

No. 39448-1-II

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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**REPLY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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

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## A. INTRODUCTION

Nicholas Hacheny was convicted of the arson-murder of his wife. The truth, however, is that Dawn Hacheny died in an accidental fire, not one intentionally set.<sup>1</sup>

Mr. Hacheny's timely filed PRP raises several meritorious claims, which he supports (where necessary) with extra-record evidence as required by the rules. For example, Mr. Hacheny claims that "surrogate witness" testimony regarding two forensic reports prepared by scientists who were not available for cross-examination violated his right to confrontation. He presents new evidence that undermines the reliability of the state crime lab—heightening the need for the actual analyst's testimony. He shows that the State encouraged three previously deposed witnesses not to return for trial, completely contradicting the inference previously created by the State and relied on by this Court on direct appeal. And, he shows that the State's case for Hacheny's guilt could have been effectively undermined if trial counsel had only conducted a simple investigation to determine what time Hacheny arrived with others to duck hunt. If counsel had taken this obvious and simple investigatory step counsel would have been able to

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<sup>1</sup> In recent years, courts and commentators have become increasingly aware of both the mistakes and limitations of "arson science." For example, Cameron Todd Willingham and Ernest Willis were both sentenced to death for arson-murders that now appear to be accidental fires. Hall, Michael, "Separated at Death," *Texas Monthly*, p. 90 (Dec. 2009). Willingham's case is perhaps more well-known, but only because he was wrongly executed. See Frontline: *Death by Fire* at <http://www.pbs.org/wgbh/pages/frontline/death-by-fire/etc/readings-links.html>.

effectively argue that the fire that took his wife's life started long after Hacheney had left the house.

In response, the State contests many of Hacheney's facts in the body of its brief, but fails to present a single contesting declaration.

Consequently, because the State has failed to meet its burden this Court can reach the merits of most of Hacheney's claims and reverse. To be clear, Hacheney understands and agrees that any material and disputed facts can only be resolved at an evidentiary hearing. However, because Hacheney has made out *prima facie* claims of error based on facts not properly contested, this Court can and should grant relief.

## **B. PROCEDURAL ISSUES**

Hacheney begins by discussing the two procedural issues with application to multiple claims.

### *Requirements for an Evidentiary Hearing*

Both parties are required to meet certain pleading standards in order to merit an evidentiary hearing. Hacheney met those requirements. The State did not.

A petitioner must state with particularity facts which, if proven, would entitle him to relief. *In re PRP of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Hacheney has done so, submitting numerous sworn declarations and supporting documentation. Where the petitioner's evidence is based on knowledge in the possession of others, he may not

simply state “what he thinks those others would say,” but must present their affidavits *or* “other corroborative evidence.” *Id.* To illustrate, in the case of the three witnesses whose depositions were admitted at trial, Hacheny has submitted various source documents obtained from the Prosecutor’s office (documents which were neither revealed to Hacheny or the court previously), as well as other corroborative evidence of what they would say about the reasons for their absence.

Once the petitioner makes this threshold showing then, if the State disputes any of the new facts, it must do so with its own sworn declarations. “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.” *Rice, supra.*

If the parties’ documentary evidence establishes the existence of material and disputed facts, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions. “In other words, 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.” *Id.* A hearing is likewise not a vehicle to determine whether the State can produce actual evidence to dispute Petitioner’s facts.

In this case, while the State says it disputes almost all of Hacheny’s

new facts, it fails to produce competent evidence contradicting Hachenev's declarations and supporting documents. The State has failed to meet its burden.

*When Relitigation is Permitted*

The State argues that this Court should refuse to consider the merits of any claim in Hachenev's petition that is similar to a claim rejected on direct appeal, even where that claim is based on new law or new facts. The State's *Response* grossly mischaracterizes the "relitigation bar."

Under Washington law, a personal restraint petitioner may raise an issue decided on direct appeal if the "interests of justice require relitigation." *In re PRP of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). Washington courts have never precisely defined the "interests of justice" standard. Rather, they have adopted the intentionally loose test originally set out by the U.S. Supreme Court in *Sanders v. United States*, 373 U.S. 1 (1963). *See Taylor*, 105 Wn.2d at 688-89, quoting *Sanders*, 373 U.S. at 17 ("ends of justice" standard "cannot be too finely particularized"). The "ends of justice" standard "is clearly not a 'good cause' standard." *In re PRP of Holmes*, 121 Wn.2d 327, 330, 849 P.2d 1221 (1993).

Consequently, Washington courts have re-examined claims whenever a petitioner raises "new points of fact and law that *were not* or could not have been raised in the principal action, to the prejudice of the

defendant.” *In re PRP of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (emphasis added). There does not appear to be any Washington case in which an appellate court found that the petitioner had established that he was otherwise entitled to relief, yet refused to entertain the claim because the ends of justice did not favor relitigation. In fact, *Taylor* explains that the ends of justice will always be satisfied whenever a petitioner “is actually prejudiced by the error.” *Taylor*, 105 Wn.2d at 688.

In addition, state court have found the “ends of justice” to be satisfied when a petitioner presents additional allegations in support of the same legal claim made on direct appeal, when he presents the same allegations but improves his constitutional analysis, and when the court was simply wrong the first time around. For example, in *PRP of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001), the state court found trial counsel ineffective in failing to present expert testimony concerning the defendant’s medical and mental conditions. Brett had previously argued on direct appeal that trial counsel were ineffective, and had specifically relied on counsel’s failure to explore Brett’s fetal alcohol syndrome. *Id.* at 883 (conc. op. of Talmadge, J.) *citing State v. Brett*, 126 Wn.2d 136, 202-04, 892 P.2d 29 (1995). *See also, State v. Brett*, 126 Wn.2d at 198-200. Nevertheless, the stronger evidence of ineffectiveness presented in the PRP justified revisiting the issue and granting relief.

In *PRP of Percer*, 111 Wn. App. 843, 47 P.3d 576 (2002), the Washington Court of Appeals permitted the petitioner to relitigate an issue simply because the Court was convinced it had made a mistake in the direct appeal. The Washington Supreme Court reversed on the merits, but confirmed that the Court of Appeals properly reviewed the claim. *Percer*, 150 Wn.2d at 54.

Hachenev does not raise a single claim where he argues that this Court should reconsider a direct appeal decision simply because that decision was incorrect. Instead, in each claim Hachenev has either supplied this Court with new facts, new law, or has framed the claim in a manner different than considered on direct appeal.

This Court should consider the merits of each of Hachenev's claims.

### **C. ARGUMENT**

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

#### *Introduction*

Two forensic reports were introduced during Hachenev's trial, despite the fact that the witnesses who conducted the tests and made the respective reports did not testify and were not subject to cross-examination. On direct appeal, the State conceded:

Here, although Weiss, having died, was clearly unavailable at the time of trial, it is equally clear that Hacheney did not have an opportunity to cross-examine her. Thus, if her reports are deemed "testimonial" then they should have been excluded under *Crawford*.

*Direct Appeal Response*, p. 46. Nevertheless, this Court concluded the tests were not "testimonial," but were instead reliable business records.

The United States Supreme Court's decision in *Melendez-Diaz v.*

*Massachusetts*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527 (2009) is contrary to this

Court's decision on direct appeal and merits reexamination in this PRP.

In that case, the Court held the right of confrontation is violated when a

prosecutor submits a chemical test report without the testimony of the

person who performed the test, rejecting Massachusetts' claim that the

forensic affidavits met the business records exception to the hearsay rule.

#### *Facts Relevant to Claim*

During Hacheney'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. Egle Weiss, an employee of the WSP

Crime Lab, performed tests on Dawn Hacheney's lungs and blood from her heart, testing for the presence of drugs, carbon monoxide, and propane.

Olympic Medical Laboratories also performed toxicology tests.

Olympic Medical Laboratories also performed toxicology tests.

Dr. Barry Logan, the former toxicologist at the Washington State Patrol Crime Laboratory, was permitted to testify concerning the protocol

and the results of tests performed on lung tissue. Contrary to the State's

suggestion otherwise, Dr. Logan did not witness Weiss testing the samples and no bench notes existed to show what procedures she followed. *See Declaration of Logan* attached to PRP. Likewise, there is simply no support for the State's claim that Dr. Logan's testimony was based on personal knowledge of how the tests were conducted or the ability to evaluate each step in the process due to contemporaneous documentation by Ms. Weiss (*Response*, p. 13). *See also* RP 1550. Nevertheless Dr. Logan vouched for Ms. Weiss—how she conducted the tests, and the results. Likewise, Dr. Lacsina had no personal knowledge how the lung tissue was collected; tested, or stored. RP 904. Nevertheless, he also relied on the test results.

There are a number of potential reasons that those results might not be reliable. For example, the failure to properly store the tissue could significantly affect later testing for the presence or absence of a gas. In fact, despite the fact that the integrity of the test results depend on the handling and storage of this piece of evidence, the State did not call (and Hachenev could not cross-examine) Ted Zink (who drew the blood) or Glen Case (who received it in the crime lab, where he previously was employed).

Both scientific tests figured large in this case because they both concerned the presence or absence of propane and carbon monoxide 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). In other words, without these tests there would be no proof for a key element of the State’s murder case.

*The Forensic Reports Constituted Testimonial Hearsay*

The State violated the Confrontation Clause by introducing two analysts’ testimonial statements through surrogate scientists who did not perform, observe, or replicate any of the laboratory tasks or analysis described in their respective statements. The foundational rule of the Confrontation Clause – which has been established for centuries and applies across every kind of testimony – is that if the prosecution wishes to introduce a witness’s testimonial statements, then the defendant is entitled to be confronted with that particular witness.

This Court previously upheld the admission of the crime lab reports after concluding that the reports did not constitute “testimonial” hearsay because they were not prepared when Hachenev was a suspect. This was not an uncommon holding prior to *Melendez-Diaz*. However, *Melendez-Diaz* now mandates a different outcome. Further, calling a “surrogate” witness does not merit a different outcome.

Confrontation of a particular witness serves four primary purposes: (1) it enables cross-examination concerning the witness's factual assertions, his believability, and his character; (2) it guarantees that the witness gives his testimony under oath; (3) it allows the trier of fact to observe the witness's demeanor; and (4) it ensures that the witness testifies in the presence of the defendant. Confrontation with what might be called a "surrogate witness" thwarts all four of these objectives. *See Maryland v. Craig*, 497 U.S. 836, 846 (1990).<sup>2</sup>

When the United States Supreme Court held in *Melendez-Diaz*, that forensic reports are testimonial, it explained that the prosecution there had violated the Confrontation Clause not simply because it had introduced forensic reports without putting an analyst on the stand, but rather because "[t]he analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation . . . ." *Id.* at 2537 n.6 (emphasis added); accord *id.* at 2532.

There is no exception to the Confrontation Clause's prohibition against surrogate testimony for cases in which a court believes that a defendant's ability to question a testifying witness about a non-testifying witness's testimonial statements provides a meaningful opportunity for cross-examination. Precedent, as well as good sense, dictates that there is

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<sup>2</sup> The United States Supreme Court has a "surrogate witness" confrontation clause case pending this term entitled *Bullcoming v. New Mexico*, SCOTUS No. 09-1227.

no “forensic evidence” exception to the Confrontation Clause’s bar against surrogate testimony.

In the course of holding in *Melendez-Diaz* that forensic reports are testimonial, the Court repeatedly stated that, if the defendant objects, “the analyst who provide[d] [the] results” must testify. 129 S. Ct. at 2537; see also *id.* at 2532 n.1 (“what testimony is introduced must (if the defendant objects) be introduced live”) (emphasis in original); *id.* at 2531 (a “witness’s testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination”) (emphasis added). Accordingly, the Court did not simply hold that the Commonwealth of Massachusetts violated the Confrontation Clause by failing to present a witness along with its forensic report. It held, instead, that “[t]he analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation.” *Id.* at 2537 n.6 (emphasis added); see also *id.* at 2532 (“petitioner was entitled to ‘be confronted with’ the analysts at trial”) (emphasis added).

Contrary to the State’s claim, the dissent in *Melendez-Diaz* recognized as much. Summarizing the import of the majority’s holding, the dissent explained that, at the very least, “the . . . analyst who must testify is the person who signed the certificate.” *Id.* at 2545 (Kennedy, J., dissenting). The dissent added that “[i]f the signatory is restating the

testimonial statements of the true analysts – whoever they might be – then those analysts, too, must testify in person.” *Id.* at 2546 (Kennedy, J., dissenting).

Forensic reports face the same “risk of manipulation” and error, 129 S. Ct. at 2536, as other *ex parte* testimony. An analyst could simply be careless or hurried while preparing a sample for testing; programming or setting up a machine; checking controls; or checking a machine’s calculations against accompanying graphs. These are no small matters: According to one source, 93% of errors in laboratory tests for BAC levels, for example, are human errors that occur either before or after machines actually analyze samples. See Donald J. Bartell et al., *Attacking and Defending Drunk Driving Tests* § 16:80 (2007).

The only person whom a defendant can question effectively respecting these issues is the actual analyst who wrote the report that is introduced against him. Investigative boards, journalists, and independent organizations have documented numerous recent instances of fraud and dishonesty in our nation’s forensic laboratories. *Melendez-Diaz*, 129 S. Ct. at 2536-38. “While it is true,” as the Court observed, “that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst.” *Melendez-Diaz*, 129 S. Ct. at 2536 (internal citation omitted).

The ordinary rules of confrontation apply when a witness's testimonial statements purport to do nothing more than write down a number that was displayed on the screen of (or on a piece of paper generated by) a machine. The Confrontation Clause cannot be "dispens[ed] with" simply because a testimonial statement is "obviously reliable." *Crawford*, 541 U.S. at 62; accord *Melendez-Diaz*, 129 S. Ct. at 2536. This is because the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Accordingly, analysts who write reports that the prosecution introduces are personally "subject to confrontation," even if they have "the veracity of Mother Teresa." *Melendez-Diaz*, 129 S. Ct. at 2537, n.6.

Many different factors in the control of the analyst can affect the validity of gas chromatography (GC) test results. GC is a process that requires several steps. Each tier of the process of testing by GC involves the exercise of judgment and proper technique, and presents a risk of error by the analyst that can be disclosed only through cross-examination of the actual analyst who performed those steps.

In short, the "reliability" that is normally associated with business records has no application in this instance and is no substitute for the right to cross-examine. *See Hinojos-Mendoza v. People*, 169 P.3d 662, 666-67

(Colo.2007) (“[The] historic business records hearsay exception does not mean that any document which falls within the modern-day business records exception is automatically nontestimonial.”); *State v. Johnson*, 982 So.2d 672, 680-81 (Fla.2008) (holding that lab reports are “accusatory” and subject to confrontation clause); *Jackson v. State*, 891 N.E.2d 657, 660-61 (Ind.Ct.App.2008) (finding that lab reports are the “functional equivalent of an affidavit” in place of live testimony); *State v. Laturner*, 38 Kan.App.2d 193, 163 P.3d 367, 377 (2007) (determining that statements in lab report were scientist's testimony); *State v. March*, 216 S.W.3d 663, 666 (Mo.2007) (“[Laboratory reports] constitute a core testimonial statement”).

Further, the WSP Crime Lab’s primary function is to test items that may have evidentiary value at a trial. Their business is to test and testify. The WSP Crime Lab website states: “The laboratories play a vital role in the criminal justice process. Scientific testimony is often the deciding factor in the judicial resolution of civil and criminal cases. The results of scientific analysis of evidence - blood, semen, shreds of clothing, hair, fibers, glass, paint, soil, bullets or bullet casings, impressions, and other physical indications - left at the scene of a crime can seem more compelling to a jury than the testimony of eyewitnesses.” More specifically, the Washington State Toxicology Laboratory “performs drug and alcohol testing for coroners, medical examiners, law enforcement agencies,

prosecuting attorneys, and the State Liquor Control Board in all 39 Washington counties.” This is another reason the documents are testimonial. 2 Barbara E. Bergman & Nancy Hollander, *Wharton's Criminal Evidence* § 6:25 (15th ed. 2008) (“[D]ocuments made for the purpose of producing evidence for litigation should be considered testimonial.”); 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:91 (3d ed. 2009)(submitting that lab reports which are prepared for litigation cannot fall under business or public record hearsay exceptions); 30A Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 6371.2 (2009) (arguing that “courts should worry more about depriving the defendant of the opportunity to cross-examine crime lab ‘junk scientists’ ” instead of focusing on reliability); John M. Spires, Note, *Testimonial or Nontestimonial? The Admissibility of Forensic Evidence after Crawford v. Washington*, 94 Ky. L.J. 187, 203-204 (2005) (reasoning that lab reports are not neutral facts, and testimony of a technician should be treated similarly to the testimony of an eyewitness). Indeed, this was not a close case for the Supreme Court, which noted that “under Massachusetts law the *sole purpose* of [these certificates] was to provide ‘*prima facie* evidence of the composition, quality, and the net weight’ of the analyzed substance.” *Melendez-Diaz*, 129 S.Ct. at 2533 (emphasis in original).

There are numerous possible reasons that the GC tests of Dawn

Hachenev's blood and lung tissue may have been unreliable. Hachenev was unable to even attempt to establish any of those reasons because he was not able to cross examine the persons who conducted the tests. Instead, Hachenev was faced with the impossible task of attempting to cross-examine experts who vouched for and incorporated the test result in their ultimate opinions. It was impossible for Hachenev to attack the tests themselves because the persons who performed the tests were not subject to cross-examination. Where the test results are as critical as they were in this case, reversal is required.

CLAIM NO. 2: NEWLY DISCOVERED EVIDENCE REGARDING THE PERFORMANCE 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.

### *Introduction*

The reliability of Mr. Hachenev's conviction is further undermined by the fact that numerous problems existed in the toxicology and other sections of the state patrol crime lab. If those problems were discovered or revealed only after Hachenev's trial, then a new trial is required because of this "newly discovered" information. On the other hand, if this information

was known at the time of Hachenev's trial then he is entitled to a new trial because of the discovery violation and due to counsel's failure to investigate.

Hachenev is less concerned with the chronology than with substance.<sup>3</sup> Certainly, an evidentiary hearing could establish what was known at the time of trial and what was discovered only later. However, given that none of this information is "disputed," (the State attempts to minimize this new evidence by discussing only a small portion of it), this Court should simply evaluate whether the new evidence sufficiently undermines the reliability the lab and, as a result, calls into question the conclusions drawn which assumed the absolute accuracy and reliability of those test results. Evidence of the chronic problems in the crime lab aggravates the confrontation error, as well as provides separate grounds for relief.

### *Facts*

On direct appeal, this Court concluded that Dr. Logan could relate the contents of a report prepared by Egle Weiss were admissible because Ms. Weiss was a "professional" acting under a "business duty." Indeed,

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<sup>3</sup> It is clear that some of this information was known at the time of Hachenev's trial. Dr. Logan knew that the lab was overloaded and that he was not able to provide sufficient supervisory oversight, but he portrayed the office in the opposite light. He also knew through the exchanges of emails on the subject, but did not reveal, the problems that led to Glen Case's departure. Finally, the ultimate, uncontested conclusion of the investigation of the crime lab was that these were problems which developed over time—that a culture of shortcuts had developed and had been passed down from one scientist to another. Dr. Logan himself attributed the problems in the lab to high workloads; complacency with the lack of professionalism; and inadequate written protocol.

Dr. Logan's opinion was not based on how Ms. Weiss actually performed the test in question (he had no personal knowledge of that fact), 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."

In February 2008, Dr. Logan resigned and admitted that "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 B to PRP. A panel of judges further found that a culture had developed in the lab under Dr. Logan's watch where accuracy was a secondary concern. Dr. Logan admitted no such difficulty or problems during his testimony in this case.

While the State attempts to lead this Court to examine only some of the facts with lesser relevance and to avoid those most damning, what is more important is that the State has not properly disputed any of Hachenedy's new facts.

#### *Brady Violation*

The State's response suggests that maybe they did not know about the problems in the crime lab. This is no excuse or defense. .

The Fifth and Fourteenth Amendments require the Government to disclose evidence favorable to the accused when such evidence is favorable to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The

elements of a *Brady* claim are well-established: “The government violates its constitutional duty to disclose material exculpatory evidence where (1) the evidence in question is favorable to the accused in that it is exculpatory or impeachment evidence, (2) the government willfully or inadvertently suppresses this evidence, and (3) prejudice ensues from the suppression (*i.e.*, the evidence is ‘material’).” *Silva v. Brown*, 416 F.3d 980, 985-86 (9th Cir. 2005) (citing *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

The *Brady* rule cannot be undermined by allowing an investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it. *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995). Moreover, actual awareness (or lack thereof) of exculpatory evidence in the government's hands, is not determinative of the prosecution's disclosure obligations. Rather, the prosecution has a *duty to learn* of any exculpatory evidence known to others acting on the government's behalf. Because the prosecution is in a unique position to obtain information known to other agents of the government, *it may not be excused from disclosing what it does not know but could have learned*. *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir.1997) (en banc) (citations omitted) (emphases added). The holding in *Carriger* drew directly from holdings of the Supreme Court, which state that “[i]n order to comply with *Brady*, ‘the individual prosecutor has a duty

to learn of any favorable evidence known to the others acting on the government's behalf in th[e] case, including the police.” *Strickler*, 527 U.S. at 281 (quoting *Kyles*, 514 U.S. at 437).

“*Brady* suppression occurs when the government fails to turn over even evidence that is ‘known only to police investigators and not to the prosecutor.’” *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (*per curiam*) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.)).

The prosecution’s duty to disclose exculpatory evidence includes information that the defense could use to impeach government witnesses. *Giglio v. U.S.*, 405 U.S. 150, 154-55 (1972). *See generally United States v. Bagley*, 473 U.S. 667, 676 (1985) (“Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule.”). *Brady* violations have been found in a number of cases where the prosecution failed to disclose evidence that would have undermined the credibility of important witnesses. *See, e.g., Kyles v. Whitley*, 514 U.S. at 436 (finding

violation where prosecutor failed to disclose information that would have revealed inconsistency and unreliability of witness testimony and physical evidence); *Benn v. Lambert*, 283 F.3d 1040, 1053-54 (9th Cir. 2002) (finding violation where prosecutor failed to disclose that key witness was a drug user and had lied to the police).

The government's duty under *Brady* arises regardless of whether the defendant specifically requests the favorable evidence. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Similarly, the disclosure requirements set forth in *Brady* apply to a prosecutor even when the knowledge of the exculpatory evidence is in the hands of another prosecutor. *See Giglio v. United States*, 405 U.S. at 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government.").

In addition, a prosecutor's obligation to disclose exculpatory evidence does not end once the last witness at trial is called, but instead continues throughout the proceedings. *See e.g., Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9<sup>th</sup> Cir. 1992) (prosecutor has on-going duty to disclose that extends to habeas proceeding). *See also Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir.2003) ("A prosecutor's decision not to preserve or turn over exculpatory material before trial, during trial, or after conviction is a violation of due process under [*Brady*]."); *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir.2001) (stating that "*Brady* requires disclosure of information that the prosecution acquires during the trial itself, or even afterward");

*Smith v. Roberts*, 115 F.3d 818, 820 (10<sup>th</sup> Cir.1997) (agreeing with the State's concession that the *Brady* “duty to disclose is ongoing and extends to all stages of the judicial process,” where the evidence arose after trial but during direct appeal).

*Ineffective Assistance of Counsel*

Defense counsel have a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. “A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance.” *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir.1999) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir.1999)) (internal quotation marks omitted and second alteration in original). In particular, if counsel’s failure to investigate possible methods of impeachment is part of the explanation for counsel's impeachment strategy (or a lack thereof), the failure to investigate may in itself constitute ineffective assistance of counsel. *See Tucker v. Ozmint*, 350 F.3d 433, 444 (4th Cir.2003) (“Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel.”).

Although trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy, counsel cannot be said to have

made a tactical decision without first procuring the information necessary to make such a decision. *See Riley v. Payne*, 352 F.3d 1313, 1324 (9th Cir.2003) (holding that, under clearly established Supreme Court law, when defense counsel failed to contact a potential witness, counsel could not “be presumed to have made an informed tactical decision” not to call that person as a witness); *see also Williams v. Washington*, 59 F.3d 673, 681 (7th Cir.1995) (“Because investigation [of the witnesses] might have revealed evidence bearing upon credibility (which counsel believed was the sole issue in the case), the failure to investigate was not objectively reasonable.”); *cf. Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir.1994) (“Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made.” (citations, emphasis, and internal quotation marks omitted)).

The duty to investigate is especially pressing where, as here, witness credibility is crucial to the government’s case. *See Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir.1998) (collecting cases).

#### *Newly Discovered Evidence*

However, even if the information about the crime lab existed only after Hacheney’s conviction, then he is entitled to a new trial based on the newly discovered evidence (although it still does not excuse the State’s

failure to provide this information to Hachenedy while on appeal).

*State v. Roche*, 114 Wn.App. 424, 59 P.3d 682 (2002), is directly on point and holds:

Hoover's credibility has been totally devastated by his malfeasance. Not only did Hoover steal heroin from the crime lab, he also admitted that he regularly used heroin on the job. He repeatedly lied about his activities until he was finally confronted with the fact that he had been videotaped. Even then, he maintained that it all started when an officer asked him to purify heroin for a drug-dog training project, although he could not provide the name of the officer who allegedly made this request. Furthermore, Hoover's co-workers thought that his work seemed sloppy and even suspected, with some scientific basis to support their suspicions, that he might have been dry labbing some methamphetamine cases. These events are serious enough that a rational trier of fact could reasonably doubt Hoover's credibility regarding his testing of any alleged controlled substances, not just heroin, and regarding his preservation of the chain of custody during the relevant time period.

*Id.* at 437. On the issue of whether this new information was merely impeachment, the Court held:

Moreover, the evidence of Hoover's malfeasance is more than "merely" impeaching; it is critical, with respect to Hoover's own credibility, the validity of his testing, and the chain of custody. *See State v. Savaria*, 82 Wash.App. 832, 838, 919 P.2d 1263 (1996) ("[I]mpeaching evidence can warrant a new trial if it devastates a witness's uncorroborated testimony establishing an element of the offense. In such cases the new evidence is not merely impeaching, but critical.").

\*\*\*\*

In denying Roche's motion for a new trial, the court noted that the main issue at trial was whether Roche constructively possessed the substances found at his residence, not whether the substances were in fact methamphetamine. But Roche had no reason to challenge Hoover's testimony at his trial because evidence of Hoover's

malfeasance had not yet come to light. As far as the defense bar knew at that time, Hoover was a respected and reputable chemist whose integrity and scientific methodology were above reproach. There can be no doubt, however, that if evidence of Hoover's theft of heroin, use of heroin at work, sloppy work habits, and the factually supportable suspicion of his fellow chemists that he was dry labbing had come to light during Roche's trial, the admissibility of the trial exhibits would have been vigorously challenged-and probably the exhibits would not have been admitted into evidence at all.

*Id.* at 438.

The same is true here. Hacheny is entitled to a new trial.

CLAIM NO. 5: MR. HACHENY'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN VIDEO DEPOSITIONS WERE ADMITTED AT TRIAL.

Mr. Hacheny claims that his confrontation rights were violated when videotaped depositions were admitted based on the State's assurance to the trial court that the witnesses refused to return to testify and that the State played no role in that refusal. It bears repeating that on direct appeal, this Court heavily relied on the State's representations to the trial court:

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).

In his PRP, Hachenev presented evidence that the Delashmutts were completely willing to return to trial if the State had offered to pay for the airfare; that State either told or suggested that the three witnesses were done once they testified in the depositions; and that the State collaborated with the witnesses to establish their unavailability without ever even suggesting that the witnesses were legally obliged to return. The Delashmutts never refused to return for trial and there is no evidence that the State ever suggested they needed to do so. To the contrary, the Delashmutts were willing and legally obligated to return.

The State's silence in response is especially damning. Despite the State's responsibility to contest facts with its own competent, admissible evidence, the State's response includes absolutely no contesting evidence. This is even more remarkable given that much of Hachenev's evidence was directed at the conduct of employees of the Kitsap County Prosecutor's

office, not to mention the fact that the civilian witnesses clearly see their interests aligned with the State. Perhaps most significantly, the State repeated takes umbrage from Hachenev's accurate representations that certain information was not disclosed. The State argues that this evidence was destroyed, but never explains why its employees could not reconstruct under oath what they said and did.

Instead, the State's response is to argue that this Court should not revisit this issue. This, of course, is a reasonable (if dishonorable) strategy given that all of Hachenev's newly discovered evidence undermines the statements relied upon by the trial and direct appeal court. Obviously, the need to revisit an issue is at its zenith where a PRP claim is based on new evidence which contradicts the representations made and inferences drawn previously.

The State's final argument is that Hachenev was not sufficiently harmed by the State's repeated and successful efforts to violate of his confrontation rights. The State is incorrect.

Michael Delashmutts' testimony that (prior to the fire that caused his wife's death) Hachenev stated he could not wait to get to heaven so he could have sex with whomever he wanted was a crucial piece of evidence to the State's motive theory. Indeed, the statement was admitted to prove motive, intent, and premeditation. RP 335. In its direct appeal brief, the State specifically cited to this testimony: "Each of the romantic pursuits

and attempted romantic pursuits of Nicholas Hacheny is made stronger motive evidence by his pre-murder statement, ‘I can't wait until I get to heaven, because there I can have sex with whoever I want.’” When it sought to have the depositions taken, the State urged that both of the Delashmutts were “crucial” to the State’s case. The State’s switch in time should be rejected.

In addition, Olson's testimony was relied on by other experts in reaching their opinions. *See* CP 1015- 1-124 *as redacted* by CP 1007-08.

This Court should review the confrontation violation using the direct review standard given the State’s previous lack of candor to the tribunal. However, even if it applies the more burdensome post-conviction standard, this Court need look no further than the State’s own words to discern the value of the evidence and the resulting prejudice to Hacheny.

CLAIM NO. 6: CLOSING THE COURTROOM VIOLATED HACHENY’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO AN OPEN AND PUBLIC TRIAL.

Just as the State does not dispute any of the new facts related to the previous assignments of error, it does not dispute the fact that all three witnesses were deposed in a courtroom with a judge (designed to give jurors every appearance that the witnesses were testifying as part of trial). The depositions were not for the purpose of discovery. Instead, they were taken to “preserve” the witness testimony because the witnesses may be unavailable at trial. The State also does not dispute that each witness was

permitted to give their testimony privately and then leave the country, apparently assured by the State that they did not need to return. Finally, the State does not dispute that Mr. Hachenev's father was excluded from the deposition without any consideration of any of the factors justifying closure.

Hachenev now asserts a violation of his rights to an open and public trial, premised only in part on the State's subterfuge.

Obviously, if this Court finds that the State's actions contributed to the absence of the witnesses at trial, it should find that the State's misconduct resulted in a violation of Hachenev's right to a fair trial. However, even putting aside that concern, a preservation deposition implicates the right to an open and public trial, especially where it is conducted in a courtroom and where a judge is present. Where, as here, there is absolutely no countervailing privacy interest, it violates the constitution to close the deposition.

The Washington Supreme Court has concisely explained the critical importance that transparent court action has for our system of justice:

"Whether the Court fairly and appropriately dealt with the parties and the issues that came before it are the matters of public interest that dictate the openness of judicial proceedings. Everything that passes before this Court, whether or not ultimately held to be admissible at trial or supportive of a viable claim, has relevance to that inquiry." *Rufer v. Abbott*

*Laboratories*, 154 Wn.2d 530, 541-542, 114 P.3d 1182 (2005). In *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 35, 640 P.2d 716 (1982), the Court held that "[e]ach time restrictions on access to criminal hearings or the records from hearings are sought" the court must follow five required steps. (emphasis added).

As a generic matter, there are three types of depositions upon oral interrogatories. They are the deposition to preserve testimony, the formal deposition taken for discovery purposes, and the informal, investigatory deposition. In general, the character of the deposition will largely depend on the authorization sought and obtained in advance of taking it. A deposition to preserve testimony is taken when there are grounds to believe that a needed witness will not be available to testify at the hearing. The party seeking authority to take the deposition must indicate in the application that the object is to preserve testimony and must include justification for using a deposition in lieu of the witness' personal appearance at the hearing. Frequently, the judge will preside over the taking of the deposition in order to observe the demeanor of the witness and to be available to rule immediately on motions relating to the oral examination. A deposition to preserve testimony will usually be received as part of the record without much formality, particularly when the witness is not actually available to testify at the hearing

At the other end of the spectrum is the investigatory or informal

deposition. This is little more than an interview with the witness, in question-and-answer form, conducted under oath, usually in an attorney's office, and in the presence of a stenographic reporter who records the questions and the answers. No judge is present.

In *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986), the Supreme Court noted that "the First Amendment question cannot be resolved solely on the label we give the event, i.e., 'trial' or otherwise[.]" *Id.* at 7. But in assessing whether the First Amendment does apply, the Court will focus on two considerations. *Id.* at 8. The first consideration is whether the "place" and the "process" have historically been open to the press and the general public. *Id.* Clearly the place, the courtroom, has been historically open to the public. Similarly, the "process" involved in this case has historically been open—one where a judge presides and rules upon the testimony of a witness in the courtroom.

In *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 384 (Fla. 1987), the court explained why having a Judge ruling on the examination transforms the proceeding from a deposition into a hearing: Discovery depositions are judicially compelled for the purpose of allowing parties to investigate and prepare their case, but, unlike a suppression hearing, they are not judicial proceedings "for the simple reason that there is no judge present, and no rulings nor adjudications of any sort are made by any judicial authority." *Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867,

872 n. 4 (Fla. 1st DCA 1979).

Allowing a witness who will likely be unavailable at trial to testify in a closed courtroom subverts one of the basic reasons that courts are open—the knowledge that the public can observe the testimony of a witness discourages perjury.” *Waller v. Georgia*, 467 U.S. 39, 46 (1984). Playing the deposition publically later is not an adequate substitute where the witness is gone—sometimes permanently—from the community when the deposition is shown.

It is critical to also keep in mind that fact that the Supreme Court has suggested, albeit in dicta, that the right to a public trial entitles a criminal defendant “at the very least ... to have his friends, relatives and counsel present, no matter with what offense he may be charged.” *In re Oliver*, 333 U.S. 257, 272 (1948); *see also Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir.1994).

Moreover, the State did not and could not demonstrate any harm from allowing Mr. Hacheny’s father to be present when the witnesses were examined.

This Court should reverse.

CLAIM NO. 7: MR. HACHENY 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. HACHENY TO HAVE STARTED THE FIRE.

Mr. Hacheny’s claim here is simple, despite the State’s obfuscation.

Phil Martini, a witness for the prosecution testified that he was with Hachenev in the duck hunting blinds at the “beginnings of the cracks of dawn coming over the edge of the horizon.” RP 541-42. Martini testified:

Q- "And did you get to the hunting spot before first light?"

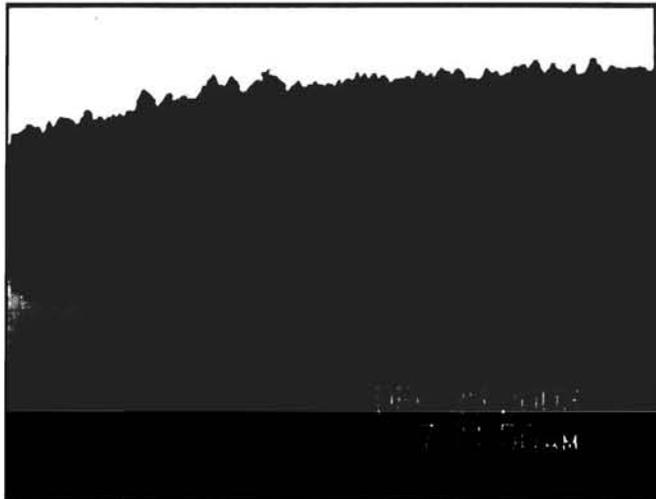
A- "Yeah barely."

Q- "So, it was still dark when you arrived at the hunting site?"

A- "It was still dark, but you could see the beginnings of dawn."

VRP 513. Using Martini’s testimony, the State alleged that Hachenev left home at 6:45 a.m. and arrived in the hunting blinds at 7:50 a.m. RP 5028. <sup>4</sup>

A reasonably competent investigation would have completely undermined this theory. Here is what it looks like at 7:31 a.m., 20 minutes earlier than the State’s asserted time, at the same location and during the same time of year described by Martini:



Reasonable people would describe this as daylight. They would not

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<sup>4</sup> The State inexplicably criticizes Hachenev’s reliance on Martini. Both, Martini and Lindsey Latsbaugh were called by the State. Both testified consistently. *Response*, p. 50-52.

describe it as the “crack of dawn.” Instead, the picture below, which was taken at 6:45 a.m., is much more consistent with what Martini was describing:



It is also consistent with Martini’s testimony that the hunters had been in the hunting blinds for 20-30 minutes and it was still not “fully daylight.” *Id.* Martini testified:

Q- "You indicated that you saw two birds but you didn't take a shot; when was that?"

A- "Probably been there approximately 20 or 30 minutes and there were two birds out there that I didn't think I could hit."

Q- "Was it fully daylight when you saw those two birds?"

A- "No, it was not fully daylight at that time." VRP 541-542.

If Hachenev arrived in the hunting blinds around 6:45 a.m., that means he left home at around 6 a.m., at the latest—perhaps 15-20 minutes earlier.

That would mean, if you accept the State's murder theory, that Hachenev started the fire before 6 a.m.

The fire was first reported in a "911 call" at 7:13 a.m. It was extinguished at approximately 7:25 a.m. Jim White testified that the fire burned for about 20 minutes and that the physics of the universe do not support a longer burn time. However, if Hachenev left before 6 a.m., then the fire would have burned for over 90 minutes—over four times White's scientific conclusion. Thus, this investigation could have showed that it was impossible for Hachenev to have started the fire because he had been gone from the house for over an hour after the time that it started. 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. Conducting this investigation would have also supported, not undermined, Hachenev's approximate timeline that he gave to insurance personnel and which the State attempted to use against Hachenev at trial. VRP 5028 ("He's flat-out telling Safeco a whole line of lies about his time line there, and it's inconsistent with reality.").

Hachenev guessed to Safeco investigators that he arrived to hunt

“around 6:30 or 7.” *Transcript of Interview*, p. 28-29. A competent investigation would have shown the accuracy of Hachenev’s estimate.

If counsel had conducted a competent investigation of the time that it took to travel certain distances, the defense could have created more than a reasonable doubt of Hachenev’s guilt. Just as importantly, the defense could have made the State’s character assassination of Hachenev irrelevant. Hachenev’s moral failings were irrelevant to the murder charge because he could not have started the fire that caused his wife’s death.

Not only did this investigation have tremendous evidentiary value to the defense (making the failure to investigate all the more unreasonable), it was simple to conduct. In fact, Hachenev’s trial took place around the anniversary of his wife’s tragic death in the accidental fire.

In response, the State nitpicks. First, it is important to note that the issue is not whether a dispute still exists over whose timeline is more accurate, but instead is whether Hachenev’s new evidence—taken as true—undermines confidence in the verdict. It easily passes that test.

If anything, Hachenev’s time line is conservative because it did not take into account the stop at the bridge where Latsbaugh changed vehicles and got into Hachenev’s truck; the time in the parking lot getting gear together; getting the dogs out; getting shotguns ready and boots on. Phil Martini also testified that he changed the choke on his shotgun at the parking lot. 1 hour and 14 minutes is a very conservative estimate.

It is important, in addition, to correct some of the State's incorrect and misleading representations. The State complains about the presence and positioning of webcams. Jefferson County purchased a webcam in February 2000, as the attached business record shows. *See* Appendix A. The State argues that the camera was pointed west. This, too, is incorrect. *See* <http://www.co.jefferson.wa.us/webcam/CourtHousePTZCam.htm> (last visited on January 14, 2011). The camera points southwest. The hunting sight is on the west side of Indian Island, which is directly southwest of the courthouse. In other words, the camera is pointing at the body of water near the hunting site—just as Hacheny claimed in his PRP. The camera at the fire-station points east—the direction that Hacheny and the other hunters were facing that morning.

However, Hacheny's point is not that the timeline needed to be constructed in a particular manner, just that it was both easy and enormously helpful to do so. That point is uncontested.

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

CLAIM NO. 9: MR. HACHENY 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.

A medical doctor should be permitted to offer his opinion about

medical matters. Further, a medical doctor can be asked a hypothetical question which assumes various facts. However, the line is crossed where the expert expresses an unequivocal conclusion which is necessarily based on judgments about the credibility of witnesses—which goes beyond the realm of their expertise. Only jurors can judge credibility.

Dr. Selove testified to 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.

Nevertheless, the State attempts to dial back Dr. Selove’s opinion because he was willing to concede that his opinion would be different if certain witnesses were not testifying truthfully. This was no cure because Dr. Selove did not remain impartial on the credibility question—he sided with the State, adding the gloss of his expertise to matters beyond it.

Dr. Selove offered a definite conclusion. This conclusion was based on two premises: (a) the fire was arson and not an accidental flash fire; and (b) Hacheny admitted to Glass that he drugged and the suffocated his wife. In both cases, Dr. Selove found those premises to be more credible than the other alternatives offered. In both cases, Dr. Selove improperly credited other witnesses. In other words, Dr. Selove positioned himself as the ultimate arbiter of all of the evidence. It does not matter that the jury was free to disagree with him. The State was permitted to attach Selove’s expertise to its theory of the case.

In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *City of Seattle v. Heatley*, 70 Wash.App. 573, 579, 854 P.2d 658 (1993)).

Expert testimony will also be precluded if would usurp the jury’s role as the final arbiter of the facts, such as testimony on witness credibility. *See, e.g., Nimely v. City of New York*, 414 F.3d 381, 398 (2d Cir.2005) (holding “that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702”); *United States v. Boney*, 977 F.2d 624, 630 (D.C.Cir.1992) (concluding that expert testimony on the guilt or innocence of a defendant in a criminal case invaded the province of the jury).

The one case relied on by the State is distinguishable. In *State v. Kirkman*, 159 Wn.2d 918, 923, 155 P.3d 125 (2007), a medical doctor was asked whether his physical examination of the complaining witness was consistent with her accusation. The expert replied “that he found nothing in the physical examination to make him doubt A.D., but that there was also nothing to confirm A.D.'s explanation.” *Id.*

Certainly, Dr. Selove could have testified in a similar manner, but he

did not. Instead, he chose to side with the State, at least in part, on his personal determination of what witnesses were more credible.

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.

Trial counsel promised Hachenev's jury one thing and then did another. This could have only served to harm Hachenev. Nevertheless, the State defends trial counsel's switch in time arguing that pursuing the original "promised" course of cross-examination would have only served to harm Hachenev more. If that were the case, the State surely would have offered the evidence. Instead, the State's current position is entirely disingenuous.

The importance of Ms. Glass' testimony and especially her credibility cannot be understated. Given the competing arguments regarding the performance of trial counsel, coupled with the fact that neither party can compel trial counsel to speak until an evidentiary hearing is ordered (RAP 16.12), this Court should do just that. RAP 16.11.

CLAIM NO. 11A: THE INSTRUCTION WHICH TOLD JURORS THEY COULD CONSIDER HACHENEY'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. 11B: THE "CONSCIOUSNESS OF GUILT" LIMITING INSTRUCTION

VIOLATED DUE PROCESS BECAUSE MR. HACHENEY'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. HACHENEY'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. HACHENEY'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. HACHENEY'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL FAILED TO REQUEST A CORRESPONDING "CONSCIOUSNESS OF INNOCENCE" INSTRUCTION.

A permissive inference instruction violates the Due Process Clause of the federal constitution when the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. Hacheny concedes that flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and intentional destruction of evidence can be admissible as evidence of consciousness of guilt, and thus of guilt itself *See 2 Wigmore on Evidence 3d Ed., s 276*. However, reason and common sense do not support the conclusion that Mr.

Hachenev's sexual partners after his wife's death shows that he was guilty of murder.

In response, to these multiple assignments of error based on arguments not advanced or considered on direct appeal, the State simply asserts that the relitigation doctrine should block consideration of all of these claims. The State reasons that because the claims of error all involve the "consciousness of guilt instruction" and because this Court rejected a single argument regarding that instruction on direct appeal that this Court cannot and should not review these claims of error. The State's view of the relitigation bar is incorrect, as Hachenev explained earlier in this reply.

In *State v. Jackson*, 112 Wash.2d 867, 774 P.2d 1211(1989), the Washington Supreme Court found the "permissive" inference of intent to commit a crime after unlawfully entering a building to be error and reversed. In addition, the Court appeared to treat the error as structural: "Here, the giving of the instruction could not be harmless error since it tended to prove an element of the commission of a crime." *Id.* at 876. The error here was much more severe since the instruction permitted jurors to find Hachenev's guilt from the mere fact of his sexual liaisons.

It is important to note that Hachenev does more than simply attack the instruction. In addition, he argues that trial counsel was ineffective because counsel failed to seek any language limiting the instruction or by failing to propose an equally reasonable "consciousness of innocence"

instruction. Hachenev's actions after his wife's tragic death is equally, if not more consistent with despair. However, trial counsel also failed to request an appropriate instruction informing jurors to draw the inference consistent with innocence, if they found two equally reasonable inferences from that conduct.

There was no reason for defense counsel not to attempt to draw some of the sting out of the instruction. Further, most, if not all, of the additional language that Hachenev now proposes was proper. The State does not argue otherwise.

Hachenev was prejudiced even if this instruction was proper to prove motive and/or intent. Motives can be attributed to innocent people. Guilty knowledge is the product of only one thing--guilt.

If there is any question about why trial counsel failed to take such an obvious and obviously helpful step, this Court should remand this claim for an evidentiary hearing. Otherwise, this Court should grant relief.

CLAIM No. 15: CUMULATIVE ERROR

The State fails to respond to this claim of error.

It is important to emphasize the synergetic nature of a number of the errors infecting Hachenev's trial. *See, e.g., United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir.1993) ("In other words, we will order a new trial on the basis of cumulative error only if multiple errors synergistically

achieve the critical mass necessary to cast a shadow upon the integrity of the verdict.”).

Hachenev was unable to cross-examine the scientists who handled and tested the central piece of scientific evidence against him. Instead, the evidence was admitted through a surrogate based on the misleading assertions that the toxicology section of the crime lab was well supervised and problem free. Hachenev was denied the right to an open and public trial when three preservation depositions were conducted in court where all members of the public, including Hachenev’s father were excluded. Those depositions were admitted at trial based on representations to the trial court (expressly relied on by this Court on appeal) which, at best, failed to include all relevant fact and, at worst, were misleading. A number of witnesses was permitted to offer improper and highly prejudicial testimony, which was emphasized in an improper instruction and where trial counsel failed to take reasonable action to minimize the harm.

If this Court finds that Hachenev was not sufficiently harmed by individual errors in order to justify reversal, then this Court should measure the cumulative harm and reverse.

#### D. CONCLUSION AND PRAYER FOR RELIEF

A fair trial based on reliable facts is the hallmark of justice. Unfortunately, Mr. Hachenev’s trial fell far short of that mark.

Based on the above, this Court should reverse Mr. Hachenev's murder conviction and remand for a new trial. In the alternative, this Court should remand any claims with material, disputed facts to the trial court for an evidentiary hearing.

DATED this 14<sup>th</sup> day of January, 2011.

Respectfully Submitted:

*/s/ Jeffrey E. Ellis*

Jeffrey Erwin Ellis #17139

*Attorney for Mr. Hachenev*

Law Office of Alsept & Ellis

621 SW Morrison St., Ste 1025

Portland, OR 97205

(206) 218-7076 (ph)

[JeffreyErwinEllis@gmail.com](mailto:JeffreyErwinEllis@gmail.com)



Jeff Ellis <jeffreyerwinellis@gmail.com>

## FW: request for records - webcam

2 messages

Daniel M Hachenev <dhachenev@embarqmail.com>

Thu, Dec 30, 2010 at 8:45 AM

To: JeffreyErwinEllis@gmail.com  
Cc: dhachenev@embarqmail.com

**From:** Sara McIntyre [mailto:[smcintyre@co.jefferson.wa.us](mailto:smcintyre@co.jefferson.wa.us)]  
**Sent:** Wednesday, December 29, 2010 10:17 AM  
**To:** [dhachenev@embarqmail.com](mailto:dhachenev@embarqmail.com)  
**Cc:** jeffbocc; Renee Talley; David Shambley  
**Subject:** RE: request for records - webcam

Mr. Hachenev,

The retention for this type of document is 6 years.

We no longer have the signed purchase order, packing slip or invoice for the old webcam.

The only "proof" that we have is an entry in our purchase order database. ( screen shot below )

PO#		PO Date	Ordered By	Vendor
3015 112th Ave NE			Sure 203	Bellevue
Street Address		Suite/PO Box		City
WA	98368	Ship Via	FBI Point	Terms
ST	ZIP			
Department to be Billed		Shipping	Tax	Other Charges
IS		\$25.00	7.9	\$0.00
Comments: New Web Camera		Discount		
		Flat Discount:		
Order Info Subform		Duplicate Record		
PO Number	Qty	Unit	Description	Unit \$
1473	1		Asst 200+ Web Camera	\$519.00
1473	1	TVR3314ADH	Auto Inc 3.3mm-8mm Lens for 200+	\$149.00
1473	1	EH4718-1	Outdoor Enclosure (Heating Unit Gas Spring)	\$269.00
1473	1	EM22	Mounting Arm	\$98.00
1473	0			\$0.00

Record: 14 | 1 | : 3 | 11 | 10 | of 4

Record: 14 | 1 | : 8 | 11 | 10 | of 4

Sara

Sara McIntyre

Jefferson County Info. Services

PO Box 1220

Port Townsend, WA 98368

360-385-9370

[smcintyre@co.jefferson.wa.us](mailto:smcintyre@co.jefferson.wa.us)

From: jeffbocc

Sent: Wednesday, December 29, 2010 9:36 AM

To: Sara McIntyre

**CERTIFICATE OF SERVICE**

I, Renee Alsept, certify that I served a copy of the attached *Reply Brief* and *Motion to Permit Overlength Brief* on opposing counsel by mailing a copy of both documents, postage pre-paid to:

Randall Avery Sutton  
Deputy Prosecuting Attorney  
Kitsap County Prosecutor's Office  
614 Division Street  
Port Orchard, WA 98366

Jan. 14, 2011//Portland, OR  
Date and Place

/s/ Renee Alsept  
Renee Alsept

COURT REPORTERS  
BY SERVICE II  
11 JAN 19 PM 2:59  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
CERTIFY