



**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... iv

FEDERAL CASES ..... iv

I. COUNTERSTATEMENT OF the ISSUES .....1

II. RESPONSE.....2

III. STATEMENT OF THE CASE.....3

IV. AUTHORITY FOR PETITIONER’S RESTRAINT.....8

V. ARGUMENT.....8

A. STANDARD OF REVIEW ON COLLATERAL  
ATTACK. ....8

B. *MELENDEZ-DIAZ* DOES NOT PROVIDE A  
BASIS FOR RECONSIDERATION OF THE  
CONFRONTATION CLAIM THAT WAS  
PREVIOUSLY DECIDED ON DIRECT APPEAL.....9

C. HACHENEY FAILS TO SHOW THAT  
INFORMATION REGARDING ISSUES WITH  
CRIME-LAB PERSONNEL WHOLLY  
UNRELATED TO HIS CASE AND WHICH  
WERE LARGELY UNKNOWN AT THE TIME  
OF TRIAL CONSTITUTES NEWLY  
DISCOVERED EVIDENCE, THAT THE STATE  
COMMITTED A *BRADY* VIOLATION WITH  
REGARD TO THE INFORMATION, OR THAT  
COUNSEL WAS INEFFECTIVE FOR NOT  
DISCOVERING AND USING IT.....20

1. Hacheny fails to meet the standards for a  
new trial on the grounds of newly discovered  
evidence. ....21

a. Hacheny fails to show that this  
“evidence” would probably change the  
result of the trial. ....28

b. The newspaper articles were discovered  
since the trial. ....29

c. The underlying facts contained in the

newspaper articles could have been discovered before trial by the exercise of due diligence. ....	29
d. The 2007-08 reports and rulings were discovered since the trial, and could not have been discovered before trial by the exercise of due diligence.....	30
e. The evidence is not material. ....	30
f. This “evidence” is at best merely cumulative or impeaching.....	31
2. Hacheney fails to establish any Brady violation. ....	31
3. Hacheney fails to show counsel was ineffective with regard to the allegedly new evidence. ....	35
D. HACHENEY FAILS TO SHOW THAT THE ENDS OF JUSTICE REQUIRE THIS COURT TO RECONSIDER ITS DIRECT APPEAL CONCLUSION THAT THE TRIAL COURT PROPERLY FOUND THAT THE DELASHMUTTS AND OLSON WERE UNAVAILABLE FOR TRIAL BEFORE ADMITTING THEIR DEPOSITION TESTIMONY. ....	36
E. HACHENEY ALSO FAILS TO SHOW THAT THE ENDS OF JUSTICE REQUIRE THIS COURT TO RECONSIDER ITS DIRECT APPEAL CONCLUSION THAT THERE WAS NO UNCONSTITUTIONAL CLOSURE OF THE COURTROOM WHEN HIS FATHER WAS EXCLUDED FROM THE DEPOSITION-TAKING, BUT THE VIDEO DEPOSITIONS THEMSELVES WERE PLAYED IN OPEN COURT DURING TRIAL.....	43
F. HACHENEY FAILS TO SHOW COUNSEL WAS INEFFECTIVE IN FAILING TO IMPEACH THE STATE’S TIMELINE WHERE SOME OF THE EVIDENCE ON WHICH HE RELIES DID NOT EVEN EXIST AT THE TIME OF TRIAL, WHERE	

	HIS OWN VIDEOTAPED TRIP TO THE HUNTING SITE WAS NOT FILMED AT THE RELEVANT TIME, AND WHERE EMPHASIZING THE TIMELINE WOULD HAVE HIGHLIGHTED HIS OWN LIES ABOUT THE TIMING TO THE INSURANCE COMPANY AT THE TIME OF THE MURDER.....	48
G.	COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO OBJECT AT TRIAL TO DR. SELOVE’S ALLEGED VOUCHING FOR THE CREDIBILITY OF SANDRA GLASS NOR FOR FAILING TO RAISE THE ISSUE ON DIRECT APPEAL WHERE SELOVE DID NOT VOUCH FOR HER CREDIBILITY, AND INDEED TESTIFIED THAT IF HER STATEMENTS WERE NOT TRUE, HIS OPINION WOULD CHANGE.....	55
H.	HACHENEY FAILS TO SHOW THAT COUNSEL WAS INEFFECTIVE FOR DECIDING NOT TO PURSUE THE EXAMINATION OF GLASS REGARDING HER “PLAN” TO KILL HER HUSBAND, WHERE INTRODUCTION OF THAT EVIDENCE COULD HAVE LED TO THE INTRODUCTION OF HACHENEY’S OFFER TO ADVISE HER HOW TO DO IT, AND HIS STATEMENT THAT HE FELT LIKE HE HAD “GOTTEN HIS LIFE BACK” AFTER DAWN’S DEATH.....	63
I.	HACHENEY FAILS TO SHOW THAT THE ENDS OF JUSTICE REQUIRE THIS COURT TO RECONSIDER ITS DIRECT APPEAL CONCLUSION THE THAT TRIAL COURT DID NOT ERR IN INCLUDING THE TERM “CONSCIOUSNESS OF GUILT” IN ITS ER 404(B) LIMITING INSTRUCTION.....	68
VI.	CONCLUSION.....	71

**TABLE OF AUTHORITIES**  
**FEDERAL CASES**

*Amato v. City of Richmond*, 157 F.R.D. 26 (E.D. Va. 1994).....15

*Brady v. Maryland*, 373 U.S. 83 (1963) .....2, 21

*Campbell v. Blodgett*, 982 F.2d 1321 (9th Cir. 1992).....7, 11

*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), ..10

*Hachenedy v. Washington*, 552 U.S. 1148 (2008).....7

*Hampton v. United States*, 191 F.3d 695 (6th Cir.1999) .....4

*Kimberlin v. Quinlan*, 145 F.R.D. 1 (D.D.C. 1992).....15

*Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965) .....17

*Lord v. Wood*, 184 F.3d 1083 .....21

*Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).....12, 17

*Mattox v. United States*, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895) .....12

*Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2527 .....12, 13, 16, 20

*In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948).....16

*Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)15

*Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005).....21

*States v. Bertoli*, 854 F. Supp. 975 (D.N.J. 1994).....14

*States v. Brooks*, 966 F.2d 1500 (D.C.Cir.1992) .....4

*In re The Reporters Committee For Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) .....15

*Times Newspapers, Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189 (C.D. Cal.

1974) .....	15
<i>United States v. Acevedo-Ramos</i> , 842 F.2d 5 (1st Cir. 1988).....	14
<i>United States v. Andrus</i> , 775 F.2d 825 (7th Cir.1985).....	4
<i>United States v. Bagley</i> , 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).....	2
<i>United States v. Driscoll</i> , 970 F.2d 1472 (6th Cir.1992) .....	3
<i>United States v. Henthorn</i> , 931 F.2d 29 (9th Cir.1991).....	3
<i>United States v. Quinn</i> , 123 F.3d 1415 (11th Cir.1997) .....	3
<i>United States v. Santiago</i> , 46 F.3d 885 (9th Cir.1995).....	4
<i>United States v. Turner</i> , 591 F.3d 928 (7th Cir. 2010).....	18
<i>United States v. Williams</i> , ___ F.R.D. ___, 2010 WL. 4071538 (D.D.C. Oct. 18, 2010) .....	18
<i>Vidal v. Williams</i> , 31 F.3d 67 (2d Cir. 1994), <i>cert. denied</i> , 513 U.S. 1102 (1995) .....	16
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	16, 17
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	5

#### STATE CASES

<i>Aguilar v. Com.</i> , 699 S.E.2d 215 (Va. 2010).....	19
<i>Aguirre</i> , 168 Wash. 2d at 16 .....	7
<i>In re Brown</i> , 143 Wash. 2d 431, 21 P.3d 687 (2001) .....	22
<i>In re Cook</i> , 114 Wn. 2d 802, 792 P.2d 506 (1990).....	8
<i>In re Dyer</i> , 143 Wn. 2d 384, 20 P.3d 907 (2001) .....	9
<i>In re Finkelstein</i> , 112 N.J. Super. 534, 271 A.2d 916 (1970).....	15
<i>Galiana v. McNeil</i> , 2010 WL. 3219316 (S.D. Fla. Jul. 5, 2010).....	19

<i>In re Gentry</i> , 137 Wash. 2d 378, 972 P.2d 1250 (1999).....	2
<i>In re Hews</i> , 99 Wn. 2d 80, 660 P.2d 263 (1983) .....	7, 9, 11
<i>In re Jeffries</i> , 114 Wn. 2d 485, 789 P.2d 731 (1990) .....	6, 11
<i>Larkin v. Yates</i> , 2009 WL 2049991 (C.D. Cal. Jul. 9, 2009).....	16, 19
<i>Lisa C.-R. v. William R.</i> , 166 Misc. 2d 817, 635 N.Y.S.2d 449 (N.Y. Sup. 1995).....	15
<i>In re Lord</i> , 123 Wash. 2d 296, 868 P.2d 835 (1994).....	7, 10, 11, 18
<i>Melnikoff v. Washington State Patrol</i> , 142 Wash. App. 1018, 2008 WL 40158 (Jan. 02, 2008) .....	23, 24
<i>Oliver v. State</i> , 2020 WL 3307391 (Tex. App. Aug. 24, 2010).....	19
<i>People v. Antonio</i> , 2010 WL 3417862 (Ill. App. Aug. 30, 2010).....	19
<i>People v. Brown</i> , 13 N.Y.3d 332, 918 N.E.2d 927 (N.Y. 2009) .....	19
<i>People v. Cortez</i> , 931 N.E.2d 751 (Ill. App. 2010).....	19
<i>People v. Geier</i> , 41 Cal. 4th 555, 161 P.3d 104 (2007).....	17
<i>People v. Williams</i> , ___ N.E.2d ___, 2010 WL 2780344 (Ill. July 15, 2010).....	19
<i>Rector v. State</i> , 285 Ga. 714, 681 S.E.2d 157 (2009) .....	19
<i>In re Rice</i> , 118 Wn. 2d 876, 828 P.2d 1086 (1992).....	5
<i>Saltarelli</i> , 98 Wn. 2d 358, 655 P.2d 697 (1982).....	20
<i>Scollo v. Good Samaritan Hospital</i> , 175 A.D.2d 278, 572 N.Y.S.2d 730 (N.Y. App. 1991) .....	15, 16
<i>State v. Aguirre</i> , 168 Wash. 2d 350, 229 P.3d 669 (2010) .....	7, 16
<i>State v. Bone-Club</i> , 128 Wn. 2d 254, 906 P.2d 325 (1995).....	16, 17
<i>State v. Demery</i> , 144 Wn. 2d 753, 30 P.3d 1278 (2001) .....	7

*State v. Eder*, 78 Wash. App. 352, 899 P.2d 810 (1995) .....1

*State v. Guloy*, 104 Wn. 2d 412, 705 P.2d 1182 (1985) .....11

*State v. Hachenedy*, 160 Wn. 2d 503, 158 P.3d 1152 (2007) .....3, 7

*State v. Hendrickson*, 129 Wn. 2d 61, 917 P.2d 563 (1996).....5

*State v. Hobson*, 61 Wn. App. 330, 810 P.2d 70 (1991).....12

*State v. Hough*, 690 S.E.2d 285 (N.C. App. 2010) .....18

*State v. Hutcheson*, 62 Wash. App. 282, 813 P.2d 1283 (1991).....1

*State v. Johnson*, 77 Wn. 2d 423, 462 P.2d 933 (1969).....16

*State v. Kirkman*, 159 Wn. 2d 918, 155 P.3d 125 (2007) .....6, 7, 8

*State v. Lord*, 117 Wash. 2d 829, 822 P.2d 177 (1991).....1

*State v. Lord*, 117 Wn. 2d 829, 822 P.2d 177 (1991) .....5

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

*State v. Lui*, 153 Wash. App. 304, 221 P.3d 948 (2009).....16, 17

*State v. McFarland*, 127 Wn. 2d 322, 899 P.2d 1251 (1995).....5

*State v. Ortiz*, 91 Haw. 181, 981 P.2d 1127 (1999).....16

*State v. Pierce*, 155 Wash. App. 701, 230 P.3d 237 (2010) .....1

*State v. Scott*, 48 Wn. App. 561, 739 P.2d 742 (1987) .....11

*State v. Williams*, 96 Wash. 2d 215, 634 P.2d 868 (1981) .....22, 23

*United Statesv. Alexander*, 2010 WL. 404072 (N.D. Ind. Jan. 25, 2010).....19

*United Statesv. Mirabal*, 2010 WL. 3834072 (D.N.M. Aug. 7, 2010) .....18

*In re Vandervlugt*, 120 Wash. 2d 427, 842 P.2d 950 (1992) .....7, 9, 11

*In re Westchester Rockland Newspapers v. Marbach*, 66 A.D.2d 335, 413 N.Y.S.2d

411 (NY App. 1979) .....	15
<i>Wittenbarger</i> , 124 Wash. 2d 467, 880 P.2d 517 (1994) .....	2
<i>Wood v. State</i> , 299 S.W.3d 200 (Tex. App. 2009).....	18

**DOCKETED CASES**

<i>State v. Hacheney</i> , No. 29965-8-II.....	6
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**STATE STATUTES**

RCW 5.45.020 .....	10
RCW 5.45.020violated.....	10
RCW 10.95.020(11).....	5

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**I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether *Melendez-Diaz* fails to provide a basis for reconsideration of the confrontation claim that was previously decided on direct appeal?

2. Whether Hacheny fails to show: that information regarding issues with crime-lab personnel wholly unrelated to his case and which were largely unknown at the time of trial constitutes newly discovered evidence, that the state committed a *Brady* violation with regard to the information, or that counsel was ineffective for not discovering and using it?

3. Whether Hacheny fails to show that the ends of justice require this court to reconsider its direct appeal conclusion that the trial court properly found that the DeLashmutts and Olson were unavailable for trial before admitting their deposition testimony?

4. Whether Hacheny also fails to show that the ends of justice require this Court to reconsider its direct appeal conclusion that there was no unconstitutional closure of the courtroom when his father was excluded from the deposition-taking, but the video depositions themselves were played in open court during trial?

5. Whether Hacheny fails to show counsel was ineffective in failing to impeach the State's timeline where some of the evidence on

which he relies did not even exist at the time of trial, where his own videotaped trip to the hunting site was not filmed at the relevant time, and where emphasizing the timeline would have highlighted his own lies about the timing to the insurance company at the time of the murder?

6. Whether Hachenev fails to show that counsel were ineffective for failing to object at trial to Dr. Selove's alleged vouching for the credibility of Sandra Glass or for failing to raise the issue on direct appeal where Selove did not vouch for her credibility, and indeed testified that if her statements were not true, his opinion would change?

7. Whether Hachenev fails to show that counsel was ineffective for deciding not to pursue the examination of Glass regarding her "plan" to kill her husband, where introduction of that evidence could have led to the introduction of Hachenev's offer to advise her how to do it, and his statement that he felt like he had "gotten his life back" after Dawn's death?

8. Whether Hachenev fails to show that the ends of justice require this court to reconsider its direct appeal conclusion that the trial court did not err in including the term "consciousness of guilt" in its ER 404(b) limiting instruction?

## **II. RESPONSE**

The State respectfully moves this court for an order dismissing the

petition with prejudice because his claims are without merit.

### III. STATEMENT OF THE CASE

Nicholas Hacheny was charged with first-degree murder with aggravating circumstances for killing his wife, Dawn Hacheny. *State v. Hacheny*, 160 Wn.2d 503, ¶ 1, 158 P.3d 1152 (2007). The State's theory at trial was that after Hacheny suffocated Dawn, he left on a hunting trip, but before leaving, he set fire to the family home to conceal the evidence. *Hacheny*, 160 Wn.2d at ¶ 1, 4, 7-8, 17. The jury found Hacheny guilty of first-degree premeditated murder, and also found the aggravating circumstance that the murder was committed in the course of an arson. *Hacheny*, 160 Wn.2d at ¶ 12; CP 9-10. The trial court accordingly sentenced Hacheny to life without the possibility of parole. *Hacheny*, 160 Wn.2d at ¶ 1.

The facts are set out in greater detail in this Court's opinion in Hacheny's first direct appeal:

On December 26, 1997, Nicholas and Dawn Hacheny's house burned. A firefighter discovered Dawn, deceased, on a bed in the debris. Several propane canisters and an electric space heater were found near the bed. For the next couple of years, the fire marshal, medical examiner, and other investigators thought both the fire and Dawn's death were accidental. In 2001, however, they came to suspect foul play.

On December 29, 1997, Dr. Emmanuel Lacsina performed an autopsy. He found that although Dawn did not have soot in her trachea or lungs, she did have

pulmonary edema, which can result from congestive heart failure, drowning, a drug overdose, head injury, or suffocation. He initially thought that she had been asphyxiated when, during a flash fire, her larynx had spasmed reflexively.

During the autopsy, Dr. Lacsina collected blood and lung samples that were later tested by Egle Weiss, an employee of the state toxicology laboratory. Weiss performed the tests about ten days after the fire, at a time when she and the investigators were thinking that the fire had been accidental. She found little carbon monoxide and no propane in the lungs, no carbon monoxide in the blood, and an elevated level of Benadryl. Weiss died unexpectedly before trial.

Like the others, John Rappleye, a fire investigator for the Bremerton Fire Department, 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.

On January 26, 1998, Hachenev was interviewed by Rappleye and Detective Daniel Trudeau. Hachenev 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.

During the summer and fall of 1997, Hachenev 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 Hachenev had been alone in the basement of their church, Hachenev had admitted giving Dawn some Benadryl and lying awake until God told him, "(G)o take something that you want." He held a plastic bag over Dawn's head until she was no longer breathing, set the fire, and left.

In September 2001, the State charged Hachenev with first degree premeditated murder. In February 2002, the State amended its charge to allege that Hachenev,

on or about the 26th day of December, 1997, with a

premeditated intent to cause the death of another person, did cause the death of such person: to-wit: DAWN M. HACHENEY, AND FURTHERMORE, the defendant committed the murder in the course of the crime and/or attempted crime of arson in the first degree; contrary to [RCW] 9A.32.030(1)(a) and RCW 10.95.020(11)(e).

In February and March 2002, the trial court held pretrial hearings to determine whether certain evidence was admissible under ER 404(b). The State offered Hacheneys alleged statements, 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, Hacheneys 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. Hacheneys objected, but the trial court admitted. Later, at trial, 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.

On June 28, 2002, over Hacheneys 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 for three years so Michael could obtain an advanced degree. The third, David Olson, was moving for at least six months to a rural area in Bolivia. Hacheneys father asked to attend the depositions, but the trial court denied his request.

On October 1, 2002, the court held a hearing on the admissibility of testimony from Drs. Logan, Lacsina, and Selove. At the end of the hearing, the trial court indicated it would admit the offered testimony.

On October 16, 2002, a jury trial began. ...

Drs. Lacsina, Selove, and Logan all testified. Based in part on the lab report in which Weiss had described the results of her tests, Lacsina and Selove opined that Dawn had died from suffocation prior to the fire. 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 Hachenev's objections, the trial court admitted Exhibit 323, the report in which Weiss described her test results.

*State v. Hachenev*, No. 29965-8-II, Opinion at 1-5 (Aug. 3, 2005) (Exh. A).

In his first direct appeal, Hachenev raised a plethora of issues, including:

That the evidence was insufficient to support the jury's finding of the aggravating circumstance that he committed the murder in the course of first degree arson, and that the trial court erred in giving the instruction on this factor;

[W]hether 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;

[T]hat the trial court violated his constitutional right to a public trial by not allowing his father to attend the depositions;

[T]hat the trial court erred by including "consciousness of guilt" in the instruction by which it limited the use of the ER 404(b) evidence regarding Hachenev's sexual relationships with a number of women shortly after his wife's murder; and

[T]hat the trial court erred by allowing Drs. Lacsina, Logan, and Selove to rely on Exhibit 323, the written lab report in which Weiss described the results of her tests because it was inadmissible hearsay, violated his right to

confrontation, and was not supported by an adequate chain of custody.

Exh A at 17.<sup>1</sup>

This Court found that none of these issues had merit and affirmed both Hachenev's conviction and his sentence of life without possibility of parole.

On discretionary review, the Supreme Court found that the course of events did not support the aggravating circumstance because the arson was committed after the murder was complete. *Hachenev*, 160 Wn.2d at ¶ 27, 30; CP 20, 21-22. The Court affirmed Hachenev's conviction, but struck the aggravating circumstance and remanded the case for resentencing. *Hachenev*, 160 Wn.2d at ¶ 39; CP 27.

Hachenev sought a writ of certiorari in the United States Supreme Court, on the grounds that the closure of the depositions amounted to a closure of the trial. That Court declined to review the case. *Hachenev v. Washington*, 552 U.S. 1148 (2008).

On remand, Hachenev was given a standard-range sentence and he again appealed. This Court affirmed.

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<sup>1</sup> Hachenev also argued: that the trial court impermissibly commented on the evidence when, in an instruction pertaining to the aggravating factor, it referred to "the killing"; that the trial court erred by using "assault" to describe the actus reus of first degree murder; and that the trial court erred in responding to the jury's questions during deliberations; that the trial court erred by admitting evidence of the sexual relationships in which he engaged shortly after Dawn's death. He also raised a host of other issues in his statement of additional grounds.

The instant proceeding was filed during the pendency of the second appeal, and was stayed pending its outcome. As such the petition, and the amendments thereto, which were filed well within one year of the issuance of the mandate, are timely.

#### **IV. AUTHORITY FOR PETITIONER'S RESTRAINT**

The authority for the restraint of Nicholas Hacheney lies within the amended judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on June 20, 2008, in cause number 01-1-01311-2, upon Hacheney's conviction of first-degree murder.

#### **V. ARGUMENT**

##### **A. STANDARD OF REVIEW ON COLLATERAL ATTACK.**

A collateral attack should be entertained only if the petitioner makes a prima facie showing of prejudicial constitutional error. Only then will a petitioner "have established that the error is of the type that should be subject to full collateral review." *In re Cook*, 114 Wn.2d 802, 811, 792 P.2d 506 (1990). Reviewing courts have three options in evaluating

Personal Restraint Petitions:

- 1) If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;
- 2) If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand

the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;

3) If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the Personal Restraint Petition without remanding the cause for further hearing.

*In re Hews*, 99 Wn.2d 80, 88-89, 660 P.2d 263 (1983). To support a request for a reference hearing, the petitioner must state with particularity facts which, if proven, would entitle hers to relief. *In re Dyer*, 143 Wn.2d 384, 397, 20 P.3d 907 (2001). If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that she has competent, admissible evidence to establish the facts that entitle her to relief. *Dyer*, 143 Wn.2d at 397. If the petitioner's evidence is based on knowledge in the possession of others, she may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. *Dyer*, 143 Wn.2d at 397. Hacheney fails to show either a prima facie entitlement for relief, or any basis for ordering a reference hearing.

**B. MELENDEZ-DIAZ DOES NOT PROVIDE A BASIS FOR RECONSIDERATION OF THE CONFRONTATION CLAIM THAT WAS PREVIOUSLY DECIDED ON DIRECT APPEAL.**

Hacheney argues that his Sixth Amendment right to confrontation was violated by the admission of the crime lab's analysis report and the admission of Dr. Logan's opinions based on the underlying data. This

issue was decided adversely to Hachenev on direct appeal.

In this case, the trial court had discretion to infer from Dr. Logan's testimony that he had personal knowledge of the way in which the lab generally conducted its tests, and that Weiss, an employee of the state lab, conducted her tests in accordance with those procedures. The trial court had discretion to infer from evidence showing that Weiss conducted her tests while the fire was thought to be accidental, and more than two years before any criminal suspicion arose, that Weiss was not acting in anticipation of litigation. It is undisputed that Weiss' report was a business record, that she was working under a business duty to her employer when she prepared it, and that she was describing an act, condition or event at or near the time of its occurrence. The trial court had discretion to conclude that the sources of information, method and time of preparation were trustworthy. Accordingly, we hold that all the requirements of RCW 5.45.020 had been met, and that Exhibit 323<sup>[2]</sup> was properly admitted.

B.

The next question is whether the admission of Weiss' report under RCW 5.45.020 violated Hachenev's Sixth Amendment right to confront the witnesses against him. In general, the Sixth Amendment insures that every accused shall enjoy the right to confront the witnesses against him. In *Crawford v. Washington*, [541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004),] the United States Supreme Court held that the Sixth Amendment's confrontation clause applies only when a witness' statement is "testimonial." The Court declined "to spell out a comprehensive definition of 'testimonial,'" but it said that the term at least applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." The Court also said that the term does not apply to most of the common law's hearsay exceptions – "for example, business records or statements in furtherance of a conspiracy."

Assuming without holding that an employee of

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<sup>2</sup> A copy is attached as Exh. B.

Washington's toxicology laboratory can sometimes make a "testimonial" statement within the meaning of *Crawford*, Weiss did not do so here. She made her statements while she, the investigating officers, and the medical examiner all thought the fire was accidental. She made her statements more than two years before any criminal suspicion arose and before any criminal investigation was started. As she was merely performing her duty to her employer in the course of the lab's regular routine, her report was not "testimonial," and its admission did not violate Hacheny's right to confront witnesses.

*Hacheny* Op. at 21-22 (citations omitted).

This Court may not reconsider a claim that was rejected on its merits on direct appeal unless the petitioner shows that reconsideration will serve the ends of justice. *In re Jeffries*, 114 Wn.2d 485, 487, 789 P.2d 731 (1990). "Simply 'revising' a previously rejected legal argument ... neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." *Id.*, 114 Wash.2d at 488. Thus, a "petitioner may not create a different ground [for relief] merely by alleging different facts, asserting different legal theories, or couching his argument in different language." *In re Lord*, 123 Wash.2d 296, 329, 868 P.2d 835 (1994) (quoting *Campbell v. Blodgett*, 982 F.2d 1321, 1326 (9th Cir. 1992), *reh'g denied, amended and superseded*, 997 F.2d 512 (9th Cir. 1993)). Indeed, it appears the only context that has been found to satisfy this standard is where there has been a "significant intervening change in the law." *See In re Vandervlugt*, 120 Wash.2d 427, 433, 842 P.2d 950 (1992).

Hachenev essentially argues that *Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2527, L. Ed. 2d (2009), represents such a change. He asserts baldly that in that case, the Supreme Court “clarified that forensic laboratory reports are testimonial evidence.” Petition at 13. Hachenev grossly overstates the holding of that case.

First, the report here was in no way comparable to the “certificates” at issue in *Melendez-Diaz*. Those documents admitted without testimony at all and were quite conclusory:

The affidavits submitted by the analysts contained only the bare-bones statement that “[t]he substance was found to contain: Cocaine.” App. to Pet. for Cert. 24a, 26a, 28a. At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use “methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs.”

*Melendez-Diaz*, 129 S. Ct. at 2537; *see also id.* at 2539 (the certificates’ “sole purpose” was “providing evidence against a defendant”); *id.* at 2540 (the certificates were “prepared specifically for use at petitioner’s trial”).

Here, the report was admitted into evidence only after Dr. Logan had testified at length to his *own* opinions based on the testing that had been done. He initially noted that the laboratory annually performed 4000 death examinations, of which only 200 were related to suspected

homicides. RP 1527. There was no criminal case pending at the time the testing was done in this case. RP 1564.

Logan further testified that before the year 2000,<sup>3</sup> he personally reviewed the work of the scientists working under him. RP 1528. He testified extensively regarding the lab's processes and chain of custody protocol. RP 1532-35. In reaching his opinions, he relied on reports, notes of results and the machine printouts. RP 1545. He was present at the defense interview of Weiss, conducted the Summer before trial, and also relied on her statements there. RP 1546. Based on all of this data and information, he concluded that the testing in this case was conducted in compliance with the protocols in place at the time. RP 1547.

He further testified that the chromatographs were calibrated on the dates the testing was performed, and that the machine was properly calibrated. RP 1549, 1553. Weiss's reports were consistent with the machine printouts. RP 1549.<sup>4</sup>

Logan explained that he had reviewed the case file with all Weiss's notes and the printouts and the report issued by the lab. RP 1559. The

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<sup>3</sup> The testing in this case was done in 1998.

<sup>4</sup> See *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (“[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. ... Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.”).

latter report, was also signed by Logan at the time it was issued. Exh. B. Logan himself reviewed the calibration record of the machines before signing the report. RP 1563. It was properly calibrated. RP 1564. This information was the type that he reasonably relied upon in his practice in formulating opinions. RP 1560.

Logan testified regarding the procedures and limitations involved in doing a “head space” test for propane from lung tissue, including the fact that while placing the specimen in a plastic bag or container was not ideal, it was common. RP 1567-72. Only after discussing all this information did he offer his own opinion: that the gas chromatograph did not disclose the presence of propane in the lung tissue. RP 1587.

He further testified that that result was corroborated by the blood alcohol test, which would also reveal the presence of propane in the blood. RP 1588. Notably, this test was completely automated. There was nothing that was manipulated by the analyst. RP 1591.

He next addressed the testing for prescription-type drugs, which was conducted using a different gas chromatograph than the one used for the lung tissue. RP 1592. In his opinion the test results showed that Dawn had caffeine and diphenhydramine (Benadryl) in her blood. RP 1593. The latter was in the amount of 1.04 milligrams per liter. RP 1594. His testimony went well beyond the mere amounts, however. He explained

that this amount was in excess of the therapeutic level by a factor of 10. RP 1594. He went on to discuss the effects of post-mortem distribution on the results, and the effects that Benadryl would have on a person. RP 1594-98.

He also offered the opinion that cyanide was not detected in her system, and likewise that the level of CO in Dawn's blood, if any, was below the level that the instruments were capable of detecting. RP 1599-03. In light of the foregoing data and conclusions he offered the opinion that Dawn was not breathing at the time of the fire. RP 1602-03. At this point trial exhibit 323 was admitted. A review of this exhibit shows that it is very limited. Indeed, without Logan's expert testimony it would have been utterly meaningless:

BLOOD ETHANOL

neg

BLOOD TEST RESULTS

cyanide – neg		mg/l
carbon monoxide	<5	% Sat
propane* - neg		mg/l
diphenhydramine	1.04	mg/l
drugs of abuse - neg		

Exh. B.

Further, it is also well settled that in the case of a plurality opinion of the United States Supreme Court, only the narrowest view endorsed by a majority of justices can be considered to be the holding of the case. In *Melendez-Diaz*, Justice Scalia's opinion was only endorsed by three other

justices. The holding depended on the concurrence of Justice Thomas, who wrote:

I write separately to note that I continue to adhere to my position that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” ... I join the Court's opinion in this case because the documents at issue in this case “are quite plainly affidavits,” ante, at 2532. As such, they “fall within the core class of testimonial statements” governed by the Confrontation Clause. *Ibid.* (internal quotation marks omitted).

*Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring). The *holding* of the case is thus that only formalized testimonial material such as affidavits, depositions, confessions, etc., can be deemed testimonial. Here the report is not an affidavit, is not signed under penalty of perjury, and indeed, no litigation was anticipated at the time it was issued. It clearly does not fall within the narrow holding of *Melendez-Diaz*. See *Larkin v. Yates*, 2009 WL 2049991, \*1-2 (C.D. Cal. Jul. 9, 2009).

Moreover, even if *Melendez-Diaz* were read more broadly, Hachenev would still not show a violation of his confrontation rights, as Division I of this Court recently held in *State v. Lui*, 153 Wash.App. 304, 221 P.3d 948, 953-59 (2009), *review granted*, 168 Wash.2d 1018 (2010). The Court distinguished *Melendez-Diaz* because in that case, no live witness was made available for cross-examination by the defense, whereas in *Lui*, witnesses were made available to provide expert opinions and be

subjected to cross-examination. *Lui*, 221 P.3d at 955-56. The court held that the experts could refer to the factual bases for their opinions, relying on the report and other available evidence, without running afoul of the Confrontation Clause because experts may rely on inadmissible materials to form their opinions. *Id.* at 958-59. Division I's conclusion is in accord with what appears to be the overwhelming majority of courts around the country that have considered the issue.

For example in *People v. Geier*, 41 Cal. 4th 555, 593-596, 161 P.3d 104 (2007), *cert. denied*, 129 S. Ct. 2856 (2009), the defendant was convicted of rape and murder based in part on DNA evidence. The laboratory analyst from Cellmark who performed the DNA testing did not testify at trial. A laboratory director who cosigned the report testified instead. *Id.*, 41 Cal. 4th at 593-594. The laboratory director stated that, in her expert opinion, the DNA of the perpetrator matched the defendant's DNA, based on the test results and the director's view of the case. *Id.*, 41 Cal. 4th at 593.) Thus, in *Geier*, an in-court witness, subject to cross-examination, was permitted to rely on laboratory notes and reports to support an expert opinion her training and experience qualified her to give. Although, *Geier* was decided before *Melendez-Diaz*,<sup>5</sup> numerous courts have followed its reasoning since *Melendez-Diaz* was decided.

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<sup>5</sup> Notably, however, certiorari was denied in *Geier* four days after *Melendez-Diaz* was issued.

*See, e.g., United States v. Winston*, 372 Fed.Appx. 17, 19-20 (11<sup>th</sup> Cir. 2010) (“Although *Melendez-Diaz* discusses when a forensic opinion may be admitted into evidence, neither it nor any opinion of this Court addresses whether an expert witness's testimony that is based on a forensic opinion prepared by a non-testifying expert, in addition to other evidence, violates a defendant's right to confrontation.” Court concludes that “*Melendez-Diaz* did not do away with Federal Rule of Evidence 703.”); *United States v. Williams*, \_\_\_ F.R.D. \_\_\_, 2010 WL 4071538, \*4 (D.D.C. Oct. 18, 2010) (same); *United States v. Mirabal*, 2010 WL 3834072, 4 -7 (D.N.M. Aug. 7, 2010) (introduction of testimony by supervisor who was also a forensic chemist regarding the content and quantity of the material that officers seized from the defendants did not violate *Melendez-Diaz*); *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010) (where scientist who performed testing was on maternity leave, testimony regarding results by supervisor not violate *Melendez-Diaz* because the witness testified as an expert, not as a fact witness); *Wood v. State*, 299 S.W.3d 200, 213 (Tex. App. 2009) (“[T]he Confrontation Clause is not violated merely because an expert bases an opinion on inadmissible testimonial hearsay. The testifying expert's opinion is not hearsay, and the testifying expert is available for cross-examination regarding his opinion.”); *State v. Hough*, 690 S.E.2d 285, 290-91 (N.C. App. 2010) (an expert's opinion, based in part on another expert's tests, was admissible, because “her expert opinion

was based on an independent review and confirmation of test results”); *United States v. Alexander*, 2010 WL 404072, \*2-4 (N.D. Ind. Jan. 25, 2010) (*Melendez-Diaz* not prevent experts from relying on data produced by others); *People v. Brown*, 13 N.Y.3d 332, 338, 918 N.E.2d 927 (N.Y. 2009) (report was not “testimonial” because it consisted of merely machine-generated graphs, charts and numerical data with no conclusions, interpretations or comparisons); *Larkin v. Yates*, 2009 WL 2049991, \*1-2 (C.D. Cal. Jul. 9, 2009) (expert testimony about test results performed by someone else was not akin to the affidavit-like certificates of analysis in *Melendez-Diaz*); *People v. Cortez*, 931 N.E.2d 751, 755-756 (Ill. App. 2010) (autopsy report to be admitted without the State producing its author for cross-examination); *Galiana v. McNeil*, 2010 WL 3219316, \*16-22 (S.D. Fla. Jul. 5, 2010) (results of his blood alcohol tests, admitted not through the testimony of the analysts who conducted the blood tests but through their supervisor); *Rector v. State*, 285 Ga. 714, 715-716, 681 S.E.2d 157, 160 (2009) (State's toxicologist testified about a toxicology report relating to the deceased victim that had been prepared by another doctor); *Aguilar v. Com.*, 699 S.E.2d 215, 221 -222 (Va. 2010); *People v. Antonio*, 2010 WL 3417862, \*7-9 (Ill. App. Aug. 30, 2010) ; *Oliver v. State*, 2020 WL 3307391, \*2-4 (Tex. App. Aug. 24, 2010); *State v. Mitchell*, 4 A.3d 478, 488-490 (Me. 2010); *People v. Williams*, \_\_\_ N.E.2d. \_\_\_, 2010 WL 2780344, \*8-10 (Ill. July 15, 2010).

Regardless of the admissibility of the report, *i.e.*, the actual document, it is thus quite clear that Dr. Logan was entitled to offer his opinion based on Weiss's testing. It is even more clear that Drs. Lacsina and Selove were also entitled to rely on her test results in forming their autopsy opinions. Moreover, as the *Melendez-Diaz* itself notes, it was not commenting on the applicability of harmless error review in this context. *See Melendez-Diaz*, 129 S. Ct. at 2542 n.14. ("We of course express no view as to whether the error was harmless. The Massachusetts Court of Appeals did not reach that question and we decline to address it in the first instance. *Cf. Coy v. Iowa*, 487 U.S. 1012, 1021-1022, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)"). Here, even if Exhibit 323 should not have been admitted, it is clear the experts were entitled to rely on the underlying data. Hachenev thus cannot show prejudice.

**C. HACHENEV FAILS TO SHOW THAT INFORMATION REGARDING ISSUES WITH CRIME-LAB PERSONNEL WHOLLY UNRELATED TO HIS CASE AND WHICH WERE LARGELY UNKNOWN AT THE TIME OF TRIAL CONSTITUTES NEWLY DISCOVERED EVIDENCE, THAT THE STATE COMMITTED A *BRADY* VIOLATION WITH REGARD TO THE INFORMATION, OR THAT COUNSEL WAS INEFFECTIVE FOR NOT DISCOVERING AND USING IT.**

Hachenev asserts that a "wealth of information" has come to light since trial. Petition at 29. His supporting evidence, however, fails to back

up this claim. Instead, it really consists of two items, neither of which has any direct relationship to his case: a series of 2004 articles from the Seattle *Post-Intelligencer*, and audit reports issued in 2007 and 2008 regarding the crime lab.

Further, Hacheney utterly fails to address the relevant legal standards. His entire argument is contained in one conclusory paragraph:

Petitioner has framed his claim in three alternative ways: newly discovered evidence, a *Brady* violation, and Sixth Amendment ineffectiveness for failing to investigate. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Silva v. Brown*, 416 F.3d 980, 985-86 (9<sup>th</sup> Cir. 2005); *Lord v. Wood*, 184 F.3d 1083, 1093 99<sup>th</sup> Cir. 1999). In the end no matter how the claim is framed, one thing is clear: Hacheney'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.

Petition at 36-37. An examination of the facts presented in light of the relevant legal standards governing each of Hacheney's three alternatives shows that he fails to meet his burden of showing that he is entitled to relief.

***1. Hacheney fails to meet the standards for a new trial on the grounds of newly discovered evidence.***

To obtain a new trial based on newly discovered evidence, a defendant must demonstrate “that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of

any one of the five factors is grounds for the denial of a new' proceeding.” *In re Brown*, 143 Wash.2d 431, 453, 21 P.3d 687 (2001)(quoting *State v. Williams*, 96 Wash.2d 215, 222-23, 634 P.2d 868 (1981)) (emphasis the Court’s). At best Hachenev meets the second and third prongs as to *some* of the evidence. These claims should be rejected.

The first set of materials consists solely of newspaper articles published in the Seattle *Post-Intelligencer* four years after the trial. See Petition, Appendix B. They fail to cast any shadow on Egel Weiss or on the overall performance of the lab.

The first article, dated July 23, 2004, discusses a handful of incidents occurring over a period of 30 years, and specifically notes that lab officials stated that they “were isolated incidents that don’t reflect the high-quality work done by their 120 employees on thousands of cases a year.” *Id.*, July 23, 2004 article, at 1.

The first incident discussed involved a DNA analyst, John Brown. *Id.*, at 2-5. According to the newspaper who made an error during his analysis that was caught during peer review of his results. He re-ran the test but failed to mention the first test in his report. He then lied when confronted by defense counsel about the first test. At trial, he admitted to lying. He was placed on administrative leave, and ultimately resigned in 2000. Logan told the paper that Brown was not investigated earlier

because the lab did not learn of Brown's dishonesty until his trial testimony, noting that before this incident, Brown had an excellent track record. The lab, however, took action as soon as it learned of the issue. *Id.*, at 5.

The article then discussed the case of Donald Phillips. He was initially fired by the lab in 1985 for his conduct in interviewing a witness, but was reinstated on appeal. *Id.*, at 6. He subsequently botched a crime-scene investigation in the Brian Keith Lord murder case by spraying too much blood-detection chemical on the suspected murder weapon, a claw hammer. Afterward, Phillips attempted to cover up the error, and ultimately was fired for the misconduct. *Id.*, at 7.

Next it addressed the case of Michael Hoover, a drug analyst who was fired for stealing and using heroin. This highly publicized incident resulted in the dismissal of hundreds of cases after his conviction in 2001. *Id.*, at 8-9.

The article also discussed the case of Arnold Melnikoff, who was investigated after it was determined that his test results were inaccurate in a rape case. As a result of a 2003 audit of his work, he was fired. *Id.*, at 10.<sup>6</sup>

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<sup>6</sup> Melnikoff's termination was not final until late 2008. See *Melnikoff v. Washington State Patrol*, 142 Wash.App. 1018, 2008 WL 40158 (Jan. 02, 2008), review denied, 164 Wash.2d 1014 (Sept. 4, 2008).

The article then goes on to detail a number of incidents in which scientists were disciplined for matters unrelated to their scientific proficiency, such as using porn at work and sexual harassment. *Id.*, at 10-11.

The second article, dated March 24, 2004, merely provides more details regarding Melnikoff's termination. Petition, Appendix B, March 24, 2004, article.

The third article is dated July 22, 2004. Petition, Appendix B, July 22, 2004, article. This is a piece describing a nationwide debate about the use of "blind proficiency testing" in which lab workers are tested by disguising a proficiency test as part of their case work. Logan is quoted as observing that such testing was prohibitively expensive. No factual material regarding anything done by the lab is presented in this article. The fourth article, dated July 23, 2004, is similarly long on general opinions by alleged experts and short on any facts.

The second group of documents concerns an investigation into the crime lab's operations that was conducted in 2007, some four or more years after the trial in this case, and nearly a decade after the testing was done by Egle Weiss.

The first document appears to be a press release put out by the Washington Association of Criminal Defense Attorneys in October 2007,

and does not appear to contain any admissible evidence. Petition, Appendix B.

The next is a King County District Court ruling, dated January 30, 2008, pertaining to Anne Marie Gordon, who was manager of the DUI Breath Testing Program. The ruling only addresses issues in that program. Nothing in the report is based on any evidence regarding the lab workers like Egle Weiss who were involved in other aspects of the lab's responsibilities.

The next document Hachenev presents is a report by the Forensic Investigations Council, which was created by the Legislature in 1995 to oversee the operation of the crime lab. This report, dated April 17, 2008, reviewed the recent allegations concerning the lab.

It concluded that in the case of errors by Evan Thompson, a firearms examiner, that the lab had acted in a timely and appropriate manner:

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.

Petition, Appendix B (Forensic Investigations Council, *Report on the Washington State Toxicology Laboratory and the Washington State Crime Laboratory* (Apr. 17, 2008), at 2-3).

The report goes on to address the issues surrounding the conduct of Anne Marie Gordon. It discussed an audit conducted by the Risk Management Section of the Washington State Patrol. It found that the “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 [such as Weiss’s unit]. In addition breath testing functions had not been evaluated by external auditors and were not a part of the accreditation by ABFT.” *Id.*, at 6. It further noted, however, that the recommendations from that audit were being implemented. *Id.* A subsequent audit found that although some errors in calculations were found in the breath testing, Gordon’s reviews “were professionally done, and [the detected errors] appear[ed] to reflect isolated oversights rather than unprofessional conduct.” *Id.*

The Council concluded that Logan had “taken very thorough steps to examine and solve the problems in the Crime Laboratory.” *Id.*, at 8. It further noted that the lab’s procedures ensured that issues were detected and resolved:

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 a way that was intended when the checks and balances were put into place in the crime laboratory.

*Id.* The Council's ultimate conclusion illustrates the lack of merit to

Hachenev's present claim:

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 of 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.

*Id.*, at 11. The Council took specific note of criticisms of Logan such as those contained in the ruling of the King County District Court, but did not accept them:

[E]veryone who supervises a large number of employees, which does not include the aforementioned judges, realizes that sometimes employees do not follow 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.

*Id.*, at 11 n.3.<sup>7</sup>

Turning to the relevant standards for newly-discovered evidence, it is plain that these materials provide no basis for the granting of a new trial.

**a. Hachenev fails to show that this “evidence” would probably change the result of the trial.**

As will be discussed, *infra*, none of these newspaper articles are admissible evidence. Nor has he shown that the remaining “evidence” would be relevant or admissible. Moreover, he fails to show how this evidence even impeaches Logan’s testimony at trial. Indeed, the evidence primarily shows that in the relatively few instances that lab personnel have not properly performed their duties, the lab has taken decisive steps to

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<sup>7</sup> Hachenev includes a quote regarding the lab attributed to the “Washington Foundation for Criminal Justice.” Petition at 31. A Google search for this organization reveals that its only function appears to be the presentation of an annual seminar on defending clients against DUI charges, and that the “foundation” shares a mailing address with the DUI-defense law firm Fox & Bowman Duarte. It thus cannot seriously be considered an impartial observer. See <http://www.annualduiseminar.com> (accessed Oct. 27, 2010).

correct the deficiencies. He thus cannot show that their existence could have changed the outcome of trial.

**b. The newspaper articles were discovered since the trial.**

The State concedes that the newspaper articles themselves had to have been discovered since trial, given that they were published four years afterwards. The State has no way of knowing whether the information contained in them was known to Hacheney or his counsel before trial.

**c. The underlying facts contained in the newspaper articles could have been discovered before trial by the exercise of due diligence.**

While the articles themselves did not exist at the time of trial, the underlying information, at least as to Phillips, Brown, Hoover and Melnikoff, was a matter of public record and of some notoriety prior to trial. Phillips's misconduct was extensively discussed in the Supreme Court's 1991 opinion in *Lord*, which was a high-profile Kitsap County murder case. *See State v. Lord*, 117 Wash.2d 829, 864-70, 822 P.2d 177 (1991). Brown's actions were discussed in a report published by the Office of Public Defense in December 2001. *See* Washington State Office of Public Defense, *Postconviction DNA Testing: Report on the Act Relating to DNA Testing of Evidence* (Dec. 31, 2001), at 9.<sup>8</sup> Hoover's misconduct, firing and arrest not surprisingly also made the news. *See*,

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<sup>8</sup> The report is available at <http://www.opd.wa.gov/Reports/Other%20Reports/12-31-01%20DNA%20Report.pdf> (accessed Oct. 22, 2010).

e.g., Associated Press, *Lab chemist pleads not guilty in heroin case*, *Seattle Post-Intelligencer* (Feb. 9, 2001).<sup>9</sup> Even the issues surrounding Melnikoff's work were the subject of at least one local newspaper report published a week before Hacheney's trial began. See Lise Olsen, *Reopened rape case dogs crime lab worker*, *Seattle Post-Intelligencer* (Oct. 11, 2002).<sup>10</sup> Plainly all the information that was existent and even arguably relevant to the issues in Hacheney's trial could have been easily discovered before trial.

**d. The 2007-08 reports and rulings were discovered since the trial, and could not have been discovered before trial by the exercise of due diligence.**

As these reports and the court ruling were all generated after the trial of this case it is obvious that they could not have been discovered beforehand.

**e. The evidence is not material.**

To be "material," allegedly newly-discovered evidence must be admissible. *State v. Pierce*, 155 Wash.App. 701, ¶ 27, 230 P.3d 237 (2010); *State v. Eder*, 78 Wash.App. 352, 357, 899 P.2d 810 (1995), *review denied*, 129 Wash.2d 1013 (1996). Hacheney utterly fails to explain how the "evidence" he presents, which amounts to hearsay-within-

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<sup>9</sup> The article is available at <http://www.seattlepi.com/local/herr09.shtml> (accessed Oct. 22, 2010).

<sup>10</sup> The article is available at [http://www.seattlepi.com/local/90771\\_foren11.shtml](http://www.seattlepi.com/local/90771_foren11.shtml) (accessed Oct. 22, 2010).

hearsay, would be admissible at trial.

Moreover, even if the “evidence” were not hearsay, Hacheny fails to explain how its substance would be admissible at trial. Nothing in the articles calls into question Egel Weiss’s performance. Nothing in them questions Logan’s expertise. At best they show that over a period of three decades, a handful of the hundred-plus scientists working for the lab failed to follow proper procedures and/or lied about their misconduct. Even were there some marginal relevance, any probative value would be outweighed by the danger of confusion or unfair prejudice. ER 403.

**f. This “evidence” is at best merely cumulative or impeaching.**

By his own argument, Petition at 36-37, the only purpose of this evidence is to impeach the veracity of Logan’s testimony regarding whether his employees followed the lab’s protocols. However it is well-settled that a new trial may not be granted when the only purpose of the new evidence is to impeach testimony presented at trial. *State v. Hutcheson*, 62 Wash.App. 282, 300, 813 P.2d 1283 (1991).

Hacheny clearly fails to show that the documents contained in Appendix B constitute newly-discovered evidence that would entitle him to a new trial. This claim should be rejected.

**2. Hacheny fails to establish any Brady violation.**

To comport with due process, the prosecution has a duty to

disclose material exculpatory evidence to the defense. *State v. Wittenbarger*, 124 Wash.2d 467, 475, 880 P.2d 517 (1994); *see also Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence is material and therefore must be disclosed if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *In re Gentry*, 137 Wash.2d 378, 396, 972 P.2d 1250 (1999). *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The question to be answered is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether the absence of the evidence undermines confidence in the verdict. *Gentry*, 137 Wash.2d at 396 (*citing Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

While a prosecutor has no duty to independently search for exculpatory evidence, the prosecutor has a duty to learn of evidence favorable to the defendant that is known to others acting on behalf of the government in a particular case, including the police. *Gentry*, 137 Wash.2d at 399. However, there is no *Brady* violation if the defendant could have obtained the evidence himself using reasonable diligence. *State v. Lord*, 161 Wash.2d 276, ¶ 42 165 P.3d 1251 (2007).

As discussed above, the information in the newspaper articles was

readily available to Hachenev. There is no evidence on the other hand, that information arising from the Anne Marie Gordon investigation was known to Dr. Logan, much less the prosecution, or indeed, had even occurred, at the time of trial.

Furthermore, what Hachenev essentially claims is that the prosecutor's office failed to conduct an investigation of personnel files of another State agency. There is no evidence the prosecutor's office was itself in actual possession of any of this evidence at the time of trial.

Although the Ninth Circuit in *United States v. Henthorn*, 931 F.2d 29, 31 (9th Cir.1991), held that it was error for the government to fail to examine the personnel files of testifying *officers* from federal agencies for impeachment material, that case also does not support Hachenev's claim. In *Henthorn*, the Ninth Circuit stated that the defendant needed to make a demand for production to invoke the government's obligation to examine files. *See id.* Here Hachenev made no demand for the type of evidence he now offers as "newly discovered."

Moreover, other courts have declined to follow the Ninth Circuit and require both a demand *and* a showing of materiality before they will order such an examination. *See United States v. Quinn*, 123 F.3d 1415, 1422 (11th Cir.1997); *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir.1992) (upholding government's refusal to disclose testifying

officers' personnel files based only on defendant's speculation that files contained impeachment material), *abrogated on other grounds by Hampton v. United States*, 191 F.3d 695 (6th Cir.1999); *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir.1985) (noting that mere speculation is insufficient to require in camera inspection of personnel files of law enforcement witnesses); *see also United States v. Brooks*, 966 F.2d 1500, 1504 (D.C.Cir.1992) (explaining that more than mere speculation is required to trigger government's duty to search files). Moreover, the Ninth Circuit has itself refused to extend *Henthorn's* holding beyond personnel files of testifying law enforcement officers. *See United States v. Santiago*, 46 F.3d 885, 895 (9th Cir.1995) (holding that defendant must demonstrate materiality of prison inmate files before government has duty to produce files).

Even if the State had had a duty to comb the internal personnel records of the crime lab, Hacheny fails to show materiality or prejudice. As discussed above, considered as a whole, this information shows that when it has discovered reliability issues, the lab has taken corrective action to correct the problems. And more importantly, nothing in the information provided calls into question the proficiency of Egle Weiss or her section of the lab, or the expertise or qualifications of Dr. Logan. Hacheny fails to show a *Brady* violation.

**3. *Hacheny fails to show counsel was ineffective with regard to the allegedly new evidence.***

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*,

466 U.S. at 687.

As previously discussed, much of the information Hacheny now offers did not even exist at the time of trial. Plainly counsel could not have been deficient in failing to discover and present it. As for the remainder, as also previously discussed, Hacheny fails to show that it was relevant and admissible. Counsel cannot be deemed deficient for not seeking to introduce irrelevant evidence. For the same reasons, Hacheny fails also to show prejudice. This claim should be rejected.

**D. HACHENY FAILS TO SHOW THAT THE ENDS OF JUSTICE REQUIRE THIS COURT TO RECONSIDER ITS DIRECT APPEAL CONCLUSION THAT THE TRIAL COURT PROPERLY FOUND THAT THE DELASHMUTTS AND OLSON WERE UNAVAILABLE FOR TRIAL BEFORE ADMITTING THEIR DEPOSITION TESTIMONY.**

Hacheny next asserts that this Court should reconsider an issue decided on direct appeal: whether the trial court acted within its discretion in concluding that three witnesses who testified via video deposition were unavailable for trial. Hacheny fails to meet his burden of showing that the ends of justice would be served by reconsidering this issue.

This Court may not reconsider a claim that was rejected on its merits on direct appeal unless the petitioner shows that reconsideration will serve the ends of justice. *In re Jeffries*, 114 Wn.2d 485, 487, 789 P.2d

731 (1990). “Simply ‘revising’ a previously rejected legal argument ... neither creates a ‘new’ claim nor constitutes good cause to reconsider the original claim.” *Id.*, 114 Wash.2d at 488. Thus, a “petitioner may not create a different ground [for relief] merely by alleging different facts, asserting different legal theories, or couching his argument in different language.” *In re Lord*, 123 Wash.2d 296, 329, 868 P.2d 835 (1994) (quoting *Campbell v. Blodgett*, 982 F.2d 1321, 1326 (9th Cir. 1992), *reh’g denied, amended and superseded*, 997 F.2d 512 (9th Cir. 1993)). Indeed, it appears the only context that has been found to satisfy this standard is where there has been a “significant intervening change in the law.” *See In re Vandervlugt*, 120 Wash.2d 427, 433, 842 P.2d 950 (1992).

Hachenev fails to show that reconsideration of this issue would serve the ends of justice. Although he attempts to frame his argument as a case of the State attempting to “hide the ball,” a review of his “new” evidence fails to support his argument. For example, in his discussion of his public disclosure request (made five years after trial) he repeatedly adds emphasized language such as “The State did not disclose its response to this letter,” and “Once again the State did not provide information regarding its response,” and “Once again, the State did not provide the email ... claiming it was deleted.” Petition at 38-39.

There is no evidence with regard to the first two editorial

comments that the State ever responded to these letters in writing. As for the email, as was explained in the response to the public disclosure request (attached to the Petition as part of Appendix C), all emails from 2002 would have been overwritten by 2007 on the County's server in the ordinary course of business. The only emails in existence from 2002 would have been those saved on a an individual employee's machine or printed out and placed in the case file. There is no evidence whatsoever that the State did not fully comply with Hachenev's document request. Notably he has raised no claim to the contrary.

Turning to the allegedly new evidence Hachenev presents, nothing in it changes the basis upon which the trial court, and this Court on direct appeal, concluded that the witnesses were unavailable for trial. The hearsay account of Mr. DeLashmutt's conversation with defense counsel, even if accepted as admissible evidence, merely confirms that the State was unwilling to pay for their trip from Scotland to Washington to testify. This fact was before the Court on direct appeal:

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.

Exh. A, at 14.

The Court went on to observe that the outcome might be different

if the evidence suggested that the State had encouraged the witnesses to ignore their subpoenas. *Id.* Contrary to his claims, Hacheny has produced *no* evidence that would support such a contention. The only evidence is that the legal assistant provided proposed language for the witnesses to submit in their letters indicating their unavailability. It is not at all uncommon for an attorney to explain to a lay person what facts are relevant and needed in a statement to be submitted to the court. This hardly raises an inference that attorney is dictating the witness's conduct. This fact is thus just as consistent with the witnesses having expressed their unwillingness to appear as it is with Hacheny's supposition that the State encouraged it. And it must be kept in mind that Hacheny bears the burden of proving he is entitled to relief with facts, not mere supposition.

Moreover, DeLashmutt's purported statement is consistent with the facts presented to the trial court. It reasserts that he and his wife would come to Washington for the trial, *if it were at State expense*. Nothing in his alleged statement suggests that the State encouraged them to disregard their subpoenas.

Hacheny also asserts that the State misrepresented to the trial court that Olson would be difficult to reach. Again, however, his documentation fails to support his contentions. His June 5, 2002, letter to the prosecutor declares that he would be returning to South America in

late September, that the “trip require[d] a great deal of coordination as it involves working with a construction team set to arrive at that time,” and hence he would “not be available during the trial.” Petition, Appendix C. The emails between the State and Olson took place in late September. In the final email, dated September 27, 2002, he stated that he was then in Pennsylvania, and would be departing for Bolivia the following Tuesday. Nothing in these emails contradicts the assertion that he would be out of touch during trial, which began in mid-October of that year. *Id.*

Even if merely “alleging different facts” were sufficient to justify reconsideration of this issue, which it is not, *Lord*, 123 Wash.2d at 329, Hachenev would fail to meet his burden of producing competent evidence to support his claim. This Court should thus decline to reconsider this issue, which was correctly decided on direct appeal.

Further, even if Hachenev had met his factual burden, he also bears the burden of establishing that the alleged error was harmful. This he cannot do. None of these witness’ testimony could be described as critical. The DeLashmutts’ testimony was largely innocuous and cumulative. *See* CP 1194-1321 *as redacted by* CP 1008-13. Olson’s testimony pertained to matters that the other experts relied upon in reaching their opinions. *See* CP 1015-1124 *as redacted by* CP 1007-08. His conclusions and reports would have thus been admissible under ER

703 regardless of his deposition testimony.

“It is well established that constitutional errors, including violations of a defendant’s rights under the confrontation clause, may be so insignificant as to be harmless.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The Court applies the “overwhelming untainted evidence” test:

Under the “overwhelming untainted evidence” test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.... The “overwhelming untainted evidence” test allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.

*Guloy*, 104 Wn.2d at 426. This standard applies on direct appeal. On collateral review, Hacheney bears the burden of establishing harmfulness.

As noted above, the deposition testimony added little to the State’s case. Subtracting it from the evidence the jury heard over the course of seven weeks of trial (less than 140 pages of deposition compared to nearly 5000 pages of other testimony) would not have changed the verdict. *See State v. Scott*, 48 Wn. App. 561, 566-567, 739 P.2d 742(1987). Finally, Hacheney cannot show prejudice because the videotaped depositions in this case satisfied the purpose if not the letter of the Confrontation Clause:

The purpose of the guarantee is to provide a personal

examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S.Ct. 337, 39 L.Ed. 409 (1895). In the instant case, [the witness] testified under oath, [the defendant] was present, and his attorney cross-examined [the witness]. Moreover, the jury had the opportunity to view [the witness'] demeanor and manner in which he testified against [the defendant] in [the defendant's] presence. The only difference between admitting [the witness'] deposition and having him testify in person is that [the witness] did not give his testimony in the presence of the jury. Although it would have been preferable to have [the witness] testify in person, we hold that admitting the videotaped deposition satisfied the "central concern" of the Confrontation Clause, which "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666, 678 (1990).

*State v. Hobson*, 61 Wn. App. 330, 334, 810 P.2d 70 (1991).

Hachenev has shown neither a factual basis for his claim nor any ensuing prejudice. It should be rejected.

**E. HACHENEY ALSO FAILS TO SHOW THAT THE ENDS OF JUSTICE REQUIRE THIS COURT TO RECONSIDER ITS DIRECT APPEAL CONCLUSION THAT THERE WAS NO UNCONSTITUTIONAL CLOSURE OF THE COURTROOM WHEN HIS FATHER WAS EXCLUDED FROM THE DEPOSITION-TAKING, BUT THE VIDEO DEPOSITIONS THEMSELVES WERE PLAYED IN OPEN COURT DURING TRIAL.**

Hachenev next argues that the Court should reconsider its decision that the exclusion of his father from the depositions of Olson and the DeLashmutts did not amount to a closure of the trial. He argues that, based on his previous contention that the witnesses were available, their depositions *were* the trial. This contention, even were Hachenev correct as to his prior contention, lacks logical force.

First, he again injects a false factual premise, that the State “misled” the trial court into believing that the depositions were for discovery rather than for trial. Petition at 45. This contention is patently untrue. The depositions were requested for the perpetuation of testimony pursuant to CrR 4.6. RP (Pre-Trial Vol. III) 433-37.

Secondly, at best Hachenev shows (in his previous contention) that the depositions should not have been admitted at trial. But even assuming that were the case, his present contention suffers from the same infirmity as his direct appeal argument.

There, Hacheny claimed that the trial court's exclusion of his father from the depositions of the DeLashmutts and Olson violated his right to a public trial. This claim was found to be without merit because the taking of the depositions themselves was not a "trial," and at the time they were presented as evidence to the jury, the court was open to all. Both the Washington and United States Supreme Courts declined to review this issue.

This Court rejected the claim because Hacheny's argument was based on a false premise: that the public was excluded from his "trial." Depositions, however, are not part of "trial." Moreover, this Court's resolution on direct appeal was consistent with the unanimous precedent of federal and state courts elsewhere.

The First Circuit has concluded that exclusion of the public from the taking of a deposition did not implicate a criminal defendant's right to a public trial, where "was aired in public, via the videotape, at trial." *United States v. Acevedo-Ramos*, 842 F.2d 5, 8 (1<sup>st</sup> Cir. 1988). The federal district court for New Jersey has agreed. In that case the court concluded that the closure of the depositions did not violate the right to a public trial because they were subsequently offered into evidence at a public trial. *United States v. Bertoli*, 854 F. Supp. 975, 1019 (D.N.J. 1994), *vacated in part on other grounds*, 40 F.3d 1384 (3<sup>d</sup> Cir. 1994). No case

was located that held to the contrary.

While there is little precedent regarding whether a deposition is part of trial for purposes of assessing whether a defendant's right to public trial was improperly limited, there is abundant case law discussing whether closure of depositions violates the *public's* right to access trials. The courts uniformly hold that it does not. *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984); *In re The Reporters Comm. For Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985); *Amato v. City of Richmond*, 157 F.R.D. 26, 27 (E.D. Va. 1994); *Kimberlin v. Quinlan*, 145 F.R.D. 1, 2 (D.D.C. 1992); *Times Newspapers, Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 197 (C.D. Cal. 1974); *Scollo v. Good Samaritan Hosp.*, 175 A.D.2d 278, 280, 572 N.Y.S.2d 730 (N.Y. App. 1991); *In re Westchester Rockland Newspapers v. Marbach*, 66 A.D.2d 335, 413 N.Y.S.2d 411 (NY App. 1979); *Lisa C.-R. v. William R.* 166 Misc.2d 817, 819, 635 N.Y.S.2d 449 (N.Y. Sup. 1995); *In re Finkelstein*, 112 N.J. Super. 534, 537, 271 A.2d 916 (1970).

This precedent is relevant because both the Washington and United States Supreme Courts employ the same standards in evaluating a defendant's right to a public trial under the Sixth Amendment and Const. art. 1, § 22, as they do when assessing the public's right to attend trials

under the First Amendment and Const. art. 1, § 10. *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (citing *Waller v. Georgia*, 467 U.S. 39, 47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The rationale in the civil arena is that same as that in the criminal: exclusion of the press from depositions did not hinder the “public’s right to know,” because “that right is not being subverted, but is merely being delayed until the trial begins.” *Scollo*, 175 A.D.2d at 280.

Here, there was a proper order for the taking of the depositions. Both defendant and his counsel were present for the depositions at the Kitsap County Courthouse. Thereafter, the videotapes of the depositions were played in open court before the finder of fact, in this case a jury, and in front of any member of the public (except properly excluded witness, see *State v. Johnson*, 77 Wn.2d 423, 428, 462 P.2d 933 (1969)) who chose to attend the trial.

None of the cases cited by Hacheney hold that the closure of a *deposition* violates the right to a public trial. Nor are the situations in the cited cases analogous to the closure of a deposition. All involve the exclusion of the public from the viewing of the evidence upon which the trier of fact reached its verdict, such as a trial, *State v. Ortiz*, 91 Haw. 181, 189, 981 P.2d 1127 (1999), *Vidal v. Williams*, 31 F.3d 67, 68 (2<sup>d</sup> Cir. 1994), *cert. denied*, 513 U.S. 1102 (1995), or contempt hearing, *In re*

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*Oliver*, 333 U.S. 257, 265, 68 S. Ct. 499, 92 L.Ed. 682 (1948), or the evidence upon which it reaches a legal conclusion at a significant stage of the proceeding, such as a suppression hearing. *Bone-Club*, 128 Wn.2d at 257; *Waller*, 467 U.S. at 42.

As has been noted, “[t]he right to a public trial is not only to protect the accused but to protect as much the public’s right to know what goes on when men’s lives and liberty are at stake, for a secret trial can result in favor to as well as unjust prosecution of a defendant.” *Lewis v. Peyton*, 352 F.2d 791 (4<sup>th</sup> Cir. 1965). There was no secret trial here. All the evidence offered against Hacheney was presented to the jury in a courtroom open to the public. Moreover, because the deposition were videotaped, the jury and the public were able to gauge the witnesses’ credibility much as if they had been present in court:

[T]he presence of these other elements of confrontation -- oath, cross-examination, and observation of the witness’ demeanor -- adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition.

*Maryland v. Craig*, 497 U.S. 836, 851, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

Nothing in Hacheney’s allegation that the depositions should not

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have been admitted at trial changes this analysis. Hacheney cites no authority that even remotely reaches such a conclusion. He thus fails to meet his burden of showing that reconsideration of this issue will serve the ends of justice. *Lord*, 123 Wash.2d at 329. Moreover, he also fails to show actual prejudice, as is his burden on collateral review. This claim should be rejected.

**F. HACHENEY FAILS TO SHOW COUNSEL WAS INEFFECTIVE IN FAILING TO IMPEACH THE STATE’S TIMELINE WHERE SOME OF THE EVIDENCE ON WHICH HE RELIES DID NOT EVEN EXIST AT THE TIME OF TRIAL, WHERE HIS OWN VIDEOTAPED TRIP TO THE HUNTING SITE WAS NOT FILMED AT THE RELEVANT TIME, AND WHERE EMPHASIZING THE TIMELINE WOULD HAVE HIGHLIGHTED HIS OWN LIES ABOUT THE TIMING TO THE INSURANCE COMPANY AT THE TIME OF THE MURDER.**

Hacheney next alleges that counsel was ineffective for failing to adequately investigate and impeach the State’s timeline at trial. The standards for ineffectiveness claims have been discussed above. Hacheney fails to show either deficient performance or prejudice.

First, as to the web cam photos, Hacheney is incorrect that “a simple internet search would have revealed” this supposed evidence, Petition at 47, because he fails to offer any evidentiary basis for his assertion that “prior to 2002 when this trial was taking place the City of

Port Townsend installed cameras on top of the county courthouse” that point “directly to the same body of water that the hunters were on.” Petition at 49. In support of these contentions, he provides photos downloaded from the City of Port Townsend’s website in 2009.

His contentions contain several factual inaccuracies. First of all, the City’s website features a cam mounted not in the county courthouse, but on a tower located at the Lawrence Street fire station. See <http://www.cityofpt.us/webcam/OutsideCam.asp> (accessed Oct. 22, 2010). Counsel could not possibly have accessed these photos at the time of trial, since the website and the tower cam were not in existence until July of 2006. See Jeff Chew, *Go to [www.cityofpt.us](http://www.cityofpt.us) and take control of Port Townsend’s new web cam*, *Peninsula Daily News* (August 1, 2006).<sup>11</sup>

Furthermore, as noted in the *Daily News* article, the camera is on a tower some 200 feet above sea level, while the hunters were on a beach some 10 miles to the south. Plainly at an altitude of 200 feet, the horizon would appear further to the east, and dawn would be perceived earlier. As such these photographs cannot be considered to be relevant to the issue of the lighting conditions on the beach at Indian Island. Since the photos are not relevant to the issue, counsel cannot be deficient (even assuming such photos *had* existed in 2003) for not introducing them into evidence.

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<sup>11</sup> The article is available at <http://www.peninsuladailynews.com/apps/pbcs.dll/article?AID=2006608020306> (accessed Oct. 22, 2010).

Although there is a webcam in the county courthouse, it does not have a date stamp and is clearly not the source of the photos. See <http://www.co.jefferson.wa.us/webcam/CourtHousePTZCam.htm>. And that camera does not face the “the same body of water” as Indian Island. To the contrary, it faces to the west, *i.e.*, in the opposite direction. *Seeid.*, and Exh. C. Nor is there any evidence that this webcam was in existence at the time of trial, either.

Turning to the substance of the claim, Hacheney completely ignores the testimony of Lindsey Smith Latsbaugh. Latsbaugh, who was an experienced hunter who had hunted with Hacheney on numerous occasions, testified that when they went hunting they tried to be in place a few minutes before daylight. RP 581. They would seldom be out there by “legal” shooting time unless, for example, it was the first day of the season, and they wanted to beat the crowds to their favorite spot. RP 698.

This was because at legal shooting time was still dark so it did not make sense to be out there when they could not see the birds. RP 699. They usually went by actual sunrise. RP 699. Despite defense counsel’s attempts to get Latsbaugh to concede that they were at the blinds by legal shooting time, or 7:28, She stood by her testimony and explained, repeatedly that by “sunrise,” she meant when the sun actually peeked over the horizon. RP 702, 796.

Hachenev called the defense investigator in an attempt to impeach this testimony. He testified that in her pre-trial interview Latsbaugh said she was in place 5 to 10 minutes before “shooting light.”RP 4805. His report stated that “Smith [Latsbaugh] recalled a rendezvous with Martini in Poulsbo probably 45 to 60 minutes before dawn.”<sup>12</sup>RP 4808. His notes stated that she had left her car at the bridge 45 minutes to one hour before daylight.<sup>13</sup>RP 4808. But he had to concede that neither his notes nor his report indicated that they had discussed any distinction between “shooting light,” which Latsbaugh testified to her meant actual dawn, and the legal shooting time. RP 4809.

Additionally, Latsbaugh specifically testified that they had met at the bridge between 7:00 and 7:15. RP 582. They were in place 5 or at most 10 minutes before sunrise, which as she explained, meant actual sunrise. RP 583. The drive from the bridge took 25 to 30 minutes. RP 584. When they arrived at the blinds, it was light enough that they did not need flashlights. RP 796. It had been dark when they met at the bridge. RP 796. They only stayed about half an hour. RP 586. Hachenev did not finish his breakfast and left early. Latsbaugh also testified that she had made the trip before, and it was about 25 minutes from Mitzel’s to

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<sup>12</sup> She met Martini in Poulsbo and rode with him to the Hood Canal bridge, where they rendezvoused with Hachenev.

<sup>13</sup> Both Latsbaugh and Martini testified that she had left her car in Poulsbo, not at the bridge.

Hachenev house. RP 590.

And, contrary to Hachenev's arguments, Martini's testimony was consistent with Latsbaugh's. He told the jury that the plan was to meet about 45 minutes to an hour before daylight. He said the drive was 30 to 45 minutes from the bridge to the island. RP 513. They "barely" got there before first light: "It was still a little bit dark but you could see the beginnings of dawn." RP 514.

Hachenev was late showing up. RP 515. Because of this, they were in a hurry, so Hachenev just pointed and they followed him when he arrived at the bridge. RP 514. They were at the island for an hour or so. RP 515. Hachenev stood up and said "let's go." RP 515. Hachenev seemed preoccupied at breakfast. RP 516. As soon as the food arrived, Hachenev said he had to leave to go open Christmas presents with his wife. RP 517. He did not eat his breakfast. RP 517.

Hachenev also fails to mention the testimony of detective Robert Davis. Davis testified that he drove from the Hachenev house to Indian Island at the posted speed limit. RP 2582. It took him 28 minutes from the house to the bridge. RP 2584. It took him 23 minutes to travel from the bridge to the island. RP 2585. The return trip from Indian Island via Chimacum to Mitzel's Restaurant in Poulsbo took him 36 minutes. RP 2587.

In Hachenev's video, which was obviously taken on a work-day, not a weekend, the trip from the house to the bridge, despite being slowed by a school bus and traffic moving below the speed limit on the Highway 3 freeway, took 34 minutes, only six minutes longer than it took Detective Davis. See Petition Appendix E (DVD track VTS\_01\_1.VOB "Video 1"). The trip from the bridge to where Davis stopped took 26 minutes, or only three minutes difference. *Id.* (tracks VTS\_01\_2.VOB "Video 2" and VTS\_01\_3.VOB "Video 3"). The trip from there to where Hachenev is alleged to have parked consumed another minute. Plainly the travel time differences are not significant, particularly since both assume driving at or under the speed limit at all times. Since, as Latsbaugh testified, Hachenev was running late, it would be unsurprising if they actually drove slightly faster.

Hachenev also makes much of the lighting conditions in the video. However, the testimony was that it was still dark at the bridge. At the end of Video 1 and the beginning of Video 2, purported to be around 7:19 a.m., it is clearly still dark. Moreover, as is later revealed on Video 3, it was not actually 7:19 at that time but more likely around 7:28 or 7:29, in other words, 15 minutes to a half hour *later* than when Latsbaugh testified they met at the bridge.

At about 5:36 on Video 3, the younger individual states that there

is a discrepancy of about eight minutes between his cell phone and the car clock, which was what the times on the earlier videos were based upon. A review of the videos shows that in fact the discrepancy was about 9 and a half minutes. The car clock was shown to read 7:47 at 30:34 on Video 2. A further four minutes and 40 seconds elapse before the end of the video. The cell phones are depicted as showing the time to be 8:04 a.m. at 4:34 on Video 3. Thus subtracting nine minutes from 8:04, it was actually about 7:55 when the car arrived, not 7:47.

While nine minutes is not a huge amount of time, it certainly is critical for the argument Hacheny is making. When the missing nine minutes are accounted for, the video fails to show any discrepancy in Latsbaugh's time line. But even without the inaccuracy of Hacheny's timing on the video, it fails to impeach Latsbaugh's testimony, which was that it was dark at the bridge, and light enough that they did not need flashlights when they arrived at the hunting site.

Furthermore, even if his present timing were accepted there would be no way that it would have been light enough when they arrived at the blind to see without flashlights if, as Hacheny told Safeco on January 2, 1997, he had left his house between 5:00 and 5:10 the morning of December 26. Exh Dat 23, 67.<sup>14</sup> Even by his accounting, that would have

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<sup>14</sup> This is trial exhibit 281, which is the transcript of the tape of Hacheny's Safeco

placed him at the bridge between 5:44 and 5:54, and at the blind by to 6:11 to 6:21 a.m.,<sup>15</sup> at a time when it clearly would have still been very much completely dark, as forcefully demonstrated by the beginning of Video 1, which was purported to be at 6:42, or, accounting for the “discrepancy,” 6:51. Counsel could well have determined that making too much of the time issue would only have served to prove that his statements to the insurance company and the police at the time of the murder had to have been false. He would have then only reinforced the State’s theme of guilty knowledge.

Given the foregoing, Hacheny fails to in any way undermine confidence in the verdict. He fails to show he is entitled to a reference hearing, much less that he is entitled to a new trial.

**G. COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO OBJECT AT TRIAL TO DR. SELOVE’S ALLEGED VOUCHING FOR THE CREDIBILITY OF SANDRA GLASS NOR FOR FAILING TO RAISE THE ISSUE ON DIRECT APPEAL WHERE SELOVE DID NOT VOUCH FOR HER CREDIBILITY, AND INDEED TESTIFIED THAT IF HER STATEMENTS WERE NOT TRUE, HIS OPINION WOULD CHANGE.**

As previously discussed, to establish ineffective assistance of

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interview, which was played for the jury. RP 3679-80, 3683. Hacheny reviewed the transcript and attested that it was accurate. *Id.*

<sup>15</sup> He told Safeco they arrived at blind between 6:30 and 7:00, and was “real dark” when they got there. Exh. D at 28-29. He also stated they stayed at Indian Island until 9:00 and got to Mitzel’s at 9:30. *Id.* at 28, 30

counsel, the Hacheny must show both that counsel's performance was deficient, and prejudice. Additionally, "[i]n order to prevail on an appellate ineffective assistance of counsel claim, petitioners must show that the legal issue which appellate counsel failed to raise had merit and that they were actually prejudiced by the failure to raise or adequately raise the issue. *In re Maxfield*, 133 Wash.2d 332, 344, 945 P.2d 196 (1997). Failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance, and the exercise of independent judgment in deciding what issues may lead to success is the heart of the appellate attorney's role. *In re Lord*, 123 Wash.2d 296, 314, 868 P.2d 835 (1994).

Generally, this Court will not consider an evidentiary issue raised for the first time on appeal, and any error is deemed waived. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, ¶ 20, 155 P.3d 125 (2007). The reason for this rule is that timely objection gives a trial court the opportunity to prevent or cure error. *Kirkman*, 159 Wn.2d at ¶ 17. For example, a trial court may strike testimony or provide a curative instruction to the jury. *Id.*

A narrow exception exists, however, for "manifest error( s) affecting a constitutional right." RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at ¶ 20. However, the Court on appeal "will not approve a party's failure to object at trial that could identify error which the trial court might correct

(through striking the testimony and/or curative jury instruction),” because “[f]ailure to object deprives the trial court of this opportunity to prevent or cure the error.” *Kirkman*, 159 Wn.2d at ¶ 53. The decision not to object is often tactical. *Id.* If raised on appeal only after losing at trial, a retrial maybe required with substantial consequences. *Id.* The defendant therefore must show the error is "manifest," meaning, in the present context, that the testimony included an explicit or nearly explicit opinion of guilt that resulted in actual prejudice. *Kirkman*, 159 Wn.2d at ii 21, 23. Although Hachenev cites to *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001), the Supreme Court has specifically disapproved *Demery* the extent that it concluded that a comment on another witness’s credibility was necessarily manifest constitutional error. *Kirkman*, 159 Wn.2d at ¶ 56-58.

In considering testimony that is alleged to comment on a witness’s veracity is improper, “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.’” *State v. Aguirre*, 168 Wash.2d 350, ¶ 14, 229 P.3d 669 (2010) (*quoting Kirkman*, 159 Wn.2d at 928). To be improper, the testimony must amount to “a direct comment on ... the victim's veracity.” *Aguirre*, 168 Wash.2d at 16.

In *Kirkman* the Supreme Court thus found that a physician's testimony was not an improper comment on the victim's veracity:

The Court of Appeals erroneously deemed Dr. Stirling's testimony as "clearly" an improper opinion implying Kirkman's guilt. Dr. Stirling was not "clearly" commenting on A.D.'s credibility and actually testified that his findings neither corroborated nor undercut A.D.'s account. Dr. Stirling did not come close to testifying that Kirkman was guilty or that he believed A.D.'s account. Dr. Stirling's statement that A.D.'s account was "clear and consistent" does not constitute an opinion on her credibility. A witness or victim may "clearly and consistently" provide an account that is false. The jury properly was instructed to determine the facts. Thus, Dr. Stirling's testimony was not a manifest error of constitutional magnitude.

*Kirkman*, 159 Wn.2d at ¶ 34.

Here, an examination of Dr. Selove's testimony in context does not show that he directly commented on Glass's veracity. To the contrary, it is clear that her account of Hacheny's statement was merely one of the facts upon which his opinion was based.

Q. And did you rely upon a statement in particular by one of those alleged women?

A. Yes, I relied upon the statement that Mr. Hacheny allegedly made to Sandra Glass concerning how he killed Dawn Hacheny.

Q. And to your recollection, what was that statement?

A. That he gave her a medication, Benadryl, that is used by some - - while it has several uses, but one use is as a sleeping aid. Gave Benadryl, and when she became sedated from that, he suffocated her by placing a plastic bag over her head and holding it there until she stopped moving.

RP 1384-85. He explained that is conclusion was that Dawn Hacheny

died of asphyxia, and that he had ruled out drowning or strangulation as the cause of her asphyxiation. He then, still on direct examination, explained that if Glass's statements were excluded, he would not be able to reach that conclusion:

If I was not to rely on alleged statements by Nicholas Hachenev [to Glass], then I would not be able to tell if strangulation or suffocation had occurred. ... And because of reliance on those statements, I can exclude strangulation.

RP 1415-16. He also excluded smoke inhalation as a cause of death based on there being no elevated carbon monoxide, no soot in the airways, and based on the fire investigation, no flash fire leading to laryngospasm. He found that the presence of pulmonary edema left suffocation as the cause of death. He then gave his opinion to a reasonable degree of medical certainty. RP 1416. He explained his opinion:

Q. Your opinion is that this is a suffocation by plastic bag?

A. It is.

Q. Why have you excluded laryngospasm in this case?

A. The conditions of the fire scene were described as not one of a flash fire. I am speaking of the fire investigative reports that I have reviewed. They are reports that are stating an apparent arson occurred.

I am also considering alleged statements by Nicholas Hachenev made to Sandra Glass about how he killed Dawn Hachenev. I am finding pulmonary edema foam, that might be the only finding from a plastic bag asphyxia. I am finding evidence of death before the fire began. These are the foundations for my opinion and the reason I believe asphyxia by plastic bag suffocation occurred

rather than laryngospasm.

RP 1417.

On cross-examination, Selove confirmed that his opinion depended on the correctness, *inter alia*, of Glass's statements:

- Q. Okay. So you didn't have, as far as the manner of death concerning a plastic bag, or Benadryl and those kinds of issues, those were statements from Sandy Glass, right?
- A. That's correct. The Benadryl was present in the toxicology report of Dawn Hachene's blood. But the use of a plastic bag, the source of my knowing of that or concluding that comes from Sandra Glass's statement.
- Q. Okay. I just want to make clear. You didn't have any direct statements from Nicholas Hachene where he had written down, or made some kind of oral confession that you were able to see, transcribed or listen to, that he had placed a plastic bag over her head and suffocated her?
- A. No, I've not been shown any such statement.
- Q. Okay. It's the statements from Sandy Glass supposedly from Mr. Hachene?
- A. Yes, as I've stated.

RP 1443. Counsel further elicited from Dr. Selove that he had no personal knowledge as to Glass's veracity:

- Q. And as far as Sandy Glass goes, you never had a discussion with her either over the phone or in person?
- A. That's right. I didn't.
- A. So you've never been in her presence to try and judge her credibility about her version of events?
- A. No, I have not.

RP 1444. The subject was again broached later in cross-examination, and it was again established that his opinion was dependent on the truth of Glass's statements:

Q. And so now, as I understand it, your current opinion is that Dawn Hacheney died of asphyxiation by suffocation from a plastic bag?

A. That's my current opinion. Yes.

Q. Okay. Now, concerning the suffocation by a plastic bag, your basis for that opinion relies completely and solely on the, statements of Sandy Glass, is that right?

A. That's right.

A. So if you made a determination that Sandy Glass was not credible, the statements about the plastic bag, would that change your opinion concerning the mode of suffocation?

A. Yes. Then I would say asphyxia, not knowing if there had been initially strangulation, a gag, what had caused the asphyxia. The use, in my opinion of plastic bag, I have no independent way of knowing that from the autopsy report or photographs. The only basis is the statement by Sandra Glass. So I would generically just say asphyxia, if I did not have that statement concerning the bag.

RP 1467-68. At no point did Selove ever suggest that he had any basis to evaluate whether Glass's statements were true or not.

On redirect, Selove was asked to summarize the bases of his opinion regarding the cause of death:

Q. Mr. Talney asked you several questions about the fire investigation. You indicated you're not a trained fire investigator. But in looking at this case, what specific findings and facts were most remarkable to

you, in rendering your opinion today?

- A. That Dawn Hacheny died without evidence of having breathed during the fire. That fire investigative reports evolved in those that I read to believe that arson had been the cause of the fire. *And that there were alleged statements by Mr. Hacheny that explained the finding of diphenhydramine in the blood, the Benadryl-type medication in the blood, and explained how death may have occurred before the fire with subsequently no carbon monoxide or soot involved. And that, in fact, plastic bag suffocation had occurred.* Those are the facts that are the most significant, in summary, to me.
- Q. So some of the facts that Mr. Talney asked you about, would those cause you to change your opinion at all today as to the cause of death?
- A. No, none that I have heard today cause me to change my interpretation of these, of the autopsy and investigative reports.
- Q. Mr. Talney asked you if – he gave you kind of a hypothetical that if there was some evidence of a flash fire in this case, would you find that laryngospasm would be consistent with what you found. And you said yes. Now, does that assume, also, that the statement regarding Mr. Hacheny putting a plastic bag over his wife's head, does that assume that that's incorrect when you answer that question?
- A. That assumes that statement is incorrect. That answer of -- if I assume a flash fire -- are the findings consistent with laryngospasm as a cause of death. That is based solely on if there's a flash fire and what are the autopsy and toxicology results. That ignores any other information that I might base, upon which I might base an opinion.

RP 1499-1501.

I none of the foregoing passages did Selove ever give an opinion as

whether Glass's statements were true. To the contrary, he repeatedly conceded that his opinion as to cause of death depended on their truth. Otherwise, he was unable to offer an opinion.

The only specific testimony Hachenev cites is Selove's statement, "that in fact, plastic bag suffocation occurred." Petition at 60. Hachenev, however, takes that statement out of context. The context appears in the highlighted paragraph, *supra*. In context it is clear that that Selove is referring to Hachenev's statements as recounted by Glass; he is not offering his own opinion.

Because Hachenev fails to show that Selove made any direct comment on Glass's credibility he cannot show that trial counsel was ineffective in not objecting and further cannot show a manifest constitutional error that would have allowed appellate counsel to have prevailed had the issue been raised.

**H. HACHENEV FAILS TO SHOW THAT COUNSEL WAS INEFFECTIVE FOR DECIDING NOT TO PURSUE THE EXAMINATION OF GLASS REGARDING HER "PLAN" TO KILL HER HUSBAND, WHERE INTRODUCTION OF THAT EVIDENCE COULD HAVE LED TO THE INTRODUCTION OF HACHENEV'S OFFER TO ADVISE HER HOW TO DO IT, AND HIS STATEMENT THAT HE FELT LIKE HE HAD "GOTTEN HIS LIFE BACK" AFTER DAWN'S DEATH.**

Hachenev next claims that counsel was ineffective for failing to

cross-examine Glass regarding her supposed plan to kill her husband after “promising” to do so in opening statement. Hachenev greatly exaggerates both the importance of the passage in opening and the relevance and effect of the supposed testimony. Furthermore, he fails to acknowledge that counsel had tactical reasons for not pursuing this line of questioning.

The standards governing ineffectiveness claims have been discussed, *supra*. Moreover, counsel’s mid-trial decisions regarding what questions to ask are among the most tactical, and thus are accorded the most deference.

Here, counsel’s decision not to pursue questioning of Glass regarding her purported “plan” to kill her husband was not, as Hachenev would have it, “quite inexplicable.” Petition at 64. Instead, it is quite apparent that counsel’s choice was a considered decision:

I think it certainly does tarnish her as a witness. It was more than just a thought. She actually had a specific plan in which to kill her husband, and on one specific day was actually, was contemplating taking that step to actually do it.

I would say at this point in time, though, I would agree with the state to leave that out. Just obviously again I would raise the issue again depending on what her testimony might be on direct, on whether or not I thought that was a necessary area to go into.

RP 2157.<sup>16</sup>

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<sup>16</sup> Hachenev takes part of the second paragraph out of context in support of the contention that “[l]ater in the trial the defense sought to admit the evidence.” Petition at 64. Clearly

Contrary to Hacheny's characterization, both presently and at trial, the evidence was not particularly compelling. It hardly could be called a viable "plan," and was more accurately described as an "idea or plan or fantasy." RP (3/27/02) 65. The "plan" consisted of Glass driving into a tree, resulting in her husband's death while she and her children would somehow survive. RP (3/27/02) 66. While it might have tended to show that Glass was unrealistic in her view of the world, that was a point that counsel made repeatedly during his lengthy cross-examination. RP 2366-2476. And in any event, Glass would also have testified that she later told Hacheny that she (unlike Hacheny) was unable to go through with killing her spouse. RP (3/27/02) 66.

Nor was the evidence without a downside. Part of the State's trial theory was that Hacheny killed his wife so he would be free to pursue relationships with other women, including Glass. Testimony apart from that of Glass established that Hacheny in fact pursued several relationships with other women after Dawn's death. If it was shown that Glass was also contemplating the murder of her own husband, that evidence could have been viewed as supporting the State's case. While it might have implicated Glass, it certainly would not have exculpated Hacheny.

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counsel was informing the court that he had decided *not* to seek its admission.

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In this regard, counsel had significant tactical reasons for not pursuing this evidence. The evidence of Glass's "plan" did not stand in a vacuum. It arose in the context of a conversation between Glass and Hacheny. After Glass related the "plan," Hacheny responded, "I want to tell you what to do, but don't expect any help." RP (3/27/02). During the same conversation, Hacheny also commented, presumably in reference to his killing of Dawn, that "he felt like a man who just got his life back." RP (3/27/02) 67. Hacheny successfully argued before trial that this evidence was at best rebuttal and should not be admitted unless he opened the door. RP (3/27/02) 71. The trial court excluded the evidence under ER 403. RP (3/29/02) 4.

Later, during Hacheny's opening statement, the State objected to his reference to the alleged "plan" to kill Jimmy Glass. RP 69. It argued that the plan came within the scope of the pretrial ruling discussed above. RP 104. Hacheny's counsel expressed a belief that the "plan" evidence was a separate matter not covered in the pretrial ruling. RP 105. The trial court observed that it had ruled pretrial that no "prophecy" or ER 404(b) testimony was to be elicited without a prior hearing, and that its prior ruling had encompassed only Hacheny's statements in that regard. It therefore ruled that no further reference to the "plan" was to be made before such a hearing was held. RP 106-07.

Having successfully excluded the damaging evidence of Hacheney's statements, counsel could have decided not to risk opening the door to that evidence coming in by raising the very context in which Hacheney made those statements, particularly since that trial court had excluded the evidence not because it was irrelevant, but because its prejudicial effect exceeded its probative value. If Hacheney persisted in going into the "plan" the trial court may well have altered its calculus and found that Hacheney's statements were sufficiently probative of the plan's context to outweigh the potential for unfair prejudice.

In light of the very preposterousness of the "plan" itself, it cannot be said that counsel acted outside the bounds of the performance of reasonable, competent counsel in deciding to avoid risking having the jury hear that Hacheney was willing to help in the planning of the murder of Jimmy Glass, and that Dawn's death made him feel like he had gotten his life back.

Likewise, for the same reasons, Hacheney cannot show prejudice. Additionally, Glass was thoroughly and aggressively cross-examined on her beliefs, credibility and motive. *See* Exh A, at 34 (The testimony about the "plan" to kill her husband "was minor and inconsequential, given that Glass was fully cross-examined about her marriage, her marital problems, and various other 'thoughts' and 'prophecies' in which she visualized her

husband's death. Its exclusion did not affect the fairness of the trial, and the trial court did not err.”). All of this examination supported the more central theme of the defense opening, which was that this case was about “one jealous woman.” RP 64.

Nor, as Hachenev implies, Petition at 67, did the State exploit the difference between the brief reference in Hachenev’s opening and the evidence at trial. Nothing in the record supports this claim. Nor does Hachenev point to any extra-record evidence that would support it either. Both the claim and his request for a reference hearing should be denied.

**I. HACHENEV FAILS TO SHOW THAT THE ENDS OF JUSTICE REQUIRE THIS COURT TO RECONSIDER ITS DIRECT APPEAL CONCLUSION THAT THE TRIAL COURT DID NOT ERR IN INCLUDING THE TERM “CONSCIOUSNESS OF GUILT” IN ITS ER 404(B) LIMITING INSTRUCTION.**

Hachenev next attempts to again recycle one of his direct appeal claims. As this contention was properly rejected on direct appeal, and Hachenev fails to show that the ends of justice would be served by reconsidering it, and it should be again rejected.

As discussed above, this Court may not reconsider a claim that was rejected on its merits on direct appeal unless the petitioner shows that reconsideration will serve the ends of justice. Moreover, simply revising a previously rejected legal argument neither creates a new claim nor

constitutes good cause to reconsider the original claim. As also noted, the only context that has been found to satisfy this standard is where there has been a significant intervening change in the law. Here, Hacheny fails to show there has been a change in the law since he raised this claim on direct appeal, and indeed, virtually all of the cases on which he relies predate not only his first direct appeal, but his trial as well.

Hacheny claimed on direct appeal, as he does now, that the “trial court erred by instructing the jury on the definition of consciousness of guilt. However, as was argued on the direct appeal, the trial court did nothing of the kind. The court gave a WPIC 5.30 limiting instruction regarding evidence admitted under ER 404(b). As this Court found on direct appeal, the ER 404(b) evidence was properly admitted as probative of, *inter alia*, Hacheny’s consciousness of guilt. Exh. A at 16. The instruction was therefore proper.

Hacheny proposed an instruction based on WPIC 5.30:

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, or premeditation. You must not consider this evidence for any other purpose.

CP 973. At the charge conference, the State objected that the ER 404(b) evidence was expressly admitted to show Hacheny’s consciousness of guilt, and that it would be unfair to limit the evidence from such a use.

RP 4972, 4976-77. Hacheny conceded that consciousness of guilt was one of the bases of the court's ER 404(b) ruling. RP 4975. The court ultimately agreed and added the phrase "or as evidence of consciousness of guilt" after "premeditation" and before the final sentence of the proposed instruction. RP 4980; CP 1355.

When ER 404(b) evidence is admitted, the trial court should instruct the jury of the limited purpose of such evidence. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The trial court did so here, substantially in the form requested by Hacheny. This instruction no more instructed the jury to make inferences regarding consciousness of guilt than it instructed it to make inferences regarding motive, intent, or premeditation. Notably Hacheny did not object and does not object to that aspect of the instruction. It follows that if the evidence was properly admitted for that purpose, the trial court did not abuse its discretion in instructing the jury *not* to consider the evidence for other purposes.

Furthermore, as this Court held on direct appeal, Hacheny cannot show the prejudice that is the *sine qua non* for collateral relief:

Hacheny argues that the trial court erred by including "consciousness of guilt" in the instruction by which it limited the use of the evidence discussed in the preceding section. Even assuming error, however, we do not perceive how it could have made a difference to this case.

Consciousness of guilt is a state of mind similar to motive and intent, and under the particular circumstances here it seems unlikely that the jury would have understood it to mean anything different from motive. It could not have affected the outcome of the trial, and any error was harmless “within reasonable probabilities.”

Exh. A at 16-17.

Hachenev fails to show any reason why this issue should be considered again. Nor does he show any actual error or prejudice. This claim should again be rejected.

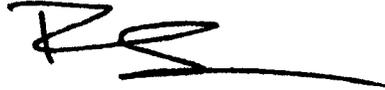
## VI. CONCLUSION

For the foregoing reasons, Hachenev’s petition should be denied.

DATED November 4, 2010.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



RANDALL AVERY SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney

# **APPENDIX A**

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_

DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS DANIEL HACHENEY,

Appellant.

No. 29965-8-II

UNPUBLISHED OPINION

MORGAN, J. – In this appeal from a conviction for aggravated premeditated first degree murder committed in the course of an arson, Nicholas Hacheny raises 29 issues. We affirm.

On December 26, 1997, Nicholas and Dawn Hacheny's house burned. A firefighter discovered Dawn, deceased, on a bed in the debris. Several propane canisters and an electric space heater were found near the bed. For the next couple of years, the fire marshal, medical examiner, and other investigators thought both the fire and Dawn's death were accidental. In 2001, however, they came to suspect foul play.

On December 29, 1997, Dr. Emmanuel Lacsina performed an autopsy. He found that although Dawn did not have soot in her trachea or lungs, she did have pulmonary edema, which can result from congestive heart failure, drowning, a drug overdose, head injury, or suffocation.

He initially thought that she had been asphyxiated when, during a flash fire, her larynx had spasmed reflexively.

During the autopsy, Dr. Lacsina collected blood and lung samples that were later tested by Egle Weiss, an employee of the state toxicology laboratory. Weiss performed the tests about ten days after the fire, at a time when she and the investigators were thinking that the fire had been accidental. She found little carbon monoxide and no propane in the lungs, no carbon monoxide in the blood, and an elevated level of Benadryl. Weiss died unexpectedly before trial.

Like the others, John Rappleye, a fire investigator for the Bremerton Fire Department, initially thought the fire was accidental. He also noted that some of the propane canisters had “vented” during the fire,<sup>1</sup> and that the area around the canisters had burned more heavily than other areas in the room.

On January 26, 1998, Hacheny was interviewed by Rappleye and Detective Daniel Trudeau. Hacheny 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.

During the summer and fall of 1997, Hacheny 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, Hacheny had admitted giving Dawn some Benadryl and lying awake until God told him, “[G]o take something that you

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<sup>1</sup> Report of Proceedings (Trial) (RP) at 1260.

want.”<sup>2</sup> He held a plastic bag over Dawn’s head until she was no longer breathing, set the fire, and left.

In September 2001, the State charged Hachenev with first degree premeditated murder. In February 2002, the State amended its charge to allege that Hachenev,

on or about the 26th day of December, 1997, with a premeditated intent to cause the death of another person, did cause the death of such person: to-wit: DAWN M. HACHENEV, AND FURTHERMORE, the defendant committed the murder in the course of the crime and/or attempted crime of arson in the first degree; contrary to [RCW] 9A.32.030(1)(a) and RCW 10.95.020(11)(e).<sup>[3]</sup>

In February and March 2002, the trial court held pretrial hearings to determine whether certain evidence was admissible under ER 404(b). The State offered Hachenev’s alleged statements, 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, but the trial court admitted. Later, at trial, 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.<sup>[4]</sup>

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<sup>2</sup> RP at 2335.

<sup>3</sup> Clerk’s Papers (CP) at 324.

<sup>4</sup> CP at 1355.

On June 28, 2002, over Hachenev'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 for three years so Michael could obtain an advanced degree. The third, David Olson, was moving for at least six months to a rural area in Bolivia. Hachenev's father asked to attend the depositions, but the trial court denied his request.

On October 1, 2002, the court held a hearing on the admissibility of testimony from Drs. Logan, Lacsina, and Selove. At the end of the hearing, the trial court indicated it would admit the offered testimony.

On October 16, 2002, a jury trial began. During voir dire, the trial court permitted the prosecutor to ask potential jurors, over Hachenev's objections, whether they could convict on circumstantial evidence if otherwise convinced that the State had met its burden of proving the case beyond a reasonable doubt.

Drs. Lacsina, Selove, and Logan all testified. Based in part on the lab report in which Weiss had described the results of her tests, Lacsina and Selove opined that Dawn had died from suffocation prior to the fire. 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 Hachenev's objections, the trial court admitted Exhibit 323, the report in which Weiss described her test results. No one has included Exhibit 323 in the record on appeal.

On November 18, 2002, the State informed the trial court that it had identified a new witness, Eduard Krueger, a retired employee of the manufacturer of the propane canisters found

near Dawn's body. Until about a week before trial, the parties had thought the canisters had been manufactured by Coleman. A week before trial, the State had discovered that the canisters had actually been manufactured by Garrett Industries. Active Garrett employees proved reluctant to testify, so the prosecutor found Krueger, a retired Garrett employee. Hacheney objected to the late disclosure and asked that Krueger's testimony be excluded. The trial court offered a continuance so Hacheney could prepare to meet Krueger's testimony. Hacheney declined the continuance, the trial court overruled his objection, and Krueger testified.

The jury received the case on December 26, 2002. During deliberations, it submitted three written questions to the court. (1) "Would Arson be an aggravating circumstance if Dawn Hacheney was all ready dead but other people were injured by the fire. For instance the insurance company, Dawn's parents and Dawn's body." (2) "Does malice have to be specifically w/ intent to injure another person." (3) "For Arson to be an aggravating circumstance did the fire have to result in the injury to a living person or only related to the murder, assuming Dawn Hacheney was all ready dead."<sup>5</sup> After hearing from the parties, the court responded in writing that it "will not provide further instructions in response to this inquiry. Please review the instructions provided."<sup>6</sup>

Also on December 26, 2002, the jury found Hacheney guilty of first degree premeditated murder and answered "yes" to a special interrogatory asking whether Hacheney had killed in the

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<sup>5</sup> CP at 1358-60.

<sup>6</sup> CP at 1358-60.

course of first degree arson. The trial court imposed a sentence of life without parole, and this appeal followed.

I.

Citing *State v. Golladay*,<sup>7</sup> *State v. Diebold*,<sup>8</sup> *State v. Dudrey*,<sup>9</sup> *State v. Leech*,<sup>10</sup> and *State v. Brown*,<sup>11</sup> Hacheny claims that the evidence is insufficient to support the jury's finding that he committed the murder "in the course of" first degree arson. This is true, he says, because the evidence shows that Dawn was dead before the fire started. The State responds that Washington law requires only an "intimate connection" between the arson and the murder, and that such a connection exists here.

RCW 10.95.020(11)(e) states in pertinent part:

A person is guilty of aggravated first degree murder . . . if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a) . . . and . . . [t]he murder was committed in the course of . . . [a]rson in the first degree.

"To establish that a killing occurred in the course of, in furtherance of, or in immediate flight from a felony, there must be an 'intimate connection' between the killing and the felony."<sup>12</sup> An

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<sup>7</sup> 78 Wn.2d 121, 470 P.2d 191 (1970), *overruled on other grounds*, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976).

<sup>8</sup> 152 Wash. 68, 277 P. 394 (1929).

<sup>9</sup> 30 Wn. App. 447, 635 P.2d 750 (1981), *review denied*, 96 Wn.2d 1026 (1982).

<sup>10</sup> 114 Wn.2d 700, 790 P.2d 160 (1990).

<sup>11</sup> 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

<sup>12</sup> *Brown*, 132 Wn.2d at 607-08 (quoting *Golladay*, 78 Wn.2d at 132).

“intimate connection” between a killing and a felony charged as an aggravating circumstance is established when the killing is “part of the ‘res gestae’ of the felony.”<sup>13</sup> A killing and an aggravating felony are part of the same *res gestae* where the killing occurs in “close proximity in terms of time and distance,”<sup>14</sup> and there is a “causal connection” clearly established between the killing and the felony.<sup>15</sup>

In *Brown*, the defendant kidnapped, robbed, and raped a woman for two days before killing her. On appeal, he argued that the evidence was insufficient to prove that he had committed first degree murder “in furtherance of” kidnap, rape, or robbery because the murder had occurred “hours” after the other felonies.<sup>16</sup> Declining to read “in furtherance of” literally, and “look[ing] instead to whether the killing was part of the *res gestae* of the felony,” the Washington Supreme Court required a “‘causal’ or ‘intimate’ connection between a killing and a related felony to establish the killing was committed in the course of, in furtherance of, or in immediate flight from the felony.”<sup>17</sup> Finding that the evidence supported such a connection, the *Brown* court affirmed.

Taken in the light most favorable to the State, the evidence recited above is sufficient to

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<sup>13</sup> *Brown*, 132 Wn.2d at 608.

<sup>14</sup> *Brown*, 132 Wn.2d at 608 (quoting *Leech*, 114 Wn.2d at 706).

<sup>15</sup> *Brown*, 132 Wn.2d at 608 (quoting *Golladay*, 78 Wn.2d at 130); *see also* *Dudrey*, 30 Wn. App. at 450.

<sup>16</sup> *Brown*, 132 Wn.2d at 609.

<sup>17</sup> *Brown*, 132 Wn.2d at 610 (emphasis added).

show that Dawn's murder was "intimately connected" with the arson, and was part of the arson's "res gestae." Thus, the evidence is also sufficient to show that Dawn's murder was committed "in the course of" arson.

II.

Hachenev argues that the trial court should not have instructed the jury to decide whether the murder was committed "in the course of" the arson. In Instruction 12, the court told the jury:

To establish that the killing occurred "in the course of" another crime, there must be an intimate connection between the killing and the other crime. The killing and the other crime must be in close proximity in terms of time and distance. However, more than a mere coincidence of time and place is necessary: A causal connection must clearly be established between the two crimes.<sup>[18]</sup>

While considering Hachenev's objections, the trial court correctly stated that, "under the circumstances of this case [Instruction 12] takes the place of the words 'res gestae,' which would not be used in normal conversations, and, consequently, Instruction No. 12 is necessary."<sup>19</sup> With this one exception, the instruction followed *Brown*, and the trial court did not err.

III.

Hachenev argues that the trial court impermissibly commented on the evidence when, in Instruction 12, it referred to "the killing." Jury instructions must be read as a whole and in context,<sup>20</sup> and the trial court so informed the jury.<sup>21</sup> Instruction 11 said that *if* the jury found

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<sup>18</sup> CP at 1353.

<sup>19</sup> RP at 4961.

<sup>20</sup> *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001).

<sup>21</sup> CP at 1341 ("You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.").

Hachenev guilty of premeditated first degree murder, the jury must determine whether the murder was committed in the course of first degree arson. Instruction 12 said that an “intimate connection” had to be shown before “the killing”—to be fully consistent with Instruction 11, Instruction 12 really should have said “the murder”—could be considered to have occurred in the course of another crime.<sup>22</sup> Instructions 11 and 12 were both conditioned on the jury’s first finding Hachenev guilty of first degree murder, and thus neither commented on that issue.<sup>23</sup>

Because Instructions 11 and 12 were conditional, *State v. Becker*<sup>24</sup> is distinguishable from this case. The issue in *Becker* was whether a particular facility was a “school,” and the trial court improperly instructed that it was. The issue here is whether Hachenev committed murder, and the trial court properly instructed that *if* Hachenev had committed the murder, the jury should go on to decide whether the murder was intimately connected with the arson. Instruction 12 was not an impermissible comment on the evidence.

#### IV.

Hachenev argues that the trial court erred by using “assault” to describe the actus reus of first degree murder. Reasoning from WPIC 26.02, he claims that the trial court should have said

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<sup>22</sup> CP at 1353.

<sup>23</sup> See also CP at 1342 (“The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.”).

<sup>24</sup> 132 Wn.2d 54, 935 P.2d 1321 (1997).

“drugged and suffocated,” instead of “assault.”<sup>25</sup> But even if the trial court had accepted Hachenev’s proposal that it say “drugged and suffocated,” it would have been describing a particular type of assault. We see no reason not to describe the assault more generally, and no prejudice to Hachenev from the trial court’s having done that. The trial court had discretion to decide how its jury instructions would be worded,<sup>26</sup> and it did not abuse that discretion here.<sup>27</sup>

V.

Hachenev argues that the trial court erred when, in response to the three questions

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<sup>25</sup> WPIC 26.02 recommends that a trial court describe the elements of premeditated first degree murder as follows:

- (1) That on or about the \_\_\_ day of \_\_\_\_\_, 19\_\_, the defendant \_\_\_\_\_ (briefly describe the act charged);
- (2) That the defendant acted with intent to cause the death of \_\_\_\_\_ (name of person);
- (3) That the intent to cause the death was premeditated;
- (4) That \_\_\_\_\_ (name of decedent) died as a result of the defendant’s acts; and
- (5) That the acts occurred in the State of Washington.

11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 26.02, at 284 (2d ed. 1994). Instruction 7 said:

- (1) That on or about the 26th day of December 1997, the defendant *assaulted* Dawn Hachenev;
- (2) That the defendant acted with intent to cause the death of Dawn Hachenev;
- (3) That the intent to cause the death was premeditated;
- (4) That Dawn Hachenev died as a result of the defendant’s acts; and
- (5) That the acts occurred in the State of Washington.

CP at 1348 (emphasis added). Instruction 8 defined “assault” as “an intentional touching or striking of another person that is harmful.” CP at 1349.

<sup>26</sup> *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968); *State v. Ellison*, 36 Wn. App. 564, 576, 676 P.2d 531, review denied, 101 Wn.2d 1010 (1984).

<sup>27</sup> Nor do we find *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), *State v. Clark*, 96 Wn.2d 686, 638 P.2d 572 (1982), or *State v. Olson*, 47 Wn. App. 514, 735 P.2d 1362 (1987), all cited by Hachenev, to be on point or helpful here.

submitted during deliberations, it told the jurors to reread the instructions they already had. According to Hachenev's argument, the instruction defining "in the course of" was ambiguous, and the ambiguity would have been clarified by additional instructions.

The doctrine of invited error bars a party from asking for an instruction, then "later complain[ing] on appeal that the requested instruction was given."<sup>28</sup> Logically extended, it also bars a party from asking a trial court *not* to give an instruction, then later complaining on appeal that the trial court failed to give it. In this case, Hachenev asked the trial court to tell the jury "[t]hat you have the instructions; you should reread them."<sup>29</sup> He also said that he did not object to the trial court's telling the jury, "The Court will not provide further instructions in response to this inquiry. Please review the instructions provided."<sup>30</sup> The court acted as Hachenev asked it to, and he may not now claim error on that basis.<sup>31</sup>

## VI.

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

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<sup>28</sup> *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (quoting *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted from original)).

<sup>29</sup> Report of Proceedings: Jury Inquiry (RPJ) at 3.

<sup>30</sup> RPJ at 9.

<sup>31</sup> *Studd*, 137 Wn.2d at 546.

live testimony, it violated his Sixth Amendment right to confront the witnesses against him.

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."<sup>32</sup>

Whether a witness is unavailable despite the State's good faith efforts to obtain his or her presence is a question of preliminary fact that the trial court decides under ER 104(a).<sup>33</sup> The trial court considers all the facts and circumstances<sup>34</sup> according to a preponderance of the evidence,<sup>35</sup> and we reverse only if the record does not support its decision.<sup>36</sup>

In *State v. Aaron*,<sup>37</sup> the defendant was charged with burglary. He failed to appear in court

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<sup>32</sup> 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).

<sup>33</sup> *State v. Allen*, 94 Wn.2d 860, 866, 621 P.2d 143 (1980) (pre-rules trial; "question of 'unavailability to testify at trial' is one of fact to be determined by the trial judge").

<sup>34</sup> *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.").

<sup>35</sup> ER 104(a); *Bourjaily v. United States*, 483 U.S. 171, 176, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987); *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn. App. 275, 285-89, 966 P.2d 355 (1998); *State v. Pinnell*, 311 Or. 98, 114, 806 P.2d 110 (Or. 1991); Advisory Committee's Note to FRE 104(a), 56 F.R.D. 183, 197 (1973).

<sup>36</sup> See *State v. DeSantiago*, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003).

<sup>37</sup> 49 Wn. App. 735.

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 that he had had the case only an hour and a half and was not prepared. 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,<sup>38</sup> Division One reversed.

In *State v. Hobson*,<sup>39</sup> 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."<sup>40</sup> The trial court granted the motion, and Division One affirmed.

The facts and circumstances here resemble *Hobson* more than *Aaron*. The State served all three witnesses with enforceable trial subpoenas before they left Washington. As far as the

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<sup>38</sup> *Aaron*, 49 Wn. App. at 741 (emphasis added).

<sup>39</sup> 61 Wn. App. 330, 810 P.2d 70, *review denied*, 117 Wn.2d 1029 (1991).

<sup>40</sup> *Hobson*, 61 Wn. App. at 333.

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,"<sup>41</sup> and that the prosecutor had "revealed [that] all three witnesses refused to come and refused to honor the subpoena,"<sup>42</sup> 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.

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<sup>41</sup> RP at 3833.

<sup>42</sup> RP at 3833.

VII.

Hachenev argues that the trial court violated his constitutional right to a public trial by not allowing his father to attend the depositions. The State responds that the depositions were not used until trial, and that the trial was open to the public.

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.<sup>43</sup> If that right is violated, the remedy is to reverse and remand for a new trial.<sup>44</sup>

The federal cases help here. In *United States v. Bertoli*,<sup>45</sup> the public was excluded as several depositions were being taken, but the testimony was later “offered into evidence at a public trial.” In *United States v. Acevedo-Ramos*,<sup>46</sup> the public was excluded as a deposition was being videotaped, but again the testimony “aired in public, via the videotape, at trial.” In each case, the court found that the right to public trial was not violated by excluding the public from the deposition because the public had not been not excluded from the trial at which the deposition was later used.<sup>47</sup>

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<sup>43</sup> *Cohen v. Everett City Council*, 85 Wn.2d 385, 387, 535 P.2d 801 (1975).

<sup>44</sup> *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), *review denied*, 146 Wn.2d 1006 (2002).

<sup>45</sup> 854 F. Supp. 975, 1019 (D.N.J.), *vacated in part on other grounds*, 40 F.3d 1384 (3d Cir. 1994).

<sup>46</sup> 842 F.2d 5, 8 (1st Cir. 1988).

<sup>47</sup> Hachenev also cites *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965), a case in which the trial judge failed to follow the statutory procedure for taking depositions in a criminal case. *Lewis* does not help here.

Here as in *Bertoli* and *Acevedo-Ramos*, the trial court excluded a citizen from depositions that were later used in a public trial that the citizen had every right to attend. Accordingly, Hachenev's right to public trial was not abridged.

#### VIII.

Hachenev argues that the trial court erred by admitting evidence of the sexual relationships in which he engaged shortly after Dawn's death. More specifically, he contends that the trial court abused its discretion by admitting (1) the testimony of Michael DeLashmutt that Hachenev had said he could not wait to get to heaven because then he could have sex with whomever he wanted; (2) the testimony of Latsbaugh, Anderson, and Matheson that each of them had a sexual relationship with Hachenev shortly after Dawn's death; (3) e-mails from Hachenev to Latsbaugh with sexual content; (4) the testimony of Latsbaugh that before Dawn's death, Hachenev had said that he wished he could take Latsbaugh as his wife; and (5) testimony that Hachenev inappropriately hugged a woman at Dawn's funeral.

ER 404(b) allows proof of motive. The State's theory of the case was that Hachenev was motivated to murder Dawn because he desired to pursue other women whom he knew through his church. The evidence showed motive, and its use for that proper purpose (probative value) was not substantially outweighed by the danger it might be improperly used to show a propensity to be a bad person (unfair prejudice). The trial court did not abuse its discretion.

#### IX.

Hachenev argues that the trial court erred by including "consciousness of guilt" in the instruction by which it limited the use of the evidence discussed in the preceding section. Even assuming error, however, we do not perceive how it could have made a difference to this case.

Consciousness of guilt is a state of mind similar to motive and intent,<sup>48</sup> and under the particular circumstances here it seems unlikely that the jury would have understood it to mean anything different from motive. It could not have affected the outcome of the trial, and any error was harmless “within reasonable probabilities.”<sup>49</sup>

X.

Hachenev asserts that the trial court erred by allowing Drs. Lacsina, Logan, and Selove to rely on Exhibit 323, the written lab report in which Weiss described the results of her tests.<sup>50</sup> Hachenev asserts that none of the doctors should have been permitted to rely on that report because it (A) was inadmissible hearsay, (B) violated his right to confrontation, and (C) was not supported by an adequate chain of custody. The State responds (A) that the report was admissible under RCW 5.45.020, Washington’s business records exception to the hearsay rule; (B) that the report did not violate the confrontation clause because it was not “testimonial”

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<sup>48</sup> *State v. Messinger*, 8 Wn. App. 829, 837, 509 P.2d 382 (“conduct indicates a consciousness of guilt, an inconsistency with innocence, or the intent with which the act was committed”) (quoting 1 C. Torcia, WHARTON’S CRIMINAL EVIDENCE § 209, at 437 (13th ed. 1972)), *review denied*, 82 Wn.2d 1010 (1973), *cert. denied*, 415 U.S. 926 (1974).

<sup>49</sup> *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

<sup>50</sup> In Assignments of Error 14, 15, and 16, Hachenev asserts in his brief that “[t]he trial court erred by admitting the expert testimony of Dr. Logan, Mr. Lacsina, and Mr. Selove.” Br. of Appellant at 54; *see also* Br. of Appellant at 2. In his statement of the issues however, he claims that the issue is “[w]hether expert witnesses may rely on laboratory reports prepared by others, and testify as to the conclusions [of others], when the reports do not contain sufficient guarantees of trustworthiness with regard to chain of custody and do not qualify for a hearsay exception.” Br. of Appellant at 3. In the argument section of his brief, he argues in accordance with his issue statement and adds a claim that his right to confront was violated.

within the meaning of *Crawford v. Washington*<sup>51</sup>; and (C) that the report was supported by an adequate if not perfect chain of custody. Accordingly, we turn to those issues.

A.

The first question is whether Weiss' report was admissible under RCW 5.45.020. That statute provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

According to the Washington Supreme Court, this statute contains five requirements.<sup>52</sup> First, the offered evidence must be in the form of a record. Second, the record must be of an act, condition, or event. Third, the record must be made in the regular course of business (and thus not primarily in anticipation of litigation). Fourth, the record must be made at or near the time of the act, condition or event. And fifth, the trial court in its discretion must believe that the sources of information and the method and time of preparation justify admission.<sup>53</sup>

The Washington Supreme Court has applied these requirements to facts like those here. In *State v. Kreck*, the defendant's wife was found dead. The police received information that the defendant had bought chloroform to use while robbing her. The medical examiner in Spokane

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<sup>51</sup> 541 U.S. 36.

<sup>52</sup> *State v. Kreck*, 86 Wn.2d 112, 118, 542 P.2d 782 (1975).

<sup>53</sup> *Kreck*, 86 Wn.2d at 118-19.

forwarded to the state toxicology lab in Seattle a blood sample from the wife's autopsy, asking that it be tested for chloroform. The head of the state lab, Dr. Loomis, directed a qualified lab employee named Skinner to do the test, and Skinner reported in writing, "Test: chloroform; Result: 26.0 mg%."<sup>54</sup> Skinner was in Germany during the defendant's trial for murder, so the State offered his written report after having Loomis testify to how the test was conducted, how the report was prepared, and to Loomis' own role as supervisor. The trial court admitted the report, and the Supreme Court affirmed, holding that the requirements of RCW 5.45.020 had been met.

In *State v. Rutherford*,<sup>55</sup> the defendant asked the Air Force to test a product that he wanted the Air Force to buy. Hopkins did some of the testing, which he reported to his supervisor, Spellman, and which Spellman incorporated into a report that Spellman wrote. Hopkins had a stroke before trial and thus could not testify. At trial then, the State asked that Spellman be "allowed to testify concerning reports made to him by Mr. Hopkins and others in the laboratory."<sup>56</sup> The defendant objected on hearsay grounds, claiming that Spellman had "not personally conduct[ed] the tests," that he "could not be cross-examined on the procedures followed," and that he lacked "knowledge concerning what [had been] done."<sup>57</sup> The trial court

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<sup>54</sup> *Kreck*, 86 Wn.2d at 114.

<sup>55</sup> 66 Wn.2d 851, 405 P.2d 719 (1965).

<sup>56</sup> *Rutherford*, 66 Wn.2d at 852-53.

<sup>57</sup> *Rutherford*, 66 Wn.2d at 853.

overruled, and the Washington Supreme Court affirmed. According to the Supreme Court, “the trial court did not abuse its discretion in permitting [Spellman] to give the results of tests performed under his supervision and control, even though he did not personally conduct the tests or witness their performance.”<sup>58</sup>

In *State v. Ecklund*,<sup>59</sup> the defendant was charged with murder. At trial, the State presented the testimony of a blood expert named Boughton. As an employee of the FBI laboratory, Boughton relied in part on the summary reports and lab work sheets that related the results of blood tests done on the defendant’s shoes “by a technician working under [Boughton’s] supervision and control and recorded on laboratory work sheets.”<sup>60</sup> The defendant claimed “that because Boughton did not personally perform the laboratory tests, his testimony [was] inadmissible hearsay and its admission denied defendant his constitutional right of confrontation.”<sup>61</sup> Although neither the summary report nor the lab work sheets had been offered into evidence, this court stated in dictum that they “would have been admissible under RCW 5.45.020 had they been offered into evidence.”<sup>62</sup>

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<sup>58</sup> *Rutherford*, 66 Wn.2d at 855.

<sup>59</sup> 30 Wn. App. 313, 633 P.2d 933 (1981).

<sup>60</sup> *Ecklund*, 30 Wn. App. at 317.

<sup>61</sup> *Ecklund*, 30 Wn. App. at 317.

<sup>62</sup> *Ecklund*, 30 Wn. App. at 319 (emphasis added). *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002), *review denied*, 148 Wn.2d 1001 (2003), contains similar dictum. Although the question in *Nation* was the admissibility of an expert’s oral opinion, and not the admissibility of a business record, Division Three commented, based in part on *Ecklund*’s dictum, that if the question *were* the admissibility of a business record, the record it was hypothesizing would not be admissible. *Nation*, 110 Wn. App. at 665-66.

Together, these cases allow a laboratory employee to relate his or her personal knowledge of how the lab generally conducts its tests, and the trial court to infer that the particular tests in question were done in the same way.<sup>63</sup> These cases also show that testing by a state laboratory is sometimes done in the regular course of the laboratory's business, and not solely in anticipation of litigation.

In this case, the trial court had discretion to infer from Dr. Logan's testimony that he had personal knowledge of the way in which the lab generally conducted its tests, and that Weiss, an employee of the state lab, conducted her tests in accordance with those procedures. The trial court had discretion to infer from evidence showing that Weiss conducted her tests while the fire was thought to be accidental, and more than two years before any criminal suspicion arose, that Weiss was not acting in anticipation of litigation. It is undisputed that Weiss' report was a business record, that she was working under a business duty to her employer when she prepared it, and that she was describing an act, condition or event at or near the time of its occurrence. The trial court had discretion to conclude that the sources of information, method and time of preparation were trustworthy. Accordingly, we hold that all the requirements of RCW 5.45.020 had been met, and that Exhibit 323 was properly admitted.

B.

The next question is whether the admission of Weiss' report under RCW 5.45.020 violated Hacheney's Sixth Amendment right to confront the witnesses against him. In general, the Sixth Amendment insures that every accused shall enjoy the right to confront the witnesses

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<sup>63</sup> This same idea is embodied in ER 406.

against him. In *Crawford v. Washington*, the United States Supreme Court held that the Sixth Amendment's confrontation clause applies only when a witness' statement is "testimonial."<sup>64</sup> The Court declined "to spell out a comprehensive definition of 'testimonial,'" but it said that the term at least applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."<sup>65</sup> The Court also said that the term does not apply to most of the common law's hearsay exceptions— "for example, business records or statements in furtherance of a conspiracy."<sup>66</sup>

Assuming without holding that an employee of Washington's toxicology laboratory can sometimes make a "testimonial" statement within the meaning of *Crawford*, Weiss did not do so here. She made her statements while she, the investigating officers, and the medical examiner all thought the fire was accidental. She made her statements more than two years before any criminal suspicion arose and before any criminal investigation was started. As she was merely performing her duty to her employer in the course of the lab's regular routine, her report was not "testimonial," and its admission did not violate Hachenev's right to confront witnesses.

C.

We do not overlook Hachenev's argument that Weiss' lab report did not have "sufficient guarantees of trustworthiness with regard to chain of custody"<sup>67</sup> on the blood and lung-tissue

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<sup>64</sup> *Crawford*, 541 U.S. at 51.

<sup>65</sup> *Crawford*, 541 U.S. at 68.

<sup>66</sup> *Crawford*, 541 U.S. at 56.

<sup>67</sup> Br. of Appellant at 3.

samples. When an item is offered as an exhibit in court, or when it is merely referred to in a business record, the chain of custody need not be perfect, though it must be sufficient.<sup>68</sup> The record in this case shows that Dr. Lacsina took blood and lung-tissue samples during the autopsy;<sup>69</sup> that a deputy coroner named Zink packaged the samples and, inferentially, delivered them to an employee of the state lab named Case; and that the samples were thereafter subject to the lab's internal procedures as described by Dr. Logan.<sup>70</sup> Like Lacsina and Weiss, Zink and Case were professionals acting under their own business duties to their employers. "[B]eyond mere speculation and innuendo, there is not the least indication in the evidence that the questioned exhibits were anything other than what they were represented to be or that they were contaminated in the course of their journey to the testing laboratory."<sup>71</sup> Even though Zink and

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<sup>68</sup> ER 901(a) ("requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims"); *United States v. Smith*, 308 F.3d 726, 739 (7th Cir. 2002) (perfect chain of custody is not prerequisite to admission); *United States v. Humphrey*, 208 F.3d 1190, 1205 (10th Cir. 2000) (chain of custody need not be perfect); *United States v. Lott*, 854 F.2d 244, 250 (7th Cir.1988) ("government need not prove a perfect chain of custody for evidence to be admitted at trial"); *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985); *State v. Roy*, 126 Wn. App. 124, 130, 107 P.3d 750 (2005); *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002); *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998); *State v. DeCuir*, 19 Wn. App. 130, 135, 574 P.2d 397 (1978); *State v. McGinley*, 18 Wn. App. 862, 866-67, 573 P.2d 30 (1977).

<sup>69</sup> The record does not show, however, that the blood or tissue samples were ever marked for identification or offered as exhibits.

<sup>70</sup> *See, e.g.*, RP at 1535.

<sup>71</sup> *State v. Boehme*, 71 Wn.2d 621, 638, 430 P.2d 527 (1967), *cert. denied*, 390 U.S. 1013 (1968).

Case did not testify, the trial court had discretion to infer they acted reliably and trustworthily,<sup>72</sup> leaving any defect for the parties to argue to the jury as a matter of weight.

XI.

Hachenev argues that the State tardily disclosed Krueger as an expert witness, that the trial court was required to exclude his testimony, and that the trial court erred by not doing that. A trial court has broad discretion when ruling on a discovery violation, and we review its ruling only for abuse of that discretion.<sup>73</sup>

Until about a week before trial, the State did not know that the propane canisters had been manufactured by Garrett rather than Coleman. After discovering that fact and finding that Garrett's active employees were unwilling to testify, the State located Krueger, a retired Garrett employee. The State disclosed Krueger's identity and summarized his testimony as soon as it knew about him. The trial court offered a continuance to give Hachenev time to prepare, but Hachenev declined. The trial court had discretion to allow Krueger to testify, and it did not abuse that discretion by ruling that he could.

XII.

Citing *State v. Bokien*<sup>74</sup> and *Handshy v. Nolte Petroleum Co.*,<sup>75</sup> Hachenev argues that the

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<sup>72</sup> *Kreck*, 86 Wn.2d at 118-19; *Boehme*, 71 Wn.2d at 638; *Rutherford*, 66 Wn.2d at 855.

<sup>73</sup> *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981).

<sup>74</sup> 14 Wash. 403, 44 P. 889 (1896).

<sup>75</sup> 421 S.W.2d 198 (Mo. 1967).

trial court erred by allowing the prosecutor to ask during voir dire: “If you heard the case and it was based largely upon circumstantial evidence, but you were convinced beyond a reasonable doubt, do you think you could convict based upon that evidence?”<sup>76</sup>

A trial court has broad discretion in determining the scope and extent of voir dire.<sup>77</sup> “Absent an abuse of discretion and a showing that the accused’s rights have been substantially prejudiced thereby, the trial judge’s ruling as to the scope and content of voir dire will not be disturbed on appeal.”<sup>78</sup>

*Bokien* does not support Hacheney’s position. It held that the trial court had discretion to reject such a question, a proposition not involved here. It did not hold that the trial court lacked discretion to allow such a question, as Hacheney now asserts.

Nor does *Handshy* support Hacheney’s position. Although the question asked there was similar to the one asked here— “If the law and the evidence shows you Mr. Handshy is not entitled to recover, are there any of you who couldn’t give a verdict for the defendant?”<sup>79</sup>—the court held that it did not warrant reversal, a conclusion with which we agree. The question asked here called for an answer so obvious as to be virtually meaningless, and we cannot say that the trial court abused its discretion by allowing it.

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<sup>76</sup> Report of Proceedings: Voir Dire at 356.

<sup>77</sup> *State v. Davis*, 141 Wn.2d 798, 826, 10 P.3d 977 (2000); *see also* CrR 6.4(b).

<sup>78</sup> *State v. Frederiksen*, 40 Wn. App. 749, 752-53, 700 P.2d 369, *review denied*, 104 Wn.2d 1013 (1985).

<sup>79</sup> *Handshy*, 421 S.W.2d at 200.

XIII.

Hachenev argues that the trial court erred by allowing Scott Nickell and Allison LeGedre to testify that Sandra Glass had told them, outside of court, that Hachenev had told her that Hachenev had killed Dawn. The State responds that Hachenev implied during his cross-examination of Glass that she was fabricating her story in exchange for immunity from prosecution, and thus that her prior statements were admissible under ER 801(d)(1)(ii).

According to ER 801(d)(1)(ii), a prior consistent statement is not hearsay if the declarant testifies at trial and the statement is relevant “to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” To rebut such a charge, a statement must be made *before* the charge.<sup>80</sup> Thus, the questions here are whether Hachenev expressly or impliedly charged Glass with fabrication, and whether the fabrication was “recent” because it came after the offered statement.

Hachenev elicited from Glass that when she met with law enforcement officials, the first thing she did was “negotiate[] this immunity agreement” that gave her “absolute immunity from prosecution for anything [she] might have told the investigator’s throughout this investigation.”<sup>81</sup> A motive to fabricate arguably arose at that time, and Glass’ statements to Nickell and LeGedre were made before that time. Accordingly, the trial court properly admitted Nickell’s and LeGedre’s testimony concerning Glass’s prior statement.

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<sup>80</sup> *Tome v. United States*, 513 U.S. 150, 157, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995).

<sup>81</sup> RP at 2368-69.

XIV.

Hachenev argues that the trial court erred by refusing to allow Hachenev to ask Glass about Nickell's marital status at the time Nickell and Glass began a sexual relationship. The State responds that Nickell's marital status was irrelevant. Agreeing with the State and the trial court, we hold that Nickell's marital status long before trial was not relevant.

XV.

Pro se, Hachenev makes two assertions regarding preservation of the blood and lung tissue samples. First, he claims that the State failed to prove that the samples were preserved in accordance with WAC 448-14-020(3)(b). By its terms, however, WAC 448-14-020(3)(b) applies to blood *alcohol* analysis, a matter not relevant here. Second, he claims that the State failed to prove that the blood and tissue samples were properly collected, stored, and tested. As discussed in Section X, however, Dr. Logan's testimony regarding the state laboratory's general procedures for collecting, storing, and testing blood and tissue provided a basis to reasonably infer that the samples in issue here were handled in the same way.

XVI.

Hachenev contends that the trial court erred "by allowing the State to present volumes of phone records and summary charts that were not authenticated."<sup>82</sup> ER 901(a) provides that "[t]he requirement of authentication or identification . . . is satisfied by evidence sufficient to

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<sup>82</sup> Appellant's Statement of Additional Grounds (SAG) at 4.

support a finding that the matter in question is what its proponent claims.”<sup>83</sup> At trial, the State called Horacio Delgado, the manager of Qwest’s business office. He identified the records and explained how they had been maintained. This was enough to support inferences that the records were what they purported to be and that the records had not been altered. Hence, it was also sufficient to authenticate under ER 901.<sup>84</sup>

## XVII.

Hachenev claims that summary charts were improperly authenticated and that Richard Kitchen, the investigator who authenticated them, was improperly allowed to testify as an expert. Under ER 1006, “[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.” The proponent must show that (1) the original materials are voluminous and an in-court examination would be inconvenient,<sup>85</sup> (2) the originals are authentic and the summary accurate,<sup>86</sup> (3) the underlying materials would be admissible as evidence,<sup>87</sup> and (4) the originals

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<sup>83</sup> See also *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003) (ER 901 satisfied by “sufficient proof to permit a reasonable juror to find in favor of authenticity or identification”), *review denied*, 150 Wn.2d 1028 (2004).

<sup>84</sup> *Campbell*, 103 Wn.2d at 21.

<sup>85</sup> *State v. Barnes*, 85 Wn. App. 638, 662-63, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997).

<sup>86</sup> 5C Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 1006.3, at 271 (4th ed. 1999) (citing *Needham v. White Labs., Inc.*, 639 F.2d 394 (7th Cir.), *cert. denied*, 454 U.S. 927, (1981); *United States v. Scales*, 594 F.2d 558 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979)).

<sup>87</sup> *State v. Kane*, 23 Wn. App. 107, 110-11, 594 P.2d 1357 (1979).

or duplicates have been made available for examination and copying by the other parties.<sup>88</sup>

These factors were met here. At trial, Hachenev did not object to factor one or factor four. Factor two was met because Delgado properly authenticated the phone records and Kitchen properly explained how he had prepared the summary charts. Factor three was met because the charts were relevant and, if hearsay, within the business records exception to the hearsay rule.

Nor did Kitchen improperly testify as an expert. "Every opinion must be based on knowledge."<sup>89</sup> Lay opinion must be based on personal knowledge and expert opinion must be based on scientific, technical, or specialized knowledge.<sup>90</sup> Kitchen merely explained, based on his personal knowledge, how he had collected the relevant phone records and summarized them into the charts that the State then offered. He did not give expert testimony, and Hachenev's objection on that ground was correctly overruled.

#### XVIII.

Hachenev argues that the trial court erred by permitting the jury to have Kitchen's summary charts in the jury room during deliberations. Based on *State v. Lord*,<sup>91</sup> we hold that the trial court did not err.

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<sup>88</sup> ER 1006.

<sup>89</sup> *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003); *State v. Kunze*, 97 Wn. App. 832, 850, 988 P.2d 977 (1999), *review denied*, 140 Wn.2d 1022 (2000).

<sup>90</sup> *Dolan*, 118 Wn. App. at 329; *Kunze*, 97 Wn. App. at 850.

<sup>91</sup> 117 Wn.2d 829, 856 n.5, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

XIX.

Hachenev argues that the trial court erred by not sending to the jury room CD-ROMs with computerized simulations of the fire. CrR 6.15(e) provides that the “jury shall take with it . . . all exhibits received in evidence.” Notwithstanding this wording, however, the decision to allow exhibits to go into the jury room lies within the sound discretion of the trial court.<sup>92</sup> Here, the trial court said it would address the jury’s request to play the CD-ROMs if and when one was ever made. No request was ever made, and we perceive no abuse of discretion.

XX.

Hachenev argues that the trial court erred because the bailiff communicated with the jury in two instances. During the trial, Juror No. 8 sent the court a note asking (1) why one of the State’s witnesses had been permitted to be present in court during another witness’ testimony; and (2) why one of the State’s witnesses was allowed to testify over a hearsay objection when other witnesses were not. After discussing the note with the parties, the trial court decided not to respond and instructed the bailiff to inform Juror No. 8.

During deliberations, the same juror, No. 8, asked for an exhibit list. The parties agreed on a list that the bailiff gave to the jury. The trial court stated that “[w]hen the jury was handing [the bailiff] their earlier inquiry, they also said something to the effect to her, ‘Do we have all of the admitted exhibits?’ And she said, ‘You have everything you’re supposed to have,’ and I assume that was the end of their inquiry.”<sup>93</sup>

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<sup>92</sup> *State v. Frazier*, 99 Wn.2d 180, 189, 661 P.2d 126 (1983); *State v. Strandy*, 49 Wn. App. 537, 542, 745 P.2d 43 (1987), *review denied*, 109 Wn.2d 1027 (1988).

<sup>93</sup> RP at 5190.

“A bailiff is forbidden to communicate with the jury during deliberations except to inquire if it has reached a verdict, or to make innocuous or neutral statements.”<sup>94</sup> If a bailiff improperly communicates, however, the error will be deemed harmless if the record demonstrates the absence of prejudice beyond a reasonable doubt.<sup>95</sup> Assuming without finding error here, the record plainly shows the absence of prejudice beyond a reasonable doubt.<sup>96</sup> Hence, this argument fails.

XXI.

Hachenev argues that the trial court erred by admitting a photo of a plastic bag and testimony concerning its contents. As he did not object at trial, he has not preserved this issue for review.<sup>97</sup>

XXII.

Hachenev argues that the trial court erred by permitting Robert Bily, Robert Smith, Ron McClung, and Carol McClung to testify about a church meeting held several months after Dawn’s death. Earlier in the trial, however, he had suggested that Bily was so biased against him as to cause him to leave the church. The trial court had discretion to allow the State to explain

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<sup>94</sup> *State v. Johnson*, 125 Wn. App. 443, 460, 105 P.3d 85 (2005).

<sup>95</sup> *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997); *State v. Caliguri*, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983).

<sup>96</sup> *State v. Johnson*, 56 Wn.2d 700, 709, 355 P.2d 13 (1960), *cert. denied*, 366 U.S. 934 (1961).

<sup>97</sup> *See* RAP 2.5(a).

Bily's bias, and the court did not abuse that discretion here.<sup>98</sup>

XXIII.

Hacheny argues that the trial court should not have admitted an in-life photo of Dawn because the defense had offered to stipulate to her identity. A single in-life photograph is not inherently prejudicial, "especially when the jury also sees after death pictures of the victim's body."<sup>99</sup> Nor must the State accept a defendant's offer to stipulate to the identity of the victim.<sup>100</sup> Given that the jury in this case saw several "after death" pictures, and that the trial court admitted a single four-by-six inch in-life picture, we perceive no abuse its discretion.

XXIV.

Hacheny argues that the trial court erred by allowing Sandra Glass to speculate about a "prophecy" that she had discussed with Hacheny. Glass testified that about a week before the fire, while she and Hacheny were praying in the sanctuary of their church, she thought, "Your hands are no longer tied."<sup>101</sup> She related her thought to Hacheny, whose non-verbal response

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<sup>98</sup> *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) ("when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced"); *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), *aff'd*, \_\_\_ Wn.2d \_\_\_, 114 P.3d 637 (2005); *State v. Horton*, 116 Wn. App. 909, 917-18 n.26, 68 P.3d 1145 (2003).

<sup>99</sup> *State v. Brett*, 126 Wn.2d 136, 159, 892 P.2d 29 (1995) (quotations omitted), *cert. denied*, 516 U.S. 1121 (1996).

<sup>100</sup> *Brett*, 126 Wn.2d at 159.

<sup>101</sup> RP at 2298.

was “Accepting. Okay.”<sup>102</sup>

ER 701 permits lay opinion when rationally based on the witness’ perception and helpful to a clear understanding of the testimony or issue.<sup>103</sup> These criteria were met here, and the trial court did not err.

XXV.

Hachenev contends that his Sixth Amendment right to confront witnesses was violated because the trial court prevented him from questioning Glass about a “prophecy” in which God spoke to her about killing her own husband. By virtue of the Sixth Amendment, an accused has a right to cross-examine witnesses “to elicit facts which tend to show bias, prejudice or interest . . . but the scope or extent of such cross-examination is within the discretion of the trial court.”<sup>104</sup> A trial court can reject or limit cross examination if the circumstances only remotely tend to show the witness’ bias or prejudice.<sup>105</sup>

Before trial, Glass disclosed that she had received a “prophecy” that her husband was going to die, as well as a “prophecy” about a specific way to kill him. She received the first prophecy before Dawn’s death, and the second one after Dawn’s death. The trial court permitted cross-examination on the first but not the second, and Hachenev’s counsel agreed to “leave [the

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<sup>102</sup> RP at 2299.

<sup>103</sup> See also *State v. Stenson*, 132 Wn.2d 668, 724, 940 P.2d 1239 (1997) (citing *State v. Craven*, 69 Wn. App. 581, 586, 849 P.2d 681, review denied, 122 Wn.2d 1019 (1993)), cert. denied, 523 U.S. 1008 (1998); *State v. Day*, 51 Wn. App. 544, 552, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988).

<sup>104</sup> *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

<sup>105</sup> *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001), aff’d, 147 Wn.2d 288 (2002).

second] out.”<sup>106</sup>

The second “prophecy” was minor and inconsequential, given that Glass was fully cross-examined about her marriage, her marital problems, and various other “thoughts” and “prophecies” in which she visualized her husband’s death. Its exclusion did not affect the fairness of the trial, and the trial court did not err.

XXVI.

Hachenev argues that the State did not establish the corpus delicti of homicide or arson. To prove corpus delicti, the State must produce evidence other than the accused’s confession that is sufficient to show that a criminal act occurred through human agency.<sup>107</sup> Those requirements were amply met here with respect to both murder and arson, and there was no error.

XXVII.

Hachenev argues that the trial court erred by not giving a limiting instruction, *sua sponte*, on how the jury could properly use the State’s ER 404(b) evidence. The trial court gave a limiting instruction, but even if it had not, ER 105 expressly provides that the trial court shall give a limiting instruction “upon request” by a party. The court did not err.

XXVIII.

Hachenev argues that the trial court erred by permitting Scott Roberts, a fire investigator employed by an insurer, to testify to autopsy results that were not within the scope of his expertise. But rather than testifying about autopsy results, Roberts testified that (1) he disagreed

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<sup>106</sup> RP at 2157.

<sup>107</sup> *State v. Pineda*, 99 Wn. App. 65, 76-77, 992 P.2d 525 (2000); *State v. Flowers*, 99 Wn. App. 57, 59-60, 991 P.2d 1206 (2000).

with the part of the autopsy report that concluded Dawn died as result of a flash fire because, in Roberts' opinion, there was no evidence of a flash fire; and (2) based on his prior experience and knowledge about propane, the autopsy report's findings regarding the absence of propane were significant because "there should have been [propane] present," considering the distance between the propane canisters and a heater.<sup>108</sup> The trial court did not err.

XXIX.

Hachenev asserts that the prosecutor committed misconduct in opening statement and closing arguments. Absent a timely objection, a defendant's challenge to an allegedly improper remark by opposing counsel is waived unless the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."<sup>109</sup> "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial."<sup>110</sup> We review misconduct claims in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given.<sup>111</sup>

Hachenev argues that the prosecutor made "numerous [] inflammatory and erroneous

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<sup>108</sup> RP at 3588.

<sup>109</sup> *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (quoting *Stenson*, 132 Wn.2d at 719), *cert. denied*, 528 U.S. 922 (1999).

<sup>110</sup> *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

<sup>111</sup> *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

statements during opening argument which were never testified to.”<sup>112</sup> A prosecutor is permitted to outline “anticipated material evidence” in his or her opening statement so long he or she believes in good faith that such testimony will be forthcoming.<sup>113</sup> Here, Hacheny has not shown that the prosecutor did not have a good faith belief that the described testimony would be produced.

Hacheny argues that the prosecutor misstated scientific and medical facts in opening and closing arguments. Hacheny did not object, and the statements are supported by the record.

Hacheny argues that the prosecutor injected inadmissible testimony when, in closing, he asserted that Nickell told Hacheny on the phone, “You better not call Sandy Glass, and you better go to the authorities. I know what you did.”<sup>114</sup> Hacheny did not object, and those two sentences were not so flagrant and ill-intentioned that a curative instruction would not have been effective.

Hacheny argues that the prosecutor misrepresented the time at which Hacheny went hunting with friends on the day of fire, and also whether Glass had received a copy of the autopsy report. Hacheny’s counsel objected, the trial court gave a curative instruction, and the problem was so minor that the instruction was necessarily effective.

Hacheny argues that the prosecutor made remarks during rebuttal that were not really rebuttal, and that the prosecutor personally vouched for Glass’ credibility. In our view, however,

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<sup>112</sup> SAG at 37 (emphasis omitted).

<sup>113</sup> *Campbell*, 103 Wn.2d at 15-16; *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211 (1983).

<sup>114</sup> RP at 5170.

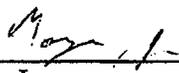
No. 29965-8-II

the prosecutor was rebutting the arguments concerning Glass' credibility that defense counsel had advanced in the defense closing argument.

Arguments not discussed are meritless or need not be reached.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
Morgan, J.

We concur:

  
\_\_\_\_\_  
Quinn-Brintnall, C.J.

  
\_\_\_\_\_  
Van Deren, A.C.J.

# **APPENDIX B**

PHONE (206) 343 5435

FAX (206) 731 8564

## Death Investigation Toxicology Report

**ST 976114**

agency case # KC 97-114  
attn.  
agency Kitsap Co. Coroner  
614 Division St  
Port Orchard WA 98366

date received 12-30-97  
date completed 1-9-98

Last name	First name	middle initial
Hachenev	Dawn	

sample	blood - heart	lung tissue
container	vg	pc
labelled	Y	Y

**BLOOD ETHANOL** neg

### BLOOD TEST RESULTS

cyanide - neg		mg/L
carbon monoxide	<5	% Sat
propane* - neg		mg/L
diphenhydramine	1.04	mg/L
drugs of abuse - neg		

### URINE TEST RESULTS

not performed

**RECEIVED**

JAN 13 1998

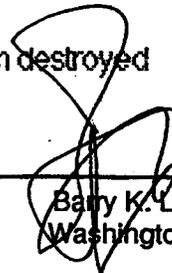
**CORONER'S OFFICE**

### COMMENTS

Note: samples will be retained for nine months then destroyed  
Propane assay performed on lung sample



Egle Weiss, Analyst



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

323

# **APPENDIX C**

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# **APPENDIX D**

## RECORDED CLAIMS STATEMENT

Insured	Policy No. CL#21D 97360 581	Date of Loss 12/16/97
Name of Person Giving Statement Nick Hacheney	Relationship to Accident	
Date Taken 1/2/98	Adjuster Deborah Krinbring	

A: Nick Hacheney, Interviewee  
 B: Margaret Conklin, SAFECO  
 C: Frank Kampsen, SAFECO  
 D: Carol McClung  
 Q: Deborah Krinbring, Adjuster

Q: This is Deborah Krinbring [phonetic], speaking with Nick Hacheney [phonetic] on January the 2<sup>nd</sup>, 1998, in Bainbridge Island, Washington. Um, also present for this statement is Margaret Conklin [phonetic] from SAFECO, Frank Kampsen [phonetic] from SAFECO, and Carol [phonetic], I didn't get your last name...

D: McClung [phonetic].

Q: McClung?

D: Mm hm [affirmative].

Q: You're also from - you're from where?

D: From Poulsbo.

A: Nicholas Daniel [phonetic] Hacheney, H-A-C-H-E-N-E-Y.

Q: [unclear] this statement is to gather facts surrounding a fire loss that took place at your home on or about um December 26<sup>th</sup>, to gather facts surrounding that loss to determine how coverage under your SAFECO policy will apply. Do you understand that?

A: Yes, I do.

Q: Okay. Uh, just to reference the file, this is in regards to claim number 21D97360581. Um, what is your um date of birth, please?

A: 5/20/70.

Q: And what is your social security number?

A: 538-...

Q: Okay. And what is your um occupation?

A: I'm a pastor at Christ Community Church.

Q: What is the [unclear] um, I'm, I know this is a, a delicate matter, and I'm gonna try to just um get through it um pragmatically to make it easier, but we need to ask about Dawn, and which um - was she employed prior to the fire?

A: Yes. Kathy Mento- Mentor [phonetic].

Q: Kathy Mentor?

A: Mm hm [affirmative].

Q: Do you recall her number at work?

A: 478-...

Q: [unclear] to pause. Thank you. This is Deborah Krinbring resuming our statement with Nicholas Hachenev. And we were just um completing the employment information from Dawn. When did you guys get married?

A: Uh, 1990.

Q: 1990. And how long had you known each other prior to that?

A: Two years. We met at Bible college.

Q: Which college?

A: Northwest, in Kirkland.

Q: Okay. All right. And um, do you have any dependents?

A: No.

Q: Any pets?

A: I have a dog.

Q: An' what kind of dog do you have?

A: A yellow lab.

Q: An' how old is he? He or she?

A: She's three years old.

Q: M'kay. Okay. So could you tell me about your occupation and just what you do, what - as a pastor there?

A: Um, yeah, I'm one of the, I'm one of the associate pastors and I do adult and youth ministries. I run - we have two celebration services at our church and I do the Thursday night celebration service which is geared more towards the Generation X type of age group.

Q: Yeah.

A: Um...

Q: I've heard I'm not a part of that age group. What is Generation X?

A: Um, it's supposed to be anybody born from 1965 on.

Q: I'm borderline.

A: Close. You could come. Many people do. An' they're...

Q: Okay. So 1965...

A: Well, that's just like...

Q: forward, right?

A: Yeah.

Q: And younger.

A: Um, so I, I run that...

Q: Mm hm.

A: an' then um I also am what's called a, a zone pastor in our church...

Q: Mm hm.

A: which means I have oversight of, um about half of the, the adult home groups...

Q: Oh.

A: which are uh mid-week groups that meet in the home with teaching an' it's ki-kind of a mini-church.

Q: Bible study type o' things, too?

A: Yeah.

Q: Mm hm.

A: It's uh teaching and worship and prayer time. And I oversee those.

Q: Okay.

A: So leadership training and meetings an'...

Q: Mm hm.

A: and then I do some counseling work.

Q: Did uh, did e- did Dawn have any other sources of

employment or income other than...

A: No.

Q: Okay. Um, did she have uh life insurance?

A: Um, a li- a little bit, not very much. Through her work she has about, I guess about \$10,000 worth.

Q: Okay. Do you guys have auto insurance?

A: Yeah, through SAFECO. We have all of our insurance through you guys.

Q: Have you had any claims um in the past with your auto policy?

A: No.

Q: No?

A: I mean, we had - uh, we - a window replaced with ya.

Q: M'kay.

A: And a couple of tow [unclear], but that's about it.

Q: How 'bout your um homeowner's policy, have you ever had any claims on that?

A: No. We have a new [unclear].

Q: You had a, you had a rental policy before you had your homeowner's. Did you have any claims on that?

A: No.

Q: Ever even filed an insurance claim before?

A: No.

Q: Okay. Do you have any more than the SAFECO policy on this house? Any other policies?

A: No.

Q: Okay. All right. Um, when did you purchase the house?

A: Uh, f- let's see. I think it was January, last year.

Q: In '97?

A: Yeah.

Q: Okay. And uh, how much did you purchase it for?

A: I think we, I think we paid like 75.

Q: 75,000?

A: I think. I'm not...

Q: Did you buy it through a real estate agent?

A: Mm hm [affirmative].

Q: Did ja?

A: An' we bought it through um All Points Properties in uh Bremerton.

Q: Had you lived in the house prior to purchasing it?

A: No.

Q: Where did you live prior to that?

A: Um, um, in Bremerton at uh, uh, what was that address there? We lived on Nipsick [phonetic] Avenue in Bremerton.

Q: Okay. How long did you live there?

A: Uh, y-year and a half.

Q: M'kay. An' did you live in Bremerton prior to that?

A: Uh, no, no, that's the first house we [unclear].

Q: So you purchased it in January of '97, um, was it occupied before you guys bought it?

A: No, actually um it had belonged to um an older couple and uh um they - the, the, the woman had died, had gotten sick and had had to go to a nursing home, I believe, an' then passed away. And the gentleman had uh gotten remarried and so they weren't living in it at the time we purchased it.

Q: So he moved out then?

A: Yeah.

Q: Okay.

A: An' they did a, you know, a - he did a owner contract with us.

Q: He did?

A: Yeah. S-...

Q: Is he still carrying the contract?

A: I don't think so, I think he sold it to a mortgage company or something.

Q: Okay. Do you know who you pay your mortgages to?

A: Um, I have a - we have two loans on the house.

Q: M'kay.

A: We have the main mortgage and then we took out a home equity loan.

Q: When you bought the house for 75,000, how much did you finance?

A: Uh, I think we put down \$10,000 [unclear].

Q: Did you finance 65?

A: I think so.

?: That's this [unclear].

Q: An' then when did you take the second mortgage out?

A: Um, it was, I think, in March or April.

Q: So the first mortgage was in January.

A: Yeah.

Q: What was the man's name who carried your contract first?

A: Um, his last name's Henry [phonetic], I don't remember his first name, but it was just Mr. Henry.

Q: Mr. Henry, an' then he - do you know when he sold it to...

A: It wasn't very lo-...

Q: a mortgage company?

A: it wasn't very long ago..

Q: Long ago or long after you...

A: Long ago.

Q: bought it?

A: It was only like within the last couple months, I think.

Q: Oh, okay.

A: And it's uh Vanderbilt Mortgage and Finance. I, I would say that maybe it was in the - October, maybe?

Q: And how much are your payments?

A: The first part is uh 503 - oh, no, 4- I'm sorry, 498, 498.96, an' then we have a second mortgage through Key Bank, which is, I think, another two hundred an' - three hundred, uh, two or three hundred dollars.

Q: How much is your - how much did you borrow?

A: I think we, we took out um - I think it was 20,000, it might be 25,000.

Q: An' the payments are what amount?

A: I think it's around 250.

Q: And why did you borrow the money?

A: Uh, we had um - we were gonna fix the house up an' we - um, we had quite a bit of um credit card debt, so we wanted to get our payments down so we could use some of the monies to, to f- do repairs to the house...

Q: How much of...

A: an' buy new carpet an' stuff.

Q: how much of the 20 to 25,000 went towards debt, prior debt?

A: I don't have any idea. She...

Q: No idea?

A: No, she did all of that.

Q: Okay. Are your payments current, um, either mortgage?

A: Yeah. Yeah, everything should be current.

Q: [unclear].

A: It's kinda what Carol's doin' today, was goin' through my checkbook for me, doin' all that, so...

Q: Okay.

A: but she was - we've never had a late payment ever in our entire marriage, so I'm pretty positive it was current.

Q: Mm hm.

A: She was very meticulous about that.

Q: M- and she handled all of it?

A: Everything.

Q: Yeah. Okay. All right. Um, okay. So you've used the money also to fix up the house?

A: Mm hm [affirmative].

Q: What um, what have you done?

A: Um, well, we put in uh, you know, basically almost a whole new kitchen, new appliances, new uh countertops...

Q: When did you buy the appliances?

A: Uh, some time this spring, summer.

Q: An' what did you buy?

A: A 'frigerator, um, we bought a washer an' dryer, uh, there was a stove there, we bought a, a dishwasher. The stove was in the house when we bought it. Everything else...

Q: Mm hm.

A: a new microwave.

Q: Okay.

A: An' then we um put new floors in, new countertop, um, new carpets, hardwood floors.

Q: Carpet where?

A: In the front room. An' then we bought...

Q: Who installed that?

A: I did.

Q: Where did you purchase the carpet?

A: Uh, in Bremerton at uh Carpet - uh carpet store in Bremerton, I don't remember the name of it.

Q: Did you buy it or did um Dawn go with you to write the check? Do you recall?

A: No, we went together.

Q: You went together?

A: We bought everything together.

Q: Okay. Did you - do you recall how you paid for it?

A: Um, I would assume on a credit card, that was...

Q: Mm hm.

A: where we - everything we - we did most of our purchases on credit cards, an' then she'd just, you know, make big payments or whatever.

Q: An' when did you take out your second loan?

A: I believe it was in uh March or April or May, somewhere in there. I can check [unclear] my records somewhere.

Q: Okay. [unclear]. Um, so you, you bought the carpet. How mu- do you recall how much you paid for it? No. Do you remember what pr- the price was per yard?

A: Uh, well, it was a really good deal, I remember that. It was - I think it was like \$30 a yard to start with, an' then it was um like 50% off or somethin', so it was a really..

Q: Do you know what kind it is?

A: It's, it's a um really heavy Berber. They're a really

expensive Berber.

Q: Do you recall the, the brand?

A: No.

Q: Okay.

A: I know where the carpet store is, I could, I could...

Q: Okay.

A: try that, though.

Q: Okay.

A: An' then we put um all new trim and uh..

Q: Wainscoting?

A: wainscoting on the ledges an' that sort of stuff in the front room.

Q: An' who was doing that work?

A: I did it. Yeah, we did it all, the two of us did, all of the repairs ourselves.

Q: Mm hm.

A: Um...

Q: When you bought the house was it inspected?

A: Mm hm [affirmative].

Q: Professionally?

A: I believe so.

Q: [unclear]

A: Yeah, I'm pretty sure that it was.

Q: Were there any um repairs required at the time that you purchased the house?

A: Hm mm [negative].

Q: Um, do you know if the electrical was inspected?

A: I don't know if it was or not.

Q: [unclear]

A: We had electrical problems. Uh...

Q: Can you tell me what those problems were?

A: Well, we had had um some folks move in with us that were needing a place to stay. And uh, up to that juncture we had never used the, the l- uh, well, be called the guest bathroom, I guess. Um..

Q: That'd be the one um..

A: Not the one..

Q: closest to the living room or the one off the kitchen?

A: The one closest to the living room.

Q: Okay.

A: And um, there was uh - as soon as we started using that, we um - the breaker would just continually uh go, so what we did is we just...

Q: What do you mean, the breaker would continually go?

A: It would just trigger off, you know, like the, the...

Q: Breaker would flip?

A: Yeah.

Q: Mm hm.

A: Yeah. So we were gonna have, we were gonna have an electrician look at it, an' we never did.

Q: When um, when did you have people living with you?

A: Uh, when was that?

D: [unclear]

A: I think it was before summer. I think it was maybe April or May, June [unclear].

Q: Okay. So early summer, late spring. Until when?

A: I think uh it was right before I left for Mexico.

D: [unclear]

A: That was in uh - so it - July, July.

Q: So July?

A: Yeah.

Q: And so you noticed problems in July then, when they moved out? Is that what you said?

A: No. As soon as, as soon as they moved in, we noticed with the additional use of electricity an' stuff that, you know, it just wasn't, you know, running, uh you know, hair dryers and stuff an' then in that bathroom just didn't work, so we just um turned off that, that breaker and uh we just ran - the front room, um, had great power, everything was fine in the front rooms, an' in our bedroom, um, the o-one, that one circuit was - seemed to have a problem with it, so we just, just didn't use that circuit at all, so we just ran extension cords and whatnot from the main room or from our bedroom. But then..

Q: So what was on that circuit that you turned off?

A: Um..

Q: The bathroom..

A: the bathroom, uh, the fan, the light, and then the bedroom um light, the bedroom lights.

Q: The bedroom, your bedroom?

A: And the other bedroom, both bedroom [unclear]...

Q: Both bedroom lights?

A: Both the overhead lights would go off on it.

Q: So, so you just turned that breaker off altogether...

A: Mm hm [affirmative].

Q: an' didn't use any of it?

A: We just didn't use it at all until we could get an electrician, but...

Q: Did you ever get an electrician out?

A: No, we never did.

Q: Who, who installed the panel that's in the basement?

A: It was there when we got there.

Q: Um, had you done any electrical repairs on the house?

A: No, I really don't know how to do much electrical, so I didn't get into [unclear].

Q: Who installed the outlets on the - under the kitchen counter an' the bar, the breakfast bar?

A: Those were there.

Q: H- er- those were there...

A: Yeah.

Q: like that?

A: Yeah.

Q: And the house wha-...

A: They were.

Q: an' do you - and the house was inspected when you bought it?

A: They, they were just - there was um - that counter wasn't there.

Q: Uh huh.

A: We - I mean, it was - part of it was there, but we put, we brought that counter out, so when we did...

Q: Which way? Towards the kitchen, towards the living room or...

A: Towards the living room.

Q: Towards the living room..

A: Yeah.

Q: okay.

A: So, originally those had just been sitting like up underneath there. And then we just left 'em when we...

Q: Okay. So you just detached 'em an'...

A: Yeah, just detached 'em and left them sit there.

Q: M'kay. Okay, so um, so you just turned that circuit off. Um, do you know anything about electrical, do you know how much um - what size line that was that you shut off, was it a o- 110 or...

A: It...

Q: a 220 or...

A: it was a 110 line.

Q: Mm hm.

A: Yeah, it was a 110 [unclear].

Q: And after you shut that off, did you have any other electrical problems?

A: Um, just if you took the - if you were runnin' like the dryer, um, in the laundry room, bathroom, you couldn't run the, the wall heater there at the same time or that - it's a different breaker, the, the uh - a different breaker would go if we did that, so we just, we just didn't do that. We ran the dryer at - during separate times.

Q: From which heater then?

A: The bathroom heater.

Q: From the bathroom wall heater? Okay. Okay. So how, then how did you light the bathroom by the living room, if you turned that circuit off?

A: We just had a, a lamp in there, [unclear] one o' these..

Q: Okay.

A: uh, torch [unclear] or uh halogen lights.

Q: Okay.

A: But we never used that bathroom after the people, after - unless we had guests over or something then they were - that was their bathroom. We used the other one. The one with the shower.

Q: Okay. How was the plumbing in the house?

A: It was pretty good. Um, pretty good.

Q: Who installed the um outlets on the outside?

A: Those were there.

Q: Those were there?

A: Yeah. Yeah.

Q: And the building up on the hill, whose is that?

A: That's ours.

Q: That's yours?

A: Yeah, it's a year or two [unclear].

Q: You [unclear].

A: Yeah.

Q: And what a year it was.

A: Yeah, yeah. My wife and I, we were...

Q: Why, what is that for?

A: we were working towards getting a, a - one of the visions of our church is to have a, a camp and retreat center, and uh eventually that was what Dawn and I were gonna have oversight of, um, was to - uh, of the camp and retreat center. In a year it was intended to be a part of that, to be - we wanted to put a yurt up for housing and different...

Q: So who ran the extensions cords from the...

A: I did.

Q: You ran those?

A: Yeah, yeah.

Q: Do you know why those were installed there before?

A: Hm mm [negative].

Q: Did you ever talk to the prior owner?

A: Just...

Q: He carried your contract, didn't he?

A: Yeah.

Q: Did you ever ask him why those outlets were on the outside of the house like that?

A: Hm mm, hm mm [negative].

Q: That's interesting. Okay. When you um - so what did you run off from those lines that went up to the yurt?

A: Just uh lights an' there was a, there's a 'frigerator in the yurt. Lights in the 'frigerator.

Q: Any problems with the house when you were using the yurt?

A: No, not a bit.

Q: Do you know why? I mean, was it on a separate circuit or something?

A: Yeah, those ones are on a, a circuit of their own, those downstairs ones are on a circuit - it looks like when um - there's kind of two wirings in the house. The house was originally just uh - if you walk up the deck from the - what would be the front door, to your right as you're facing the house, that's the original house. And then - I think it's in 1970 - they put in - maybe it was '75 - they, they put in a whole addition, the whole - from leftover, it was an addition, and - so, about half the kitchen and that whole front area was all new. And that was um, you know, different - everything was different about it, the, you know, the, the floors were different, the wiring's different, um, it's all new, you know.

Q: How was the house heated?

A: Um, we had electric heat in the front rooms, an' then..

Q: Which would include which rooms?

A: The living room. An' then there was um, there was baseboards in the bedroom an' the, an' the small bedroom.

Q: Both bedrooms?

A: Both bedrooms. An' then there is a, like a forced air type electric heater in the, in the one bathroom..

Q: Mm hm.

A: an' the other bathroom didn't have a heater in it.

Q: The bathroom, like a utility bathroom..

A: No.

Q: where the laundry was? Or..

A: No, the utility bathroom's the one that had forced air heat.

Q: Oh, right, right.

A: The little forced air heater an' then the uh - yeah.

Q: The one by the living room had no heat.

A: Yeah. And we installed the, the forced air heaters in the living room.

Q: Any problems with those?

A: No. An' there's actually the..

Q: Any breakers flip or anything when you use 'em?

A: Huh uh [negative].

Q: Okay. An' how did the heat work in your bedroom?

A: Um, not very good. The baseboard didn't work, it - so...

Q: It didn't work at all?

A: No, it worked somewhat, but it, it wouldn't really warm the room up.

Q: Okay.

A: An' we used a, we used a small uh space heater as well in the bedroom.

Q: Um, okay. Had you had the heater checked at all, as to why it didn't work well?

A: Hm mm [negative].

Q: Do you know if it was on or not at the time of the fire?

A: I assume it was.

Q: Okay. Okay. So you didn't do any of the electrical repairs yourself, other than install those two heaters in the living room, right?

A: There's only...

Q: Is that what you said?

A: there's only one heater in the living room.

Q: One heater in the living room.

A: Um, let me think. What else did we - we pulled out the light in the, in the bathroom..

Q: Mm hm.

A: and disconnected that, 'cause we were trying to see uh if, you know, if it was the light...

Q: Mm hm.

A: that was bad. Um, we were never able to get to the problem on that.

Q: Did you do any rewiring in the house yourself?

A: No. [unclear]

Q: Okay.

A: I didn't [unclear].

Q: Okay. All right. Um, let's talk about um the events that led up to the fire.

A: Okay.

Q: Um, to- when did the fire occur?

A: Well, they told me that they responded at 7:30, 7:25 or 7:30.

Q: That'd be a.m. or p.m.?

A: A.m.

Q: And do you recall the date?

A: It was the day after Christmas, December 26<sup>th</sup>.

Q: Okay. And where were you at the time?

A: I was um up on Indian Island, duck hunting.

Q: Okay. And um, were you alone?

A: No, I was with a couple of kids.

Q: Who were you with?

A: Phil Martini [phonetic].

Q: And how old is Phil?

A: Twenty-three. And Lindsay Smith [phonetic]. An' she's...

Q: An' how old is Lindsay?

A: twen'y, twen'y.

Q: Twen'y? Okay. All right. And what time did you leave to go hunting?

A: About 5 a.m.

Q: And who drove?

A: I drove to the bridge and met them there.

Q: What bridge?

A: The Hood Canal Bridge.

Q: Okay. An' then what happened [unclear]? You, you met them there, who drove from there then?

A: They just followed me in their car. Their truck, Phil's truck. I had my Jeep. I was in a Jeep.

Q: Oh, they followed you from there?

A: Yeah, they just...

Q: Oh, okay.

A: followed me.

Q: An' how...

A: An' then...

Q: how long does um it take then to get to Island, uh, Indian Island?

A: Um, from the Hood Canal Bridge...

Q: Mm hm.

A: it's about 45 minutes.

Q: Do you know how many miles that is?

A: Uh, it's about 25 miles, maybe.

Q: M'kay. What was the weather like that morning?

A: It was clear. Pretty cl- just real clear.

Q: Mm hm. And um, let me see. What did you take with you to hunt for your ducks?

A: Uh, my dog an' my gun.

Q: How many guns did you take?

A: Just one.

Q: Pardon?

A: Just one.

Q: One gun. What kind did you take?

A: A shotgun, uh t- a Browning, a 12-gauge shotgun.

Q: 'Kay. How much ammunition did you have with you?

A: Uh, three or four boxes, maybe. I have uh all, all my stuff is in my Jeep. You know, I have these - they, they make those drawers, you know, that...

Q: Mm hm.

A: slide underneath the, your things, so I have all that stuff in there.

Q: Generally just keep it in your Jeep?

A: Yeah.

Q: M'kay.

A: Mostly. I don't keep the gun in there.

Q: Did you provide any ammunition for Phil or Lindsay?

A: No.

Q: They have all their own?

A: They had all their own stuff.

Q: Mm hm. Did they have their own dog?

A: Phil has a, a yellow lab that Dawn and I..

Q: Did..

A: bought him last year.

Q: Did he take that?

A: Yeah.

Q: Okay. Did you guys get anything?

A: No.

Q: Nothin'?

A: No. [unclear]

Q: Do you have to, do you have to tag ducks like you do salmon, when you catch a salmon you do a stamp..

A: No.

Q: thing on your license? You don't have - is there any limit on..

A: Yeah, there is.

Q: duck hunting per year?

A: Yeah. An' there's a daily number that you can..

Q: Oh.

A: take - I mean, there's different - you can have a total of seven ducks, an' there's different for each - you can only have, for instance, two hen mallards an' three pintails, an' that sort of stuff. So [unclear]...

Q: Mm hm. Did anybody get anything that morning?

A: Not one of us.

Q: Did you...

A: We never even fired a shot.

Q: You usually - you, you never fired a shot, huh?

A: Nope. There was nothin' going. It was just a clear, cold morning.

Q: Where does Phil live?

A: He lives in Suquamish.

Q: Do you know his number?

A: It's probably [unclear].

Q: An' does Lindsay live here at this house?

A: Lindsay lives in this house, but she just left um on New Year's Eve for South Africa.

Q: Really?

A: Yeah. She's a - I don't know if you're familiar with the Youth with a Mission, she works for them.

Q: Youth for a Mission?

A: Youth with a Wi-Mission, [unclear].

Q: Oh, Youth with a Mission, oh, okay, yeah.

A: So, it's just called YWAM. She just went there to work at the base for [unclear].

Q: How long will she be gone?

A: Two years.

Q: Will she be setting up from email or phone contact eventually?

A: Yeah. She called Bob Lundell [phonetic] last night. She...

Q: She's there?

A: she got there.

Q: She got there already.

A: Yeah. She's pretty sick, but she got there. She said she threw up the whole way there. 598- [unclear]...

Q: Mm hm.

A: 4893. It's a 360.

Q: Okay. An' how long have you known Phil?

A: Uh, f- since last Christmas. He came out here to uh - actually, to marry a girl in our church that didn't work out, and so uh he ended up - he lived with us for quite a while, a few months in the year..

Q: Is he the one that lived with you last summer?

A: No. That was Sam [phonetic] and Julie Penaoyer [phonetic].

Q: Sam and Julie...

A: Penaoyer.

Q: Okay. How do you spell Penaoyer? P-E-N...

D: P-E-N-A-O-Y-E-R.

Q: Thanks. Do you know where they live now?

A: In Poulsbo. They go to our church.

Q: Okay. Um..

A: Phil lived in our yurt.

Q: Did he? Has anybody slept in there lately?

A: No.

Q: I saw the couch and..

A: Yeah.

Q: comforter handy there, an' some heaters.

A: Yeah. No, there's..

Q: Has anybody slept in there recently?

A: No, no, we had a couple people livin' there for a while, just people that, you know, were needin' a place to stay while they were lookin' for a rental or something.

Q: Mm hm.

A: So, it's not really livable.

Q: So you guys went hunting and um - what time did you actually get to Indian Island?

A: I guess it was about 6:30, 7, somewhere in there.

Q: M'kay. Do you have a cell phone?

A: Yeah.

Q: What is your phone number on your cell?

A: It's uh 6- uh 206, 679-6191.

Q: Okay. So you got there about 6:30 or 7, and how long did you hunt?

A: Um, till about 9, I guess.

Q: How do you know it was like 6:30 or 7 when you got

there?

A: Well, it's - shooting light, I think, was at 7:20, and it was dark when we got there. But that's what you try to do, is get there in the dark and wait for light to come, you know. So it might have been closer to 6:45ish as opposed to 7, because it was real dark when we got there. We had plenty of time to get there and get set up an', you know...

Q: How do you...

A: like...

Q: how do you get set up?

A: You just find it, you know, there's - on Indian Island, there's um, there's blinds, there's duck blinds that...

Q: They're already there?

A: They're already there, so you just get in...

Q: How often do you go there?

A: Oh, that particular spot I don't go to very often. Maybe once a month, twice a month. Bob [phonetic] and Adele [phonetic] have a um, a, a club that they have a membership to up in Sequim. That's where we usually go.

Q: So how do you know you were there until about 9?

A: Um, that's just a, a guess. We were...

Q: Guess.

A: gonna go out, we got cold and we were gonna go out to breakfast at the Chimicum Café [phonetic].

Q: Did you?

A: We got there an' it was closed, actually, so we went to - we drove into Poulsbo and went to Mitzel's. Had breakfast there.

Q: What time did you get to Mitzel's?

A: Uh, I'm gonna guess about 9:30.

Q: Okay. An'...

A: Um probably, it's probably later than that, because it's...

Q: How long were you there?

A: it's f- it's more than a half hour from Chemicum to Mitzel's, so it's probably [unclear].

Q: A little longer than 9:30?

A: Yeah. It mighta been - I, I really couldn't tell ya, I mean, for sure.

Q: Okay.

A: But I know it's more than a half an hour drive.

Q: Do you go to Mitzel's very often?

A: Yeah, it's about the only place in Poulsbo to eat.

Q: Mm hm.

A: It's - it wasn't [unclear]...

Q: Do they know you there? Or...

A: I doubt it.

Q: Oh...

A: I didn't [unclear].

Q: you don't know any waitress or anything, that waited on you?

A: No.

Q: Okay. Um, so did all three of you eat?

A: Mm hm [affirmative], yeah.

Q: Okay. And who paid the tab?

A: I did.

Q: You paid it? How did you pay for it?

A: With a credit card.

Q: Okay. Um, and then what did you do?

A: Then I drove home.

Q: And what did you find when you drove home?

A: Um, I pulled, I pulled down the street and uh there was a um police car across the, across the road - they had the, the road closed off and there was a, there was fire engines at the front of the house. There were a lot of people standin' around.

Q: Who was with you when you pulled up?

A: [unclear]

Q: All right. You're makin' me talk as soft as you are, I'm gonna have to keep you talking so that we can hear you on the tape, okay.

A: I understand.

Q: Uh, okay. Was the fire still burning when you got there?

A: No.

Q: So the fire was out?

A: They're - yeah.

Q: Okay. Who did you speak to when you got there?

A: Uh, the first fireman that was standin' there. I didn't get his name.

Q: Okay. So you spoke to a fireman. Do you remember what you said to him?

A: I asked him where my wife was.

Q: Okay. What did he do when you said that?

A: He uh, he told me to, to wait there. That he would go get somebody to talk to me.

Q: Okay. Okay. An' then do you, did you speak to anybody else then?

A: Yeah, an' then the uh Jane Jeremy [phonetic], the coroner, came down and asked me to come up and sit on the - in the, the uh fire truck.

Q: Mm hm. Jane Jeremy is the coroner, right?

A: Yeah.

Q: Is she the one that um told you?

A: She told me - they asked me a bunch of questions.

Q: What did they ask you?

A: They uh told me that they had found the body in the house and that uh, they had asked me who it was, who was in the house. Then they asked me a lot of questions if we had any children.

Q: Mm hm.

A: 'Cause they had uh found some toys, I guess.

Q: Okay. An' when they asked you who was in the house, what did you tell them?

A: I told 'em that Dawn had been in the house.

Q: An' when um they asked if anybody else was in there, were - was, was there anybody else in your house that

Nick Hachenev -  
Page 33

you know of?

A: No.

Q: Okay.

A: We were livin' alone at the time.

Q: M'okay. Um, an' what did you tell 'em when they asked about children an' the toys?

A: I told them that we used to babysit quite a bit for different people's kids.

Q: Where were the toys?

A: I assume they were in the uh spare room.

Q: Okay. They ask any other questions?

A: Not really. They just uh, you know, um, she just talked to me about, you know, if there was somebody she could call, if...

Q: Mm hm.

A: you know.

Q: Have you talked to anybody since then about what caused the fire?

A: They called a couple times, an' I spoke to the inspector. He asked me many of the same questions about where different things were...

Q: Mm hm.

A: and all of that, but um...

Q: Okay. Well, can we talk about that a second? Let's talk about the room where the fire originated, which appears to - by the evidence, appears to be in the bedroom.

A: Okay.

Nick Hacheny

Page 34

- Q: And um, when I did the floor plan the other day, I found a closet area on this back wall. Um, let's see, I forgot which direction the house faces. The um east, is that correct? Someone told me that the um...
- A: Yeah.
- Q: bedroom was on the north end of the house.
- A: Yeah.
- Q: Is that correct?
- A: Yeah, that should be correct.
- Q: Okay. So then it would be the um - at the west end, there was a um closet area down there, right?
- A: Yeah.
- Q: Was there a wall that divided that area from the bedroom?
- A: Mm hm [affirmative], yeah.
- Q: Okay. Could you kind of draw that for me here?
- A: There was a um wall right here, an' then there was a doorway right here.
- Q: Was there a door on it?
- A: Yeah, it was a sliding door. You know, like a...
- Q: Sliding...
- A: pocket door.
- Q: Oh, a pocket door?
- A: Yeah, like a pocket door.
- Q: So it - the door slid into the wall, or was it...

Nick Hacheney  
Page 35

A: Mm hm [affirmative].

Q: more of a bypass door?

A: No, it slid into the wall.

Q: Slid into the wall there. Okay.

A: [unclear]

Q: An' then where was the door, in relationship to that wall, where's the door that goes to the utility bathroom?

A: Right here.

Q: Okay. Um...

A: I'm assuming this is just the room.

Q: Yeah, just the room. Right.

A: Uh, unless you did the bathroom.

Q: Okay. And then where was the bed? There? Okay. Any other furniture? Are these nightstands sticking out here?

A: They're part of the bed.

Q: That's part of the bed, okay.

A: They were nightstands. Cedar chest was right here. Right here was the um - there's another closet right here. There was a TV, VCR...

Q: Okay, so that would have been in the um northeast corner?

A: Yeah.

Q: Okay.

Nick Hachenev —  
Page 36

A: That's it for our furniture. Um..

Q: That's all the furniture that was in there? Okay.

A: I think so.

Q: And then where are outlets in this room?

A: There's one right here..

Q: Make a X by it. Okay.

A: There's one right here..

Q: Okay. Did you use both of those outlets?

A: Just this one.

Q: Just the one on the uh north wall? M'kay.

A: Yep. This one didn't work?

Q: Why?

A: Part o' that circuit. This is..

Q: You had shut off?

A: Yeah. This is the..

Q: Mm hm.

A: bathroom right here..

Q: Mm hm.

A: an' that's probably that circuit.

Q: Okay. So um, what did you have plugged into this outlet on the north?

A: There was an extension cord in here to plug the electric blanket and the alarm clock into. We had one o' those, you know, computer strips at the end o' this

extension cord.

Q: Mm hm. Let me ask you, was it the same power strip that ran to this outlet that you had everything plugged into?

A: Yeah. There was a, there...

Q: So you had - there was - everything was plugged into a power strip.

A: Yeah.

Q: How long was the cord on the power strip?

A: On the power strip itself?

Q: Mm hm.

A: Uh, maybe two feet. You know, it's just one o' those ones with the breakers in 'em, like it - which you'd put [unclear]...

Q: Well, the box itself is what probably, eight inches to a foot...

A: Yeah.

Q: with the cord coming from it...

A: Yeah, just maybe two feet.

Q: was only two feet? Okay, then what was that plugged into?

A: That was plugged into this extension cord.

Q: Okay.

A: So, we [unclear] plugged into this. I think this was plugged in here. And there's also...

Q: When did you run this extension cord?

Nick Hacheney

Page 38

A: When we first moved in. No, when we moved into this room. We didn't move into this room to start with, we moved into this room.

Q: Into the other bedroom?

A: Yeah. This room had some really bad uh, really rotten carpet in it, 'cause the um - they'd had a roof leak at one juncture or something, and the walls were all uh light green. They were painted green.

Q: So...

A: So...

Q: when they were green, were they still green from paint or green from something else?

A: They were - so - this room wasn't so bad.

Q: Oh, could you answer that question? Was it gr- still green from paint?

A: Yeah, yeah...

Q: Okay.

A: it was - they were painted green. Um, sorry...

Q: That's okay.

A: I-I thought you were, I thought you were joking.

Q: I just wanted to clarify. No - well, not really.

A: No. Th- it - no, they were - the whole house was, you know, it was kind of um just really old..

Q: Mm hm.

A: but it, they had taken really good care of it, it was just really old, really so like...

Q: So when did you move into this bedroom?

A: Well, right before those people moved in, we got this bedroom ready. We took out all the carpets and we found hardwood floors underneath, so we sanded all the hardwood floors down and we stained 'em, and then we painted the room, um, kind of a light pink. Not real, not real strong pink, really, a really super-light. And uh put in, you know, mini-blinds and stuff like that. And then...

Q: Was there, was there a mini-blind on the window?

A: Yeah, there's a mini-blind on each window.

Q: Okay.

A: Um...

Q: So when um - what else was on the floor then? If you redid the floors...

A: There was a rug, we got a like an area rug.

Q: Okay.

A: Um...

Q: Is there a pad under that?

A: Yeah, that non-slip stuff that they sell. Then you buy the - it's really thin, it just...

Q: Kinda like a weave?

A: Yeah, it just keeps your area rugs from slidin' on...

Q: Mm hm.

A: hardwood floors.

Q: Mm hm.

A: And um...

Nick Hachenev  
Page 40

Q: Does this have a fringe on it or anything? Is it that kind of an area rug, or...

A: Didn't have a...

[end of side one]

[beginning of side two]

Q: Um, this is Deborah Krinbring continuing my statement uh with Mr. Hachenev on January the 2<sup>nd</sup>, 1998, on Bainbridge Island. This is uh side two of tape one. So we're just describing um the room, and...

A: [unclear]

Q: you were telling me about the rug, I think, just before the tape ended on the previous side. You were tellin' me about the rug, and you said it was a 9x10, is that correct?

A: I think so.

Q: Okay. Um, could you repeat for me what was plugged into the power strip?

A: The alarm clock.

Q: And how old of an alarm clock was that?

A: Uh, the same one my wife's had since she was in college, so ten years [unclear]...

Q: Ten years old or so? Do you remember what kind it was? No?

A: It's a little pink alarm clock.

Q: Little pink alarm clock, okay. Um, what else was plugged in there?

A: There's two lights in the bed itself, there's lights and mirrors...

Nick Hachenev  
Page 41

Q: Mm hm.

A: u-um, and those two lights are plugged into that.

Q: They each had their own outlet plugs?

A: They each had their own outlet plug.

Q: Okay. And how old was the bed?

A: Uh, it - it's like in third year we were married.

Q: You got married in '90, you say?

A: Yeah. So [unclear]...

Q: So '92 or '93, do you remember um where you bought it?

A: Yeah. We bought it - it's actually a waterbed store that we bought it at in Silverdale. I think it was Waterbed Emporium, it was W- what was the name of that waterbed store in Silverdale?

D: [unclear]?

A: Yeah.

D: Is that the one [unclear]?

A: I think it was like Waterbed - it's, you know, one o' those ones that has the going--

Q: Mm hm.

A: out-of-business sale every six months.

Q: Okay.

A: Um, we bought it on credit, I think. [unclear]. Um, an' then the, the electric blanket was plugged into that.

Q: Okay. Um..

Nick Hachenev

Page 42

A: There was another extension cord that went from the TV an' VCR, an' plugged into this. An' that just had the TV an' VCR on it.

Q: Was it the same kind of extension cord that this one was?

A: Yeah.

Q: Do you know when um - let me back up, let's, let's stay with what else was plugged in here. So you said the electric blanket was plugged in here, too, right?

A: Mm hm [affirmative].

Q: Oh. Do you know um what kind of electric blanket that was?

A: Like what brand?

Q: Uh huh.

A: No. 'Cause...

Q: You don't recall the brand?

A: Her parents bought it for us for Christmas a few years back.

Q: Her parents bought it for you?

A: Yeah.

Q: Do you know their names?

A: Yeah, Donald [phonetic] and Diane [phonetic].

Q: Can you get that down please? Donald and Diane...

A: Diana [phonetic].

Q: Diana.

A: Uh, Tienhaara [phonetic], T-I-E-N-H-A-A-R-A.

Nick Hachenev

Page 43

Q: Okay.

A: Do you need the phone number?

Q: Sure, that's...

A: It's unlisted, so it's uh 479-0729.

Q: Okay. So they bought it for you for Christmas?

A: A few years back.

B: What area code is that?

A: 360, they livin'...

B: Okay.

A: here.

Q: Okay. So the alarm clock, the two lights to the um headboard, and the electric blanket. Anything else?

A: Not that I [unclear].

Q: Any trouble with any of those a-appliances? Did the lights work okay?

A: Yeah, they were great.

Q: Did the alarm clock work okay?

A: Yes.

Q: Did the electric blan-blanket work all right?

A: Yeah.

Q: How many controls did the electric blanket have?

A: Two.

Q: An' where did you keep those?

Nick Hacheny  
Page 44

A: There's a um - in the headboard itself, there's like a cubbyhole with uh holes for things like that, that you can run...

Q: Mm hm.

A: you can run your phone line down there, your alarm clock wires and stuff. It's, it's real nice.

Q: Like over where your pillow area was?

A: Mm hm [affirmative], yeah.

Q: 'Kay. And um w- excuse me. Was it the type that um you could have one side on and not the...

A: Yeah.

Q: other?

A: Yeah.

Q: Did it have dual controls?

A: Yeah, it had two.

Q: Okay. Um, was it on that night?

A: Yes.

Q: Before the fire? Did you use your side?

A: Um, yeah, I probably started to use it, you know, use it an' then turn it off a little later.

Q: Do you know if Dawn's was on?

A: I doubt it. She...

Q: What was her normal practice?

A: She didn't usually have it on. But sometimes...

Nick Hachenev

Page 45

Q: Did she turn it on when she'd go to bed?

A: Yeah, we'd both turn ours on, and then she'd get hot an' turn it off.

Q: Okay. Was the TV and VCR plugged in?

A: No. We had..

Q: Were they un- y-you said you had an extension cord going into that outlet..

A: The um, at night, if we'd ha- this is where the space heater was, and we would have to unplug the TV an' VCR an' plug in the space heater.

Q: Okay. On the night before the fire, what was plugged in there?

A: The space heater.

Q: Okay. Um, do you know what kind of space heater it was?

A: Just a, you know, one with the control knob on it and uh, an' a, you know, s- it had four feet to it..

Q: Mm hm.

A: to stand on.

Q: Okay.

A: [unclear]

Q: On your bed, did you have um - was there a dust ruffle on that - along the floor?

A: Mm hm [affirmative].

Q: And then what else was on the bed, as far as bedding?

A: There was uh sheets and uh electric blanket..

Nick Hachenev

Page 46

Q: What were the sheets made out of? Were they...

A: I would assume they were flannel, don't really remember. We mostly...

Q: You...

A: use flannel sheets.

Q: Flannel sheets? Okay. And then...

A: [unclear]

Q: did you have anything underneath the box sheet?

A: There was a mattress cover. Underneath the box...

Q: Underneath the sheet, the bottom sheet.

A: Yeah.

Q: Ov- between the mattress and the...

A: The mattress cover.

Q: bottom sheet. You had a mattress cover?

A: Yeah.

Q: Okay. Did you um - was it a fabric one or was it an electric one?

A: No, it was just a fabric.

Q: Okay. And then the, the box sheet.

A: Yeah, that would be it, you know, a t- a regular top sheet...

Q: Mm hm.

A: an' then the electric blanket.

Q: Okay.

Nick Hacheny

Page 47

A: An' then um we had this comforter that was inside of a comforter cover.

Q: Okay. What was that made out of?

A: The comforter cover?

Q: No, the comforter itself, inside.

A: Just like - I don't know. You know, whatever that little fluffy - it wasn't down, it was like a real fluffy type of blanket, sort of.

Q: Kind of like a - just a comforter?

A: Yeah.

Q: It - a non-down comforter?

A: Yeah..

Q: Okay.

A: it wasn't down.

Q: Okay. Anything else?

A: Um, the dog's blanket may have been on the bed, or it might have been on the floor. On my side.

Q: Mm hm. M'kay. N- any lights in the ceiling or anything like that?

A: That was that light that I told you didn't work on that circuit.

Q: Okay. So the lights in the headboard - were there any other light sources in there?

A: [unclear].

Q: And what about heat sources in that room?

A: [unclear] baseboard is right here.

Q: Baseboard heater. Any combustibles stored in that room?

A: There was a case of propane fuel.

Q: A case of propane fuel. How many cans in a case of propane fuel- fuel?

A: Twelve. An'...

Q: What was that used for?

A: We had gotten it um for um - I us 'em - that - when I go duck hunting. Dawn had gotten me a case of 'em for Christmas.

Q: Okay. Where were they stored?

A: Well, they weren't really bein' stored, they were just sittin' there on the floor.

Q: Where?

A: Over here. We had been opening presents in there.

Q: Okay.

A: There was other presents in there, too.

Q: So, let's talk about the day before a little bit. Um, the day before the fire was Christmas. Did you guys stay home all day or did you go somewhere?

A: Oh, we went everywhere. We started off with my family, at my family's house.

Q: Let me put this back a second here. Um, you started - when time did you get to your family?

A: Um, I think we got done at 7:30, it was early.

Q: A.m.?

A: Yeah. The kids wanted to open their stuff.

Q: Where did i- where does your family live?

A: My brother's house is down um Old McWilliams  
[phonetic], Bremer-...

Q: How long did...

A: Bremerton.

Q: it take you to get there?

A: Maybe ten minutes.

Q: And how long were you there?

A: Uh, we were there for maybe two and a half hours.

Q: What time did you leave?

A: We caught a ferry, I think we caught um, I think it was  
the 10:30 or somethin', the Bremerton boat, with Dawn's  
family, her parents and her brothers.

Q: With her family?

A: Uh huh [affirmative].

Q: Mm hm.

A: They, they just met us there. They had their own car,  
we had our car.

Q: And you went where?

A: We went over to West Seattle to her grandparents'  
house.

Q: So which ferry?

A: We took the Bremerton boat.

Q: The Bremerton boat to which landing?

A: To Seattle. It was...

Q: Downtown Seattle?

A: Uh huh [affirmative].

Q: An' how long did it take you to get to West Seattle from downtown?

A: Uh, ten or fifteen minutes.

Q: Okay. And where did you go in West Seattle?

A: To her grandparents' house.

Q: Okay.

A: It's Claude [phonetic] and June Sykes [phonetic], S-Y-K-E-S.

Q: Okay. An' what time did you get there?

A: Uh, I imagine from 11:30, 12, somethin' like that.

Q: Okay. An' then how long were you there?

A: I think - uh, I don't remember. They did everything there. It's like Christmas bingo, and they buy presents an' if you win a game of bingo, you get to pick out a present.

Q: Oh, fun. How long were you there?

A: Uh, probably till 6 o'clock at night.

Q: Mm hm. Then what'd you do?

A: Came here.

Q: Came back home?

A: Yeah, uh here.

Q: Came here to Smiths [phonetic]?

A: Yeah.

Q: What time did you think you arrived here at Smiths?

A: I think we took a 6 somethin' boat, so we probably got here by 7:15, 7:20. We stayed here late. We had dinner, we exchanged gifts, we exchange gifts with them.

Q: With the Smiths?

A: Yeah.

Q: What'd they get you?

A: They got me a decoy.

Q: Cool.

A: Old cork decoy.

Q: An old what?

A: Cork decoy.

Q: Cork decoy? Okay.

A: Yeah.

Q: What'd they get Dawn?

A: A card with money in it.

Q: M'kay. How much?

A: I think like \$300.

Q: Oh, wow.

Nick Hachenev

Page 52

- A: They had had some uh, somebody give 'em like a special gift or something, cash gift, an' they gave it, an' they split it between the three other pastors.
- Q: Oh, that's nice.
- A: [unclear]
- Q: Very nice. What'd you get for them? You got it.
- A: Sorry. Um, I don't know what I, what I gave 'em then. Oh, we got them tickets to the Riverdance [phonetic] at the Paramount.
- Q: Mm hm.
- A: We got ourselves tickets, too. Then we got them tickets.
- Q: You did get them - good, good, okay. Okay. About how long were you here?
- A: We were here pretty late. Um, we got - [unclear] we stayed up, Michael [phonetic] and Julia [phonetic] at the last minute came over and uh..
- Q: Michael and Julia..
- A: Velashman [phonetic].
- Q: Hm.
- A: And uh, a bunch of people were here. An' we stayed up playing games till uh maybe 11:30 or 12. It was pretty late.
- Q: Okay.
- A: Then we went home.
- Q: How long does it take you to get home from here?
- A: About 45 minutes.

Q: Okay. And what did you do when you got home?

A: Went to bed. Well, we opened up, I think, two presents apiece. We were so tired, an' I had to get up early.

Q: Was there more than that two open?

A: Oh, yeah. There were a whole bunch more.

Q: You musta been really tired.

A: We were exhausted, we'd been up all day, and we thought it'd be fun just to wait until [unclear]..

Q: So what did you open?

A: I got a uh two ties. That was one, one present. And uh then I got a, a pair of uh, of tennis shoes [unclear].

Q: Okay. An' um..

A: And the box of, box of propane.

Q: Mm hm.

A: It was the heaviest gift.

Q: And then what did she open?

A: I had bought her um - last Christmas I bought her [unclear] s- dishes, and she loved this stuff, and so this year Mervyn's had all this new stuff on sale, like the [unclear]..

Q: Mm hm.

A: stuff. So I got her - oh, tons of stuff, [unclear] sort of stuff.

Q: So which ones did she open that night?

A: I made a big box of 'em.

Q: Oh. One big box of 'em?

A: Yeah, there was a bunch of it. An' she didn't - there was other pieces, too, like uh salt an' pepper shaker, stuff...

Q: Mm hm.

A: but she never got to it. She opened that and uh - what else did she open? I think I bought her a flannel shirt [unclear]. That was Lincoln City. We went down to the outlets for Thanksgiving, an' I bought her a flannel shirt, an' she...

Q: She did open the flannel shirt?

A: Okay.

Q: Anything else?

A: I don't think so.

Q: So then what did you do after you opened presents?

A: We went to bed.

Q: Where was the heater at the - at this time?

A: It was [unclear] right here.

Q: Had it been there all day, or did you move it in there at a certain time?

A: Well, that's where it sat, when we plugged it in [unclear]. Actually, we plugged it in as soon as we got home.

Q: Mm hm.

A: It was really cold in the house.

Q: So you, um, when you got home, you plugged the heater in, in the bedroom. Did you spend any time out in the other part of the house at all?

A: Yeah, a little bit, [unclear] um puttin' stuff away or whatever. We were pickin' out presents all - 'cause our Christmas tree was right [unclear], Christmas tree was right in the corner of the livin' room..

Q: Mm hm.

A: we grabbed a couple presents apiece. We went from there..

Q: Mm hm.

A: to the bedroom. You know [unclear]..

Q: Was everybody happy an' in a good mood? Or..

A: Oh, yeah..

Q: Mm hm.

A: it was a great day. She was havin' a little bit of um - she had a little bit of cold.

Q: Was she takin' any medication for that?

A: She was takin' some antihistamines.

Q: Did she take any medications for anything else?

A: [unclear].

Q: Okay. An' how 'bout you? Did you take any medications?

A: No.

Q: Had either of you had any alcohol that day?

A: No.

Q: Or that evening?

A: We don't drink at all.

Q: Any other um narcotics or drugs of any kind?

A: No.

Q: Okay. Um, what time do you think you went to sleep?

A: P- it was pretty late, maybe 1. I was pretty exhausted anyway.

Q: What time did your alarm go off?

A: At a quarter to 5.

Q: On a non-work day?

A: Duck hunters are notoriously stupid.

Q: Yeah. So your alarm went off at what time?

A: At a quarter to 5 [unclear].

Q: A.m.? Which side of the bed was the alarm on?

A: [unclear] right up, right between us [unclear].

Q: Okay. Who sleeps on what side of the bed, as you're facing it?

A: I sl--

Q: On the right side?

A: I sleep, I sleep closest to the door.

Q: So you sleep on the left and she sleeps on the right?  
And the alarm was where?

A: Between us, closer to her.

Q: Okay.

A: Up above, on the platform..

Q: Okay.

A: [unclear].

Q: All right.

A: [unclear]'s right there.

Q: Did she wake up when your alarm went off?

A: Mm hm [affirmative].

Q: Did you get up?

A: Did I?

Q: Mm hm.

A: Yeah.

Q: Did she?

A: No. She doesn't get up that [unclear]. Well, sometimes she goes with me, but I wouldn't have even gone [unclear] promised Phil and Lindsay.

Q: Mm hm. Um, when you left the house, um, I wanna try to get a, a clear idea on where things were and what was on and what wasn't on. When you left, were any o' the lights in the headboard on?

A: No.

Q: Was the electric blanket on?

A: I don't think so. I don't think so.

Q: Okay. Um, do you recall looking at the controls and noticing whether they were on?

A: No.

Q: So when you say you don't think so...

A: That's just based on - they're usually not on at that time of the day.

Q: You usually turn 'em off by then?

A: But it could..

Q: What about the TV and the VCR?

A: They were unplugged.

Q: Still unplugged. Is there a lamp or anything on the cedar chest?

A: No.

Q: Okay. An' then the space heater.

A: That was on.

Q: Okay. Was there anything uh, uh, near the space heater? Like, how far was it from the bed? In feet or inches.

A: Maybe two feet.

Q: Two feet from the bed.

A: [unclear]

Q: Was it more in line with the foot of the bed or off..

A: No.

Q: to the side, or..

A: More over towards the door, right over there.

Q: Now the doorway's not there for me to see that any more..

A: Oh.

Q: so..

A: I'm sorry.

Q: um..

A: A ways away from the [unclear].

Q: I can tell where the bed was, so...

A: You know where the outlet...

Q: it kinda - mm hm.

A: can you tell where the outlet was?

Q: Yep.

A: well, it was plugged into the outlet an' pushed, you know, pretty much just back towards the outlet so that there was room to walk by to get into the bathroom and the closet.

Q: Was it against the wall, were the feet of it against the wall?

A: Probably, probably - possibly close to that, not quite.

Q: So s- was it square against the wall? Or...

A: Yeah. It was...

Q: maybe angled?

A: it would be more square.

Q: Squared against the wall?

A: [unclear].

Q: Was it in front of the outlet?

A: Yeah.

Q: It was in front of the outlet.

A: Well, more towards, more towards this - more away from the bed and then plugged into the outlet then.

Q: Like if we're looking at the, if we're lookin' at the outlet on the wall, let's say this is the wall, and

here is the outlet right here...

A: If I, if we're looking at the wall?

Q: Mm hm. So it was just alongside of it then?

A: Yeah.

Q: If you were standin' there, you can still see the outlet.

A: Yeah.

Q: Okay. All right. Thanks. Batten that down. Okay. Anything else uh - let's see, where was the propane? You said that was in the corner here...

A: Yeah.

Q: anything else uh other than the rug you described. Let's see, if it was 9x10, how far out from the - uh, under the bed did it stick?

A: [unclear] pretty much all the way out [unclear]...

Q: Did it stick out from...

A: uh from this [unclear]?

Q: Yeah, from the foot of the bed?

A: Oh. Yeah, there was, you know, probably two feet all the way around it. You could walk on the carpet around the bed.

Q: M'kay.

A: Pretty...

Q: And it was hardwood everywhere else?

A: Yeah.

Q: Okay. Okay. So you've got the hardwood floor and the rug, what else was on the floor?

A: Um...

Q: Any stuff?

A: Yeah, we had stuff all over the place.

Q: What kinda stuff?

A: Um, a lot of books and magazines and that sort of thing.

Q: Where were the books and magazines?

A: All along the top of the headboard.

Q: Now let's talk about what's on the floor.

A: Oh. Um, well, on the cedar chest there was just piles of stuff. You know, different stacks of stuff that we were gonna get to. Just, you know, miscellaneous papers, that sort of thing.

Q: Any clothes or...

A: Yeah.

Q: Was the room...

A: [unclear]

Q: would you say the room is pretty lived in, or was it...

A: It was pretty cluttered.

Q: so it was cluttered and lived in?

A: Yeah.

Q: Okay. Um, so there was stuff on top o' here...

A: There was uh...

Q: anything around here?

A: a couple o' robes. Probably hers.

Q: Couple o' robes over here?

A: Probably her robe was over here, mine was probably over here.

Q: Was it on somethin' or on the floor?

A: There is a hook on the door that...

Q: Okay.

A: we put our robes on there.

Q: What about at the foot of the bed anywhere?

A: The dog blanket was probably at the foot of...

Q: What's the dog blanket like?

A: It's one o' these uh throws, it's a [unclear] type throws.

Q: Like a blanket style or is it...

D: It's a yarn.

Q: it, made outta yarn like an afghan?

A: Um, no, wasn't yarn.

D: Like it was woven, [unclear] trim around the edge.

A: You know, the ones that have pictures on 'em an'...

Q: Okay. Made out of - do you know what it's made out of?

D: [unclear]

A: Probably [unclear].

Q: Okay. So that may have been on the floor?

A: Yeah. It was one we bought it uh - in Minnesota,

actually.

Q: Anything else on the floor through here?

A: Maybe, you know, shoes an' stuff. Slippers maybe.

Q: Okay.

A: Her slippers would be there, so [unclear]...

Q: When um..

A: she always [unclear] slippers.

Q: when the alarm went off that morning, what side of the bed did you get out of?

A: This side.

Q: An' where did you go?

A: [unclear] I got up, I always lay my clothes out on top of my nightstand when I go hunting. 'Cause she doesn't like me to turn on the light, so I probably got my clothes on, probably walked to the bathroom an' used the bathroom, uh, in here, in this closet was all my clothes and [unclear] like, probably grabbed a hat from there.

Q: You did walk this way?

A: Yeah.

Q: Did you have shoes on yet?

A: No. My shoes would be out here. I - out in the uh the main room, by the door.

Q: Did you notice anything unusual or smell anything?

A: No.

Q: Do you know if the heater was on when you walked by it?

A: The heater was on.

Q: Was it glowing?

A: Hm mm [negative].

Q: When you set the heater the night before, when you plugged it in, do you know what setting you had it on?

A: Probably, probably all the way up.

Q: Was it the kind that would turn off and on by itself, or did it just stay constant?

A: It turned on and off by itself.

Q: So when you walked by in the morning, was it on or off?

A: It was on.

Q: Okay. Okay. So it was in the heating process then. Okay. So you went and got a hat...

A: It wasn't very...

Q: Hm?

A: It wasn't very we- our bedroom wasn't extremely well insulated, it's...

Q: Was it still cold in there? Could you see your breath?

A: No. You couldn't [unclear].

Q: Mm hm. My room was like that when I was a kid an'...

A: Not [unclear]. But this bathroom, the door in the bathroom needed to really be sealed an' stuff. A lot of air [unclear] come under it.

Q: Was this door open or closed?

A: It'd be closed.

Q: When you left, was it open or closed?

A: Closed.

Q: Did you close it?

A: Uh huh [affirmative].

Q: When you, when you went into the bathroom, with all your clothes an' everything and your hat, did you come back through the room again?

A: Uh huh [affirmative], yeah. I always do. I use the bathroom, get the dog, um..

Q: Where does the dog sleep?

A: She sometimes sleeps in the bathroom an' sometimes sleeps in here. Last night - uh, that night she was sleepin' in the bathroom.

Q: Was she closed in the bathroom?

A: Hm mm [negative]. She's a pretty big dog an' she likes to sleep on the beds, so if we don't - if we're real tired or some'n, we stick her in the bathroom 'cause she, she hogs the bed.

Q: So how often would you say the dog sleeps on the bed?

A: 80% of the time.

Q: 80%? 'Kay.

A: So...

Q: And that night she was in the utility bathroom.

A: Yeah. She's just got bred..

Q: Mm hm.

A: um, so she's pregnant now, and uh she's a lot more antsy...

Q: Mm.

A: now. She gets up an' paces a lot an' stuff 'cause she's uncomfortable, an' she's [unclear]...

Q: Do you have a normal scenario that you go through when you leave the home?

A: Yeah. I walk back through here. I kissed Dawn goodbye.

Q: Did she wake up?

A: Yeah. She told me goodbye, and then I walked out to the main room and uh on the counter there's like um - I laid out the night before on the futon, is my coat, my hunting jacket, an' I put that on, gettin' ready. Put my boots on or my shoes on, and uh get my gun, get the dog, and go out, lock the door behind me.

Q: Which way did you bring the dog out?

A: [unclear].

Q: [unclear] the blankets? How, how far did the blankets fluff out here?

A: Um just a little bit. I mean - yeah.

Q: When you walked through, did you see anything close by the...?

A: No. But, you know...

Q: Did the dog go through before you or after you?

A: After me. She'd be following me.

Q: Okay.

A: An' then I [unclear] started the Jeep [unclear], put the dog in the back. I have a special dog box in the back for her.

Q: Mm hm. What time was it when you left?

Nick Hachenev

Page 67

A: Probably around 5:10. It doesn't take me long to get ready. I didn't take a shower or anything to go duck huntin'.

Q: Anybody call that morning? Anybody call on your cell phone?

A: [unclear]

Q: Did you call anybody? From home or on your cell?

A: [unclear]

Q: Um, I think I've covered uh most of the questions I can remember that I had. You - oh, you know, I know what it was I was gonna ask you is um - Dawn's funeral was on...

A: Tuesday.

Q: Tuesday, correct?

A: Her memorial service was on Tuesday, and the graveside was on Wednesday.

Q: The graveside was on Wednesday, okay. So the coroner did release her um body to you, right?

A: Yes.

Q: Did they give you results of their investigation?

A: Not yet.

Q: Not yet? Have they issued a death certificate yet?

A: I don't know.

Q: Mm hm.

A: They haven't given it to me.

Q: Okay.

A: The coroner was at the funeral.

Q: Was she?

A: She came.

Q: That was nice. Okay.

A: There was a lot of people there.

Q: Oh.

A: About a thousand.

Q: You said Dawn was at her job for like eight years?

A: Yeah.

Q: Was she happy there?

A: Seemed like it.

Q: Mm hm.

A: She was great. She was the best. Everybody said she was the best.

Q: Can you think of anything I missed?

C: Nick, I've got a couple of questions.

A: Oh, okay.

C: Maybe I didn't hear it when you were talkin', 'cause you sound - you're pretty low. Uh, you said Dawn wasn't taking any medication?

A: She had taken some antihistamines.

C: Just antihistamines?

A: Yeah, that's it.

C: [unclear]

A: And birth control.

C: Do you know what kind she takes?

A: Like a um one of the, you know, uh like a Benadryl [phonetic], but not, you know how they have these uh - what's the word? - generic brands that say, Compares to...

C: You don't know the generic brand?

A: They're from Group Health. She gets her - all of her [unclear] kind of stuff from there.

C: Okay.

A: Everything she gets [unclear] at Group Health.

C: Was she under the [unclear] medical care by a doctor?

A: Well, she had a doctor, you know.

C: Do you know her doctor's name?

A: Um, it's Group Health, an' it's uh, [unclear] two doctors. She had a woman's doctor, a lady, and then the - she had a - I can't remember his name. He just moved to the Poulsbo office.

C: A male doctor?

A: Yeah. I, I [unclear].

C: And he's now at the Poulsbo office for Group Health?

A: Just moved from Silverdale to Poulsbo, 'cause she was [unclear]...

Q: She goes to the Silverdale office...

A: Yeah...

Q: [unclear]?

A: 'cause she was talkin' about...

Q: Mm hm.

- A: whether or not she wanted to switch from going to Silverdale, c-c- to go to Poulsbo to stay with her same doctor [unclear].
- C: Was she under the present care of a doctor for anything at all?
- A: No. Just regular checkups an' that sort of thing.
- C: What - did she have a cold or something, was that what the reason she was taking antihistamines?
- A: Yeah, she had a, like a cold or allergies or somethin', just nasal congestion an' a little bit of a cough.
- C: Okay. Um, do you have any legal problems [unclear]?
- A: No.
- C: You have any uh bankruptcies or uh liens or judgments against you or your - Dawn?
- A: No.
- C: Are you suing anybody, anybody suing you?
- A: No.
- Q: Who has keys to your house?
- A: Just us.
- B: Can I ask a question while you're thinkin' over there, Frank?
- C: Sure.
- B: There was some stuff by the front door in boxes. Do you recall what that was and why it was there?
- A: Yeah. Um, I had just recently started the process of moving my stuff from the office here at the church to home.

B: Mm hm [affirmative].

A: We were gonna try to save a little money on our commute and uh, I do a lot of visitation type ministry. A lot of what I do is on the road, so we were kinda - I have a base at the church an' then we were s- just getting the base set up at, at the house.

B: [unclear]

A: An' we hadn't decided whether we were gonna put it in the spare room or up in the yurt - whichever work best.

B: Okay. How many guns do you own?

A: Four or five, maybe. I, I'm not positive.

B: Do you know what kind they are?

A: Mostly old shotguns. My grandpa was a big duck hunter, so he left me some guns.

B: So you don't know how many you have?

A: I think it...

B: You can think about it.

A: Yeah. I think I have three, three that - I have three older ones in the house.

B: Where are they stored?

A: There's a closet right here...

B: In the bedroom closet?

A: in the bedroom.

B: Mm hm [affirmative].

A: An' then I think my Over an' Under [phonetic] was actually in the spare room.

B: The Over an' Under?

A: Yeah. It's a brand.

B: Are they all shotguns?

A: Those ones are. An' then I think I have um, like a .22 rif- [unclear] a .22 rifle. Yeah, just a [unclear].

B: Did Dawn have any guns?

A: No.

B: Any other guns or handguns?

A: We don't have any handguns.

B: Okay.

C: Did you say you had prior insurance at one time?

A: Prior...

C: Beside SAFECO?

A: Prior? For the house?

C: House?

A: No.

C: Auto?

A: We have house - we had our auto insurance through SAFECO.

C: Have you had any other insurance company?

A: Companies? No. We had uh renter's insurance and..

C: Who with?

A: SAFECO, when we were renting. And we had earthquake insurance, um, but we couldn't get it on this house.

Q: Mm hm.

- A: Well, we, we were in the process of doin' it. Somebody had sent us a special application for it.
- B: How old was the roof on that house?
- A: Uh, they had put a new roof on, I think, like seven years back or somethin' like that.
- B: Do you know when the last time it was painted on the outside?
- A: [unclear]
- B: How 'bout the inside?
- A: The inside, we had painted the whole thing.
- B: Whole thing? 'Kay.
- A: Ceilings an' all o' that we painted. [unclear] a lot of different colors, Dawn really liked colors. So like the - that's why the, the hunter green in the kitchen, I don't know if you saw the kind of [unclear] ceiling [unclear] and stuff.
- C: So you pay everything with your credit cards. How is your credit rating right now?
- A: Perfect. We've never had a late payment since we've been married. That's probably gonna change. Carol's gonna help me with it.
- ?: [unclear]
- A: [unclear] stay on top of it, so..
- C: Outside of the electrical problems that you've told us about, um, anything else that you've ever experienced in that house as far as any other blown fuses or burned wires or anything like that?
- A: No.
- C: No other problems besides that one?

A: Well, an' that was that whole - I, I, I told you about two problems, the, the dryer blowing the fuse an' then there was uh that other circuit, separate circuit. But...

C: An' you never had the circuit box looked at?

A: Not yet.

Q: Um, [unclear] guy had a couple more questions that I forgot to ask. Um, when you left that morning, what was on in the house? What appliances or lights, not just in the bedroom. Let's start with the bedroom, but can we go through room by room? 'Cause you - it sounds like you were in almost all of the rooms that morning.

A: Uh huh [affirmative].

Q: When you left your bedroom, what was on?

A: The alarm clock and the heater...

Q: Okay.

A: and probably the baseboard heater.

Q: Okay. And anything on in the front bedroom? The smaller bedroom?

A: No.

Q: Was there anything on in the utility bathroom? The one back here.

A: Um, I don't think so.

Q: Did you remember turning off all the lights?

A: I don't specifically remember turning off all the lights, but if I hadn't...

Q: Do you know if the heater would have been on?

A: The heater could have been on.

Q: In the bathroom?

A: Could have been.

Q: Did you use the washer and dryer that morning?

A: No.

Q: Did you have an iron an' an ironing board?

A: We had an iron and an ironing board.

Q: Did you use it that morning?

A: [unclear]

Q: Was there anything on in the kitchen?

A: The microwave would be plugged in.

Q: Did you use it?

A: I don't believe so. The 'frigerator would be plugged in. [unclear]

Q: Did you open it?

A: Yeah. I got a glass...

Q: Do you drink coffee?

A: I don't drink it at home.

Q: So did you make anything warm to drink to take with you?

A: No, I stopped at a gas station to do that. We don't have a coffee maker.

Q: Did you - so you used the microwave?

A: No.

Q: Okay. Any lights on in there?

A: No. No lights.

Q: Anything on, on - in the living room? Did you turn the tree on?

A: No.

Q: Any lights or any other appliances out there?

A: There's really nothin' out there.

Q: What does the thermostat on the wall control?

A: Nothing.

Q: Nothing?

A: There used to be baseboard heaters in there, but they're all [unclear].

Q: Okay. Um, I don't remember what you said about the, about the space heater, I don't recall asking you um how old the space heater was.

A: [unclear].

Q: Do you know where you got it?

A: Um, no.

Q: Was it given to you or did you buy it?

A: I think somebody gave it to us, maybe my dad. My dad's a garage sale junkie, so [unclear] possibility he got it for us.

Q: Who ran the cord from the power strip to this, this extension cord under here?

A: We did.

Q: Both of you did that?

A: Yeah.

Q: Okay. All right. Um, and the reason, again, you were using the space heater is because...

A: It was cold. [unclear]

Q: And the, and the heat in the room...

A: This baseboard heater just wouldn't heat the room.

Q: Okay. What was uh Dawn wearing when you left?

A: Just a pair of [unclear].

Q: Okay. Anything else?

A: She always took off her clothes [unclear]. She'd get hot.

Q: Margaret?

B: [unclear]

Q: Okay. Is there anything else that you um can think of that we should know about, regarding the fire?

A: Hm mm [negative].

C: Do you have an idea as to how the fire started?

A: I have a guess, uh, I'm assumin' that somethin' went wrong with the space heater, but...

Q: What do you mean, something went wrong with it? Did it work okay?

A: Yeah, it worked fine, but h- you know, we always were a little concerned about usin' it.

Q: Why?

A: Well, [unclear] always waitin' to hear it's, you know, you know, is potentially a dangerous thing, [unclear], you know...

Q: Did you notice anything up close to it? Did you move

anything away from it?

A: No. There was wrapping paper in there, but it was all over right here, I mean, it was, it was really...

Q: The wrapping paper was over by the propane?

A: Yeah.

Q: Nothing on this area here?

A: No, I mean, I walked through there, you know...

Q: You didn't kick anything or - that you know of?

A: [unclear]

Q: Any clothes on the floor in this area?

A: No. I mean, that was our walkway...

Q: Mm hm.

A: you know, to use the bathroom an' stuff, so...

Q: Did you have anything to do with the cause of the fire?

A: Huh?

Q: Did you have anything to do with the cause of the fire?

A: No.

Q: Is there anything else you would like us to know?

A: [unclear]

Q: Do you recall that our conversation has been recorded?

A: Yes.

Q: Thank you.

A: Yeah.

[end of recording saf1767]