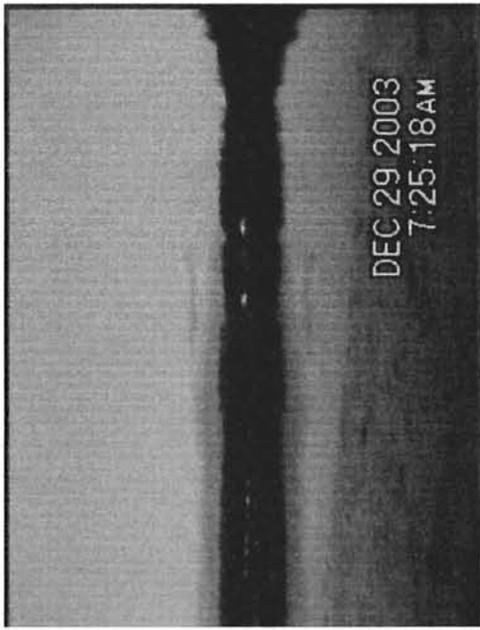
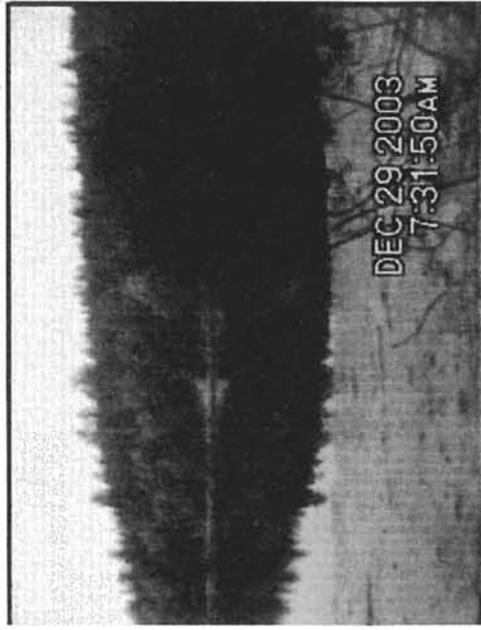
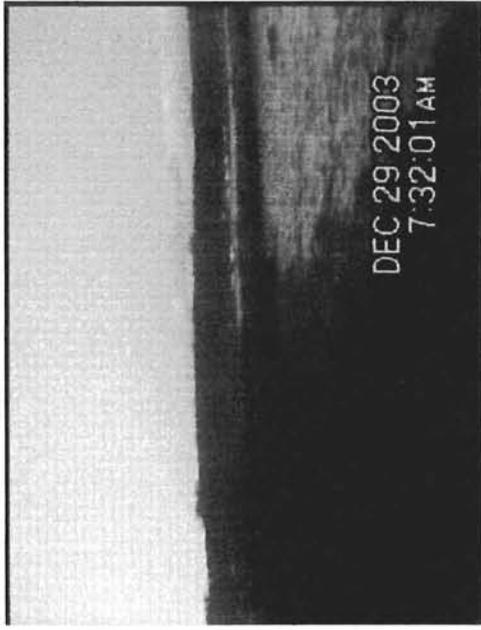
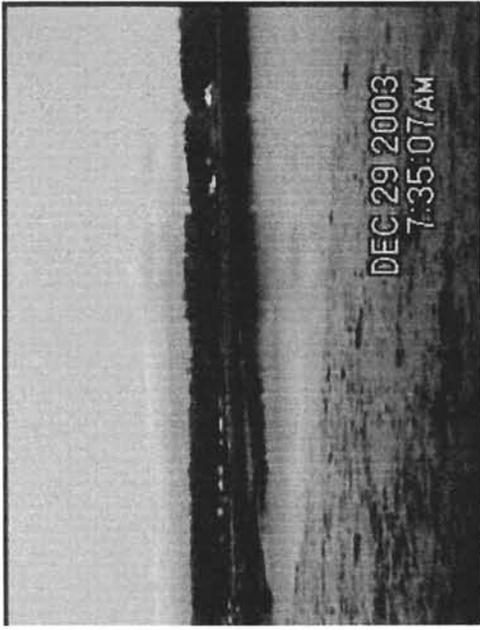
89.0 mi – about 2 hours 36 mins

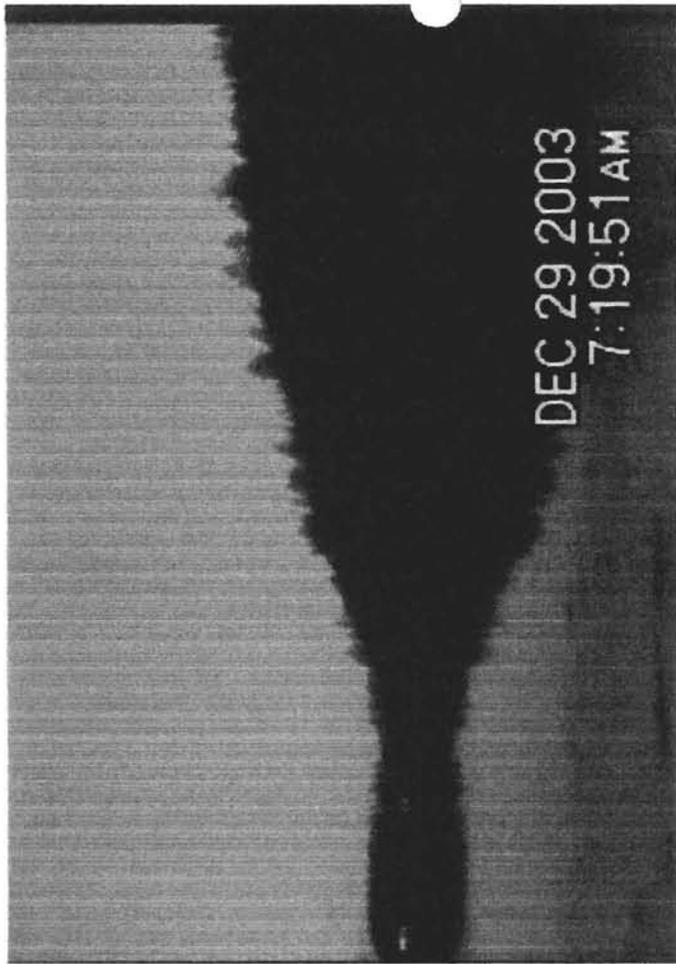
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 Download Google Maps on your phone at [google.com/gmm](http://google.com/gmm)

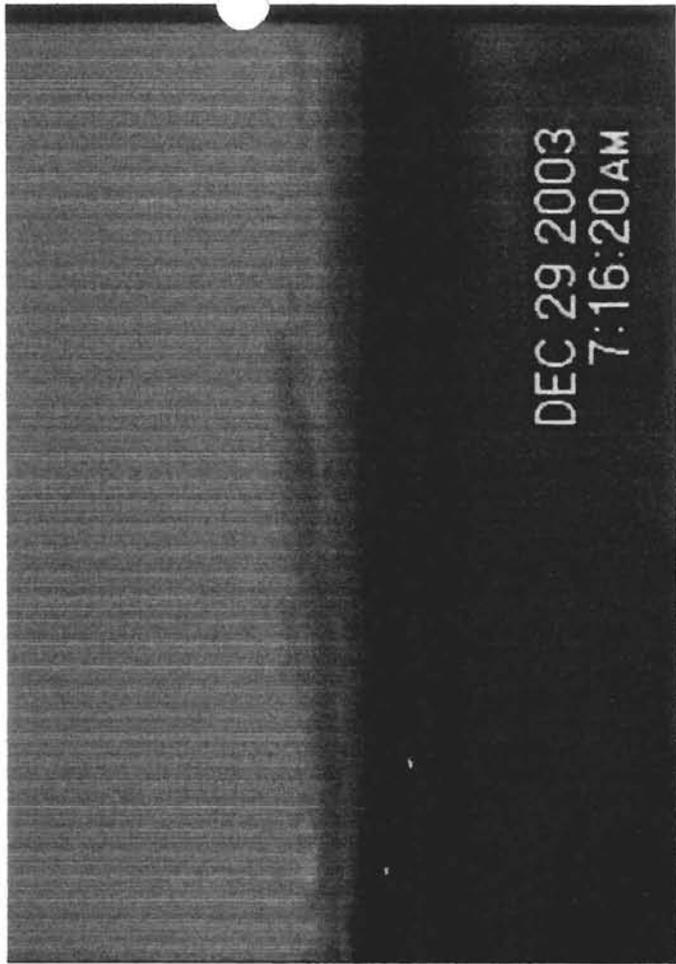




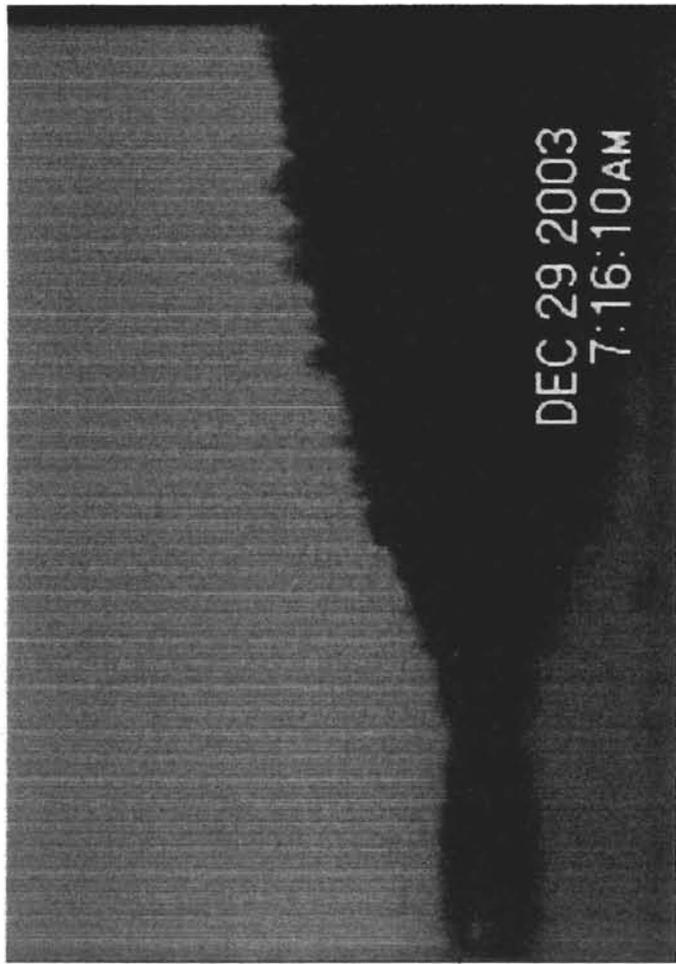




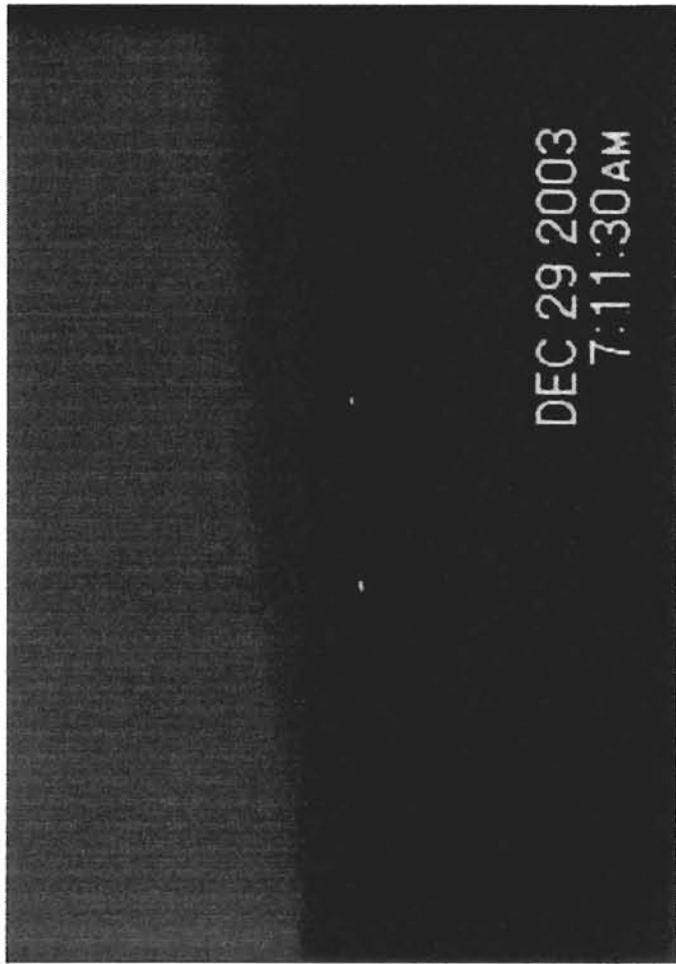
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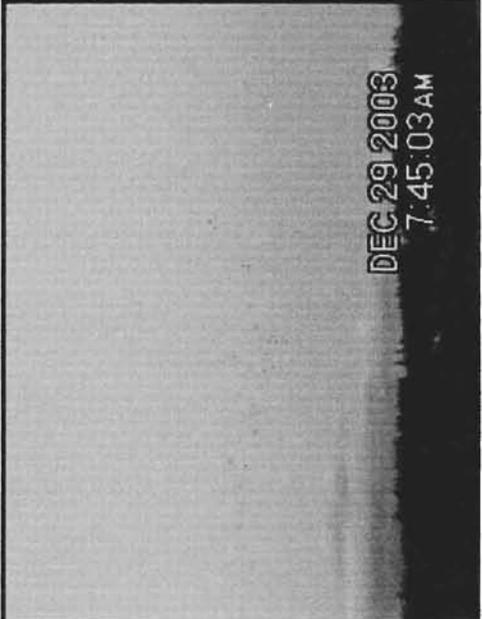
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DEC 29 2003  
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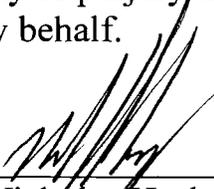


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7:45:03 AM

**VERIFICATION BY PETITIONER**

I, Nicholas Hacheny, verify under penalty of perjury that the attached PRP is true and correct and is filed on my behalf.

6/11/09 MONROE WA  
Date and Place

  
\_\_\_\_\_  
Nicholas Hacheny

COURT OF APPEALS  
DIVISION II  
09 JUN 22 PM 2:29  
STATE OF WASHINGTON  
BY   
DEPUTY